No. 18-2312

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD FREED,
Appellant,

v.

MICHELLE THOMAS; COUNTY OF GRATIOT,
Appellees,

and

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,
Intervenor-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division
Honorable Bernard A. Freidman, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amicus Curiae states:

(A) the amicus curiae brief was authored by attorneys of 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 Donald Thomas.

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 45 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.*, *Knick v. Township of Scott*, No. 17-643, 138 S. Ct. 1262 (2018) (granting cert.); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (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*, 568 U.S. 23 (2012).

PLF attorneys have extensive experience with questions at issue in this case, having participated in many cases where courts must decide whether they have jurisdiction to hear takings claims, and whether the Takings Clause protects the property interest at issue. *See, e.g.*, *Knick v. Township of Scott*, 138 S. Ct. 1262 (granting petition to reconsider whether to overturn the prudential state litigation doctrine that usually requires federal takings claims against state and local governments to be litigated in state court); *Rafaeli, LLC v. Oakland Cty.*, 919 N.W.2d 401 (Mich. 2018) (granting application for leave to appeal question of whether government violates federal and state Takings Clause when it takes valuable property to pay relatively smaller debts); *Wayside Church v. Van Buren County*, 847 F.3d 812, 823 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 380 (2017); *Coleman v. District of Columbia*, No. 1:13-cv-01456-EGS (D.D.C.) (June 11, 2015); *Koontz*, 570 U.S. 595 (Takings Clause protects money and not just land.). PLF believes that this experience will assist the Court in its adjudication of this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the district court noted below, this case challenges an "unconscionable" application of Michigan's property tax laws that "requires county treasurers to take title to real property when the taxes thereon are not timely paid and to then retain all of the proceeds obtained for the property at auction, returning nothing to the former property owner regardless of the amount of the 'surplus' or 'overage.'" *See* Opinion and Order Dismissing the Complaint For Lack of Subject Matter Jurisdiction (Opinion), RE 59 at Page ID 1078. In this case, Gratiot County (County) took and sold Donald Freed's home for $42,000 to pay a debt of approximately $1,100 in overdue property taxes, penalties, interest, and fees. *See id*. The County kept all of the proceeds from the sale pursuant to Michigan's General Property Tax Act (Act).

By keeping the approximately $40,000 that exceeded what Mr. Freed owed in taxes, penalties, and fees, the County reaped a windfall by seizing Mr. Freed's equity. The Takings Clause provides a "just compensation" remedy for this taking of private equity. Yet, in this case, the lower court failed to provide that remedy, wrongly believing

that this Court's precedent bars federal judicial review of this constitutional challenge. *See* Opinion, RE 59 at Page ID 1078-79.

Specifically, the court held that pursuant to the holding in *Wayside Church*, 847 F.3d at 823, the Tax Injunction Act and comity barred jurisdiction. Opinion, RE 59 at Page ID 1078-79. The trial court acknowledged that Michigan state courts do not provide a remedy for such claims, but concluded that the only relief available for the plaintiffs must come from Michigan's legislature.

Although the lower court rejected jurisdiction, the opinion further opined that Supreme Court precedent in *Nelson v. City of New York*, 352 U.S. 103 (1956), closed the door to takings claims like Freed's. The court ultimately concluded that though "harsh" the Act is not "unconstitutional." Opinion, RE 59 at Page ID 1078-79.

The district court was wrong. Federal courts plainly have jurisdiction over these claims. *Wayside Church* became outdated when Michigan courts subsequently made clear, contrary to this Court's presumption, that they provide no remedy for takings claims in cases like this one. Moreover, the Tax Injunction Act and comity do not bar claims that seek a refund *after* payment of all owed taxes.

On the merits, Michigan's law plainly violates the spirit and purpose of the Constitution. *See* Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. Pub. Int. L.J. 335, 337 (2001) (quoting James Madison) ("'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.'"). When government takes private property to collect on a debt it is owed, the Fifth Amendment's Takings Clause requires that the government pay just compensation for the value that exceeds the underlying debt. *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960). The taking of surplus equity does not qualify as a "forfeiture." But even if it did, the Constitution would still require a refund of those profits pursuant to the Excessive Fines Clause of the Eighth Amendment.

ARGUMENT

I. Federal Courts Have Jurisdiction To Hear Claims Alleging That Michigan's General Property Tax Act Effects a Taking or Excessive Fine

A. *Wayside Church* No Longer Bars Federal Jurisdiction

The lower court erred in finding that *Wayside Church* required the court to dismiss Freed's claims for lack of jurisdiction under the Tax

Injunction Act and comity. In *Wayside Church*, 847 F.3d at 822, the Sixth Circuit held that *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Tax Injunction Act, and comity barred federal courts' jurisdiction to hear the takings claims filed by the church (and two other plaintiffs) against Oakland County, seeking a refund of the surplus proceeds from the sale of tax-indebted properties. The Sixth Circuit reasoned that since Michigan law allows inverse condemnation claims to be filed in state court, that plaintiffs would have to seek relief there. *Id.* But after dismissal, the Michigan Court of Appeals issued a decision showing that Michigan courts do not presently provide a remedy for such takings. *See Rafaeli, LLC v. Oakland County*, No. 330696, 2017 WL 4803570, at *1 (Mich. Ct. App. Oct. 24, 2017).[1] For that reason, *Wayside Church* is no longer controlling.

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under

[1] In November, the Michigan Supreme Court agreed to hear Rafaeli's appeal, which could ultimately result in Michigan courts recognizing a remedy for takings claims in Michigan. Nevertheless, because there was no plain remedy when Freed's claim was filed, federal jurisdiction is proper, regardless of the outcome in the Michigan Supreme Court.

State law" when state court offers a "plain, speedy and efficient" remedy. 28 U.S.C. § 1341.2. Similarly, "comity" sometimes bars taxpayers from raising constitutional claims against tax systems when doing so "would halt its operation" and state courts offer "plain, adequate, and complete" remedies. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 115 (1981). As the lower court recognized, Michigan courts do not presently offer any remedy—let alone a "plain" one—for the taking suffered by Freed. *See* RE 59, Page ID 1078–79 n.1 (Based on the Michigan Court of Appeal's decision in *Rafaeli*, "[i]t would appear that while Michigan courts may provide a forum for such a takings claim, they may not in fact offer any *remedy*."). Accordingly, the Tax Injunction Act cannot apply.

Although the lower court made no reference to the case, *Williamson County* likewise can no longer apply, because it only prudentially limits federal jurisdiction when state courts offer a "reasonable, certain, and adequate remedy."[2] 473 U.S. at 194. Since the decision in *Rafaeli*

[2] The Supreme Court might soon overturn *Williamson County's* state litigation requirement. In March 2018, it granted review in *Knick v. Township of Scott*, No. 17-643, which asks the Court to reconsider and end *Williamson County*'s state litigation requirement. The Court will hear reargument in the case on January 16, 2019.

revealed that Michigan courts presently offer no such remedy, *Williamson County* cannot apply. Thus the presumption undergirding *Wayside Church* was wrong, making the case outdated and no longer dispositive on the question of federal jurisdiction.

B. The Tax Injunction Act and Comity Do Not Bar Federal Jurisdiction in Cases Seeking a Refund of Money Taken That Exceeds the Underlying Tax Debts

Even without the change in decisional law, the Sixth Circuit in *Wayside Church* erred when it held that the Tax Injunction Act (TIA) and comity bar federal jurisdiction in cases like this one. Properly understood, neither the TIA nor comity bar claims like Mr. Freed's, because such claims do not challenge a *tax* or seek to stymie tax collection. *BellSouth Telecomms. v. Farris*, 542 F.3d 499, 501 (6th Cir. 2008) (TIA only bars claims "in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes."); *Hibbs v. Winn*, 542 U.S. 88, 107 (2004) (same); *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975) (Congress did not intend the TIA to include a "case where a taxpayer contended that an unusual sanction for non-payment of a tax admittedly due violated his constitutional rights."; *see also Hibbs*, 542 U.S. at 109 (discussing *Wells* approvingly). Mr Freed seeks compensation for a taking of property *other*

than the taxes levied on them under state law.[3] *Coleman through Bunn v. District of Columbia*, 70 F. Supp. 3d 58, 68–69 (D.D.C. 2014) ("Coleman's challenge to the District's taking of the surplus equity in his home, above and beyond the amounts the District has defined as the 'tax,' is not barred by the Tax Injunction Act."). That their takings claims are loosely connected to a general administration of a tax scheme is irrelevant. *Hibbs*, 542 U.S. at 106 (TIA has never barred constitutional claims connected to "state tax administration.").

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[3] 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 it forecloses upon. *See*, *e.g.*, *id*. Indeed, if it did, the law would violate other constitutional rights, like Equal Protection. *See, e.g.*, *Elec. Data Sys. Corp. v. Twp. of Flint*, 656 N.W.2d 215, 222 (Mich. Ct. App. 2002) (Equal Protection Clause protects taxpayers from arbitrary classifications that are unrelated to a legitimate government purpose.).

If federal courts vindicate Mr. Freed's claims, and hold that the County effected an unconstitutional taking of surplus equity, that would not halt the administration of the state's tax scheme. The County could continue to collect property taxes and to sell homes to obtain delinquent taxes. It would only be compelled to avoid taking more equity than what is owed or to pay compensation when it does so. *See generally, Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37 (2005). In other words, counties could avoid an unconstitutional taking by acknowledging that the foreclosed owners (and other prior lienholders) retain equitable liens on the property for the amount that exceeds the tax debt (including penalties, interest, and fees). Once sold in a fair-market auction, the treasurer would retain what was owed and refund the remainder.

Using this same reasoning, the Second Circuit recognized federal jurisdiction in a similar case in *Luessenhop v. Clinton County*, 466 F.3d 259, 268 (2d Cir. 2006). After Clinton County took the plaintiffs' properties to pay overdue taxes, the plaintiffs sought to vacate the default judgments by raising due process claims. *Id.* at 261. The Second Circuit held that the TIA did not bar the plaintiffs' Section 1983 claims, because the taxpayers were "not attempting to avoid paying state taxes" or

"dispute the assessments or amounts owed." *Id.* at 268. Likewise, in *Coleman*, the D.C. district court held that neither comity nor the TIA bar takings claims that seek just compensation for the surplus equity taken in tax sales. *Coleman through Bunn*, 70 F. Supp. 3d at 67-68.

II. Gratiot County Effected a Taking Without Just Compensation in Violation of the Fifth Amendment by Keeping the Surplus Value of the Property

The United States Supreme Court has never decided whether government effects a taking when it sells tax-indebted property and keeps more than it is owed. In *Nelson*, 352 U.S. at 105-06, the City took the plaintiffs' valuable properties via state tax sale procedures to pay relatively small overdue water bills. The dispossessed owners brought a takings challenge because the City kept the excess proceeds from these sales. *Id.* at 109. The New York statute at issue provided dispossessed owners with the opportunity to recover the surplus proceeds by raising a claim for the surplus in the foreclosure proceedings. *Id.* at 110. The Supreme Court held there had been no taking because the plaintiffs failed to avail themselves of the statutory remedy to claim the surplus value of the property. *Id.* In so holding, the *Nelson* Court reserved the question raised here. *See id.* ("But we do not have here a statute which

absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale."); *Coleman through Bunn*, 70 F. Supp. 3d at 77-79 (*Nelson* "expressly reserved" the question at issue here).

Although the Supreme Court has not answered the question, multiple lower courts have answered the question. Some have recognized that the confiscation of surplus proceeds from the sale of tax-indebted property violates constitutional protections against uncompensated takings. *See, e.g.*, *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) (statute granting government surplus proceeds from tax sales violates state constitution's Takings Clause); *Bogie v. Town of Barnet*, 270 A.2d 898, 903 (Vt. 1970) (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation, contrary to . . . Vermont Constitution"); *Anderton v. Bannock County*, No. 4:14-CV-00114-BLW, 2015 WL 428069, at *5 (D. Idaho 2015) (plaintiffs may plead takings claim where government keeps surplus proceeds from tax sale); *Coleman through Bunn v. D.C.*, 70 F. Supp. 3d at 80 (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman II,* No. 13-01456, ECF 60 at 8 (June 11, 2016, Order) (recognizing district law treats equity as a

form of property in other contexts and thus takings claim should proceed to the merits).

Moreover, while the Supreme Court has been silent on the precise issue here, federal takings law has developed in a manner that shows the County here must pay just compensation—regardless of what state law says about surplus proceeds from tax sales.

A. Takings Law

The Takings Clause in the Fifth Amendment prohibits the government from taking private property for a public use without paying just compensation. U.S. Const. amend. V. When government action invades a protected property interest, courts focus on the nature of the governmental action to determine whether the action effects a taking. While regulatory actions that restrict the use of property are weighed under a balancing test, *Penn Central v. City of New York*, 438 U.S. 104, 124 (1978) actions that physically invade or occupy a property interest are subject to a strict, per se test. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). An uncompensated physical taking violates the Constitution, regardless of the circumstances of the

taking or its economic impact. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. at 322.

The most obvious example of a per se physical taking occurs when the government takes actual possession of property. But it also occurs when the government redefines a pre-existing private interest as public property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Government may regulate property rights, but it cannot "by *ipse dixit* . . . transform private property into public property without compensation." *Id.*; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("[T]he government's power to redefine" property rights is "necessarily constrained" by the Constitution.).

B. The Takings Clause Protects Equity

When the County applied the Act to retain the proceeds that exceeded the outstanding tax debts of Mr. Freed, it invaded and unconstitutionally took a protected property interest. Michigan's tax statute allows the County to confiscate the surplus. But state law is not the only source from which property rights arise. *Palazzolo v. Rhode Island*, 533 U.S. at 629–30. Indeed, "the right to the surplus exists independently of such statutory provision." *Farnham v. Jones*, 19 N.W.

83, 85 (Minn. 1884). "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. at 629-30; *see also Horne v. Dep't of Agric.*, 135 S. Ct. at 2426-27 (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"); *see also Bott v. Comm'n of Nat. Res. of State of Mich. Dep't of Nat. Res.*, 327 N.W.2d 838, 852-54 (1982) (takings clause protects common law property rights).

The Supreme Court has held that regardless of what state or federal law say, the Takings Clause applies to protect a diverse array of property interests from government confiscation, including homes, personal property, intangible property, money, interest on money, liens, and mortgages. *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. at 2426 (personal property); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. at 616 (money and real property); *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).

The property interest at issue in this case is privately generated and owned equity. "Equity" is, by definition, the fair-market value of the property after deduction of all encumbering debts (like tax debts). *See Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Ultimately, "equity" is money directly tied to the use and enjoyment of private property. And, as noted above, the Supreme Court has clearly indicated the same type of interests—like money and liens—are protected by the Takings Clause. Moreover, although the Michigan courts have rejected takings claims in similar cases so far, Michigan courts have traditionally recognized that the Takings Clause protects "everything over which a person may have exclusive control or dominion" including intangible property like an "identifiable fund of money." *AFT Michigan v. State*, 866 N.W.2d 782, 793-94 (2015) (internal quote omitted). Similarly, Michigan common law has consistently treated equity as private "property." *See, e.g.*, *McCallister v. McCallister*, 300 N.W.2d 629, 633 (Mich. Ct. App. 1980) (treating "home equity" as "property" in divorce proceeding). Thus all the protections of the Takings Clause must attach. 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. at 41 (government effects a taking when it takes more than owed, at expense of inferior lienholders).

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

The government may constitutionally take and sell foreclosed properties for the public purpose of collecting a valid tax debt. But to avoid violating the Takings Clause, the government must take that property subject to an equitable lien or a fiduciary responsibility to the former owner to refund the surplus proceeds after the tax sale. *See Bogie*, 270 A.2d at 899-900 (explaining that the government may only take property foreclosed for delinquent taxes subject to a fiduciary responsibility to sell the property and refund the former owner, or it would violate the constitutional right to just compensation). The government has no legitimate entitlement or claim to equity that exceeds the owner's tax debt. That equity was created during and through private ownership of the subject property and is rightly treated as private

property. *Phillips v. Wash. Legal Found.*, 524 U.S. at 168.[4] Thus, when the government confiscates the surplus proceeds from a tax sale, it causes a quintessential *per se*, physical taking. *See Webb's Fabulous Pharmacies*, 449 U.S. at 164; *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (confiscation of privately owned interest is a taking).

The system challenged here conflicts with a line of takings cases that hold that government violates the Fifth Amendment when it confiscates pre-existing property interests by redefining private property as public property. In *Webb's Fabulous Pharmacies*, 449 U.S. at 158–59, the Supreme Court held that it was an unconstitutional taking for a state to keep the interest earned on private, principal funds which had been deposited with a court. The Supreme Court held that state government could not avoid the protections of the Takings Clause by redefining private property as public property, simply because the state holds that property for some period of time: "Neither the Florida Legislature by

[4] Michigan courts once recognized this principle, explaining that "the right to receive and control [the surplus proceeds from a tax sale], no more follows the title to the land, than does the ownership of the cattle and farming utensils that a man may happen to have on his farm when it is sold for taxes . . . ." *People ex rel. Seaman v. Hammond*, 1 Doug. 276, 280-81 (Mich. 1844).

statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. To the same effect is *Phillips*, 524 U.S. at 167 ("[A]t least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests".); *see also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) (states effect a taking when they re-characterize private property as public property).

Yet that is exactly what the Act purports to do to property owners who become delinquent on their tax payments. The Act purports to statutorily convert any surplus equity in tax-indebted properties to "public" property at the time of foreclosure. The Takings Clause will not permit such a state-authored transformation of a private interest to public property.

This Takings Clause protection doesn't simply disappear because the property owner owes the government money. In *Armstrong*, a shipbuilder contracted by the United States defaulted on a contract to build ships, and the United States took title to its unfinished boats and materials, pursuant to its contractual and common law rights. 364 U.S.

at 41. Material suppliers claimed the United States had unconstitutionally taken their liens on some of the materials when the government took the shipbuilders' unfinished boats and supplies, and refused to compensate them. *Id*. The Supreme Court agreed, holding that property rights in liens do not disappear when the government takes title. *Id*. at 48. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id*. "This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens." *Id*. The government could only take the underlying property subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id*. at 49.

Armstrong confirms that the transfer of private equity into public coffers after the sale of homes and payment of outstanding debts is a taking. As in *Armstrong*, the County here, "for its own advantage," destroyed the private value of the equity when it took possession of homes in which it had a limited interest. *See id*. at 48. More accurately, it changed that value from a private interest into a public one. This transformation of a private interest to public property is a taking. The

County thus has the "constitutional obligation to pay just compensation" or to return the private property it takes. *See id.* at 49.

Ultimately, the scheme at issue here violates the "fairness and justice" principles at the heart of the Takings Clauses. *Armstrong*, 364 U.S. at 49 (The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Justice is the government collecting only what it was owed. Fairness is the return of any excess equity monies to those who have had their properties taken and sold. Neither exists here.

III. The Taking of Surplus Proceeds Is a Taking, Not a Forfeiture

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 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.*, 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 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."). Along this vein, Texas and Alaska Supreme Courts rejected the idea that statutes similar to Michigan's effect 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 "[t]axing authorities are not (nor should they be) in the business of buying and selling real estate for profit"); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981) ("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. . . .").

Likewise, the Act fails the burden of proving a valid forfeiture. First, under Michigan's law, the statute purports to cause a forfeiture approximately one year prior to foreclosure. Mich. Comp. Laws Ann. § 211.78g(1) (March 1st, at least 12 months after the property became delinquent the delinquent property "is forfeited to the county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees.") But the owner of the tax-indebted property retains title and

all rights of possession. *Id.* In other words, nothing resembling a forfeiture has occurred at the time the statute claims the property is forfeited.

Second, the purported forfeiture exceeds the scope of traditional civil forfeiture law which the United States Supreme Court has only reluctantly allowed in cases involving criminal activity.[5] *See Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (noting civil asset forfeiture law seems unfair and should be strictly limited). This expansion of forfeiture law threatens traditional protections in takings law.

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

[5] Even if this could be deemed a forfeiture, it would violate the Excessive Fines Clause of the Eighth Amendment, which protects property owners in civil forfeitures where the "forfeiture" is punitive. *Austin v. United States*, 509 U.S. 602, 609-10 (1993). 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). Here, the County is keeping thousands of dollars that have no correlation to any injury suffered by the County and thus if not a taking, the County violated the Excessive Fines Clause. *Compare id.* at 339-40.

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.

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 anything else. The Constitution demands that the County compensate Mr. Freed. The district court's decision should be reversed.

DATED: January 2, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 5,241 words.

DATED: January 2, 2019.

/s/ Christina M. Martin
CHRISTINA M. MARTIN

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2019, I electronically filed the foregoing 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
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