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

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

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BRIEF ON APPEAL OF DEFENDANTS-APPELLEES OAKLAND COUNTY AND ANDREW MEISNER

ORAL ARGUMENT REQUESTED

QUESTION PRESENTED

Whether a foreclosure of real property for nonpayment of taxes is a governmental taking of the property's excess value, if any, where the taxpayer had multiple opportunities to keep the property by paying the tax delinquency, and the taxpayer could have simply sold the property before forfeiture, paid taxes out of the proceeds, and kept the alleged equity without forcing the government to become the taxpayer's real estate agent.

The trial court answered: no.
The Court of Appeals majority answered: no.
The Court of Appeals concurrence answered: no.
Plaintiffs-Appellants answer: yes.
Defendants-Appellees answer: no.

Relevant authorities: *Nelson v City of New York*, 352 US 103, 110 (1956) (nothing in the Constitution prevents the government from keeping a foreclosure sale's excess proceeds if adequate steps are taken to notify the owner of the delinquency and the foreclosure proceedings); *Automatic Art, LLC v Maricopa County*, 2010 WL 11515708, at *5–6 (D Az, March 18, 2010) (rejecting plaintiff's argument that statute allowing "the county to retain the proceeds of the tax sale, over and above the taxes owed, amounts to an unconstitutional . . . taking of its property for public use without just compensation"; a taxpayer has no "recognizable interest" in excess proceeds unless state law creates it); *Reinmiller v Marion County, Oregon*, 2006 WL 2987707, at *3 (D Or, Oct 16, 2006) ("Courts construing state tax laws have generally found no constitutional violations in the excess proceeds provisions. . . . As courts have stated in response to similar challenges to disbursement of exceeds proceeds based on state law after foreclosure sales, the appropriate forum to raise these concerns is the state legislature."); *Ritter v Ross*, 558 NW2d 909, 912 (Wis Ct App, 1996) ("Cases considering constitutional challenges to state tax foreclosure sales generally conclude that a taxpayer has a recognizable interest in the excess proceeds from such a sale only if the state constitution or tax statutes create such an interest."); *Sheehan v Suffolk County*, 490 NE2d 523, 525–526 (NY, 1986) (tax foreclosure proceedings did not constitute a taking without just compensation as to surplus equity); *City of Auburn v Mandarelli*, 320 A2d 22, 30–31 (Me, 1974) ("city's retention of property far exceeding in value the amount of the tax liabilities" did not equate "to a taking without just compensation"); *Spurgias v Morrissette*, 249 A2d 685, 687 (NH, 1969) ("In the absence of contrary provision by statute or constitution, a municipality's title to such property is absolute so that a town is free from either legal or equitable claims by the taxpayer to any surplus realized."); see also *Oosterwyk v County of Milwaukee*, 143 NW2d 497, 499–500 (Wis, 1966) (in the absence of legislation, property owner not entitled to surplus in an equitable action); *Kelly v City of Boston*, 204 NE2d 123, 125–126 (Mass, 1965) (government's title to tax-foreclosed property is absolute, so government is free from either legal or equitable claims by the taxpayer to any surplus from a subsequent sale).

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COUNTER-STATEMENT OF JURISDICTION

Defendants-Appellees concur in Plaintiffs-Appellants statement of the basis for this Court's jurisdiction.

KEY STATUTES INVOLVED

MCL 211.78k(5)(b) & (6)

(5)(b) That fee simple title to property foreclosed by the judgment will vest absolutely in the foreclosing governmental unit, except as otherwise provided in subdivisions (c) and (e), without any further rights of redemption, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section.

* * *

(6) Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property, including all interests in oil or gas in that property except the interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h, and interests preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291. The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9).

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs say that Michigan's General Property Tax Act works a "gross injustice" that amounts to "theft" when a county keeps the proceeds of a tax-foreclosure sale in excess of the tax delinquency. Rafaeli Br 1. But the only injustice is Plaintiffs' request: that this Court invalidate the Act and replace it with a judicially created regime that allows delinquent taxpayers to sit on their rights, conscript the county as real estate agent, then decide whether to reenter the picture depending on the sale's success. There is no justice in a policy that allows Plaintiffs to privatize any gains while socializing all losses. And the remedy Plaintiffs seek can only be provided by the Legislature.

Consider the circumstances. It is undisputed that Plaintiffs failed to fully pay their property-tax obligations. It is also undisputed that Oakland County provided constitutionally adequate notice of the delinquencies. As a result, the parties are here only because Plaintiffs chose not to pay their taxes with existing assets or a loan, and further chose not to sell their property, pay the back taxes out of the proceeds, and *keep any excess equity for themselves*. Any harshness that results from losing excess equity is the natural consequence of Plaintiffs' own actions, not the Act's operation. *Sheehan v Suffolk County*, 490 NE2d 523, 525 (NY, 1986) (citing *United States v Locke*, 471 US 84, 107–108 (1985)).

That is why federal and state courts across the country consistently reject takings claims in the rare circumstance where a tax-foreclosed property sells for more than its delinquency. Some courts say that the delinquent taxpayer has no recognizable interest in a property after foreclosure, so any proceeds from a later

sale belong solely to the government, not the taxpayer. *Ritter v Ross*, 558 NW2d 909, 912 (Wis Ct App, 1996). Others hold that the delinquent taxpayer voluntarily relinquishes any interest in the property by failing to pay the delinquency during the redemption period. *E.g.*, *Sheehan*, 490 NE2d 523 at 58-60. Either way, there is no compensable constitutional violation.

In making their legal arguments, Plaintiffs ignore that they have framed a consummate policy choice: Should the burdens associated with tax-delinquent properties be placed on the property owner who failed to pay taxes? Or should they be shifted to local governments and other taxpayers who did nothing wrong? Some states choose the latter policy. Others, including Michigan, choose the former. But there is nothing unconstitutional about either choice.

What's more, Michigan's foreclosure regime is good policy. Before its enactment, Michigan witnessed chronic under- and non-payment of property taxes, as here. This regime resulted in widespread blight and severe difficulty rehabilitating tax-delinquent properties. Putting the onus on those responsible for paying the taxes has put many more properties to use, which benefits all Michigan citizens.

Accordingly, this Court should affirm and hold that a delinquent property owner who desires to keep alleged excess equity in real property has three choices: (1) pay the taxes and keep the property, (2) sell the property, pay the taxes out of the proceeds, and keep any surplus, or (3) persuade the Legislature and the Governor to enact legislation awarding the owner any excess equity, even when the owner flatly refuses to exercise any responsibility by taking steps (1) or (2). Alternatively, the Court could dismiss this appeal as improvidently granted.

STATEMENT OF FACTS

I. The General Property Tax Act

Real property taxes in Michigan are calculated by multiplying a parcel's taxable value by all the applicable local tax rates. Although taxes are assessed on an annual basis, state law allows many of these local taxing entities to collect a portion of their annual taxes in the summer, and a portion in the winter. MCL 211.44a. Summer taxes are levied and billed on July 1st, due on September 14th, and delinquent if not paid before September 15th. MCL 211.44a, 44a(5). Winter taxes are levied and billed on December 1st, due on February 14th of the following year, and delinquent if not paid by February 15th. MCL 211.44. Even after becoming delinquent, summer and winter taxes continue to be collected by the treasurer of the city, village, or township in which the property is located until March 1st of the year following the tax year at issue. MCL 211.44, 211.44a.

On March 1st of that following year, all unpaid delinquent real property taxes are "returned delinquent" to the county treasurer for collection, and each assessing governmental unit receives a payment from the county treasurer's delinquent Property Tax Administration Fund in the amount of the unpaid taxes owed. MCL 211.55–59. This process ensures that Michigan villages, cites, and townships receive the tax revenue they are expecting, even if the parcel owner has not yet paid. It is at this point that the county treasurer's tax-collection procedures kick in. See MCL 211.78 et seq.

The 1999 General Property Tax Act makes Michigan a "tax deed state." Tax deed states are jurisdictions in which the real property itself is subject to foreclosure for nonpayment of property taxes. After the running of a redemption period, fee title in the parcel vests in the state or a county treasurer. MCL 211.78k(5)(b). This is a very different process than a tax lien state, where property is sold for delinquent tax payments and the sale proceeds are taken to satisfy a lien for payment of the tax. Although the sale of a property may not (and most frequently does not) generate proceeds sufficient to pay the taxes owed, it is the only governmental remedy for the nonpayment of real property taxes. There is no "deficiency," nor is there any "excess equity." By failing to pay taxes and voluntarily allowing a parcel to be relinquished without exercising redemption rights, the owner is making a choice to allow title in the parcel to vest in the state.

The actual foreclosure process is extremely lengthy, and it provides multiple opportunities for a parcel owner both to receive notice and to stop the foreclosure process or redeem a foreclosed property simply by paying back taxes and a late fee. In summary:

- After the county treasurer takes control of the collection process on March 1st following the tax year at issue, the treasurer must provide notice to the parcel owner no later than June 1st of the delinquency and that the parcel owner will lose title to the property if back taxes remain unpaid. The treasurer must provide a second notice no later than September 1st.
- By February 1st of the following year (i.e., the second year after the year in which the taxes were due), the treasurer must provide a third notice, by certified mail, to the parcel owner, both of the delinquency and possible foreclosure.
- If the parcel owner still does not pay the back taxes owed, the delinquent taxpayer voluntarily relinquishes the property, subject to foreclosure and to the owner's right of redemption.

- By June 15th, the county treasurer must file a petition in Michigan trial court requesting a hearing and foreclosure judgment for all forfeited parcels. Before the hearing, the county treasurer must hold an administrative show-cause hearing; at least 30 days prior, the county treasurer sends notice by certified mail and first-class mail to all addresses reasonably calculated to apprise owners that their property interest is about to be extinguished.

- Also at least 30 days before the show-cause hearing, the county treasurer conducts site visits to forfeited parcels, provides written and oral information to the occupant when possible, and posts a written notice on property that appears to be occupied, if unable to meet with the owner. The county treasurer also publishes notice in a local newspaper for two consecutive weeks before the show-cause hearing.

- The treasurer then holds a show-cause hearing regarding the previously forfeited property and, sometime later, a court holds a hearing on the foreclosure petition.

- Absent payment or presentation of a valid defense or the finding of a defect in the process, the court will award the county fee simple title to the property if the property is not redeemed by March 31st. MCL 211.78k(6)

- After obtaining title, if the property is unneeded for a public purpose and is excess property, the county treasurer may conduct an auction sale in July, September, or November. Regardless, the county must publish the date and time of sale at least 30 days before the auction. At the auction, all persons are permitted to bid and purchase the property.

- The proceeds of the sale are returned to the treasurer's delinquent property tax administration fund.

From beginning to end, the process for notice, relinquishment, foreclosure, the running of the redemption period, and vesting of title in the county treasurer takes more than *two-and-a-half years* from the time that summer taxes first become delinquent. Plaintiffs' claim is that they continued to hold a property interest in their parcel after foreclosure and vesting of fee title in the government, even though Plaintiffs failed to take any of the steps available to them to retain their property interest.

II. Plaintiffs fail to pay their taxes

A. Rafaeli, LLC

Plaintiffs say that Rafaeli, LLC, is a small business owned by Uri Rafaeli. Rafaeli Br 3. The truth is more complicated. A search for "Rafaeli" on the Michigan Department of Licensing and Regulatory Affairs' business-entity search page, https://bit.ly/2YsB5sn, results in a single hit, for "Rafaeli, LLC." According to the state records associated with the filing, the company was formed on January 25, 2011, for the purpose of buying, selling, and leasing residential property, i.e., a land speculator. The sole LLC member was Manny Klier, who lived at 5219 Dantes View Drive, Calabasas, CA 91301. The home located at that address last sold in 2006 for $920,000, https://redf.in/2usRQ93. In a later filing, Mr. Klier is listed as the LLC's "Manager." And though the resident agent's name and address changes over time, Mr. Uri Rafaeli's name never appears in the LLC's paperwork.

According to the Complaint, the LLC purchased 20159 Mada in Southfield, Michigan on August 15, 2011. Compl ¶ 44, App 23a. The LLC's address at that time was 19900 10 Mile Road, St. Clair Shores, Michigan. *Id.*

On June 11, 2012, the county mailed its first notice of delinquency for 2011 taxes in a total amount of $536.24. Compl ¶ 45, App 24a. The county mailed the notice to 20159 Mada. *Id.* The LLC must have received the notice, because a payment for real property taxes was made on the property on August 30, 2012. Compl ¶ 46, App 24a. But that payment still left a delinquency. *Id.*

On September 3, 2012, the county mailed a second notice of delinquency to 20159 Mada. *Id.* The LLC must have received this notice as well, because on Janu-

ary 14, 2013, the LLC made another tax payment. *Id.* But the LLC still did not pay in full, necessitating a third notice of delinquency that the county mailed to the property on February 1, 2013. Compl ¶ 47, App 24a. This time, the LLC did not make a further payment.

To be sure, the amount of the delinquency was small—$10.67 if paid promptly. *Id.* But the General Property Tax Act's procedures are triggered by any non- or under-payment of property taxes. That is the only way to ensure that such taxes are paid. So, as the Act requires, the county filed its annual Petition of Foreclosure on May 16, 2013, relating to unpaid taxes from 2011 for more than 11,000 properties. Compl ¶ 48, App 24a–25a.

The county provided the LLC with numerous notices throughout the fall and early winter of 2013-14. On October 29, 2013, the county attempted to serve a "Notice of Show Cause Hearing, Judicial Foreclosure Hearing" at the LLC's 19900 10 Mile Road address. Compl ¶ 49, App 25a. On November 4, 2013, the county served the Notice at 20159 Mada, apparently to one of the LLC's tenants. *Id.* On December 30, 2013, the county mailed a "Final Notice" by certified mail both to 19900 10 Mile Road and to the address of the LLC's resident agent for service of process. Compl ¶ 50, App 25a–26a. Despite the fact that the LLC had apparently received the earlier county mailings, the LLC now claims that it never received any of these numerous notices.

On February 26, 2014, the Oakland County Circuit Court entered a Judgment of Foreclosure on more than 11,000 properties, including 20159 Mada. Compl,

¶ 51, App 26a. When the LLC failed to redeem the property by March 31, the county sold it at an August 19, 2014 auction for $24,500. Compl ¶ 52, App 26a.

B. Ohanessian

Plaintiff Andre Ohanessian purchased 4591 Arline Drive in the City of Orchard Lake Village on December 8, 2003. Compl ¶ 57, App 28a. Curiously, Ohanessian used a mailbox at a UPS store located at 23205 Gratiot Ave in the City of Eastpointe, some 30 miles away, as the address to send his tax bills and related notices. Compl ¶ 58, App 28a. Over the next few years, Ohanessian frequently paid his taxes *just before* the property was to go into foreclosure. Compl ¶¶ 59–66, App 28a–29a. His last payment was on February 12, 2013, when he still owed some $6,000. Compl ¶ 67, App 29a.

Ohanessian says that in late 2011, he used an electronic form on the treasurer's website to change his address when he moved to California, but he did not receive any of the subsequent notices of delinquency because the county continued sending notices to the Eastpointe address. Compl ¶¶ 64, 68, App 29a–30a. But "[t]he Treasurer's website does not now, nor has it ever had, a change of address form available." Laura Schmitt Aff ¶ 3, Ex D to Defs' Mot for Summ Disp. In fact, "the website does not have the ability to accept any such form or similar document." *Id.*

Because the county had no information regarding Ohanessian's alleged move to California, it provided notices in June and December 2013 and in February 2014 to Ohanessian's former residence at 19984 Brentwood in the City of Livonia. Compl

¶ 68, App 29a–30a. The circuit court's February 26, 2014 Judgment of Foreclosure also included Ohanessian's property. Compl ¶ 69, App 30a. After Ohanessian failed to redeem by March 31st, the county sold the Arline property at a September 26, 2014 auction for $82,000. Compl ¶ 70, App 30a.

PROCEEDINGS BELOW

I. The circuit court rejects Plaintiffs' claims.

Plaintiffs filed a seven-count class-action complaint that alleged a failure to give appropriate notice and a governmental taking without just compensation, among other things. The county and the treasurer filed a motion for summary disposition. The circuit court granted the motion in full.

Regarding notice, the circuit court examined the record and concluded that the county and the treasurer "provided notice reasonably calculated under all circumstances to apprise Plaintiffs of the pendency of the action and afford them an opportunity to present their objections." 10/8/15 Op, App 55a. The circuit court also noted that the General Property Tax Act "provided a detailed procedure designed to provide taxpayers with notice of pending foreclosures," and that Plaintiffs' facial and as-applied challenges failed as a matter of law. *Id.* Left unstated was how difficult Plaintiffs had made it for the county and the treasurer to provide proper notice for the tax delinquencies, and that Plaintiffs had not paid their taxes in full.

The circuit court also rejected Plaintiffs' takings claim "because their property was not taken by Defendants. Rather, it was forfeited by Plaintiffs." *Id.* "Forfeiture occurs because of the citizen's actions," explained the court, whereas "a taking

occurs because of a government's action." *Id.* "Property properly forfeited pursuant to state law and in accordance with due process is not subject to a Taking claim." *Id.* Under MCL 211.78(g)(1), "property that is delinquent for taxes for the immediately preceding 12 months or more is forfeited to the county treasurer." *Id.* So, "Plaintiffs *did not have a property interest in the excess proceeds* received in the tax sale because full forfeiture had already occurred." *Id.* (emphasis added).

II. The Court of Appeals affirms the circuit court.

The Michigan Court of Appeals unanimously affirmed the circuit court's ruling in an unpublished opinion. After rejecting Plaintiffs' notice arguments, two panel members concluded that the takings issue "is easily resolved by reference to *Bennis v Michigan*, 516 US 442, 452 (1996)." 10/24/17 COA Op 5, App 65a (cleaned up). In *Bennis*, a court ordered the forfeiture of an auto that a husband had used for sexual conduct with a prostitute, giving no offset for the interest of his wife, who was an innocent party. *Id.* The U.S. Supreme Court rejected the wife's petition for the value of that interest because if due process was satisfied, "the property in the automobile was transferred by virtue of that proceeding from petitioner to the state. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Id.* (citing *Bennis*, 516 US at 452).

Likewise here, the county and the treasurer obtained Plaintiffs' property "by way of a statutory scheme that did not violate due process." Accordingly, the "consti-

tution does not require them to compensate plaintiffs for the lawfully-obtained property" and "Plaintiffs' taking argument is without merit." *Id.*

In so holding, the two panel members considered and rejected Plaintiffs' attempt to distinguish *Bennis* on the ground that it involved an intentional criminal act. "First, the petition in *Bennis* was the wife of the spouse . . . and took part in no 'overt, intentional act' herself." *Id.* at 5 n 5, App 65a. "Second, plaintiffs here also 'acted' contrary to the welfare of the state by failing to pay their taxes."

Judge Shapiro agreed with the result, but his concurrence was based on alternative reasoning. Noting Plaintiff's reliance on *United States v Lawton*, 110 US 146 (1884), Judge Shapiro observed that the U.S. Supreme Court later "disavowed the constitutional aspect of *Lawton*, concluding that it was decided solely on statutory grounds. *Nelson v City of New York*, 352 US 103, 110 (1956)." 10/24/17 Op 1 (Shapiro, J, concurring), App 67a. In *Nelson*, the Court held that nothing in the Constitution prevented the government from taking excess equity in real property following a tax foreclosure if due process was satisfied. *Id* at 1–2, App 67a–68a (citing 352 US at 110). That ruling was "clear and unequivocal." *Id.* at 2, App 68a.

Judge Shapiro did have sympathy for Plaintiffs' position. But he concluded that "it is the Legislature, and not this Court, that must take . . . action" to correct any perceived unfairness. *Id.* at 3, App 69a. Indeed, "plaintiffs concede that those states that do require return of the surplus value [of tax-foreclosed property] all do so as a result of legislation, not judicial action." *Id.* at 3 n 3, App 69a.

STANDARD OF REVIEW

"This Court reviews de novo a question of constitutional law." *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018).

ARGUMENT

I. When a taxpayer relinquishes property by failing to pay back taxes and failing to redeem the property before auction, the taxpayer no longer possesses an interest for the government to "take."

A. In adopting the current General Property Tax Act, Michigan stopped being a "lien state" and became a "deed state" so as to solve the problem of delinquent properties.

Michigan used to be a tax lien state, i.e., one where a county does not foreclose on a tax-delinquent property but instead records a tax lien. Third parties can purchase the liens as an investment. If the property owner does not pay the back taxes, the lien holder can foreclose on the lien. If the lien holder does not foreclose, the property is bid off to the state for the lien amount.

This process was problematic. "Although tax lien sales serve to effectively preserve owners' property rights, the general efficacy of the tax sale is under scrutiny, given that most unredeemed liens are never perfected." House Legislative Analysis for the General Property Tax Act, Ex A, p 17, to Defs' COA Br. In other words, "most lien purchasers have no intention of eventually taking control of the property, but rather are solely interested in the redemption of the taxes by the owner." *Id.* So, if "the owner never redeems the taxes, and the lien buyer never perfects the lien, then the property is bid off to the state." *Id.* "Further, the tax sale is ineffective in many of the state's urban counties, because a high percentage of

liens offered do not generate purchaser interest. In many urban counties, properties offered at tax sale are unattractive to buyers because they have a relative low sale value to tax delinquency ratio." *Id.*

The result was a cumbersome process that "allow[ed] properties to deteriorate and serve[ ] as a barrier to their productive use. The process [also] promote[d] urban blight as it thwart[ed] urban reinvestment." *Id.* at 18. The modern version of the Act was intended to "improve the quality of life in cities throughout Michigan." *Id.*

B. This Court must assume that the county and the treasurer provided adequate notice of Plaintiffs' tax deficiencies.

As noted in the Statement of Facts, the Act contains numerous notice provisions and opportunities for delinquent taxpayers to pay their overdue tax bills. Delinquent taxpayers who *want* to receive notice and timely pay taxes have ample opportunity to do so. But this Court has previously held that due process in this context does not require the delinquent taxpayer to receive actual notice; rather, the government need only provide notice reasonably calculated to apprise interested parties of the proceedings so that they can take action. *In re Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 10; 732 NW2d 458 (2007) (citations omitted).

Here, the county and the treasurer did provide notice reasonably calculated to apprise Plaintiffs of the tax delinquency and the foreclosure proceeding. Given the procedural posture, this Court must assume that all due-process requirements have been satisfied, and that it is Plaintiffs' own failure to act that caused them to lose their real-property interests, not any unfair government act.

C. Plaintiffs relinquished all property interests when they failed to pay their taxes and failed to redeem their foreclosed properties.

It is true that the takings clause of the Fifth Amendment to the U.S. Constitution and the takings clause in Article 10, Section 2, of Michigan's 1963 Constitution generally prohibit the government from taking private property for a public use without paying just compensation. Rafaeli Br 8, 9. But tax collections are not the taking of private property for public use in the constitutional sense. *County of Mobile v Kimball*, 102 US 691, 703 (1880). This is so even when the government inadvertently over-collects a citizen's taxes. *E.g.*, *Laborde v City of Gahanna*, 561 F App'x 476 (CA 6, 2014).

Accordingly, there can be no taking when a Michigan county forecloses on a property for the nonpayment of taxes. The question this Court must answer is whether a delinquent taxpayer *maintains* some interest in property after it has been foreclosed and the redemption period has expired. Of course, this is hardly the first time that a delinquent taxpayer has brought a claim to recover the "surplus" proceeds in a tax sale. And for decades, U.S. courts have answered that question with a resounding "no," directing plaintiffs to the legislative branch for any relief.

For example, in *Kelly v City of Boston*, 204 NE2d 123 (Mass, 1965), the City of Boston similarly foreclosed and then sold land owned by the plaintiff for the nonpayment of taxes. The Supreme Judicial Court of Massachusetts interpreted the statutory regime as not providing for a refund of any surplus proceeds and held that the City had no power to pay that surplus to the landowner. If the plaintiff desired a remedy, "the matter rests in the legislative domain." *Id.* at 125–126.

The following year, the Wisconsin Supreme Court relied on *Kelly* to reach the same result involving a tax-foreclosed property in the County of Milwaukee. *Oosterwyk v County of Milwaukee*, 143 NW2d 497 (Wis, 1966). Rejecting the property owner's quasi-contract action, the Wisconsin Supreme Court explained that once the foreclosure proceeding concluded, "the county become the owner of the property in fee" and "was free to sell the property at its pleasure." *Id.* at 499. There is "no basis in equity to hold that if the property is subsequently sold at a profit it is the *former* owner who is entitled to enjoy such excess." *Id.* (emphasis added). When the government sells "its own land[, it i]s entitled to the entire proceeds of the sale." *Id.* (quoting *Booty v State*, 149 SW2d 216, 217 (Tex Civ App, 1941)). The only remedy available to the property owner is legislation. *Id.* at 500. *Accord, e.g.*, *Spurgias v Morrissette*, 249 A2d 685, 687 (NH, 1969) ("In the absence of contrary provision by statute or constitution, a municipality's title to such property is absolute so that a town is free from either legal or equitable claims by the taxpayer to any surplus realized.").

Later property owners, like Plaintiffs here, began to invoke the takings clause as the basis for their cause of action. Courts have consistently given short shrift to that change in strategy. *E.g.*, *City of Auburn v Mandarelli*, 320 A2d 22, 30–31 (Me, 1974) ("city's retention of property far exceeding in value the amount of the tax liabilities" did not equate "to a taking without just compensation").

For example, in *Ritter v Ross*, 558 NW2d 909 (Wis Ct App, 1996), the plaintiffs brought a taking claims against a county and county treasurer as a result of the county's retention of the entire $17,345 received in the sale of a tax-foreclosed

property to satisfy a tax arrearage of $84.43. The Wisconsin Court of Appeals unanimously held that the county's actions was not an unconstitutional taking. "Cases considering constitutional challenges to state tax foreclosure sales generally conclude that a taxpayer has a recognizable interest in the excess proceeds from such a sale only if the state constitution or tax statutes create such an interest." *Id.* at 912 (numerous citations omitted). "[W]hen a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements." *Id.* Because due process was satisfied, the plaintiffs' only remedy was to seek recourse from the legislature. *Id.* at 913 (citation omitted).

Likewise, in *Reinmiller v Marion County, Oregon*, 2006 WL 2987707 (D Or, Oct 16, 2006), a plaintiff filed an action against a county for retaining "excess proceeds" following a tax-foreclosure sale in Oregon. As in *Ritter*, the United States District Court for the District of Oregon surveyed the legal landscape and recognized that "[o]verall, cases considering constitutional challenges to state foreclosure sales conclude that 'a taxpayer has a recognizable interest in the proceeds from such a sale only if the state constitution or tax statutes create such an interest.' " *Id.* at *3 (citation omitted). What's more, "[f]ederal courts have not been willing to disturb state tax laws and find constitutional violations." *Id.* (citing *Nelson*, 352 US at 110). While acknowledging that other states take a different approach and enact laws for handling excess proceeds after the sale of foreclosed property, the court declined the invitation to overturn settled Oregon tax law and instead directed the plaintiff to

raise his concerns with the state legislature. *Id.* (citing *Nelson*, 352 US at 11, and *Catoor v Blair*, 358 F Supp 815, 817 (ND Ill, 1973), aff'd 414 US 990 (1973)).

Automatic Art, LLC v Maricopa County, 2010 WL 11515708 (D Az, March 18, 2010), involved yet another delinquent taxpayer's attempt to obtain the surplus proceeds of a tax-foreclosure sale via a takings claim. Following *Nelson*, the United States District Court for the District of Arizona held that the plaintiff's "interest in the subject property terminated completely with the issuance of the treasurer's deed, and no deprivation of constitutional rights occurred." *Id.* at *6. That is because the plaintiff "had no continuing property interest in the subject property after the treasurer's deed issued." *Id.*

Closer to home is the decision in *Wayside Church v County of Van Buren*, 2015 WL 13308900 (WD Mich, Nov 9, 2015), rev'd on other grounds 847 F3d 812 (CA 6, 2017). There, three plaintiffs alleged a takings claim against Van Buren County after the county sold one property for $47,750 against $5,900 in back taxes and fees, a second property for $68,750 to satisfy a $25,000 tax debt, and a third for $206,000 versus a $16,750 delinquency. *Id.* at *1. In analyzing the merits of the takings claim, the court began by noting that the "vast majority" of takings clause claims arise in the eminent domain or regulatory context, and that "the power of taxation should not be confused with the power of eminent domain." *Id.* at *6 (quoting *Koontz v St Johns River Water Mgmt Dist*, 133 S Ct 2586, 2602 (2013)).

The court held that the plaintiffs' takings claim failed as a matter of law because any "surplus equity" belonged to the county, not the property owners. *Id.* at *8. Under the General Property Tax Act, the county "has legal title to the land at

the time of the sale" and therefore retains "surplus money produced." *Id.* (quoting *People ex rel Seaman v Hammond*, 1 Doug 276, 281 (1844)). "[N]othing in state common or statutory law establishes that a person who forfeits his property in the tax context has a property interest." *Id.* at *8 n 9. Rather, "the County possesses the 'property interest' in equity when judgment becomes final and the deed vests with the County." *Id.* at *8. And because the plaintiffs did "not have a property interest in the pleaded surplus equity' at the time of the tax sale, they fail . . . to state a claim under the Takings Clause of the Constitution upon which relief can be granted." *Id.*[1]

The same is true here. Once the Foreclosure Judgment entered and the following March 31st passed without a redemption, Plaintiffs no longer possessed any interest in their former properties. Under MCL 211.78k(6), "fee simple title" to the foreclosed property vested "absolutely" in Oakland County. From that point forward, the county had "good and marketable fee simple title to the property." MCL 211.78k(6). That is why Plaintiffs' brief is conspicuously silent as to the Michigan constitutional provision, statute, or case that expressly holds that the plaintiffs hold

[1] The Sixth Circuit subsequently vacated the district court ruling because the plaintiffs had not exhausted their state-court remedies before filing a federal-court lawsuit. *Wayside* 847 F3d 812. But the plaintiffs then filed a motion under Rule 60(b) to reopen proceedings in the district court, arguing that the Court of Appeals ruling in the present matter demonstrated that there was no available state-court court remedy. The district court granted the motion. 3/26/19 Order Granting Motion to Reopen Proceedings, *Wayside Church v County of Van Buren*, No. 1:14-cv-1274. This is a curious order; it confuses the right to a state-court forum to pursue a claim with the right to a remedy. The fact that the plaintiffs lack a constitutional, statutory, or common-law right to recover alleged "surplus equity" in property they have voluntarily relinquished for nonpayment of taxes is hardly a reason to reopen the federal proceeding. All that said, the district court's initial decision got it exactly right in rejecting the plaintiffs' takings claims on the merits.

a property interest in surplus equity *after* a tax foreclosure and expiration of the redemption period. No such authority exists. Accordingly, Oakland County was free to dispose of the property, and Plaintiffs must bring any demand for excess or surplus equity to the Legislature, not this Court.

Plaintiffs' brief ignores MCL 211.78k(6) and virtually all the above-cited authorities, though they single out *Nelson* and say it is distinguishable. Unlike New York, Plaintiffs argue, Michigan "offers no opportunity for former owners to claim the surplus proceeds" of a tax foreclosure. Rafaeli Br 16. That is not true. The plaintiff's problem in *Nelson* was that he failed to file a timely answer in response to a foreclosure proceeding. 352 US at 110. And that is the same problem here: Plaintiffs allowed their rights to expire without taking action to challenge the judgment, redeem their property, or take any other of the options available to them to keep the surplus equity in their property, if any. And the U.S Supreme Court in *Nelson* was clear that there is no constitutional infirmity in such a tax-foreclosure regime:

> *What the City of New York has done is to foreclose real property* for charges four years delinquent *and*, *in the absence of timely action to redeem or to recover[ ] any surplus*, *retain* the property or *the entire proceeds of its sale*. We hold that *nothing in the Federal Constitution prevents this* where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings. [*Id.* at 110 (emphasis added).]

So, what should be made of the cases on which Plaintiffs rely? Those authorities do not rely on Michigan's foreclosure process and are easily distinguishable. In *Farham v Jones*, 19 NW 83 (Minn, 1884), the state foreclosure "statute [did] not assume to condemn the property in the land *beyond* the amount due"; the statute's "purpose and aim are to collect the revenue, and when this is accomplished and a

sale made, . . . the claim of the land-owner to the balance remains unimpaired, as in the case of ordinary judicial sales." *Id.* at 85. The court did not address whether a property-tax regime could result in the full divesting of title at the time of foreclosure.

McDuffee v Collins, 23 So 45 (Ala, 1898), was not a dispute between a delinquent taxpayer and the government, but a dispute over the proceeds from a tax-foreclosed mule between the mule's owner and plaintiffs as mortgagees. Because the mortgage had not yet matured, the court reasonably concluded that the plaintiffs, as the mule's legal owners, had "the right to its immediate possession, subject to the superior right of the tax collector to seize and sell for taxes." *Id.* at 46.

The U.S. Supreme Court's decision in *Lawton* was similarly raised by delinquent taxpayers and distinguished by courts in many of the cases cited above that reject Plaintiffs' basic takings theory. As courts have repeatedly held, including the Supreme Court itself in *Nelson*, *Lawton*'s resolution was not of constitutional magnitude, but merely a judicial interpretation of the relevant state statutory scheme. 352 US 109–110.

Grand Teton Mountain Investments, LLC v Beach Properties, LLC, 385 SW3d 499 (Mo Ct App, 2012), did not involve a tax foreclosure. The case asked who is entitled to the proceeds of a sale of foreclosed land as between private parties. *Id.* at 503. To the same effect is the Restatement (Third) of Property (Mortgages) § 7.4 (1997).

Martin v Snowden, 59 Va 100 (1868), assumed that Congress lacked the power to pass a statute providing for the absolute forfeiting of land for the nonpayment of taxes. *Id.* at 132. The holding and reasoning has long since been repudiated, including in *Nelson*.

Thomas Tool Services, Inc v Town of Croydon, 761 A2d 439 (NH, 2000), did involve a government tax foreclosure. But the Supreme Court of New Hampshire resolved the case in two sentences, concluding that the surplus amount resulted in "an unduly harsh penalty" that violated the state constitution. *Id.* at 441. To emphasize the point, the court cited numerous "other courts" that had "*not* found a taking under similar circumstances," but said that such holdings generally arise "under the Fifth Amendment of the United States Constitution, and their opinions are not controlling on this court." *Id.* at 442. Plaintiffs point to no unduly-harsh-penalty theory of Michigan's takings clause, and no precedent supports one. In a similar vein, *Bogie v Town of Barnet*, 270 A3d 898 (VT, 1970), addressed a Vermont statute.

Finally, in *Coleman through Bunn v District of Columbia*, 70 F Supp 3d 58 (D DC, 2014), a delinquent taxpayer brought a takings claim based on surplus equity in a tax-foreclosed property. In round one, the federal district court decided it "need not—and indeed cannot—address" the takings issue "because the District failed to respond" to it in preliminary briefing. *Id.* at 81. In round two, the federal court recognized that the District of Columbia's highest court "has recognized a property interest in home equity in certain contexts," and "[c]onstruing the complaint liberally" in favor of plaintiffs, they "identified sources of law from which

a property interest could be recognized." *Coleman through Bunn v District of Columbia*, 2016 WL 10721865, at *3 (D DC, June 11, 2016). The court did *not* hold that there had been a taking as a matter of Fifth Amendment law.

In addition to addressing different statutes or issues, most of Plaintiffs' cited authorities pre-date the U.S. Supreme Court's ruling in *Nelson*. Even those that post-date the decision erroneously rely on the pre-*Nelson* opinion in *Lawton*. *E.g.*, *Lake County Auditor v Burks*, 802 NE2d 896, 899–900 (Ind, 2004).

Plaintiffs take one last tack, arguing that "Michigan law ordinarily—outside the context of tax sales in which the government is the beneficiary—treats the surplus proceeds from the forced sale of debtors' property as private property to which the debtor is entitled." Rafaeli Br 13 (citations omitted). But that's exactly the county's point. The Michigan Legislature could certainly *choose* to bring tax-foreclosure practice into accord with other types of foreclosures. But it has intentionally rejected that approach in favor of fighting blight and preventing local governments from being conscripted by delinquent taxpayers as real estate agents, available to assist the delinquent taxpayers in squeezing any equity out of a foreclosed property and required to assume the loss when there is no equity. There is nothing unconstitutional about the Legislature's choice not to shift responsibility from delinquent taxpayers to local governments and those who pay their taxes timely and in full.

In the end, Plaintiffs are forced to rely on the "fairness and justice" principles "at the heart of the takings clause." Rafaeli Br 18 (citation omitted). But Plaintiffs do not seek fairness and justice. Fairness does not involve repeatedly ducking a

property-tax obligation over a period of several years. Justice does not require conscripting the government as realtor so as to privatize all surplus equity while simultaneously socializing all losses. As noted above and referenced repeatedly in the many cases rejecting Plaintiffs' takings theory, Plaintiffs have one and only one remedy in these circumstances: to petition the Legislature to change Michigan's foreclosure regime. This Court should reject Plaintiffs' invitation to circumvent the legislative process and enact a return-of-surplus-equity rule by judicial fiat.

D. The Michigan takings clause does not change the analysis.

Plaintiffs alternatively turn to the Michigan takings clause as a superior form of constitutional protection to that of the Fifth Amendment. Rafaeli Br 19–20. And to be sure, this Court has interpreted the Michigan takings clause to be more protective than its federal counterpart. Compare *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004) (holding that condemning land for a business and technology park was not a "public use" for purposes of the Michigan takings clause), with *Kelo v City of New London, Connecticut*, 545 US 469 (2005) (holding the opposite).

But Plaintiffs' problem here is not the scope of constitutional protection. It is the lack of a recognized Michigan property right. Indeed, this Court has long recognized that former owners have no continuing rights in property after foreclosure. *Krench v Michigan*, 277 Mich 168; 269 NW 131 (1936) (holding that a tax foreclosure divests the delinquent taxpayer of all interests); *James A Welch Co, Inc v State Land Office B*, 295 Mich 85, 93–94; 294 NW 377 (1940) (former owner of tax-

foreclosed property had no interest in the property after foreclosure); *Meltzer v State Land Office Bd*, 301 Mich 541; 3 NW2d 875 (1942) (same).

The lack of a recognized Michigan property right post-foreclosure cannot be cured by invoking the Michigan takings clause. Unless Plaintiffs can point to a specific Michigan law that gives them a property interest in surplus equity after "fee simple" title vests in a foreclosing governmental unit under MCL 211.78k(6), the Michigan takings clause could be the most protective takings provision in the world and it would make no legal difference. There is no "interest" to take.

The problem here is not the Michigan Constitution or even the General Property Tax Act. The problem is Plaintiffs' four-fold failure: failure to pay all their property taxes, failure to ensure they were receiving notice of all delinquencies, failure to respond to a foreclosure petition, and failure to redeem their properties once the deed to their property passed to Oakland County. There is no reason to upset the well-reasoned decision of the Court of Appeals.

II. There can be no government taking when a delinquent taxpayer relinquishes any interest in property.

Plaintiffs' takings claim also fails because Oakland County did not "take" Plaintiffs' property; Plaintiffs' relinquished it for the nonpayment of taxes.

The Court of Appeals of New York (that State's highest court) made this very point in *Sheehan v Suffolk County*, 490 NE2d 523, 525–526 (NY, 1986). There, delinquent taxpayers similarly sued the government, claiming that New York's tax foreclosure statute violated due process and constituted a taking without just compensation as to surplus equity. The court quickly disposed of those arguments.

The New York Court of Appeals began "with the well-settled proposition that an owner of property is charged with knowledge of statutory provisions affecting the control or disposition of his or her property." *Id.* at 525 (citing *Texaco, Inc v Short*, 454 US 516, 531 (1982)). "So viewed, it was the *plaintiffs'* failure to inform themselves of the relevant competitive bidding and forfeiture statutes that worked the arguably harsh consequences, *not* the statutory provisions." *Id.* (citing *United States v Locke*, 471 US 84 (1985)) (emphasis added).

"There is no unfairness, much less a deprivation of due process," said the court, "in the county's retention of any surplus." *Id.* During the statutory, three-year redemption period, "plaintiffs had the opportunity to either pay the taxes and penalties due or sell the property subject to the lien and retain the surplus." *Id.* at 525–526. "This redemption period affords the taxpayer an opportunity to avoid a full forfeiture," the court observed. *Id.* at 526 (citing *Chapman v Zobelein*, 237 US 135 (1915)). And that is why "[s]tatutes which allow a State to retain the excess collected upon the public sale of property have been sustained where they provide for a lengthy redemption period." *Id.* (numerous citations omitted). "It is not unjust for a legislative body to declare that once a taxpayer has abandoned rights in property after such a period has expired, the taxing authority may take a deed in fee," with the resulting being that "the former owner can no longer claim any just compensation upon its resale." *Id.* (citation omitted). "Full forfeiture has already occurred upon the taxpayer's failure to redeem the property before it has been resold." *Id.*

What's more, said the court, there "is no constitutional prohibition against such a full forfeiture." *Id.* (citing *Nelson*, among others). And the court explained how *Nelson* distinguished *Lawton* on this point, because the statute at issue in *Lawton* "required return of any surplus." *Id.*

The Michigan Court of Appeals majority below reached the same result by relying on *Bennis v Michigan*, 516 US 442, 452 (1996), a forfeiture case that involved an automobile. Plaintiffs try to distinguish *Bennis* as a civil forfeiture case that involved the remedying or punishment of "criminal activity." Rafaeli Br 22. But Plaintiffs forget that the party seeking to vindicate her property interest in *Bennis* committed no criminal act and could not be punished for doing so. So when the Supreme Court in *Bennis* held that the "government may not be required to compensate an owner for property which it has lawfully acquired under the exercise of governmental authority other than the power of eminent domain," 516 US at 452, its holding applied with full force to Plaintiffs' takings claim here. In fact, this is an even easier case to apply the *Bennis* holding because, unlike the innocent wife, Plaintiffs violated Michigan property-tax laws and failed to do anything about it.

Like the delinquent taxpayers in *Sheehan*, Plaintiffs were on notice of Michigan's property-tax collection and enforcement regime. And that regime—which has been in place since 1999—is consistent with longstanding Michigan law. *E.g.*, *Krench*, 277 Mich at 179; *James A Welch Co*, 295 Mich at 93–94; *Meltzer*, 301 Mich at 544.

Accordingly, Plaintiffs' position is indistinguishable from the plaintiff in *Sheehan*. Having failed to take appropriate action in the form of timely paying their taxes, responding to delinquency notices, or even selling their property, paying their back taxes, and keeping surplus equity for themselves, Plaintiffs are merely reaping the natural consequences of their own failure to act.

III. Any effort to reform the Michigan tax foreclosure process must proceed in the legislative branch.

In the many cases rejecting takings claims, the refrain is consistent: delinquent taxpayers have a remedy, but it is legislative, not judicial. When the Legislature acts within the range of its authority, an unreasonable regulation "must be remedied by it, and not by the courts." *Brown v Bd of Election Comm'rs of Kent Co*, 174 Mich 477, 481; 140 NW642 (1913) (citation omitted). Accord, e.g., *General Motors Corp v Read*, 294 Mich 558, 567; 293 NW 751 (1940) ("The legislature has the right to remedy the evil to the extent it deems necessary and advisable and it is not restricted to a complete remedy or none.").

As this Court has observed, the constitution "is not a panacea for the correction of all wrongs that some perceive within" our laws; "recourse for some wrongs must be had through appeals to the people and their representatives in the Legislature." *People v Lockridge*, 498 Mich 358, 425; 870 NW2d 502 (2015). This is such a case. Eleven other states besides Michigan likewise provide that fee simple title vests "absolutely" in a foreclosing government authority without the payment of excess money to the taxpayer. MCL 211.78k(5)(b); Or Rev Stat 275.275; 36 Me Rev Stat 1074; Mass Gen Laws 60 § 43; Minn Stat 282.05; Mo Rev State 140.230;

McKinney's RPTL 1136 & 1166 (New York); ND Cent Code 57-28-20; 68 Okla Stat 3137; RI Gen Laws 1956, § 44-9-12; SD Codified Laws 10-23-8, and Utah Code Ann 1953 59-2-1351.1(7). Other states expressly allow delinquent taxpayers to recover surplus equity. Neither approach is unconstitutional. But the approach to adopt *is* a consummate policy choice for the legislative branch.

Demonstrating this fact, the Michigan Legislature recently introduced HB 4219, which proposes that proceeds from foreclosure sales that exceed the taxes, costs, and interest owed be returned to the person who owns and occupies the property as a principal residence. See https://bit.ly/2HHzx8H. This proposed legislation demonstrates that there is a legislative remedy for Plaintiffs to pursue. And the bill also shows the number of policy decisions inherent in such a change in law, policy decisions that the judicial branch is not designed to consider.

For example, in response to the bill's introduction, the Berrien County Treasurer noted that Berrien County does not use foreclosure sale proceeds as "a cash cow" but instead chose to tear down more than 1,000 properties in blighted neighborhoods. Berrien County warns legislation could blow up foreclosure process: Demolition of dilapidated houses could cease, treasurer says, *The Herald-Palladium* (Mar 9, 2019), https://bit.ly/2uuTB5s. And by giving all the benefit of surplus equity to whomever holds occupancy status, the Legislature may inadvertently encourage drug addicts to occupy property slated for foreclosure "in anticipation of receiving money from its sale." *Id.* And does it make sense to only extend the legislation to occupiers? That would presumably leave Rafaeli LLC without a remedy.

These are the very types of policy decisions that the Legislature is ideally situated to address. The legislative branch can take testimony, consult experts, and craft the law to protect all sides of a policy debate. Plaintiffs would have this Court wield a policy hammer and blow up the entire tax-foreclosure regulatory system to save them from their own negligence and inaction. This Court should stay its hand and not attempt a judicial rewrite of the General Property Tax Act. Particularly at a time when the Legislature is already addressing the policy concerns that Plaintiffs raise, deference to the legislative process is appropriate.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly held that Plaintiffs cannot state a takings claim in the circumstances presented here. Once fee simple title vested in Oakland County following expiration of the redemption period, Plaintiffs had no interest in any alleged "surplus equity" that could be taken. And it is inaccurate to say that Oakland County "took" Plaintiffs' property in any event. Plaintiffs voluntarily relinquished it by failing to pay taxes or take appropriate action in response to numerous delinquency notices and the judicial foreclosure process.

Accordingly, this Court should affirm and hold that a delinquent property owner who desires to keep alleged excess equity in real property has three choices: (1) pay the taxes and keep the property, (2) sell the property, pay the taxes out of the proceeds, and keep any surplus, or (3) persuade the Legislature and the Governor to enact legislation awarding the owner any excess equity, even when the

owner flatly refuses to exercise any responsibility by taking steps (1) or (2). Alternatively, the Court could dismiss this appeal as improvidently granted.

Respectfully submitted,

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