
**STATE OF MICHIGAN
IN THE SUPREME COURT**

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

Plaintiffs/Appellants,

v.

OAKLAND COUNTY and
ANDREW MEISNER,

Defendants/Appellees.

Supreme Court No. 156849

Court of Appeals No. 330696

Oakland County Circuit Court
No. 15-147429-CZ

Hon. Langford-Morris

**BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS/APPELLANTS**

JOHN C. EASTMAN
ANTHONY T. CASO
Cal Bar, No. 88561
Center for Constitutional Jurisprudence
Chapman Univ. Fowler Sch. of Law
1 University Dr.
Orange, CA 92866
Phone: (877) 855-3330
Fax: (916) 307-5164
Email: caso@chapman.edu

RONALD W. RYAN
LEWIS, REED & ALLEN, P.C.
136 E. Michigan Ave., Ste. 800
Kalamazoo, MI 49007
Phone: (269)553-1424
Fax: (269) 349-3831
Email: rryan@lewisreedallen.com

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STATEMENT OF QUESTIONS PRESENTED

Does a local government violate the federal and state takings clauses by retaining proceeds from the sale of tax-foreclosed property, where the sale yields a windfall surplus over the amount of the tax delinquency?

Plaintiffs/Appellants: Yes
Defendants/Appellees: No
Court of Appeals: No
Amicus CCJ: Yes

INTRODUCTION

The Michigan Constitution outlawed debtors' prisons in 1850 – a prohibition that continues in the current state constitution.¹ Mich. Const. art I §21. However, the practice at issue here is just as pernicious as throwing a debtor in jail until he should repay the debt. Freedom is intimately related to ownership of property. This is a truth recognized by the United States Supreme Court and it was a foundation for the protection of liberty in the United States Constitution. Deprive a citizen of property (beyond what is necessary to pay the tax debt) and you have deprived him of liberty.

The County argues here that the property owners have “relinquished” their property. Nothing of the sort has happened. There was no voluntary act of giving the property to the County. Instead, the property was seized for nonpayment of taxes. The County, like any secured creditor, is entitled to take this action. However, the County asserts that it is entitled to the entire value of the property, regardless of the amount of the debt. However, the County cannot avoid the problem that it has either imposed a \$20,000 fine for nonpayment of less than \$10 in past-due taxes or it has taken nearly \$20,000 in equity without payment of just compensation.

Because the property is neither contraband nor the instrumentality of a crime, this Court need not confront the problem of whether this is an excessive fine in violation of the Eighth Amendment. Instead, the Court should follow precedent in other tax-seizure cases and hold that the County is only entitled to the amount of the past-due tax debt (including administrative fees and penalties). Confiscation of any amounts in excess of the total debt is a Taking.

1. No individual or entity other than amicus, its members, and its counsel authored any portion of this brief or provided any monetary contribution for the drafting and filing of this brief.

ARGUMENT

I. Individual Rights in Property are the Basis of Liberty

The United States Supreme Court noted that “[i]ndividual freedom finds tangible expression in property rights.” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). Justice Thomas, in his concurring and dissenting opinion, agreed that protection of property rights is “central to our heritage.” *Id.* at 81 (Thomas, J., concurring in part and dissenting in part). Indeed, protection of individual rights in property is the reason people form governments. *Id.* This is not a new understanding of the role of property rights in protecting individual liberty.

One of the founding principles of this nation was the view that liberty and individual rights in property are inextricably intertwined. St. George Tucker, *On the Several Forms of Government*, in *VIEW OF THE CONSTITUTION AND SELECTED WRITINGS*, at 41 (Liberty Fund (1999)). In 1768, the editor of the Boston Gazette wrote: “Liberty and Property are not only join’d in common discourse, but are in their own natures so nearly ally’d, that we cannot be said to possess the one without the enjoyment of the other.” Editor, Boston Gazette, Feb. 22, 1768, at 1. This widespread association of liberty and property grew from the background and influence of English law and philosophy.

In his 1765 Commentaries on English Law, William Blackstone explained the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the “absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution.” William Blackstone, 1 *COMMENTARIES ON THE LAWS OF ENGLAND* 135 (Univ. of Chicago Press 1979) (1765).

John Locke, who influenced the framers of our Constitution, taught that the right to own private property was a natural right and in fact preceded the state's political authority. Locke's 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., *PROPERTY RIGHTS: THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 17 (1997). "The great and chief end therefore, of Men's uniting into Commonwealths, and putting themselves under Government, is the preservation of Property." John Locke, *TWO TREATISES OF GOVERNMENT* 380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Property ownership is essential to the preservation of political liberty.

This view of property and liberty was at the root of the revolution and later, the Constitution. As Arthur Lee of Virginia declared in his revolutionary 1775 publication, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty". Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in PRESENT DISPUTE WITH AMERICA* 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, borrowing heavily from John Locke. Ely, *PROPERTY RIGHTS, supra*, at 17. Locke described the natural rights that government was formed to protect as "life, liberty, and estates." Jefferson substituted "pursuit of happiness" for "estates," but this should not be misunderstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one was sufficient to invoke both. Willi Paul Adams, *THE FIRST*

AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (1980).

“Liberty and Property” became the first motto of the revolutionary movement. Ely, PROPERTY RIGHTS, *supra*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property OWNERSHIP was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. English policies that threatened colonial economic interests strengthened the philosophical link between property ownership and the enjoyment of political liberty in American’s eyes. Adams, *supra*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id.* Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire’s 1783 Constitution was one of four to declare that “All men have certain natural, essential, and inherent rights— among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and, in a word, of seeking and obtaining happiness.” N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote: “Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish.” Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this philosophy. Delegate John

Rutledge of South Carolina, for instance, argued that protection of private property rights is the “principal object of Society.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling—property came unapologetically first: “I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety.” James Wilson, 2 COLLECTED WORKS OF JAMES WILSON ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). John Adams argued that there is no liberty without protection of rights in property. John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851) (“Property must be secured, or liberty cannot exist.”).

Noah Webster made the same argument in 1787: “Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges.” Noah Webster, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 58-61 (Oct. 10, 1787).

It is irrelevant that we are only dealing with the equity in the property – the amount in excess of the past-due tax debt. Money is property that is protected by the Fifth Amendment in the same way that real estate is protected. *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003); *Armstrong v. United States*, 364 U.S. 40, 44, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602, 55 S.Ct. 854, 79 L.Ed. 1593 (1935). The protections of the Fifth Amendment are not limited to ownership of real estate. *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 2426, 192 L.Ed.2d 388 (2015). In any event, the money here is directly tied to an interest in land. *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 614, 133 S.Ct.

1406, 186 L.Ed.2d 697 (2013). There is no question that the money confiscated by the County is property subject to constitutional protection.

The statute at issue here, however, protects neither property nor liberty. Instead it sacrifices this important guarantor of liberty as a means of providing a financial windfall to counties. While this may be an efficient way to raise money without raising taxes, it is contrary to the constitutional protections of property.

II. The Confiscation of the Equity in the Property in Excess of the Tax Debt Constitutes a Taking

When the State seizes property permanently, it must do so under either the Fourteenth Amendment Due Process Clause or the Fifth Amendment Takings Clause (as incorporated by the Fourteenth Amendment). *Bennis v. Michigan*, 516 U.S. 442, 452, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996). The Due Process Clause requires more than a judicial procedure for the confiscation of a citizen's property. The state must have some legitimate legal basis for the confiscation. If the state seeks to punish a crime or deprive the wrongdoer of the instrumentality of a crime, the state can proceed by forfeiture. *See id.* If the state seeks to acquire the property for the state's own use then the state must proceed under the Fifth Amendment's Takings Clause. Under the Fifth Amendment, the state is allowed to take property for public use, but only if it pays compensation. *Horne*, 135 S.Ct. at 2425-26. Finally, the state can impose monetary exactions as part of its power to tax.

The County here does not argue that its confiscation of the equity in appellants' property was an exercise of its taxing power. This saves this Court from having to determine whether confiscation of more than \$20,000 to settle a past-due tax debt of less than \$10 is "so arbitrary ... that it was not the exertion of taxation but a confiscation of property." *Koontz*, 570 U.S. at

617 (quoting *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 24–25, 36 S.Ct. 236, 60 L.Ed. 493 (1916)).

Nor does the confiscation of the equity in appellants' property fall within the category of confiscations classified as forfeitures. Forfeitures may be appropriate when the property is part of an effort to defraud the government or the property is used for an illegal purpose. *Van Oster v. Kansas*, 272 U.S. 465, 467-68, 47 S.Ct. 133, 71 L.Ed. 354 (1926); *J.W. Goldsmith Jr., Grant Co. v. United States*, 254 U.S. 505, 513, 41 S.Ct. 189, 65 L.Ed. 376 (1921); *Dobbins' Distillery v. United States*, 96 U.S. 395, 396, 24 L. Ed. 637 (1877). The purpose of forfeiture is to punish the owner of the property for the illegal conduct and prevent future illegal use of the property. *Bennis*, 516 U.S. at 451-52. The County does not argue that its confiscation of the equity in appellants' property is to punish appellants or to prevent illegal activity. The seizure of the equity in the property serves neither the crime prevention nor crime punishment purposes of a forfeiture. *See Bennis*, 516 U.S. at 451-52. Thus, the property was not taken pursuant to the Due Process Clause of the Fourteenth Amendment. *Id.* at 452.

In any event, if a state pursues a "forfeiture" under the Fourteenth Amendment as a means of punishing the owner, the State is subject to the Excessive Fines Clause of the Eighth Amendment. *Id.* at 451. The Eighth Amendment applies to the States. *Timbs v. Indiana*, 139 S.Ct. 682, 689 (2019). Characterizing the seizure at issue in this case as a "forfeiture" is problematic, to say the least. It would mean that the State is punishing a property owner for an unpaid tax bill of less than \$10 by imposing a fine in excess of \$20,000. But this Court need not consider whether the Excessive Fines Clause has been violated in this case. The property that was seized was neither contraband nor an instrumentality of a crime. The only alternative is that the seizure of the equity is a Taking under the Fifth Amendment. *See Bennis*,

516 U.S. at 452.

This is not the first time that Michigan courts have been called on to adjudicate just how much property the government may seize to satisfy a past-due tax debt. In *Fidlin v. Collison*, 9 Mich. App. 157, 167, 156 N.W.2d 53 (1976), the government seized more than \$10,000 to satisfy a tax debt of a little more than \$600. The court ruled that the seizure was excessive and thus illegal. A similar result was reached in *Joy Mgmt. Co. v. City of Detroit*, 176 Mich. App. 722, 732–33, 440 N.W.2d 654 (1989). There, the city treasurer seized more than \$13,000 to satisfy a delinquent tax debt of less than \$2,500. Although based on different statutory provisions, these decisions recognize that the taxpayer owns the equity in their property. That is, the amount in excess of that required to pay the debt belongs to the taxpayer, not the government. The state may not simply redefine property rights to claim ownership of the equity value.

The United States Supreme Court has consistently held that a government (local, state, or federal) may not escape the Takings Clause by simply redefining the property interest. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 158-159, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). The Court in *Webb's* reasoned that when the court takes possession of the property to satisfy creditors, the property has not been recharacterized the property as owned by the public, nor is title transferred to anyone until the court has ruled on the creditors' claims. *Id.* at 164. Funds remaining after the creditors have been satisfied belong to the debtor. Importantly, this included interest generated by the amount deposited with the court for purposes of paying creditors. Even though the creditors had an interest in the funds deposited, ownership remained with the debtor until the creditors' claims had been adjudicated. Title to the debtor's property never passed to the state and could not vest in the creditors until their

claims were proven, and then they only gained title to the extent of their claims. The Court ruled that “a State, by ipse dixit, may not transform private property into public property without compensation.” *Id.* Indeed, that was the very thing that the Takings Clause was meant to protect against. *Id.*

The County cannot avoid the logic of *Webb*’s by arguing that here the statute allowed it to seize title. As noted above, the County does not argue that this seizure is a tax nor can it argue that the seizure was a forfeiture intended to punish or prevent illegal activity (thus raising the Excessive Fines Clause of the Eighth Amendment). If the seizure is not a tax or a forfeiture, then the only other constitutional basis for the confiscation is the Takings Clause of the Fifth Amendment. The County has no power to simply “transform private property into public property.” *Id.* The Fifth Amendment requires payment of just compensation as a condition of taking the property.

Here, the County does not want to pay compensation. Instead it seeks to confiscate the entire value of the equity left after it has satisfied the owner’s past-due tax debt. There is no provision of the Constitution that allows such a result.

CONCLUSION

There is a reason that there are so many protections of individual rights in property in the federal constitution. Rights in property are at the core of our individual liberty. The County may not breach those rights to achieve a financial windfall. The County is entitled to collect past-due taxes. It may not, however, confiscate the equity remaining after the past-due tax and administrative fees have been paid as a result of the tax sale. What the County seeks to do here is to take property without payment of just compensation.

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Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Cal Bar, No. 88561
Center for Constitutional Jurisprudence
Chapman Univ. Fowler Sch. of Law
1 University Dr.
Orange, CA 92866
Phone: (877) 855-3330
Fax: (916) 307-5164
Email: caso@chapman.

/s/ Ronald W. Ryan

RONALD W. RYAN
LEWIS, REED & ALLEN, P.C.
136 E. Michigan Ave., Ste. 800
Kalamazoo, MI 49007
Phone: (269)553-1424
Fax: (269) 349-3831
Email: rryan@lewisreedallen.com