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

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS/APPELLANTS

Wesley Hottot*
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org

Ronald W. Ryan
LEWIS, REED & ALLEN, P.C.
136 E. Michigan Ave., Suite 800
Kalamazoo, MI 49007
(269) 553-1424
rryan@lewisredallen.com

Jaimie Cavanaugh*
INSTITUTE FOR JUSTICE
520 Nicollet Mall, Suite 550
Minneapolis, MN 55402
(612) 435-3451
jcavanaugh@ij.org

Attorneys for *Amicus Curiae* Institute for Justice

* Admitted *pro hac vice*

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STATEMENT OF THE QUESTION 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 Institute for Justice: Yes

STATEMENT OF INTEREST OF AMICUS CURIAE

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm dedicated to defending the basic principles of a free society. Property rights are one of those principles because they are an essential component of individual liberty, which helps guarantee all other civil rights. IJ litigates property-rights cases in state and federal court, including a recent win in the U.S. Supreme Court. See *Timbs v Indiana*, __ US __; 139 S Ct 682; 203 L Ed 2d 11 (2019). The *Timbs* decision bears directly on one of the issues in this case—namely whether the government's retention of amounts greater than a tax delinquency is a "forfeiture" of property. Additionally, IJ has filed amicus briefs in some of the important property-rights cases discussed in the parties' briefing. See, e.g., *Horne v Dep't of Agriculture*, __ US __; 135 S Ct 2419; 192 L Ed 2d 388 (2015); *Bennis v Michigan*, 516 US 442; 116 S Ct 994; 134 L Ed 2d 68 (1996); *Lucas v SC Coastal Council*, 505 US 1003; 112 S Ct 2886; 120 L Ed 2d 798 (1992). Like those cases, this case raises important issues of first impression about which IJ has expertise. These issues are likely to recur in future cases litigated by IJ and property owners across the United States. For these reasons, IJ respectfully asks this Court to consider the arguments set forth in the following amicus brief.

INTRODUCTION

Amicus the Institute for Justice agrees with Appellants: The takings protections of the United States and Michigan constitutions prohibit the government from retaining the windfall surplus from a tax-foreclosure sale. Just compensation is required where, as here, government goes beyond satisfying a legitimate tax delinquency (and any applicable interest, costs, or penalties) and, additionally, takes the full value of real estate from its former owner. Full stop. Defendants-Appellees' arguments to the contrary are unpersuasive. It hardly matters that the Legislature has adopted this policy; obviously, local governments must exercise legislatively-granted powers consistent with the takings guarantees of the state and federal constitutions. Accordingly, this Court should reverse on the takings issue, just as Appellants urge.

Amicus wishes to highlight the consequences of another constitutional guarantee—the Eighth Amendment's Excessive Fines Clause—should the Court reject Appellants' takings argument. The lower courts concluded that the county was engaged in "forfeiture" when it foreclosed on the properties at issue in this case. Thus, the county was not "taking" property. But, if that were correct, Appellants would have a federal constitutional right to interpose a defense under the Excessive Fines Clause. See *Austin v United States*, 509 US 602, 622; 113 S Ct 2801; 125 L Ed 2d 488 (1993), holding the civil forfeiture actions are "fines" within the meaning of the Eighth Amendment when they are at least partially punitive. And the trial court, incongruously, denied them that right. See App. 57a–58a (denying Appellants' motion to amend their complaint to raise a defense under the Excessive Fines Clause, among other defenses). Both things cannot be true—if government can take the full value of tax-delinquent property without paying just compensation to the former owner (and it cannot), the former owner has a right to argue that the forfeiture is excessive and, therefore, unconstitutional.

This argument gained force recently, when the U.S. Supreme Court held (unanimously) that the Excessive Fines Clause applies in state and local proceedings. See Timbs v Indiana, __ US __; 139 S Ct 682; 203 L Ed 2d 11 (2019). Before *Timbs*, the Michigan Court of Appeals aligned itself with a minority of state high courts which refused to apply the Clause in state and local proceedings. See *In re Forfeiture of $25,505*, 220 Mich App 572, 583; 560 NW2d 341 (1996) ("[T]he United States Supreme Court has never determined that the Excessive Fines Clause is applicable to the states through the Fourteenth Amendment."); *In re Forfeiture of 5118 Indian Garden Rd.*, 253 Mich App 255, 258; 654 NW2d 646 (2002) (similar); *People v Antolovich*, 207 Mich App 714, 716; 525 NW2d 513 (1994) (similar).[1]

We now know those decisions were wrong: The Excessive Fines Clause applies in *all* state and local proceedings, including these proceedings. See *Timbs*, 139 S Ct at 690 ("In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted."). This Court should seize this opportunity to abrogate the contrary lower-court decisions. See *$25,505*, 220 Mich App at 583; *5118 Indian Garden Rd.*, 253 Mich App at 258; *Antolovich*, 207 Mich App at 716.

Given this recent development, Appellants should be forgiven for not having raised an excessive-fines defense from the outset. When this case began, that defense was foreclosed by controlling case law (absent this Court overruling three published Court of Appeals decisions) and, moreover, Appellants had no way of knowing that the lower courts would deem the

[1] But see *People v Castillo*, No 243968, 2004 WL 243417, at *1 (Mich App Feb. 10, 2004) (unpublished) ("[W]e note that the Supreme Court recently held that the Due Process Clause of the Fourteenth Amendment 'makes the Eighth Amendment's prohibition against excessive fines . . . applicable to the States.'", quoting *Cooper Indus., Inc. v Leatherman Tool Grp., Inc.*, 532 US 424, 433–34; 121 S Ct 1678; 149 L Ed 2d 674 (2001)).

county's foreclosure actions "forfeitures," bringing them within the protections of the Excessive Fines Clause. After all, that determination was legally incorrect, as Appellants have ably explained. See Appellants' Br. at 21–27.

Amicus asks this Court to consider the implications of the lower courts' reasoning. When a local government forecloses on tax-delinquent property, it cannot be true that both: (1) the government is engaged in something analogous to civil forfeiture of property connected to criminal activity; and (2) the property owner has no right to raise an excessiveness defense. Both of those things are false. See Parts I & II below. Accordingly, if this Court affirms, it should remand with instructions to consider whether the foreclosures at issue violated the Excessive Fines Clause.

ARGUMENT

I. GOVERNMENT IS NOT ENGAGED IN FORFEITURE WHEN IT TAKES THE WINDFALL SURPLUS FROM A TAX FORECLOSURE SALE.

Retaining the full value of tax-delinquent property is not a forfeiture. Because it believed otherwise, the Court of Appeals "implicitly conclud[ed] that all 'forfeitures' are equal under the law, whether based upon a criminal enterprise or a property owner's ability to pay $8.41 in taxes." App. 68a (SHAPIRO, J., concurring).

As Appellants explain, Michigan's civil-forfeiture laws address criminal activity—predominately drug and vice crimes—not nonpayment of taxes. See Appellants' Br. at 23. Failing to pay property taxes is not a crime, see App. 68a (SHAPIRO, J., concurring), and, in any event, it is not among the various criminal offenses that can give rise to forfeiture, see MCL 333.7531, *et seq.*, MCL 600.4701, *et seq.*, MCL 600.3801 & 600.3825, MCL 750.159f, *et seq.* Accordingly, the county did not invoke the state's civil-forfeiture laws to take Appellants' properties; rather, it invoked the General Property Tax Act, MCL 211.78k, and it later retained

the windfall surplus from selling the properties under that Act, see MCL 211.78m. In form and in substance, these were tax-foreclosure actions, not forfeiture actions. See App. 68a (SHAPIRO, J., concurring) (suggesting "the substance and not the nomenclature should control" when courts determine whether something is a forfeiture).

This makes sense. When the county retained the surplus from the sale of Appellants' properties, Appellants were no longer the owners of those properties. Indeed, the county makes this very argument in an effort to rebut Appellants' takings claim. See Appellees' Br. at 18 (arguing that, once the statutory redemption period expired, Appellants "no longer possessed any interest in their former properties"). Plainly, the government cannot forfeit property that already belongs to the government.

This explains why, despite 19 other states having forfeiture statutes virtually identical to Michigan's, see Appellants' Br. at 22, no state high court has deemed a tax-delinquency foreclosure to be a forfeiture. After all, the purpose of forfeiture is to deprive criminal wrongdoers of the proceeds and instrumentalities of their crime—not to punish delinquent tax payers. Cf. *In re Forfeiture of $5,264*, 432 Mich 242, 259, 439 NW2d 246 (1989) ("Not only does forfeiture eliminate much of the profit incentive from drug dealing, but it also provides needed resources for state and local drug enforcement authorities currently waging a war on drugs."); see also *id.* at 270 (CAVANAGH, J., dissenting) (agreeing that "[t]here is no question that the Legislature adopted the forfeiture provision as a deterrent to the widespread illegal drug trade"). It would be—in a word—excessive to allow counties to wield the state's tremendous forfeiture power based on the facile theory that perhaps more people would pay their taxes.

Michigan's forfeiture statutes simply do not address the facts or procedural circumstances of this case. No authority supports the idea that tax-delinquencies are forfeitable offenses subject

to Michigan's forfeiture procedures. Accordingly, this Court should reject the reasoning below and wrestle with the difficult takings question that the lower courts evaded.

II. IF RETAINING AMOUNTS ABOVE AND BEYOND A PERSON'S TAX DELINQUENCY *IS* A FORFEITURE, THE EXCESSIVE FINES CLAUSE APPLIES.

The Court of Appeals relied on *Bennis v Michigan* for the notion that, where the government is authorized to take a person's property as punishment for some offense, no compensation is required. 516 US 442; 116 S Ct 994; 134 L Ed 2d 68 (1996). Amicus agrees with the concurring judge: "[T]his case bears little, if any relation to *Bennis*, and . . . it is a mistake to conclude that *Bennis* addresses, let alone controls, the issues in this case." App. 68a (SHAPIRO, J., concurring). If this Court, however, believes that this *is* a forfeiture action, it should remand for determination of whether it was unconstitutionally excessive for the county to retain the surplus foreclosure proceeds above and beyond Appellants' tax delinquencies (and any applicable fees, costs, and interest).

There is also good reason to address excessiveness regardless of the doctrinal framework the Court chooses to apply. When this case began, the Eighth Amendment's Excessive Fines Clause was understood by Michigan courts as having no application in state or local proceedings. See *$25,505*, 220 Mich App at 583 ("[T]he United States Supreme Court has never determined that the Excessive Fines Clause is applicable to the states through the Fourteenth Amendment."); *5118 Indian Garden Rd.*, 253 Mich App at 258 (similar); *Antolovich*, 207 Mich App at 716 (similar). With these decisions, the Court of Appeals has aligned itself with a lopsided minority of state high courts, which have declined to apply the Clause. See *State v 2003 Chevrolet Pickup*, 349 Mont 106, 108; 202 P3d 782, 783 (2009); *One (1) Charter Arms, Bulldog 44 Special*

v State ex rel. Moore, 721 So2d 620, 623 (Miss, 1998); *One (1) 1979 Ford 15V v State ex rel. Miss. Bureau of Narcotics*, 721 So2d 631, 634 (Miss, 1998).

But this term, the U.S. Supreme Court unanimously held that the Excessive Fines Clause applies in state and local proceedings. *Timbs*, 139 S Ct at 686–87. *Timbs* involved the forfeiture of a vehicle connected to a first-time drug dealing offense. After the state trial court and intermediate court of appeals held that forfeiture of Timbs's vehicle would be excessive, the Indiana Supreme Court reversed, holding—as the Michigan Court of Appeals has held—that the Excessive Fines Clause does not apply in state or local proceedings. See *State v Timbs*, 84 NE3d 1179 (Ind, 2018). The Supreme Court recently vacated that decision. *Timbs*, 139 S Ct at 691.

In holding that the Excessive Fines Clause is incorporated against the States, the Supreme Court made two observations that bear on the issues in this appeal. First, it rejected Indiana's argument that the civil forfeiture of property is not a "fine" within the meaning of the Clause. *Id.* at 690–91 ("[R]egardless of whether application of the Excessive Fines Clause to civil in rem forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged"); see also *Austin*, 509 US at 622. Second, the Supreme Court explained why, "[f]or good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history[.]" *Timbs*, 139 S Ct at 689. "Exorbitant tolls undermine other constitutional liberties[,]" *id.*, like the property rights at issue in *Timbs* and at issue here. Moreover, "'fines are a source of revenue,' while other forms of punishment 'cost a State money.'" *Id.,* quoting *Harmelin v Michigan*, 501 US 957, 979, n 9; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (opinion of SCALIA, J.). For this reason, "'it makes sense to scrutinize governmental action more closely when the State stands to benefit.'" *Timbs*, 139 S Ct at 689, quoting *Harmelin*, 501 US at 979 n 9. "This concern is scarcely hypothetical." *Timbs*, 139 S. Ct. at 968,

citing Br. for ACLU et al. as Amici Curiae at 7 ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.").

Given this history, it is hardly surprising that the Michigan Legislature has authorized local governments to retain 100% of the proceeds of tax-delinquency foreclosures. That fact sheds zero light on the grave constitutional issues surrounding Oakland County's actions toward Appellants. As the Supreme Court observed in *Timbs*, it is "scarcely hypothetical" that government will at times abuse its power to punish for the purpose of raising revenue. *Timbs*, 139 S Ct at 689. That is precisely why courts actively police the constitutional limitations on statutorily authorized fines, fees, and forfeitures. Certainly, the Legislature decides what penalties will be authorized. But this Court decides whether those penalties are constitutional.

In this case, the trial court erroneously determined that there are *no* constitutional limits on what the government can take from a person who merely fails to pay property taxes. The trial court compounded that error by denying Appellants' motion to amend their complaint to raise a defense under the Excessive Fines Clause. See App. 57a–58a. But, having deemed these proceedings forfeitures, the trial court should have permitted Appellants to explain why forfeiture of the full value of their properties would be unconstitutionally excessive. And to the extent there was confusion on this issue, *Timbs* has since clarified that one's right to raise an excessiveness claim is guaranteed in state and federal proceedings alike. 139 S Ct at 687. For these reasons, if this Court agrees that these *were* forfeiture proceedings, it should remand with instructions to determine whether the foreclosures in this case were excessive.[2]

[2] In *Bennis*, three Justices pointed out that Mrs. Bennis had not raised a defense under the Excessive Fines Clause and that, had she done so, they would have been inclined to rule in her favor. *E.g.*, *Bennis*, 516 US at 471 (STEVENS, J., dissenting).

CONCLUSION

This Court should reverse the Court of Appeals, hold that the county engaged in a taking of Appellants' property, and remand for a determination of just compensation. If, however, the Court is inclined to affirm the lower courts' conclusion that tax foreclosures are forfeitures, it should remand with instructions to consider Appellants' defense under the Excessive Fines Clause. In all events, the Court should abrogate the three Court of Appeals decisions holding that the Excessive Fines Clause does not apply in Michigan. In light of *Timbs*, those decisions are no longer good law, and this Court should say just that.

Respectfully submitted,

By: /s/ Wesley Hottot

Wesley Hottot*
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org

Ronald W. Ryan
LEWIS, REED & ALLEN, P.C.
136 E. Michigan Ave., Suite 800
Kalamazoo, MI 49007
(269) 553-1424
rryan@lewisredallen.com

Jaimie Cavanaugh*
INSTITUTE FOR JUSTICE
520 Nicollet Mall, Suite 550
Minneapolis, MN 55402
(612) 435-3451
jcavanaugh@ij.org

Attorneys for *Amicus Curiae* Institute for Justice

* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2019, I electronically filed the foregoing Amicus Curiae Brief of the Institute for Justice in Support of Plaintiffs/Appellants, which was served on all Parties by the TrueFiling system of the Michigan Supreme Court.

/s/ Wesley Hottot
Wesley Hottot
Attorney for *Amicus Curiae*