No. 21-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAWANDA HALL, et al.,

Appellants,

v.

ANDREW MEISNER, Oakland County Treasurer in his official capacity, et al.,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Michigan
Honorable Paul D. Borman, District Judge
No. 20-cv-12230

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GLOSSARY OF TERMS

"Homeowners" means Plaintiff-Appellants

"City" means City of Southfield

"County" means Oakland County

"Company" means Southfield Neighborhood Revitalization Initiative, LLC

"Non-Profit" means Southfield Non-Profit Housing Corporation

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case raises constitutional questions of first impression in the Sixth Circuit, some of which have divided state supreme courts and federal district courts. Oral argument will assist the Court in addressing these novel issues.

JURISDICTIONAL STATEMENT

Appellants raise federal constitutional claims under 42 U.S.C. § 1983, along with state law claims. The district court had jurisdiction pursuant to 28 U.S. Code § 1331, § 1343 and § 1367 because this case involves a federal question, civil rights claims under 42 U.S.C. § 1983, and pendant state claims.

The district court issued its opinion and order granting some of the Appellees' motion to dismiss for failure to state a claim on May 21, 2021. R.62, PageID #2176. The district court issued two opinions and orders disposing of all remaining claims in the case on October 4, 2021. R. 65, PageID #2221; R.66, PageID #2271. On November 3, 2021, Appellant timely filed her Notice of Appeal. R.68, PageID #2322. On December 3, 2021, this Court extended the filing deadline for Appellants' opening brief

to February 21, 2022. And on February 8, 2022, the Court extended the deadline for Appellants' opening brief to March 7, 2022.

This Court has jurisdiction over the appeal under 28 U.S.C. § 1291 (jurisdiction over final decisions of district courts).

STATEMENT OF THE ISSUES

Appellees took each of the eight Appellants' homes to satisfy tax debts in amounts far below the value of their homes. As a result, one or more Appellees received a huge windfall at the expense of the homeowners. The only compensation given to Appellants for their homes was forgiveness of the debts that were worth much less than their homes. The district court dismissed Appellants' lawsuit for failure to state a claim. The court also held one Appellant lacked standing and some of Appellants' claims were barred by res judicata. The issues are:

1. Whether Appellants have plausible claims that the Appellees took private property without just compensation in violation of the U.S. and Michigan Constitutions?
2. Whether Appellants state a plausible procedural due process claim against the County and County Treasurer?

3. Whether Appellants state a plausible Eighth Amendment excessive fines claim against the government?
4. Whether Appellants state a plausible unjust enrichment claim against the Company, Non-Profit, and related City officials where one or more Appellees received a windfall through the transfer of the Appellants' property?
5. Whether Appellant Marcus Byers has standing?
6. Whether res judicata bars claims raised by Appellants Carolyn Miller, Anthony Akande, American Internet Group, LLC, or Tawanda Hall?

INTRODUCTION

This case asks the Court to decide whether the U.S. Constitution, Michigan Constitution, and common law protect indebted homeowners when local government confiscates an entire home to satisfy debts, costs, and penalties amounting to far less than the value of that home. The common law in Michigan traditionally prevented government and private parties alike from taking more than they are owed. The Michigan Supreme Court has held that government effects an uncompensated taking or is liable for unjust enrichment when government takes more

than it is owed during property tax collection. *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 468–71 (2020).

Here, with insufficient notice, the government and its private partners took seven homes belonging to the eight Appellants (Homeowners). Each home was worth far more than the respective Homeowner owed the government. For example, Oakland County (County) took Tawanda Hall's home worth approximately $285,000 more than she owed in taxes, penalties, interest, and costs. Opinion and Order, R.66, PageID #2275. The County foreclosed on the property and transferred the title to the City of Southfield, which gave the property to a private company, the Southfield Neighborhood Revitalization Initiative, LLC (Company) for one dollar. For her $308,000 home, Ms. Hall was only compensated with forgiveness of her $22,642 debt. *See id.* Likewise, the government took homes from Coretha and Curtis Lee, Kristina Govan, Marcus Byers, Carolyn Miller, Anthony Akande, and American Internet Group, LLC. *Id.* at 2275–76. They were compensated only with the cancellation of tax debts that amounted to a fraction of what their homes were worth. In total, the government took and gave to the Company a windfall of more than $826,000. *See id.*

Homeowners raised claims under the federal and Michigan Constitutions, and under Michigan common law. Homeowners' claims find direct support from a number of cases, but most emphatically from *Rafaeli*, 505 Mich. at 470, 479. In *Rafaeli*, the Michigan Supreme Court held that where government takes private property to satisfy a tax debt and sells it to the highest bidder at a public auction, the government is only entitled to keep as much as it is owed from the proceeds of the sale. *Id.* at 749. Any surplus remaining after paying the taxes, penalties, interest, and fees belongs to the former owner, even where state law purports to give that money to the government. *Id.* at 437. However, the court did not decide the precise question in this case: what happens when the property is not sold at auction. But the thrust of the decision is that Michigan law has long prevented government from taking more than it is owed when collecting a tax debt. Notwithstanding *Rafaeli*, the lower court ruled against the Homeowners, holding that debtors are entitled to nothing when their property is taken without subsequent sale for value at auction.

This Court previously noted the government's taking of excess property to satisfy a tax debt "implicates debates going back to the

founding." *Harrison v. Montgomery Cty.*, *Ohio*, 997 F.3d 643, 652 (6th Cir. 2021). Such takings claims "rest[] on the venerable proposition that 'a law that takes property from A. and gives it to B. . . . is against all reason and justice.'" *Id.* (citing *Calder v. Bull*, 3 U.S. 3 Dall. 386, 388 (1798)). This Court has never reached the merits of the issue presented by this case, but in confirming jurisdiction over such claims, it commented that a court considering the merits "may wish to solicit historical evidence about the meaning of a taking in 1791 and 1868 with respect to this kind of government action."[1] *Id.* As explained below, that historical evidence is on the Homeowners' side.

The trial court dismissed related other claims on the premise that Michigan tax statutes authorized the actions here and therefore none of the Appellees could be held liable. The court erred.

STATEMENT OF THE CASE

A. Factual Background

When the Homeowners in this case failed to pay their property taxes on time, the County foreclosed. The homes were not sold at auction

[1] The Fifth Amendment to the U.S. Constitution was ratified in 1791. The Fourteenth Amendment was ratified in 1868.

but transferred through a series of transactions to a company managed by City officials, the Southfield Neighborhood Revitalization Initiative, LLC (Company), for a payment of the tax debt plus $1 each. Opinion and Order, R. 66, PageID #2277; June 26, 2017 City Council Minutes, R.44-5, PageID #1256.[2] The properties were all worth more than what each homeowner owed, resulting in a large windfall to the Company. R.66, PageID #2275–76. None of the Homeowners were paid for what was taken from them because a state statute purported to authorize cities "to purchase for a public purpose" tax-foreclosed property by paying the County the accrued tax debt. Mich. Comp. Laws § 211.78m (2017).

The asserted public purpose, according to a resolution adopted by the City Council, was to "revitalize and stabilize neighborhoods" and "rehabilitate and renovate these homes and then return them to productive use and purchase by individuals and families seeking housing

[2] The transfer followed a complicated and unusual path. The County first transferred title of the properties to the City, pursuant to MCL §211.78m(1), in exchange for payment from the City of the tax debt for each property. Opinion and Order, R.66, PageID #2277. The Southfield Non-Profit Housing Corporation urged the City to take title to the properties and gave the City the funds to pay the tax debts. *Id.* Rather than transfer title to the non-profit corporation, however, the City gave the properties to the Company, a related for-profit entity managed by city officials, for $1 each. *Id.*

opportunities within the City of Southfield." City Resolution, R.44-5, PageID #1254. City Council members also said at another meeting that conveyance of the property from the County through the City to the Company would attract residents with more income. *See* R.44-4, PageID #1250. With the City Council's authority, Mayor Kenson Siver signed a contract with the Southfield Non-Profit Housing Corporation (Non-Profit), which owns the Company, to execute the arrangement. *See id.*

The Non-Profit and Company are both controlled by City officials. Mayor Siver is president of the Non-Profit and signed the paperwork creating the Company. Order, R.66, PageID #2278. City Manager Fred Zorn is a board member and Vice-President of the Non-Profit, and the "manager" and registered agent for the Company. *Id.* The arrangement is "troubling" and "shocking to the consc[ience]," creates "conflict of interest" for the officials, and "rightfully breeds distrust among their electorate." *Id.* at 2318 n.9 (quoting *Jackson v. Southfield Neighborhood Revitalization Initiative (Jackson I)*, No. 344058, 2019 WL 6977831, at *8 (Mich. Ct. App. Dec. 19, 2019), *judgment vacated in part, appeal denied in part*, 953 N.W.2d 402 (Mich. 2021). But this appeal is not contesting

the propriety of this arrangement; rather it challenges how the Appellees together took more than the Homeowners owed the government.

Through this scheme, Homeowners not only lost their homes, but hundreds of thousands of dollars in equity built up in them. *See* Opinion and Order, R.66, PageID#2275–76. None of the Homeowners had mortgages on their properties. Compl. R.1, PageID #7. Some of them entered into payment plans with the County to save their homes and made "substantial" payments under those plans. *Id.* None of the Homeowners were notified of the foreclosure of their properties until after the right to redeem expired. *Id.* at #8. Nor were they warned that the County was revoking the payment plan. *Id.* at #27. Indeed, the County Treasurer's office instructed the Homeowners on payment plans to ignore warnings of foreclosure and through words and conduct informed them that they need not make timely payments, but could pay the delinquent amount by the following year. *Id.*

1. Tawanda Hall

Tawanda Hall owned a home with her now-deceased husband at 24650 Martha Washington Dr., Southfield, MI 48075, in 2010. *Id.* at 5. On February 14, 2018, the County foreclosed and took title to the

property to collect $22,642 in property taxes, interest, penalties, and fees. ECF No. 66, Page ID #2275. To redeem, Ms. Hall entered into a payment plan on March 29, 2018, agreeing to pay $650 per month. Hall Payment Plan, R.32-2, PageID #353. The Halls made a substantial payment on that debt. *See* Compl. R.1, PageID #7. Without notice, on June 29, 2018, the County Treasurer deeded the property to the City, which paid the tax debt with funds from the Non-Profit. *Id.* at #36. On October 23, 2018, the City gave the property to the Company for $1. The Company later sold the Halls' home for its fair market value of $308,000—$285,000 more than Ms. Hall's total tax debt—and kept all the proceeds.

Ms. Hall subsequently filed suit, *pro se*, in the Eastern District of Michigan against the defendants in this case. No. 2:18-cv-14086, ECF No. 9, PageID #71–123. The lawsuit alleged violation of the Fair Housing Act, due process, conspiracy and fraud under the RICO Act, and a state-law fraud claim. *Id.* at #88–96. After receiving advice from a pro se clinic, Ms. Hall dismissed the City defendants (City of Southfield, Frederick Zorn, Kenson Siver, Sue Ward-Witkowski, Gerald Witkowski, and Irvin Lowenberg) with prejudice. Opinion and Order, R.66, PageID #2291. The remaining defendants were dismissed without prejudice for failure to

effect service and failure to prosecute. *See* No. 2:18-cv-14086 ECF No. 23, PageID #257.

2. Curtis and Coretha Lee

Mr. and Mrs. Lee owed a total of $30,547 in delinquent taxes on their home at 16412 Stratford Dr., Southfield, MI 48075. Compl. R.1, PageID #6. In 2016, the County foreclosed and then conveyed the property to the City, which paid the tax debt with the Non-Profit's money. R.66, PageID #2277. The City transferred the property to the Company for $1, which sold the home for $155,000—approximately $124,000 more than the Lees' total tax debt. *Id*. at #2276.

3. Kristina Govan

Kristina Govan is a mother of nine children. Compl. R.1, PageID #7. She purchased her home at 19095 Hilton, Southfield, MI 48075, in 2009 for $83,525. Exh. H to Compl., R.1, PageID #54. To collect a $45,350 tax debt, the County foreclosed and then conveyed title to the City, which paid the tax debt with the Non-Profit's money. Opinion and Order, R.66, PageID #2276–77. The City transferred the property to the Company for $1. *Id.* The Company still holds title to the property which is worth more than Ms. Govan's total tax debt. *Id.*

4. Marcus Byers

Marcus Byers suffers from a traumatic brain injury that left him unable to care for himself. Compl., R.1, PageID #6. He alleges that he held equitable title to the condominium where he lived at 21666 South Hidden Rivers Dr., #76, Southfield, MI 48075. *Id.* His ex-wife and guardian was the named titleholder at the time of foreclosure. *Id.*; Exh. G to Compl., R.1–8, PageID #51. His money was used, however, to purchase and maintain the property. *See* Plaintiffs' Response, R.44, PageID #1179. After foreclosure, Mr. Byers's ex-wife signed a quit claim deed conveying her interest to herself and Mr. Byers jointly. Quit Claim, R.43–9, PageID #1130.

Mr. Byers and his ex-wife owed $4,113 in taxes, interest, penalties, and fees. Compl., R.1, PageID #6. The County foreclosed and then conveyed the property to the City, which paid the tax debt with the Non-Profit's money. *Id.* The City then transferred the property to the Company for $1. *Id.* The Company still holds title to the property, which has an estimated value of $90,000. *Id.*

5. Carolyn Miller

Carolyn Miller owed $29,759.00 in property taxes, interest, penalties, and fees on her house at 17600 George Washington Dr., Southfield, MI 48075. The County foreclosed and conveyed the property to the City of Southfield, which paid the tax debt with the Non-Profit's money. The City transferred the property to the Company for $1, which sold the home for $120,000.

On February 15, 2017, before the Company sold the home, Miller and two other plaintiffs in this case—Anthony Akande and American Internet Group, LLC—hired an attorney who filed a lawsuit against the County Treasurer's Office, the City, and the Company alleging discriminatory housing practices in violation of the Fair Housing Act. *See Hayes* Compl., R.34-2, PageID #460. Specifically, the complaint alleged that the City and County targeted Miller and the other plaintiffs' homes for foreclosure, and deprived them of proper notice, because of their race. *Id.* at 460. The suit also alleged that the properties were withheld from auction to prevent the plaintiffs' black family members from bidding on the properties. *Id.* That lawsuit was dismissed on May 4, 2017, with prejudice as frivolous. *Hayes* Order, R.34-3, PageID #490. Those

plaintiffs filed a motion to remove the housing discrimination claim and instead allege that plaintiffs "made timely payments that were rejected by Defendant Oakland County Treasurer or incorrectly applied to the wrong tax years." *Hayes* Mot., R.52-2, PageID #2016. That motion did not identify any constitutional or statutory claims. *See id.*; *Hayes* Order, R.34-3, PageID #490. The trial court denied the motion as futile. *Id.*

6. Anthony Akande

Anthony Akande is a pharmacist who purchased the home at 29800 Chelmsford Rd., Southfield, MI 48076, in 2011. Compl. R.1, PageID #6; Exh. E to Compl., R.1-6, PageID #44. The County foreclosed on his house to collect $2,415 in taxes, penalties, interest, and fees. Opinion and Order, R.66, PageID #2276. The County conveyed the property to the City, which paid the tax debt with the Non-Profit's money. *Id.* The City transferred the property to the Company, which sold it for $152,500.

In the 2017 housing discrimination lawsuit filed by Miller, Akande, and American Internet, the motion seeking to amend the complaint specifically alleged that Mr. Akande paid all of his taxes from 2010 until 2016 when the property was foreclosed. *Hayes* Mot., R.52-2, PageID #2016. The motion alleged that the tax delinquency occurred only

because the County failed to cash a $2,000 check he timely made as payment. *Id.* The motion was denied as futile. *Hayes* Order, R.34-3, PageID #490.

7. American Internet Group, LLC

American Internet Group, LLC, (American Internet) is a business that provides high-speed internet and networking services to schools. Compl., R.1, PageID #5. American Internet owed $9,974 in taxes, penalties, interest, and fees on its principal office located at 25927 McAllister, Southfield, MI 48033. *Id.* The property includes a single-family home and 1.8 acres of land. Exh. D to Compl., R.1-5, PageID #41. The County foreclosed and conveyed the property to the City, which paid the tax debt with the Non-Profit's money. The City transferred the property for $1 to the Company, which sold it for $149,900. R.1, PageID #6.

B. Procedural Background

In August 2020, these eight Homeowners filed this federal lawsuit against the parties involved in the confiscation of their properties: the County, City, public officials, the Company, the Non-Profit, and the

managers of the Company.[3] At issue in this appeal, the Homeowners alleged that all the Appellees took their private property without just compensation; the City, County, and public officials imposed excessive fines; the County and its treasurer violated procedural due process; and the Company, Non-Profit, City and its officials were liable to return the windfall received at the Homeowners' expense under the doctrine of unjust enrichment. The Appellees filed motions to dismiss.

On May 21, 2021, the district court dismissed all claims against Oakland County and its treasurer. On October 4, 2021, it disposed of the case by dismissing all remaining claims against the City, City officials, and the private defendants.

The district court dismissed the takings claims against all Appellees for failure to state a claim, misconstruing *Rafaeli* as holding that a "plaintiff's only 'property interest' surviving a tax-foreclosure is not in the real property itself, but only in the surplus proceeds resulting from the tax-foreclosure sale, if any . . . ." Opinion and Order, R.62,

[3] Habitat for Humanity was also originally named as a party because the Company paid it to repair some of the properties. But it was dropped from this appeal because it did not play a role in the confiscations here.

PageID #2206–07; Opinion and Order, R.65, PageID #2267; Opinion and Order, R.66, PageID #2308.

The court dismissed the procedural due process claim against the County and its treasurer for failure to state a claim, holding that notice was constitutionally adequate because the payment plans themselves warned the Homeowners that they would lose their property if they missed a payment.[4] R.62, PageID #2213. The district court also rejected their argument that notice should have been more robust before the government could take all of their equity. *Id.* at #2214. The court held that "Michigan does not recognize a 'property interest' in the alleged lost equity" and thus the Homeowners are not entitled to additional notice. *Id.*

The court dismissed the excessive fines claim brought against the County and the City, holding that the alleged actions here were not punitive and therefore there are no fines involved. R.62, PageID #2211; R.66, PageID #2310–11.

[4] Homeowners' Complaint also alleged that the City violated procedural due process but that claim was abandoned. *See* Order, R.66 PageID #2311 at n.7.

The district court dismissed the unjust enrichment claim against the Company, Non-Profit, City, and City officials because they are not alleged to have misled the Homeowners. Opinion and Order, R.65, PageID #2259; R.66, PageID #2317. The court also rejected Homeowners' claim against the Company and Non-Profit because they "failed to demonstrate a property right or amount or benefit that was 'unjustly' taken from them by anyone." Opinion and Order, R.65, PageID #2254.

The court also denied Marcus Byers' claims for lack of standing, and rejected some claims against some of the defendants by Tawanda Hall, Carolyn Miller, Anthony Akanda, and American Internet on the grounds of res judicata. Appellant Homeowners appeal and seek reversal of the decision below.[5]

SUMMARY OF ARGUMENT

Michigan state law holds, consistent with the common law tradition dating back to Magna Carta, that government effects a taking when in the course of collecting a tax debt it takes and keeps more than it is owed. *See, e.g., Rafaeli*, 505 Mich. at 470–71. Here, the government took homes

[5] The court also dismissed a federal substantive due process claim and held the complaint failed to state any claim against E'Toile Libbett and Mitchell Simon. Those matters are not at issue in this appeal.

worth far more than each Homeowner owed the government. The government only compensated the Homeowners with the forgiveness of lesser debts. Consequently, the court below erred by dismissing the state and federal just compensation claims. This Court should reverse dismissal of Counts I, II, and III.

The district court also erred in dismissing the federal excessive fines claim. The government imposed a financial punishment on the Homeowners that is grossly excessive compared the gravity of the non-criminal tax-delinquencies giving rise to a plausible excessive fines claim. *See Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019). The district court's dismissal of count IV should be reversed.

The court also erred in dismissing Homeowners' due process claim, count V. Homeowners alleged that the government told them to ignore notices of foreclosure, and failed to provide notice that they had violated the terms of a payment plan before taking their homes.

Moreover, Homeowners pled plausible claims for unjust enrichment against the Company and Non-Profit, which received windfalls at the Homeowners' expense. The Michigan Supreme Court confirmed in

Rafaeli that unjust enrichment is an appropriate claim in the context of tax foreclosures. The district court erred in dismissing count VII.

Finally, all Homeowners should be allowed to proceed as parties to this lawsuit against all of the Appellees. Contrary to the lower court's ruling, the proper application of the res judicata doctrine does not preclude Tawanda Hall, Carolyn Miller, Anthony Akande, and American Internet from pursing their claims against any of the Appellees. And Appellant Marcus Byers plausibly alleged an ownership interest in the property sufficient to state his just compensation, excessive fines, procedural due process and unjust enrichment claims. The truth of his allegations must be assumed in the context of a 12(b)(6) motion. Thus, the lower court erred in finding that he lacked standing.

This Court should reverse the dismissals and remand for further proceedings on the merits of the just compensation, excessive fines, due process, and unjust enrichment claims.

STANDARD OF REVIEW

On appeal, the Court reviews a district court's grant of a 12(b)(6) motion *de novo*. *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012). Under Rule 12(b)(6), a pleading fails to state a claim if it does

not contain allegations that support recovery under any recognizable theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Handy-Clay*, 695 F.3d at 538.

ARGUMENT

I

THE GOVERNMENT EFFECTED AN UNCONSTITUTIONAL TAKING WHEN IT TOOK THE APPELLANT HOMEOWNERS' PROPERTY WITHOUT JUST COMPENSATION

The Takings Clause of the Fifth Amendment requires government to pay just compensation when it takes private property for a public use. U.S. Const. amend. V. Similarly, Article 10, Section 2, of the 1963 Michigan Constitution provides, "Private property shall not be taken for public use without just compensation therefore being first made . . . ." Under both constitutions, when government takes title or physically appropriates property for a public purpose, it triggers the just compensation mandate. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021); *AFT Michigan v. State of Michigan*, 497 Mich. 197, 218 (2015) ("seiz[ing] title" effects taking).

"Just compensation" means the "the full monetary equivalent of what was taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973).

Here, the Homeowners each owned homes and land burdened by tax liens. Their property was nonetheless protected by the U.S. and Michigan constitutions. *See Rafaeli*, 505 Mich. at 481; *Jones v. Flowers*, 547 U.S. 220, 226 (2006). The physical appropriation of their property triggered a "categorical obligation to provide the owner with just compensation." *Cedar Point*, 141 S. Ct. at 2071.

Certainly, government may seize property and sell it to collect a debt. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277–78 (1855). But the law imposes essential restraints on that power. As explained more below, governments traditionally avoid liability by taking indebted property subject to a fiduciary duty to sell the property to the highest bidder and refund any surplus proceeds to the former owner. When government strays from that practice, it becomes liable for uncompensated takings, even when state statutes purport to authorize the confiscations.

Here, the government and its agents effected takings by failing to refund the difference between the debts and the property seized to satisfy those debts. Instead, the government treated the forgiveness of tax debts—worth a fraction of value of the homes—as sufficient compensation for property worth far more than those debts. Thus, this Court should reverse dismissal of Homeowners' claims seeking just compensation: counts I, II, and III.

A. The common law recognizes debtors' property rights in seized property and a related fiduciary duty of the debt collector

Under the common law, debtors are entitled to be paid for the equity value of property seized to pay their debt. "Equity" is the value of property that exceeds encumbering liens. *Crane v. Commissioner*, 331 U.S. 1, 7 (1947). When foreclosed property is sold, "[a]ny surplus remaining after the payment of taxes, interest, costs, and penalties must ordinarily be paid over to the landowner." 72 Am. Jur. 2d State and Local Taxation § 911 (1974).

A tax collector's power to take property is "exhausted the moment the tax was collected." Thomas M. Cooley, *A Treatise on the Law of Taxation* 343–44 (1876). The law has traditionally respected that

understanding by treating the surplus proceeds from a fair sale of foreclosed property as representing the former owner's equity or the excess property taken by the debt collector. *Grand Teton Mountain Invs., LLC v. Beach Props., LLC*, 385 S.W.3d 499, 502 (Mo. Ct. App. 2012) ("[A] foreclosure sale surplus 'retains the character of real estate for purposes of determining who is entitled to receive it . . . . Such surplus represents the owner's equity in the real estate.") (internal citation omitted); Restatement (Third) of Property (Mortgages) § 7.4 (1997) ("The surplus stands in the place of the foreclosed real estate, and the liens and interests that previously attached to the real estate now attach to the surplus.").[6]

A debtor's right to receive compensation for his equity has deep roots reaching back to Magna Carta, which "recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess." *Rafaeli*, 505 Mich. at 463; *see* William Sharp McKechnie, *Magna Carta, A Commentary on*

[6] This understanding of property equity first arose in the context of mortgages to protect debtors from harsh contracts that would have otherwise forfeited valuable property pursuant to contractual terms. *Rafaeli*, 505 Mich. at 507 (Viviano, J., concurring) (discussing the history of mortgage foreclosures and the right to property equity).

the Great Charter of King John 322–23 (2d ed. 1914). Sir William Blackstone wrote that when officials seized property for delinquent taxes, "they are bound, by an implied contract in law" to return it if the debt is paid before sale, or to sell it and "render back the overplus." 2 William Blackstone, *Commentaries on The Laws of England* *452 (internal citation omitted).

Likewise, in the United States, at the founding and for more than 100 years, tax collectors respected debtors' property rights by selling seized property for value and refunding the surplus over the debt to the former owner. *Rafaeli*, 505 Mich. at 462–67 (tracing the long and consistent history of this protection); *see* Thomas M. Cooley, A Treatise on the Law of Taxation 343 (1876) (author was unaware of any jurisdiction that failed to protect debtor's property interests by either selling the property and refunding the surplus or by limiting government to take only as much property as the taxes owed); *McDuffee v. Collins*, 23 So. 45, 46 (Ala. 1898) (tax collector must follow "well-known general rule of law" by paying surplus proceeds in order of priority). Michigan's protection for debtors was recognized at statehood and in 1963 when the Michigan Constitution was adopted. *Rafaeli*, 505 Mich. at 470–73.

Tax collectors who fail to properly sell seized property and refund the surplus profits are liable under the common law to pay the former owner. *See, e.g., Cone v. Forest*, 126 Mass. 97, 101 (1879) (liable for conversion); *Seekins v. Goodale*, 61 Me. 400, 400 (1873) (tax collector who seized and sold more cloth than necessary to pay debt was liable for trespass for the excess and had to pay fair market value for extra cloths that he sold). Thus, the common law imposed a fiduciary duty on government to fairly sell the property and hold the surplus proceeds for the benefit of the former owner. *See, e.g.*, *Bogie v. Town of Barnet*, 270 A.2d 898, 901 (Vt. 1970) ("For the privilege of so proceeding [with a tax sale to collect a tax], the town must suffer the restraints of fiduciary duty."); *Cahoon v. Coe*, 57 N.H. 556, 597–98 (1876). Courts traditionally scrutinize tax sales to ensure that they are "conducted with entire fairness" free "from all influences likely to prevent competition in the sale." *Slater v. Maxwell*, 73 U.S. 268, 276 (1867). When "characterized by . . . unfairness" courts may set aside sales or require the purchaser "to hold the title in trust for the owner." *Id.*

While the Supreme Court of the United States has not decided whether action like that at issue in this case effects an uncompensated

taking, it has chosen a strained construction of a similar statute to avoid forfeiture of the equity value and to impose a fiduciary duty on the government. During the Civil War, Congress imposed a property tax on landowners that was partly aimed at "suppress[ing] rebellion" in Confederate states and that appeared to forfeit title and all equity in tax-delinquent property. *Bennett v. Hunter*, 76 U.S. 326, 335, 337 (1869). When first called upon to decide whether government could forfeit the owner's absolute title without effecting a taking, the high court avoided the constitutional question by interpreting "forfeit" as meaning the owner was merely in danger of a tax sale and could still redeem the property until sale to a third party, because it is "proper" to avoid such a "highly penal" provision where milder construction is possible. *Id.*

Then, in *United States v. Taylor*, 104 U.S. 216, 219 (1881), the Supreme Court further interpreted the act. In that case, the federal government sold a property owner's land at a tax sale for $3,000 to collect $70.50 in property taxes. *Id.* at 217. Noting that it "was not a confiscation act," the Supreme Court held that the former owner was entitled to the surplus profits. The Court also then held that even though more than six years had elapsed from the time of the sale, the statute of limitations did

not bar the claim. Instead, the Court held that a "good faith" construction of the statute requires the government to act as trustee in selling and holding the funds for the former owner indefinitely. *Id.* at 221–22.

That traditional common law understanding that debtors must be compensated for their equity in their property was in force when the federal and state takings clauses were adopted, and it remains the law in Michigan and in most other states today.[7]

B. Government effects a taking when it takes a home worth more than the tax debt and fails to publicly sell the property and refund the surplus to the homeowner

In *Harrison*, this Court advised that when deciding whether government action like that at issue here effects a taking, courts should review whether such an action would have been considered a taking when the Bill of Rights and Fourteenth Amendment were adopted. *Harrison*, 997 F.3d at 652. As explained above, such actions indeed would have demanded payment in early American history, as well as during

[7] Jenna Christine Foos, Comment, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real. Prop. Tr. & Est. L. J. 93, 99–103 & n.38 (2019) (majority of states "require the foreclosing government unit to return surplus funds from a property tax foreclosure sale to the previous property owner").

Reconstruction. *See Martin v. Snowden*, 59 Va. 100, 136–143 (1868) *aff'd on other grounds sub nom. Bennett*, 76 U.S. 326 (describing how common law limited how much property could be taken and required payment of surplus proceeds to former owner in the U.S. and holding that statute passed during the Civil War couldn't be interpreted as causing a confiscation of the whole because it would be unconstitutional).

Consistent with that history, Michigan has *always* recognized that tax foreclosure does not strip debtors of all interest in their property. *See Rafaeli*, 505 Mich. at 470–73. Consequently, the Michigan Supreme Court has rebuffed the state legislature's attempt to extinguish debtors' property rights completely at the time of foreclosure. *Id.* High courts in other states, too, have held that retaining surplus proceeds from a public sale after a tax foreclosure takes property without compensation. *See, e.g.*, *Bogie*, 270 A.2d at 899–900; *Polonsky v. Town of Bedford*, 238 A.3d 1102 (N.H. 2020).

1. The government may not extinguish traditional property rights by ipse dixit

The Michigan legislature cannot extinguish the Homeowners' right to just compensation for their homes. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 158–59 (1980), the Supreme Court held

that government violated the Takings Clause by keeping the interest earned on private funds deposited with a court, even though a Florida statute so provided, and the Florida Supreme Court had agreed it was legal. The Court explained, "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. The plaintiff had a traditionally protected property right, which the Florida legislature and Florida Supreme Court could not take away. Likewise, in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998), the Supreme Court rejected Texas's attempt to take a fund of money without compensation by statute, explaining "at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests."

State statutes that purport to allow government to take more property than necessary as payment for debts violate the constitutional guarantee of just compensation in the same way. Neither Michigan's legislature nor the County or City or its partners may extinguish traditional property interests without compensation. Government cannot

"by *ipse dixit* . . . transform private property into public property without compensation." *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

Outside the context of tax foreclosures, the Supreme Court has rejected similar government attempts to legislatively extinguish the right to just compensation by redefining traditional property rights. For example, the Court has found a taking when government takes without payment financial interests including money, interest on money, land, liens, and mortgages. *See, e.g.*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590, 601–02 (1935) (Takings Clause protects "substantive rights in specific property," including the right to collect on a debt in a timely manner by seizing and selling that property); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013) (Takings Clause protects money and "a right to receive money that is secured by a particular piece of property"); *Webb's Fabulous Pharmacies*, 449 U.S. at 158–59 (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens). Similarly, the Court has held that where a statute requires property to be sold to pay debts and the surplus proceeds returned, the Takings Clause protects the former owner's rights to those proceeds. *United States v. Lawton*, 110 U.S. 146, 150 (1884) ("To withhold the

surplus from the owner would be to violate the fifth amendment to the constitution, and . . . take his property for public use without just compensation.").

When the Appellees here took the homes without paying the Homeowners just compensation, they effected a classic physical taking under both the state and federal takings clauses. *See, e.g., Webb's Fabulous Pharmacies*, 449 U.S. at 164 (Government cannot "by ipse dixit . . . transform private property into public property without compensation."); *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (holding that the confiscation of a privately owned interest is a taking); *Lawton*, 110 U.S. at 150 (where a statute required property to be sold to pay debts and the surplus proceeds returned, the Takings Clause protects the former owner's rights to those proceeds).

The uncompensated taking in this case is at least as profound as the injustice the Supreme Court condemned in *Armstrong*, 364 U.S. 40. There, a shipbuilder contracted by the United States defaulted on its obligation to build ships, and the United States took title to the unfinished boats and materials, pursuant to contractual and common law rights. *Id.* Material suppliers claimed the United States had extinguished

their liens on the unfinished boats and unconstitutionally refused to compensate the suppliers. *Id.* The Supreme Court agreed, holding that property rights in liens do not disappear when the government takes title to the subject property. *Id.* at 48. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id.* The government could take the underlying property, but the taking was subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id.* at 49.

In this case, "the government for its own advantage destroy[ed] the value" of the Homeowners' equity, which like the liens in *Armstrong* requires payment of just compensation. *See id.* at 48. Even though the government has only a limited interest in the taxed property, it has taken everything for the public benefit. This transformation of private property for public use is a taking. The government thus has the "constitutional obligation to pay just compensation." *See id.* at 49.

In Tawanda Hall's case, for example, the government took Ms. Hall's valuable home as payment for her $22,642 tax debt. The government did not abide by the traditional common law fiduciary duty of publicly selling the property for the highest offer. Instead, government

took the property and conveyed for a "public purpose" to the Company, which through the Non-Profit paid only the tax debt. The Company later sold the property for $308,000. Neither the government nor the Company paid Ms. Hall for the windfall, which was as much as $285,358. Thus Ms. Hall has only been paid $22,642 for her former home. The Appellees are liable for an uncompensated taking. Likewise, the other Homeowners—the Lees, Govan, Byers, Miller, Akande, and American Internet—have not received just compensation for their homes that the Appellees took.

2. *Rafaeli* supports Homeowners' takings claims

In *Rafaeli*, the Michigan Supreme Court held that, consistent with common law protections, government effects a taking without just compensation when it fails to refund the surplus proceeds from a tax sale to the former owner of the property. When Rafaeli inadvertently underpaid his property taxes by $8.41, Oakland County foreclosed, and sold the property at auction for $24,500. 505 Mich. at 437. Rafaeli filed a lawsuit alleging that the government violated the Michigan and U.S. Constitutions by keeping more than they he owed in taxes, penalties, interest, and fees. The Michigan Supreme Court confirmed that Michigan's common law tradition prevents the government from taking

more than it was owed. *Id.* at 473. It held that when government keeps the surplus proceeds from a tax sale, it takes private property without compensation in violation of Article 10, § 2, of the Michigan Constitution. *Id.* at 474. The court declined commenting on whether it effected a federal taking. *See id.* at 459 n.65.

In a footnote, the court stated that it believed the plaintiffs had "conflated" equity with surplus proceeds. *Id.* at 484 n.134. But the court held it was unnecessary to decide whether the plaintiffs had a "vested property right to equity held in property" because "[t]he question presented is whether a former property owner retains the ability to collect any surplus proceeds that might result after the government seizes title to real property for failure to pay taxes and then sells that property for more than the tax delinquency." *Id.*

Justice Viviano wrote a concurring opinion explaining that the court should have held that the County took equity without just compensation and that the surplus proceeds will generally represent that equity. *Id.* at 510. He also warned that the majority's opinion could be construed as denying just compensation when the government skips an auction or other public sale. *Id.* at 516. But just six months later, the

Michigan Supreme Court unanimously revived a case like this one, *Jackson v. Southfield Neighborhood Revitalization Initiative* (*Jackson II*), 507 Mich. 866 (2021), suggesting that the failure to conduct a tax sale does not insulate the government from liability. *Jackson* involves the same arrangement between the City, Non-Profit, and Company as alleged here. The properties were not sold at auction; rather the City exercised its right of first refusal, paying only the tax debt, and conveying the properties to the Company for one dollar after being reimbursed for the taxes by the Non-Profit. *Jackson I*, 2019 WL 6977831, at *2. The Michigan Court of Appeals rejected the *Jackson* plaintiffs' takings claims. *Id.* at *3, 9. But the Michigan Supreme Court vacated that decision and remanded to the trial court "for reconsideration . . . in light of *Rafaeli*," signaling its belief that claims like this one find support in *Rafaeli*. *Jackson II*, 507 Mich. at 866.

Indeed, *Rafaeli* confirms that in Michigan the "fundamental principles—that the government shall not collect more taxes than are owed, nor shall it take more property than is necessary to serve the public" are deeply rooted in Michigan and "have remained a staple" in the state. *Rafaeli*, 505 Mich. at 468. Moreover, *Rafaeli* supports the

federal claim that the Appellees effected a taking without just compensation. *See, e.g.*, *Fox v. Cty. of Saginaw*, No. 19-CV-11887, 2021 WL 120855, at *12 (E.D. Mich. Jan. 13, 2021) ("there is little reason to believe that the Fifth Amendment would demand a different result.").

3. Decisions in many states support the Homeowners' claims for just compensation

The Michigan Supreme Court's decision is not an aberration. Most states' statutes still protect debtors' right to be paid for their equity interest. Foos, *supra.* n.7. When state have strayed from that tradition, many courts have rejected such attempts. Like Michigan, the high courts of New Hampshire, Vermont, Mississippi, and Virginia, and several federal district courts have recognized that government owes just compensation when it confiscates property worth more than it is owed. *Griffin v. Mixon*, 38 Miss. 424, 436–37 (Miss. Err. & App. 1860); *Bogie*, 270 A.2d at 900, 903 (citing *Lawton*, 110 U.S. 146, and holding retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation"); *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000); *Martin*, 59 Va. at 142–43 *aff'd on other grounds sub nom. Bennett*, 76 U.S. 326 (violates traditional notions of due process of law); *King v. Hatfield*, 130 F. 564,

579 (C.C.D.W. Va. 1900); *Fox v. Cty. of Saginaw*, No. 19-CV-11887, 2021 WL 120855, at *12 (E.D. Mich. Jan. 13, 2021); *see also Coleman through Bunn v. District of Columbia (Coleman I)*, 70 F. Supp. 3d 58, 80 (2014); *Coleman II*, No. 13-1456, 2016 WL 10721865 *2–3 (D.D.C. June 11, 2016).

The state supreme courts of Indiana, North Dakota, Texas, and Alaska have also suggested (often in dicta) that government could not legitimately take valuable property without compensation for the owner's equity or for lienholder's interests in the property. *Lake Cty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004) (noting it would "produce severe unfairness" and likely violate the Takings Clause); *Farnham v. Jones*, 19 N.W. 83, 85 (Minn. 1884) ("[T]he right to the surplus exists independently of such statutory provision."); *Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191–92 (Tex. 1995), *as amended* (June 22, 1995) ("Taxing authorities are not (nor should they be) in the business of buying and selling real estate for profit."); *City of Anchorage v. Thomas*, 624 P.2d 271, 274 (Alaska 1981) (refusing to interpret the law as confiscating the surplus); *Shattuck v. Smith*, 69 N.W. 5, 12 (Dakota 1896) (noting statute

would likely be unconstitutional "if [it] contained no provision that the surplus should go to the landowner").

4. The United States Supreme Court holding in *Nelson v. City of New York* does not control this case

The district court rejected the takings claims based largely on a misreading of the Supreme Court's opinion in *Nelson v. City of New York*, 352 U.S. 103, 110 (1956). Opinion and Order, R.66, PageID #2308. In *Nelson*, 352 U.S. at 106, the City of New York foreclosed on two properties to satisfy delinquent debts, taking property that was worth more than the debt. The former owners asserted in their reply brief that the City took property without just compensation. In dicta, the Court rejected that argument because New York City law gave the owners an opportunity to claim the surplus proceeds from a judicial sale of the property, which the owners failed to request in time. *Id.* (rejecting takings claim "in the absence of timely action to . . . recover[ ] any surplus"). *Id.* at 110. Michigan, however, has no such procedure for the Homeowners. *See Rafaeli,* 505 Mich. at 461–62. The *Nelson* Court explicitly declined to answer whether government's retention of the windfall would be a taking where state law "precludes an owner from obtaining the surplus proceeds

of a judicial sale." *Nelson*, 352 U.S. at 106. That describes the case at hand.

Indeed, other courts have recognized that *Nelson* does not answer what happens when a state fails to provide former owners with an opportunity to claim surplus proceeds from a sale. *See, e.g., Rafaeli*, 505 Mich. at 460; *Coleman I*, 70 F. Supp. 3d at 68, 79 (*Nelson* "expressly reserved" the question).

Perhaps more importantly, *Nelson*'s takings discussion is dicta. *See Freed v. Thomas*, 976 F.3d 729, 738 (6th Cir. 2020) ("dictum is anything not necessary to the determination of the issue on appeal") (internal quote omitted). The questions presented in the Supreme Court and in the New York Court of Appeal were whether the City violated the plaintiffs' right to notice and equal protection under the Fourteenth Amendment. *See Nelson*, 352 U.S. at 107; *City of New York v. Nelson*, 130 N.E.2d 602, 603 (N.Y. 1955); *see also* Brief for Appellants, *Nelson*, No. 30, 1956 WL 89027, *3 (Sept. 14, 1956). Claims "not brought forward" in the lower court "cannot be made" in the Supreme Court. *Magruder v. Drury*, 235 U.S. 106, 113 (1914); *United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule, as the dissent correctly notes, precludes a grant of

certiorari only when the question presented was not pressed or passed upon below.") (internal quote omitted). Thus, the Supreme Court's discussion was dicta.

Furthermore, the Court's rationale in *Nelson* was recently rejected by *Knick v. Township of Scott, PA*, 139 S. Ct. 2162, 2171 (2019). In *Knick*, the Supreme Court held one may bring a federal claim for just compensation in federal court notwithstanding the existence of "a state law procedure that will eventually result in just compensation." This is the opposite of *Nelson*'s dicta, which sixty years ago disparaged a federal takings claim on the grounds that plaintiffs could have but failed to pursue a state law procedure to recover the surplus value of their confiscated property. *See* 352 U.S. at 109. Whatever the status of *Nelson*, it does not control the case at hand.

The Homeowners' failure to pay their debts does not entitle the government to take property worth more than what they owed without paying just compensation. Delinquent taxes are an old problem with old solutions that have long respected the property rights of debtors. By ignoring traditional procedures that would have returned surplus proceeds to the Homeowners, the Appellees effected a taking. Therefore,

the Plaintiffs stated viable claims seeking just compensation under the Fifth Amendment via 42 U.S.C. 1983 and Article 3, § 7, of the Michigan Constitution. The Court should reverse dismissal of Counts I, II, and III.

II

THE HOMEOWNERS PROPERLY RAISE A PROCEDURAL DUE PROCESS CLAIM

The Homeowners' procedural due process claim against the County and the County treasurer should be allowed to proceed. Due process requires that where government action will affect parties' rights, those parties are "entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Government must provide both notice and an opportunity to be heard before a neutral decisionmaker. *Id.* The procedures that due process requires will depend on the circumstances. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Courts must consider all the circumstances of the case and weigh "the 'interest of the State' against 'the individual interest sought to be protected by the Fourteenth Amendment.'" *Jones*, 547 U.S. at 229; *Morrissey*, 408 U.S. at 481, 485–89.

The protection due "depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Goldberg v. Kelly*, 397 U.S.

254, 263 (1970). Taking a home as payment for delinquent taxes imposes a grievous loss. *See Jones* , 547 U.S. at 230; *United States v. James Daniel Good Real Prop*., 510 U.S. 43, 53–54 (1993) ("right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance"); *Tracy v. Chester County, Tax Claim Bureau*, 489 A.2d 1334, 1339 (Penn. 1985) (it "is a momentous event" under the Constitution); *In the Matter of Foreclosure of Tax Liens*, 87 N.Y.S.3d 262, 272 (N.Y. App. Div. 2018), *leave to appeal dismissed sub nom.* 149 N.E.3d 434 (2020) (debtor has "substantial property interests at stake" where state law allows government to take property worth more than delinquent taxes). The Homeowners' interest here is not just the loss of a home, it is also the loss of the entire equity in that property. In contrast, the interest of the state here is whether it can collect property taxes and seize the windfall for a public purpose as quickly as it would prefer. These circumstances weigh in favor of better notice and a meaningful opportunity to be heard prior to the deprivation.

A. Notice was constitutionally deficient

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). That notice must be the sort of notice that a person "who actually desired to inform a real property owner of an impending tax sale" or foreclosure would provide. *See Jones*, 547 U.S. at 229.

The potential for grievous loss of a home and potentially all of its equity merits meaningful notice. *See, e.g.*, *id.* at 230. In the tax sale context, notice protects the owner's continued possession and ownership of real property (here, homes) by warning the owner of an imminent tax foreclosure and giving him an opportunity to save his title and protect his investment. Indeed, one major reason that owners fail to pay their property taxes is because they do not realize their peril. *Slater v. Maxwell*, 73 U.S. 268, 276 (1867) ("The owner . . . is generally ignorant of the proceeding until too late to prevent it."). "[K]nowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983).

Here, most of the Homeowners alleged that they entered into delinquent property installment agreements with the County and some had made substantial payments of 1-2 years' worth of property taxes

prior to foreclosure. Compl., R.1, PageID #7, 27. When they entered into the payment plans, they were advised to ignore notices of tax foreclosure. *Id.* And they allege the County had established a lenient "course of conduct" that allowed Homeowners to make late and partial payments, followed by "make-up" payments. *Id.* This conduct is consistent with the County's advice to others about payment plans. *See, e.g.*, *In re Matter of Petition of the Treasurer of Oakland*, No. 17-159297, Opinion and Order (Cir. Ct. Nov. 6, 2018)[8] (finding that the County had told the owner "to disregard notices she would receive because as long as she was in a payment plan, the Treasurer would not foreclose" and the "Treasurer told her not to worry about late, lesser or missing payments because as long as she was in a payment plan the Treasurer would not foreclose"); *see also Wayne County Treasurer v. City of Dearborn Heights*, No. 327928, 2016 WL 6825434, at *8 (Mich. Ct. App. Nov. 17, 2016) (unpublished) ("the Treasurer could waive strict compliance with the payment dates . . . and it clearly did so by accepting the late payments and filing the certificate" (citation omitted)).

[8] Available at R.43-10, PageID #1132.

In short, through words and deeds, the County led the Homeowners to believe that they had a year to cobble together the funds to save their homes. Compl., R.1, PageID #7, 27. Moreover, Michigan's statute itself provides that the Homeowners indeed should be given until the following year to make good on their promise to pay their debt. MCL § 211.78q(5)(b) (providing where owner fails to comply with tax foreclosure avoidance agreement, the property would be included in the "succeeding petition for foreclosure"); MCL § 211.78h.

The misleading information given by the county to the Homeowners is not the sort of notice that is "reasonably calculated, under all the circumstances" to warn the Homeowners of their peril as required by *Mullane*, 339 U.S. at 314. The Homeowners have therefore stated a viable claim for violation of procedural due process.

B. There was no pre-deprivation opportunity to oppose confiscation based on alleged material violation of the payment plans

Due process also requires an opportunity to be heard. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). "The purpose of

an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking." *James Daniel Good Real Prop.*, 510 U.S. at 55–56. When the government has a "pecuniary interest in the outcome" of a seizure, that increases the risk of erroneous deprivation and weighs in favor of a more protective process. *Id.*; *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) ("judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement"); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (mayor serving as a judge violated due process "both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.").

The Supreme Court has previously held that prior to depriving a person of a home, welfare payments, or a bed, table, stereo or a stove, the government must normally first provide a person with a meaningful hearing. *Id.* at 54 ("The seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment."); *Fuentes*, 407 U.S. at 88 (protection applies to furniture); *Goldberg*, 397 U.S. at 264 (welfare). For most Americans, their home is their most important asset.

And where, as here, the home is worth far more than the debt, it is also that individual's savings. *Cf. James Daniel Good*, 510 U.S. at 54 (noting "economic value" of home "weigh[s] heavily in" favor of a pre-deprivation hearing).

Most of the Homeowners in this case signed payment plans and believed that they were complying with the County's expectations sufficient to avoid foreclosure until at least the following year. There was no "extraordinary" circumstance that justifies the government skipping a pre-deprivation hearing. *See James Daniel Good Real Prop.*, 510 U.S. at 57 ("Because real property cannot abscond" no justification for skipping pre-deprivation hearing.).

The district court did not explain its rationale for rejecting the Homeowners' plea for predeprivation opportunity to be heard. *See* Opinion and Order, R.62, PageID #2212–14. But the County provided neither notice nor an opportunity to be heard for Homeowners after they signed the payment plans. Many of those Plaintiffs submitted payments under such payment plans. But without notice and without an opportunity to present their objections, the County moved forward with the foreclosure and deemed the agreements terminated and transferred

the properties to the City. This Court should reverse dismissal of count V.

III

HOMEOWNERS' ALTERNATIVE CLAIMS OF EXCESSIVE FINES AND UNJUST ENRICHMENT ARE PROPERLY RAISED

If the Homeowners are made whole through their takings claims, then their excessive fines and unjust enrichment claims will prove unnecessary. But they are necessary alternative claims at this stage of the litigation. Each of those claims independently states a plausible claim for relief. Thus, their claims for excessive fines and unjust enrichment are properly raised.

A. The Homeowners' Excessive Fines claim is properly raised

If the confiscation of Homeowners' homes was not a taking for a public purpose, then it was an excessive fine. The Excessive Fines Clause in the Eighth Amendment to the United States Constitution states that "excessive fines" shall not be "imposed." U.S. Const. amend. VIII. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *See United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998) (citation omitted). The clause prohibits fines that are "grossly disproportionate" to

the offense that they are designed to prevent. *Bajakajian*, 524 U.S. at 334.

The Excessive Fines Clause prohibits excessive fines in both civil and criminal cases. *Austin v. United States*, 509 U.S. 602, 609–10 (1993). A fine is excessive when it is punitive and grossly disproportionate to the offense. *Bajakajian*, 524 U.S. at 333–34. Here, the taking of the Plaintiffs' homes that were worth far more than they owed was both punitive and excessive.

1. Taking substantially more than a party owes in taxes, penalties, interest, and costs is punitive.

A fine is punitive when it goes well beyond the reasonable costs of enforcing the law against the offender. *United States v. Alt*, 83 F.3d 779, 782 (6th Cir. 1996). *Cf. Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 41 (1922) ("tax" was not remedial and was really a punishment). The demand for money or property is a punishment whenever it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." *United States v. Halper*, 490 U.S. 435, 448 (1989), *overturned on other grounds by Hudson v. United States*, 522 U.S. 93, 101 (1997).

Michigan's statutes impose interest, penalties, and costs on delinquent tax debts. MCL § 211.78a; MCL § 211.78g(3). Some of the interest and costs are remedial, specifically designed to fully compensate the government for the cost of delayed payment and the cost of enforcement against the debtor. *See id.* Because all supplemental costs imposed by the debtor are already included in the tax debt anything more is punitive and subject to review under the Eighth Amendment.

The Michigan Supreme Court in *Rafaeli* held that Michigan's tax statute is intended merely to collect what the government is owed and not to punish property owners. But in that case, the court held that the plaintiffs were entitled to be paid for the excess that was taken by getting refunded for the surplus proceeds. Here, if the Homeowners are for some reason unable to get just compensation for the taking, then they have been subjected to a form of punishment.

2. Taking Appellants' homes and all their equity as payment for a much smaller debt is excessive

Because taking property worth more than debtors owed was punitive (if it is not a taking), the next question is whether the punishment is excessive. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The

amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. Thus, to determine whether fines are excessive, courts consider the gravity of the offense and culpability of the offender, and the harshness of the penalty. *See Solem v. Helm*, 463 U.S. 277, 290–93 (1983). Courts grant some deference to the legislature to determine what constitutes a proportional fine. *Bajakajian*, 524 U.S. at 336. But "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id.* at 337.

In *Bajakajian*, the government seized and sought forfeiture of $357,144 when Hosep Bajakajian lied to government officials about how much money he was taking abroad. 524 U.S. at 324. The Supreme Court held that the forfeiture was excessive in violation of the Eighth Amendment because it was "grossly disproportional to the gravity of [the] offense." *Id.* at 339–40. Bajakajian's "[f]ailure to report his currency affected only one party, the Government, and in a relatively minor way." *Id.* at 339. Moreover, the fine "b[ore] no articulable correlation to any injury suffered by the Government." *Id.* at 340.

Like the forfeiture in *Bajakajian*, the confiscation of the Plaintiffs' homes here without payment for the surplus value of their property was unconstitutionally excessive. The Homeowners' offense is less grave than that at issue in *Bajakajian* because it is not criminal to fail to pay property taxes. Nor is it immoral for people to struggle to pay their property taxes. *See Thiede v. Town of Scandia Valley*, 14 N.W.2d 400, 407 (Minn. 1944) (poverty is not a moral failure and courts should give "[m]ore respect for the common rights of man and less regard for the condition of the public exchequer" in administering laws).

The only harm caused by Homeowners' delinquent debts is that the government was delayed in getting paid what it was owed. The Michigan legislature allows such delays and imposes on debtors all costs and remedial interest as well as penalties and higher-than-market interest to discourage tax delinquency. *See* MCL § 211.78a; MCL § 211.78g(3). By the time of foreclosure, more than 40% interest, costs, and penalties are tacked onto the original tax debt. *See id.* Taking more than that is excessive.

Assuming all facts in favor of the Homeowners, as is required on a 12(b)(6) motion to dismiss, taking the Homeowners' properties and all the

equity saved in those properties was grossly disproportionate to the noncriminal failure to timely pay their property taxes. At the very least, they should have an opportunity to show that the penalty is excessive relative to "the individualized culpability of the property's owner." *See United States v. Ferro*, 691 F.3d 1105, 1107 (9th Cir. 2012) (discussing the proper application of *Bajakajian* in assessing whether a confiscation of property is excessive).

B. The Homeowners' raise a plausible claim for unjust enrichment

Unjust enrichment is an equitable claim arising under common law that is available when there is not an adequate remedy at law. *Tkachik v. Mandeville*, 487 Mich. 38, 45–46 (2010). The Homeowners will not know whether their constitutional claims provide an adequate remedy until later in the litigation. Thus, the lower court erred in dismissing their claims.

"[U]nder the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *Kammer Asphalt Paving Co., Inc. v. E. China Twp. Sch.*, 443 Mich. 176, 185 (1993) (citing Restatement (First) of Restitution, § 1, p. 12 (1937)). "A claim of unjust enrichment can arise

when a party has and retains money or benefits which in justice and equity belong to another." *Wright v. Genesee Cty.*, 504 Mich. 410, 418 (2019) (internal quotes omitted). An action for restitution on an unjust enrichment theory may be brought "whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential." *Id.* at 197 (internal quotes and emphasis omitted).

In *Dean v. Michigan Dep't of Nat. Res.*, 399 Mich. 84, 94 (1976), the Michigan Supreme Court held that a former owner of tax foreclosed property was entitled to bring a claim for unjust enrichment against the state that had taken the windfall value of her property. *Rafaeli*, 505 Mich. at 469 (*Dean* includes "a recognition of the plaintiff's right to bring a claim under unjust enrichment" when a windfall is taken in a tax foreclosure). There, the property was transferred by the foreclosing county to Michigan's Department of Natural Resources. *Dean*, 399 Mich. at 87. The Department then sold the property to a private investor for $10,000—$9,854 more than her tax debt (i.e., what the state had paid for the property). The plaintiff filed an action seeking restitution for the

profit that exceeded her debt. The Michigan Supreme Court held that she had properly raised the claim for unjust enrichment. *Id.* at 94.

Like the State in *Dean*, here the City and Non-Profit together initiated the removal of the properties from the regular plan for auction. At the Non-Profit's request, the City took title from the County, which transferred title to the Non-Profit's Company at below market value. *See, e.g.*, June 27, 2017 Minutes, R.44-5, PageID #1256. The Non-Profit and Company were the beneficiaries of a windfall—money that properly belongs to the former owners. Thus, the claims for unjust enrichment are properly raised against the Non-Profit and the Company and the individuals who run those entities.

It is grossly unjust for government to take more than it is owed, particularly when an individual cannot afford to pay her bills in the first place. *See Rafaeli, LLC v. Wayne Cty.*, No. 14–13958, 2015 WL 3522546, at *3 (E.D. Mich. June 4, 2015) (noting "the gross injustice . . . caused by the kind of governmental action on display here"); *Bogie*, 270 A.2d at 900 (taking more than what it is owed is "unconscionable"); *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 823–24 (6th Cir. 2017) (Kethledge, J., in dissent) (in tax forfeiture of equity case dismissed for lack of subject

matter jurisdiction, Judge Kethledge noted "[i]n some legal precincts [Defendants'] sort of behavior is called theft"). Likewise, it is unjust for the Appellees to exploit the law to deprive individuals of their homes and lifesavings.

Consequently, this Court should reverse the dismissal of Homeowners' unjust enrichment claim, count VII.

IV

APPELLANTS BYERS, MILLER, AKANDE, AMERICAN INTERNET, AND HALL SHOULD BE ALLOWED TO PURSUE THEIR CLAIMS AGAINST THE APPELLEES

A. Marcus Byers has sufficiently alleged standing

The court erred by holding that Mr. Byers lacks standing and that his ex-wife and legal guardian was the only owner of the property. Mr. Byers alleged that he shares equitable title with his ex-wife, and that his disability (from brain damage in a car accident) explains why his name was not on the title. Mr. Byers's claim of equitable title at the time of foreclosure should allow his claim to survive a motion to dismiss. *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012) (court must "construe the complaint in the light most favorable to the plaintiff,

accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff").

Equitable title is a recognized property interest "in realty that may be sold, devised, or encumbered." *Graves v. Am. Acceptance Mortg. Corp.*, 469 Mich. 608, 614 (2004). There is not a single rule for what can give rise to equitable title. For example, equitable title passes where title is orally transferred by gift, and the donee possesses the property and makes valuable improvements thereon. *Maas v. Anchor Fire Ins. Co.*, 148 Mich. 432, 433–34 (1907).

Here, Marcus Byers alleged that he shared equitable title with his ex-wife and legal guardian Debbie Byers. Moreover, in response to the motions to dismiss, Mr. Byers further alleged in his response brief that his money was used to purchase the property by Debbie Byers. Response, R.43, PageID #955. Mr. Byers also submitted to the court a copy of a quit claim deed from Debbie Byers to herself and Mr. Byers as joint owners. Quit Claim, R.43-9, PageID #1130. The quit claim deed was signed after the County foreclosed on the home, thus the trial court held it could pass no interest since she no longer owned the property. Opinion and Order, R.62, PageID #2204. But since every inference should be taken in favor

of the plaintiff, a reasonable inference is that the deed evidenced Debbie Byers' understanding that Mr. Byers was joint owner of the property prior to the foreclosure. Mr. Byers' allegations establish standing to press his plausible claims for relief.

B. Miller, Akande, and American Internet's claims should not be barred by res judicata

The prior litigation in the misbegotten housing discrimination lawsuit raised by Miller, Akande, and American Internet should not bar their path to relief here. The district court held that res judicata bars their claims against all Appellees except the Non-Profit since they were not party to the prior litigation. Opinion and Order, R.65, PageID #2248. But their claims against the other Appellees should also be allowed to proceed.

Res judicata generally bars a "subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v. State*, 470 Mich. 105, 121 (2004); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (federal courts give state court judgment the same preclusive effect it would have under state law). When deciding whether a matter could have

been resolved in the first case, and thus is barred, Michigan courts use the "same transaction test," which asks "if a single group of operative facts give rise to the assertion of relief." *Adair*, 470 Mich. at 124. "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit . . . ." *Id.* at 125 (citation omitted).

Under the transaction test, res judicata does not apply where there is a change in law or facts after the prior litigation. *In re Bibi Guardianship*, 315 Mich. App. 323, 334 (2016) (res judicata does not apply "when there has been an intervening change of law"); *McNabb v. Orion Twp.*, No. 354297, 2021 WL 6131163, at *4 (Mich. Ct. App. Dec. 28, 2021) (clarifying this is part of transaction test). A supreme court decision that overturns previous decisions qualifies as an intervening change in law. *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945) ("[R]es judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation."); *W. Coast Life Ins. Co. v. Merced Irr. Dist.*, 114 F.2d 654, 662 (9th Cir. 1940) (Supreme Court

decision following prior litigation "creates a 'new situation' sufficient to justify the denial of the plea of res judicata"); *Riley v. Northland Geriatric Ctr.*, 431 Mich. 632, 640 (1988), *amended sub nom. Juncaj v. C & H Indus.*, 432 Mich. 1219 (1989) ("[I]t is not an inflexible doctrine, and its applicability depends in part upon the legal context in which a determination is made.").

Here, *Rafaeli* was a change in decisional law in Michigan. The Oakland County Circuit Court and other Michigan courts had already rejected similar takings claims when Miller, Akande, and American Internet filed their discrimination suit. *See, e.g.*, *Rafaeli*, 505 Mich. at 440 (recounting the 2015 dismissal of Rafaeli's case by trial court and subsequent loss in court of appeals); *Tim Lea Builders, LLC v. Michigan*, No. 15-000166-MM, 2016 WL 4132420, at *1 (Mich. Ct. Cl. Jan. 11, 2016). While *Rafaeli* affirmed a longstanding property right, it surprised Oakland County and the Oakland County Circuit Court, which has held that the decision was completely unforeseen. *See, e.g.*, *Rafaeli II*, No. 15-147429, Summary Disposition Opinion and Order at 1 (Cir. Ct. July 27, 2021) (holding that the Michigan Supreme Court's decision in *Rafaeli* "overrule[d] settled precedent and decide[d] an issue of first impression

whose resolution was unforeseen"). Thus an exercise of ordinary reasonable diligence would not have led the Homeowners to have raised the takings claim in their prior litigation. Indeed, the takings claim had not yet been accepted by *any* Michigan court.

But even if each of the elements of res judicata were satisfied, this Court should decline barring their claims under the manifest injustice exception to res judicata. Courts do not apply res judicata when it would "offend public policy or result in manifest injustice." *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981).

The constitutional claims of these three Homeowners have never been litigated. It would not just be unfair to bar their claims here, it would cause a manifest injustice. In other tax foreclosure cases, judges have called similar harm caused by Michigan's tax collection system "unconscionable," a "gross injustice," and asserted that it "calls out for relief." *See, e.g.*, *Wayside Church*, 847 F.3d at 823 (Kethledge, J., dissenting) (likening the tax collection system to "theft" and viewing it as a "gross injustice"); *Freed v. Thomas*, No. 17-CV-13519, 2018 WL 5831013, at *2 (E.D. Mich. Nov. 7, 2018) (Michigan tax system was "unconscionable"); *Rafaeli*, 2017 WL 4803570, at *6 (Shapiro, J.,

concurring) (plaintiffs' claims "call out for relief"). Another case that was dismissed for lack of jurisdiction was later reopened under Rule 60(b)(6) because of the "potential for inequity of Michigan's General Property Tax Act." *See Wayside Church v. Cty. of Van Buren*, No. 1:14-CV-1274, 2019 WL 13109311, at *3 (W.D. Mich. Mar. 26, 2019). The gross injustice here is the same.

Moreover, the previous housing discrimination lawsuit filed by these three plaintiffs was promptly dismissed as frivolous. Their lawyer was sanctioned and required to pay attorney fees for filing the action. *See Hayes* Order, R.34-3, PageID #490. Any harm caused by that inappropriate filing should have been remedied by those sanctions. But if the Non-Profit is not liable to fully compensate these three Homeowners, then the devastating harm to their constitutional rights will go unredressed if they cannot have their day in court.

C. It is premature to dismiss Tawanda Hall's claims against the City

Hall's prior case against the City and City officials was dismissed with prejudice and thus her present claims against the city are barred unless either the change in decisional law prevents the application of res judicata or the manifest injustice exception applies. That exception will

not be necessary to avoid manifest injustice if Ms. Hall finds relief with her claims against the other Appellees. However, if it is later determined that the City alone is liable, Ms. Hall will be without relief unless against the City, and her prayer for a manifest injustice exception to res judicata will become her only path to recover her loss. Maintaining the City as a party to her claims imposes only a minor burden on the City. Thus, at this stage dismissal of her claims against the City is premature.

CONCLUSION

The Court should reverse the trial court and remand for further proceedings.

DATED: March 7, 2022.

Respectfully submitted,

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DATED: March 7, 2022.

/s/ Christina M. Martin
CHRISTINA M. MARTIN

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I hereby certify that on March 7, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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/s/ Christina M. Martin
CHRISTINA M. MARTIN

ADDENDUM

ADDENDUM

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

In the Matter of the Petition of the Treasurer of the County of Oakland, Michigan for the Foreclosure of Certain Lands for Unpaid Taxes

Case No. 17-159297-CZ
Hon. Phyllis C. McMillen

Re: 119 E. Brockton Avenue
Madison Heights, MI 48071

_____/

OPINION AND ORDER
At a session of Court
Held in Pontiac, Michigan
On

NOV 0 6 2018

This matter is before the Court on Kathryn J. Bauss' Verified Motion to Quiet Title by Setting Aside the Judgment of Foreclosure, Tolling the Redemption Period and Allowing Payment of Real Property Taxes.

I. BACKGROUND

Bauss owned the residential property commonly known as 119 E. Brockton Avenue in Madison Heights, Parcel ID 44 25-24-304-029 (the "Property"). The Property was forfeited to the Oakland County Treasurer on several occasions after delinquent taxes owed on the Property for 2012 and prior tax years went unpaid. According to Bauss, she was awarded the Property in her divorce, and did not know her ex-husband had stopped paying property taxes when she filed for divorce.

Beginning in 2012, the Treasurer allowed Bauss to avoid foreclosure of the Property by entering into an installment payment plan. The Treasurer renewed Bauss'

payment plans in 2014, 2015, 2016, 2017 and 2018. Every document memorializing terms of her payment plan indicated failure to make "consistent and timely payments every month" could cause her to "lose [her] property".

Bauss never made consistent or timely payments. In five years, Bauss made twenty-two property tax payments totaling $15,107.08. Despite this, the Treasurer did not foreclose. According to Bauss, every year that the Treasurer renewed her payment plan, the Treasurer told her to disregard notices she would receive because as long as she was in a payment plan, the Treasurer would not foreclose. Bauss also claims that the Treasurer told her not to worry about late, lesser or missing payments because as long as she was in a payment plan the Treasurer would not foreclose.

The Treasurer's petition in this case was filed June 15, 2017, and included the Property for tax year 2015 only. In January of 2018, Bauss received a document in the mail advising her that an administrative show cause hearing would take place in the Commissioner's auditorium on February 6, 2017 [sic], and a judicial foreclosure hearing would take place on February 14, 2018. Bauss phoned the Treasurer for clarification and was told to appear on February 6, 2018, to present evidence of financial hardship and ask that her plan be renewed. Bauss was told that the Treasurer would not proceed with the foreclosure if he renewed her payment plan on February 6, 2018.

Bauss appeared at the Treasurer's show cause hearing held in the Commissioner's auditorium on February 6, 2018, and brought with her several documents[1] to substantiate the fact that she was undergoing a substantial financial hardship. Oakland County

[1] These included payroll documents; Judgment of Divorce and Quit Claim Deed to the Property; landlord license; proof of monthly car payments, student loan payments, and utilities; proof of adult son's disabilities, medical expenses, and SSA documents; tax statements and payment receipts; and receipts for house repairs.

Treasurer, Andy Meisner, chaired the meeting; his staff sat behind him. When the Treasurer called Bauss' name, she stepped up to the podium and presented oral and documentary evidence of substantial financial hardship. The Treasurer asked Bauss questions, including whether the Property was her primary residence. Bauss told the Treasurer it was not. The Treasurer told Bauss she had proven financial hardship, he would renew her payment plan for 2018, and she had until March 31, 2019, to pay in full.

The 2018 payment plan required Bauss to make a down payment of $4,000 by February 28, 2018, and monthly payments of $425, with the first payment due on or before March 31, 2018. At the time the payment plan was entered, the total amount of delinquent taxes owed on the Property for 2013, 2014, 2015 and 2016 tax years was approximately $8,465.

According to Bauss, before she left the building on February 6, she asked whether she had to appear at the judicial foreclosure hearing on February 14, 2018. The Treasurer told Respondent that she did not have to appear at the foreclosure hearing because "This hearing and payment plan takes care of that". The Treasurer gave Bauss a document indicating she was not being referred to the judicial foreclosure hearing and that her payment plan had been renewed. That document (Bauss Exhibit 3) states in part:

Decision:
- ☐ Refer to FEC
- ☐ Refer to Legal Aid
- ☐ Refer to Equalization
- ☐ Refer to Judicial Foreclosure Hearing
- ☐ Refer for TAM

Stipulations:
Down Payment: 2013-2014 taxes in full - $4,000 by 2/28/18
Payment plan: ~$425/mo Final plan
Other: _____

Initials: [signature]

Treasurer's Office
Internal use only

Nothing in Exhibit 3 indicated to Bauss that she should appear at the judicial foreclosure hearing if she wanted her Property removed from the Petition.

Bauss did not attend the judicial foreclosure hearing because the Treasurer told her she did not have to, both verbally and in writing. Despite the Treasurer's repeated promises that he would not foreclose because he renewed her payment plan, the Treasurer appeared in court on February 14, 2018 and obtained a Judgment of Foreclosure including the Property that stated she only had until April 2, 2017 [sic] to pay in full. The Treasurer never advised Bauss of the fact of the Judgment, never served her with a copy of the Judgment, and did not file a "Notice of Judgment" in the Property's chain of title until May 31, 2018. The Notice of Judgment indicates the Judgment became final and unappealable on March 31, 2016 [sic].

On February 23, 2018 (after the judicial foreclosure hearing had occurred), Bauss appeared at the Treasurer's office to pay her taxes in full using a $4,000 money order for the down payment and a credit card to pay the balance. The Treasurer accepted her money order but told Bauss not to pay the balance with a credit card because processing

fees and credit card interest rates were so high. The Treasurer told Bauss to obtain a home equity line of credit and pay using that. Bauss replied, "That will take months to process". The Treasurer said, "That's fine, see you have until March 31st of next year to pay your taxes. You're in a payment plan. You'll be ok". Bauss did not pay the balance, relying on this assurance from the Treasurer. She did apply for a home equity line of credit. The Treasurer did not tell Bauss that a Judgment had been entered stating she only had until April 2, 2018, to pay in full. Instead, Bauss was handed a payment plan, which looks like this:

ANDY MEISNER
COUNTY TREASURER

OAKLAND COUNTY TREASURER

19

1200 N. TELEGRAPH RD., DEPT 479
PONTIAC, MI 48341-0479

FINAL PLAN LD
CMH per AEM

JODY WEISSLER DEFOE
CHIEF DEPUTY TREASURER

2018 LS DELINQUENT PROPERTY TAX PAYMENT PLAN

Date: February 23, 2018

Parcel ID: 44 25-24-304-029

Property Address: 119 E BROCKTON AVE

Name: KATHRYN J BAUSS

Down Payment: $4000 pd 2/28/18

Due Date: 2/28

Phone Number:

In order to pay my: 2014,2015,2016 **Property Tax Delinquency**

I will make payments of $425 **Per Month**

To: **OAKLAND COUNTY TREASURER**
1200 N Telegraph Rd, Pontiac, MI 48341

First payment must be received before: **March 31, 2018**

Monthly payments must be received before the first day of the month.

If I do not make consistent and timely payments every month I will lose my property. State law requires the Treasurer's Office to continue the tax foreclosure process by sending notices, personal service, administrative show cause hearing and judicial foreclosure hearing, and adding interest, fees and service charges until all delinquent taxes are paid in full. This property may be withheld from auction if all payments are made. This plan is valid until February 2019.

2016 AND PRIOR MUST BE PAID IN FULL BY 3/31/2019.

Acknowledgement by Taxpayer (please initial): LE

Acknowledgement by Treasurer's Office (please initial): CMH per AEM

This is not a legal contract, though failure to comply will result in property tax foreclosure and loss of property.

OFFICE (248) 858-0612 FAX (248) 858-1810

When the Treasurer handed Bauss the payment plan on February 23, he told Bauss to continue ignoring the notices because her plan was valid through 2019, therefore the Treasurer would not foreclose.

On February 28, 2018, a family member mistakenly paid $1,028.77 to the City of Madison Heights (instead of the Treasurer). Bauss did not make the March 2018 or any subsequent payment to the Treasurer. Bauss claims she did not know the Property had been sold until July 17, 2018, when the title company processing her home equity loan advised her the Property had been sold. It is undisputed that Bauss did not receive any notices from the Treasurer, verbally or in writing, after she paid the $4,000 on February 23, 2018, and before the Property was sold.

After the Property was foreclosed by the Treasurer, the City of Madison Heights exercised its statutory right of refusal to purchase the Property. Intervener FPJ Investments, LLC ("FPJ") purchased the Property from Madison Heights and is the current owner.

II. ANALYSIS

A. Due Process Generally

Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, or property. *Kampf v Kampf*, 237 Mich App 377, 382; 603 NW2d 295 (1999). Procedural due process generally requires notice, see *In re Nunn*, 168 Mich App 203, 208-209; 423 NW2d 619 (1988), an opportunity to be heard, *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998), before an impartial trier of fact, *Newsome v Batavia Local Sch Dist*, 842 F2d 920, 927 (CA6, 1988), and a written,

although relatively informal, statement of findings, *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 641; 506 NW2d 920 (1993). In other words, procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005).

The US Supreme Court has held that "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *In re Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 9; 732 NW2d 458 (2007), quoting *Jones v Flowers*, 547 US 220, 226; 126 S Ct 1708; 164 L Ed 2d 415 (2006). Furthermore, "'when notice is a person's due ... [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'" *Jones*, 547 US at 229. However, "[d]ue process does not require that a property owner receive *actual notice* before the government may take his property." *Id.* at 226.

B. Only the Court had Authority to Withhold the Property from Foreclosure or Extend the Redemption Period

Bauss argues the Treasurer violated the General Property Tax Act ("GPTA") and due process by presiding over the February 6, 2018 show cause hearing, receiving evidence on the subject of financial hardship, "ruling" she had met her burden of proof, and thereafter renewing her payment plan and extending her redemption period to March 31, 2019. According to Bauss, this procedure violated the GPTA and due process because once a petition is filed, only the Court can extend a redemption date or withhold property

from a judgment of foreclosure on equitable grounds, i.e., because a taxpayer is undergoing substantial financial hardship.

The Treasurer argues that it complied with the GPTA, and that payment plans are authorized by MCL 211.59(1), which allows a person to pay a portion of the taxes owed. The Treasurer points out that payment plans encourage the efficient and expeditious return of delinquent properties to productive use and provide relief to taxpayers who would not otherwise be afforded relief under MCL 211.78q (allowing installment plans and avoidance agreements for eligible properties). Bauss does not dispute that payment plans are allowed or that they are a good thing. Rather, she argues the procedure used by the Treasurer does not comply with the GPTA.

The Treasurer's authority to foreclose is statutory. On or before June 15 every year, the Treasurer must file a petition in court that includes a list of all property forfeited and not redeemed.[2] MCL 211.78h(1). No later than March 30, the circuit court must enter final judgment on the petition filed the previous year. MCL 211.78k(5). All redemption rights expire on March 31 immediately succeeding the judgment (or 21 days after judgment in contested cases). MCL 211.78k(5). Not less than 7 days immediately preceding the date of the court's foreclosure hearing under 78k, the Treasurer must schedule a show cause hearing that provides the owner and any person with an interest in forfeited property an opportunity to either redeem the property or show cause why title should not vest in the Treasurer "for any of the reasons set forth in section 78k(2)". MCL 211.78j(1)-(2). MCL 211.78k(2) provides:

> (2) A person claiming an interest in a parcel of property set forth in the petition for foreclosure may contest the validity or correctness of the

[2] The June 15, 2017 petition included taxes, interest, penalties and fees ("TIPF") on Respondent's property for tax year 2015 only. The February 14, 2018 judgment included TIPF for tax years 2013, 2014 and 2015.

forfeited unpaid delinquent taxes, interest, penalties, and fees for 1 or more of the following reasons:

(a) No law authorizes the tax.
(b) The person appointed to decide whether a tax shall be levied under a law of this state acted without jurisdiction or did not impose the tax in question.
(c) The property was exempt from the tax in question, or the tax was not legally levied.
(d) The tax has been paid within the time limited by law for payment or redemption.
(e) The tax was assessed fraudulently.
(f) The description of the property used in the assessment was so indefinite or erroneous that the forfeiture was void.

Thus, under the GPTA, the purpose of the Treasurer's show cause hearing is to provide the taxpayer with an opportunity to contest the *fact* and/or *amount* of a property tax. If an owner or interested party prevails at a show cause hearing, the Treasurer must correct the tax roll. MCL 211.78j(3). A taxpayer may also challenge the fact and/or amount of a property tax for any reason set forth in 78k(2) in circuit court. MCL 211.78k.

In addition to the Treasurer scheduling a show cause hearing, the Clerk must schedule a judicial foreclosure hearing. MCL 211.78j(5). At the judicial foreclosure hearing, a *circuit court judge* may withhold property from a judgment of foreclosure or extend a property's redemption period on equitable grounds. MCL 211.78k(4). Equitable grounds include the fact that a taxpayer undergoing substantial financial hardship. Id.

The GPTA provides a comprehensive statutory scheme for including, withholding and removing property from either the petition or the judgment of foreclosure:

1. The Treasurer must include a list of all property forfeited and not redeemed in the petition. MCL 211.78h(1).

2. The Treasurer must withhold property from the petition if a 78q(5) tax foreclosure avoidance agreement is in effect. MCL

211.78g(3)(g)(i).[3]

3. The Treasurer must request that the Circuit Court remove property from a petition if it is redeemed before the judgment enters. MCL 211.78j(2).

4. The Treasurer may remove property from the petition if it is a principal residence and the owner agrees to participate in a payment plan under 78q(1) or 78q(5). MCL 211.78q(4)(b), 78q(5)(b).

5. The Treasurer or the Court may remove property from a petition or amend the amount of the delinquency if a taxpayer contests the fact and/or amount of the tax in an administrative show cause hearing or a judicial foreclosure hearing and prevails. MCL 211.78j(2), 78k(2).

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6. The Treasurer may withhold property from a petition if owned by a person (a) who is a minor heir or incompetent, (b) without a means of support, (c) unable to manage affairs due to age/infirmity; (d) undergoing substantial financial hardship; (e) participating in a payment plan under 78q. MCL 211.78h(3).

7. The Court may withhold property from foreclosure for one year or extend the redemption period as the court determines to be equitable if owned by a person who is (a) a minor heir or incompetent, (b) without means of support, or (c) undergoing substantial financial hardship. MCL 211.78k(4).

Thus, for a person undergoing a substantial financial hardship, the GPTA gives the *Treasurer* authority to withhold the property from a petition, and the *Court* authority to withhold the property from the judgment of foreclosure or extend the redemption period. The statute makes clear the fact that, after a petition is filed, the Treasurer must seek judicial review and approval of a plan that withholds a property from a judgment or extends its redemption period.

In this case, at the show cause hearing, the Treasurer received evidence of financial hardship, the Treasurer deemed Bauss' proofs to be sufficient, the Treasurer

[3] There is no dispute that Bauss did not qualify for a tax foreclosure avoidance agreement or a payment plan under MCL 211.78q because the Property was not her principal residence.

authorized a payment plan that extended her redemption date to March 31, 2019, the Treasurer told Bauss he would not foreclose on the Property because she was in a payment plan, and the Treasurer told Bauss not to appear at the judicial foreclosure hearing because "this hearing and plan takes care of that". This statement was misleading, and it was outside the authority granted by the GPTA.

Since being assigned the 2017 Petition for Tax Foreclosure, this Court has been impressed by the compassion with which the Treasurer and his staff have treated property owners threatened by foreclosure, and lauds the efforts that have been made to allow property owners suffering from financial hardship to keep their homes. Additionally, the work done by the Treasurer and his staff served as a vital screening process for the Court in making a determination of financial hardship at the February 14, 2018 judicial foreclosure hearing. Even with the Treasurer's screening which greatly reduced the time necessary to hold the hearing, the Court and its staff were in session until almost 10:00 p.m. on February 14 in order to hear all of the claims for financial hardship.

The problem with the Treasurer's process, however, is that while the GPTA allows the Treasurer to withhold a property from the Petition, only the Court has the authority to remove a property from the Judgment of Foreclosure or extend the redemption period. By his actions of advising property owners that his determination of financial hardship relieved them of the need to appear at the judicial foreclosure hearing, the Treasurer implied that the property would be removed from the Judgment of Foreclosure, or the redemption period would be extended, by his action alone. While the Court most likely would have adopted the recommendations of the Treasurer, without an

order of the Court the implied promise to remove the property from the foreclosure judgment or extend the redemption period could not be accomplished.

In the case at bar, the Court finds that under the GPTA, the Treasurer had a duty to seek judicial approval of the payment plan he created on February 6, 2018, because the plan extended Bauss' redemption date. Bauss argues that if she had been told that only a judge has the authority to withhold property from the judgment or extend a taxpayer's redemption period, she would have appeared at the foreclosure hearing and presented evidence of substantial financial hardship to the Court, which did have the authority to remove the Property from the Judgment and extend the redemption period.

In sum, Bauss was denied due process when the Treasurer advised her that she did not have to appear at the judicial foreclosure hearing, and failed to advise her that only the Court could extend the redemption date and remove the Property from the Judgment. By the Treasurer's actions, Bauss was deprived of the opportunity to be heard by the Court.

Bauss also argues the Treasurer violated the GPTA and due process by treating the February 14, 2018 Judgment like a secret "pocket judgment", which he recorded without giving her notice and an opportunity to be heard before he sold the Property. Further, Bauss argues that the mistakes and typographical errors in the Treasurer's documents were so numerous that they essentially failed to constitute proper notice, further depriving her of due process. Because the Court finds that Bauss was deprived of due process for the reason set forth above, the Court declines to address these other issues.

C. The Court May Amend the Judgment and Allow Respondent to Redeem Even Though the Property Has Been Sold.

The Treasurer and FPJ argue this Court lacks jurisdiction to modify the Judgment of Foreclosure. "[C]ircuit courts are presumed to have subject-matter jurisdiction unless jurisdiction is expressly prohibited or given to another court by constitution or statute." *In re Wayne Co Treasurer,* 265 Mich App 285, 291; 698 NW2d 879 (2005). In situations in which the property owner receives adequate due process, the GPTA deprives the circuit court of jurisdiction to modify or vacate its judgment of foreclosure. *In re Petition of Tuscola Co Treasurer for Foreclosure*, 317 Mich App 688, 699; 895 NW2d 569 (2016), citing *In re Wayne Co Treasurer Petition,* 478 Mich 1, 10; 732 NW2d 458 (2007).

Both the Treasurer and FPJ argue the motion must be denied because once this Court entered the Judgment, it was divested of jurisdiction, citing MCL 211.78k(6). According to the Treasurer, the Court cannot grant equitable relief, and Bauss' sole remedies under the GPTA were to redeem or appeal. However, if a foreclosure occurs without providing the taxpayer with constitutionally adequate notice or opportunity to be heard, the court has jurisdiction to amend the judgment and allow redemption by a former owner even after property has been sold by a foreclosing governmental unit. *In re Wayne Co Treasurer Petition,* 478 Mich 1, 10; 732 NW2d 458 (2007).

In *AAA Invest v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2007 (Docket Nos. 265266, 265326), the Court of Appeals affirmed the trial court's order setting aside a judicial foreclosure of property subsequently sold to a third party because "[t]he circumstances of this case warrant invoking the court's 'grand reservoir of equitable power to do justice.'" *Id.* at *15, citing *Heugel v Heugel*, 237 Mich

App 471, 481; 603 NW2d 121 (1999). Similarly, in *Carola Condo Ass'n v Chappell*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2016 (Docket No. 325851), the Court of Appeals again affirmed the trial court's order setting aside a judicial foreclosure of property subsequently sold to a third party "where the record demonstrate[d] a mistake was made".

Here, the record demonstrates that the Treasurer exceeded his authority under the GPTA and deprived Bauss of due process. Therefore, Bauss should have the opportunity to redeem the Property.

FPJ further argues Bauss cannot make any argument about lack of notice, because she was not the "record owner" of the Property. In reality, Bauss was entitled to notice because her interest was identifiable in the Treasurer's records and the local assessor's tax records. MCL 211.78i(6). Furthermore, a grantee of realty under an unrecorded quitclaim deed acquires an interest in the property when the deed is executed. MCL 565.3[4].

WHEREFORE, the Court finds that Bauss is entitled to relief for the reasons set forth above. Bauss is directed to submit an order for entry in accordance with MCR 2.602(B)(2), (3), or (4).

IT IS SO ORDERED.

Phyllis C. McMillen, Circuit Judge

[4] "A deed of quit claim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale." MCL 565.3.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

RAFAELI, LLC and
ANDRE OHANESSIAN,
Plaintiffs,

v

Case No: 15-147429-CZ
Hon. Denise Langford Morris

OAKLAND COUNTY and
ANDREW MEISNER,
Defendants.
_____/

SUMMARY DISPOSITION OPINION AND ORDER

Plaintiffs filed this seven-count lawsuit in June 2015 alleging that their real property had been improperly foreclosed and even if it were not, that they were entitled to the proceeds from the tax foreclosure sale which exceeded the amount they owed in taxes. This Court granted summary disposition and the Court of Appeals affirmed. On July 17, 2020 the Supreme Court reversed this Court's ruling only on Count III-Violation of Right to Just Compensation/Inverse Condemnation holding that the General Property Tax Act, which does not provide for the return of proceeds from the tax foreclosure sales in excess of the tax and other fees, is an unconstitutional taking under the Michigan Constitution. This matter was before the Court on Defendants' Motion for Summary Disposition following the Michigan Supreme Court's Opinion. This Court heard oral arguments and took the matter under advisement pending submission of additional supplemental briefs.

After careful consideration of all of the materials submitted and arguments made, this Court has determined that for the reasons set forth by Defendants, the Supreme Court's Opinion should be applied prospectively as of July 17, 2020 because it overrules settled precedent and decides an issue of first impression whose resolution was unforeseen. In addition, prospective application of the new rule will serve the interests of

justice in that the state-mandated procedure under which Defendants acted had been relied upon by Defendants and all other Michigan Counties for over 21 years. Prospective application will also advance the administration of justice since new legislation is about to be introduced to create an orderly process by which surplus proceeds can be claimed and paid in the future.

Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C) (8) and (10) is GRANTED.

This disposes of the last pending claim and closes the case.

IT IS SO ORDERED.

DATED: July 27, 2021

/s/ Denise Langford Morris
DENISE LANGFORD MORRIS CM
Circuit Court Judge