UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYSIDE CHURCH, et al.,

Plaintiffs,

-v-

COUNTY OF VAN BUREN and KAREN MAKAY,

Defendants.

No. 1:14-cv-1274

Honorable Paul L. Maloney

PLAINTIFFS' RULE 60(b) MOTION TO REOPEN CASE

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, Plaintiffs Wayside Church, Henderson Hodgens, and Myron Stahl (Plaintiffs) hereby move to reopen this case for reconsideration of their claims on the merits. In support of this motion, Plaintiffs state:

1. On December 11, 2014, Plaintiffs filed a putative class action complaint in this case alleging that Van Buren County (County) effected an unconstitutional taking when it kept the surplus proceeds from the sales of foreclosed private properties, pursuant to Michigan's General Property Tax Act. Plaintiffs sought declaratory relief and damages pursuant to 42 U.S.C. § 1983. They did not object to the foreclosure and sale of their homes to pay their penalties, late taxes, interest, and fees. Rather, they objected to the County taking more of the proceeds from the foreclosure and sale than necessary to satisfy their tax debts. *See* ECF No. 1.

2. On November 9, 2015, this Court dismissed the case for failure to state a takings claim, because it held that state law controlled whether Plaintiffs were entitled to the excess proceeds from the tax sales of their properties. *See* ECF No. 38.

3. Plaintiffs timely appealed to the Sixth Circuit. On February 10, 2017, a divided panel of the Sixth Circuit held that federal courts lack jurisdiction over the underlying takings claims, under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), because Michigan courts provide a "reasonable, certain and adequate" remedy to the underlying alleged takings, and Plaintiffs had not pursued that relief. *Wayside Church v. Van Buren County*, 847 F.3d 812, 822 (6th Cir. 2017), *cert. denied,* 138 S. Ct. 380 (2017). The court also held that it lacked jurisdiction pursuant to the Tax Injunction Act, because Michigan courts provide a "plain, adequate, and complete" remedy. The Sixth Circuit remanded the case to this Court for a decision consistent with its opinion. *Id.* at 822-23.

4. On March 28, 2017, this Court dismissed the Plaintiffs' claims without prejudice, for lack of jurisdiction. ECF No. 45.

5. Plaintiffs filed a petition seeking a writ of certiorari from the Supreme Court of the United States on July 13, 2017. *See Wayside Church v. Van Buren County*, Supreme Court No. 17-88. The Supreme Court denied review on October 30, 2017.

6. On October 25, 2017, in a different case, the Michigan Court of Appeals held that Michigan courts do not recognize a claim for a taking when government seizes more property than it is owed pursuant to Michigan's General Property Tax Act. *See Rafaeli, LLC v. Oakland County*, No. 330696, 2017 WL 4803570, at *1 (Mich. Ct. App. Oct. 24, 2017), attached to Plaintiffs' Memorandum of Law as Exhibit 1. In that case, the state appellate court held that when Michigan counties seize more than owed for property tax debts, those seizures constitute civil asset forfeitures, and are not an exercise of the takings power also known as eminent domain. *See id.*

7. On December 4, 2017, the *Rafaeli* plaintiffs timely filed an application for leave to appeal the decision of the Michigan Court of Appeals. *See Rafaeli, LLC v. Oakland County*, No.

156849 (pending).[1] Briefing in that case was completed January 11, 2018. *See id*. The Michigan Supreme Court has not yet decided whether to grant leave, but the decision by the Michigan Court of Appeals is currently the highest authority in the state of Michigan on the question presented by the takings claims of the Plaintiffs here in the instant case.

8. On March 5, 2018, the Supreme Court of the United States granted review in a different case, *Knick v. Township of Scott*, No. 17-647, 2018 WL 1143827.[2] The question presented in that case is, "[w]hether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court?" Thus, the Supreme Court of the United States will soon decide whether it will open the federal courthouse doors to takings plaintiffs like Plaintiffs in the instant case.

9. Rule 60(b)(6) allows this Court to grant relief from a prior judgment when there is "any other reason that justifies relief." Because a Michigan appellate court has now issued a decision that holds there is no remedy in state court for plaintiffs in cases like this one, this case warrants reopening and reconsideration. Plaintiffs request this Court reach the merits of their takings claims, because state courts have refused to recognize a just compensation remedy for the takings they have suffered. Rather they have departed from federal constitutional law and announced for the first time that the non-criminal act of failing to pay property taxes justifies the *civil asset forfeiture* of the property itself. *Rafaeli*, 2017 WL 4803570.

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[1] Docket available at http://courts.mi.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=156849&CourtType_CaseNumber=1.

[2] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-647.html.

10. Rule 60(b)(1) allows this Court discretion to provide relief from a final judgment when "mistake, inadvertence, surprise, or excusable neglect" warrant. A mistake that warrants a Rule 60(b) motion occurs "when the judge has made a substantive mistake of law or fact in the final judgment or order." *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002). To reopen a case under Rule 60(b)(1), the party must file the motion within one year of the pertinent judgment.

11. This case warrants reopening and reconsideration by this Court. The Sixth Circuit issued its decision in this case based on the mistaken belief that Michigan state courts provide a remedy for uncompensated takings. *Wayside Church*, 847 F.3d at 822-23. At that time, it appears that no appellate court in Michigan had ruled directly on whether the state would recognize a taking claim when a county takes more than owed while collecting a property tax debt. The decision in *Rafaeli* changed that. It is now indisputable that Michigan courts do not offer the Plaintiffs a remedy for the uncompensated taking of their property. This motion is within one year of the judgment dismissing this case for lack of jurisdiction.

12. Federal Rule of Civil Procedure 60(b)(5) allows a party to seek relief from a previous judgment when that judgment "is based on an earlier judgment that has been reversed or vacated."

13. In this case, the Sixth Circuit largely based its decision on the state litigation holding in *Williamson County*. The Supreme Court has agreed to reconsider the state litigation doctrine in its next term and thus may soon overturn *Williamson County*. Accordingly, this case warrants reopening, and a stay pending a decision by the Supreme Court in *Knick*.

14. Reopening this case will not prejudice the County.

15. The underlying taking claim is meritorious for the reasons explained in detail in the attached memorandum of law.

16. This motion for relief from this Court's March 28, 2017, judgment is timely because it is filed within a reasonable period of time. The decision in *Rafaeli* occurred only 5 months ago, and an appeal challenging that decision is still pending. Plaintiffs would prefer to wait to see whether the Michigan Supreme Court grants review of the decision in *Rafaeli*, but in an abundance of caution have filed this motion within one year of this Court's judgment dismissing the case.

Plaintiffs respectfully request that this Court reopen this case.

DATED: March 28, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court Western District of Michigan Southern Division by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ CHRISTINA M. MARTIN
CHRISTINA M. MARTIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
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-v-

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF RULE 60(b) MOTION TO REOPEN CASE

The Plaintiffs—Wayside Church, Henderson Hodgens, and Myron Stahl—request that this Court provide them relief from this Court's March 28, 2017, judgment dismissing their case, and reopen this case for reconsideration of the merits of the claims.

Plaintiffs allege that Van Buren County (County) violated the Takings Clause of the Fifth Amendment to the U.S. Constitution when the County Treasurer took and kept more than owed to satisfy their tax debts to the County. The Plaintiffs each fell behind on their property taxes. The County sold their properties for more than the tax debts, penalties, interest, and costs accrued for each property. Rather than refund the excess proceeds, the County pocketed the profits as a windfall. The taking of the excess proceeds—Plaintiffs' equity—is out of step with the constitutional mandate that government pay "just compensation" when it takes property for a public use. While the government may seize property for the public purpose of satisfying a debt, it must do so subject to the constitutional "just compensation" remedy for the taking of private

equity. Logically, this means that the County must refund whatever it takes in excess of the tax debt and associated fees.

Plaintiffs previously filed their takings claims in this Court. ECF No. 1. On appeal, the Sixth Circuit declined ruling on the merits of Plaintiffs' claims, holding instead that this case must be dismissed, because state courts provide a remedy. *Wayside Church v. Van Buren County*, 847 F.3d 812, 823 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 380 (2017). Accordingly, this Court dismissed the case. ECF No. 45. But after dismissal, the Michigan Court of Appeals issued a decision showing that Michigan courts provide no such remedy for the type of takings at issue in this case. *See Rafaeli, LLC v. Oakland County*, 330696, 2017 WL 4803570, at *1 (Mich. Ct. App. Oct. 24, 2017).

In light of the change in decisional law, and in the interest of justice, this Court should reopen this case and reach the merits of Plaintiffs' constitutional claims.

Background

A. Factual Background

Wayside Church is a small church in Chicago that owned two adjacent parcels of land in Western Michigan. Myron Stahl owned a residential lot in Paw Paw, Michigan. Henderson Hodgens, a bus driver, owned a home and small farm where he grew up in Geneva Township. All fell on hard times and could not pay their 2011 property taxes. *See Wayside Church*, 847 F.3d at 815. Van Buren County subsequently took the properties pursuant to Michigan's General Property Tax Act (Act), so it could sell them and collect the delinquent taxes. *Id*.

The sales generated significantly more cash than the tax debt owed on each of the properties. The County sold Wayside Church's parcel for $206,000 to satisfy a debt of $16,750. *Id.* It sold Stahl's property for $68,750 to pay a $25,000 debt. *Id*. It sold Hodgens's property for

$47,750 to pay a $5,900 debt. *Id.* All told, the County took in $274,850 in after-debt profits from the sales. *See id*. But rather than simply keeping the amount needed to pay the tax debt, while refunding any remainder to the original owners, the County pocketed the sale profits under authority of the Act. *See id.*; Mich. Comp. Laws § 211.78m(8). Thousands of people lose their property value under this scheme each year. ECF No. 16-2, ¶¶ 18-20.

Under the Act, a landowner's property becomes "delinquent" if he fails to pay taxes levied in the previous year. Mich. Comp. Laws § 211.78a(2). If the landowner fails to pay the outstanding taxes, fees, and penalties, then one year later, the foreclosing governmental unit declares the property "forfeited," although the delinquent property owner keeps title and all rights of possession. Mich. Comp. Laws § 211.78g(1). If all taxes are not paid after two years of delinquency, the government will foreclose, and then auction the property. *Id*. The Act prohibits local governments from refunding to the former owner any excess proceeds from tax sales. *See* Mich. Comp. Laws § 211.78m(8).[1]

B. Procedural Background

On December 11, 2014, believing state law sent them to federal court, Wayside Church, Stahl, and Hodgens filed this case in this Court, alleging that the County effected an unconstitutional taking when it kept the surplus proceeds from the sales of foreclosed private properties, pursuant to Michigan's Act. *See* ECF No. 1; ECF No. 38 at PageID 409-10. Plaintiffs sought declaratory relief and damages pursuant to 42 U.S.C. § 1983. Their suit did not object to the foreclosure and sale of their homes to pay their taxes, penalties, interest, and fees. Rather, they

[1] The Act requires the surplus to be paid into the delinquent tax revolving fund, which pays for administration, fees, and litigation costs arising from all tax foreclosures in the County. Mich. Comp. Laws § 211.78m(8)(a)–(*l*). Surplus funds may later be transferred to the County's general fund. Mich. Comp. Laws § 211.78m(8)(h).

alleged that the County violates the Fifth Amendment's Takings Clause when it takes more property than necessary to satisfy their tax debts, and refuses to refund surplus proceeds from tax sales. *See Wayside Church*, 847 F.3d at 815.

This Court recognized jurisdiction but held that state law controlled the question of whether the Takings Clause protects Plaintiffs' property interest in the surplus proceeds. ECF No. 38 at PageID 418 ("Plaintiffs, as delinquent taxpayers, have no 'property interest' under state law for any 'surplus equity' at the time of the tax sale."). On appeal, the Sixth Circuit held that federal courts lack jurisdiction over the underlying takings claims, under *Williamson County*, because Michigan courts provide a "reasonable, certain, and adequate" remedy to the underlying alleged takings. *Wayside Church*, 847 F.3d at 822. The Sixth Circuit also held that it lacked jurisdiction pursuant to the Tax Injunction Act, because Michigan courts provide a "plain, adequate, and complete" remedy. *Id.* at 822-23. The Sixth Circuit remanded the case to this Court for a decision consistent with that opinion. *Id.* On March 28, 2017, this Court dismissed the Plaintiffs' claims without prejudice, for lack of jurisdiction. ECF No. 45.

Plaintiffs timely filed a petition seeking a writ of certiorari from the Supreme Court of the United States. *See Wayside Church v. Van Buren County*, No. 17-88 (Sup. Ct. 2017). The Supreme Court denied review on October 30, 2017. *Wayside Church v. Van Buren County, Mich.,* 138 S. Ct. 380 (2017).

C. Change in Michigan Decisional Law

After this Court dismissed the Plaintiffs' case without prejudice based on the Sixth Circuit's opinion, the Michigan Court of Appeals issued a decision in another case showing that the Sixth Circuit was mistaken about the remedies available in Michigan courts. *Rafaeli, LLC v. Oakland County*, No. 330696, 2017 WL 4803570, at *1 (Mich. Ct. App. Oct. 24, 2017) (Exhibit 1

at 5). In that case, Rafaeli mistakenly underpaid the 2011 property taxes for a $60,000 home by $8.41. *See Rafaeli*., No. 330696, 2017 WL 4803570, at *5 (Shapiro, J., concurring) (Exhibit 2 at 2). In 2014, Oakland County foreclosed on his property for the $8.41 debt, and auctioned it for $24,500. *Id.* The County refused to refund to the former owner the approximately $24,215 that exceeded the total tax debt and all penalties, interest, and costs. *Id.*

Rafaeli sued and alleged takings claims under both the Fifth Amendment and the state constitution. Exhibit 1 at 5. In *Rafaeli*, the Michigan Court of Appeals held that Michigan courts do not provide a remedy for plaintiffs seeking just compensation for a taking when government takes more than it is owed pursuant to Michigan's Act. *See id.* Instead, the Michigan Court of Appeals held that such seizures constitute civil asset forfeitures, and are not a taking of property protected by the Fifth Amendment's Takings Clause. *See id*.[2] To Plaintiffs' knowledge, this is the only appellate decision in Michigan directly addressing whether Michigan courts will provide a just compensation remedy when government seizes valuable property to pay relatively smaller tax debts, and then keeps the surplus proceeds from the sale of that property.

ARGUMENT

I. In Light of the Michigan Appellate Court's Decision, This Court Should Reopen the Case and Reconsider the Plaintiffs' Takings Claims

In light of the recent change in Michigan decisional law, this Court has the authority to reopen the case and reach the merits of Plaintiffs' claims. *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006); Fed. R. Civ. P. 60(b). While federal courts do not ordinarily reopen a case and reconsider a final judgment because they favor finality, this case presents one of the rare

[2] The Rafaeli plaintiffs timely filed an application for leave to appeal the decision of the Michigan Court of Appeals, and that application is still pending. *See Rafaeli, LLC v. Oakland County*, No. 156849 (pending).

situations where reopening the case is equitable and appropriate. Reopening the case is equitable, because neither state nor federal courts have finally decided the merits of Plaintiffs' claims, and reopening the case will cause no prejudice to the County. Reopening the case is appropriate because a Michigan appellate court has now had the opportunity to weigh in on the question at issue in this case and that court has demonstrated that the Sixth Circuit was mistaken in holding Plaintiffs have a remedy in state court. This case satisfies the requirements of Rule 60(b) and thus it should be reopened.

A. This Court Has Authority To Reconsider the Jurisdictional Question Previously Decided by the Sixth Circuit

A trial court may revisit an issue already decided by an appellate court and laid out in a mandate, "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Westside Mothers*, 454 F.3d at 538; *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 943 F.2d 1511, 1520 (11th Cir. 1991) ("The 'mandate rule,' as it is known, is nothing more than a specific application of the 'law of the case' doctrine.") (internal quotation omitted); *see also* § 4478.3 Law of the Case—Mandate Rule, 18B Fed. Prac. & Proc. Juris. § 4478.3 (2d ed.) (noting circumstances where a trial court is not bound by a mandate).

While it is rare that a trial court may revisit an issue already decided by a trial court, the court may do so here. This Court may revisit the jurisdictional question because the Michigan Court of Appeals issued a decision on remedies available in state court that is contrary to the Sixth Circuit's opinion. *See Westside Mothers*, 454 F.3d at 538; *Blair v. Sealift, Inc.*, 91 F.3d 755, 761 (5th Cir. 1996) (holding trial court was allowed to reexamine a prior ruling of the court of appeals, because a state appellate court issued a decision that clarified state law). "State appellate court

decisions may constitute subsequent, controlling authority that overrides an earlier determination by [a federal court of appeals]." *Id*. at 762. Unless the County can provide a "strong showing that the state supreme court would rule differently," this Court should look to the Michigan Court of Appeals to interpret state law, not the Sixth Circuit. *Id.* at 762 (internal quotes omitted).

The Michigan Court of Appeals held in *Rafaeli* that dispossessed property owners have no just compensation remedy when a local government takes and keeps surplus equity in order to collect property taxes. *Rafaeli,* 2017 WL 4803570. The Michigan Court of Appeals held that such seizures in Michigan are civil asset forfeitures—not takings—even though it is *not* a crime to fail to pay property taxes. *Id.*[3] The decision of the Michigan Court of Appeals is a change in decisional law. Moreover, the decision in *Rafaeli* renders the Sixth Circuit's opinion in this case erroneous and would cause Plaintiffs manifest injustice by robbing Plaintiffs here of any forum in which to vindicate their constitutional rights to just compensation. Accordingly, this Court has discretion to recognize jurisdiction and reopen the case. Accordingly, this Court has authority to reconsider the jurisdictional question. *Westside Mothers*, 454 F.3d at 538; *Ad-Vantage Tel. Directory Consultants*, 943 F.2d at 1520.

B. This Case Should Be Reopened Pursuant to Rule 60(b)

Rule 60(b) of the Federal Rules of Civil Procedure provides in relevant part, that upon motion and where terms are just, "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

[3] The plaintiffs in *Rafaeli* filed an application for leave to appeal to the Michigan Supreme Court. If this Court has any doubt about whether the Michigan Supreme Court might disagree with the Court of Appeals, Plaintiffs recommend this Court stay consideration of the motion until the Michigan Supreme Court disposes of *Rafaeli.*

. . .

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

"Rule 60(b) is a grand reservoir of equitable power to do justice in a particular case that may be tapped by the district court in the sound exercise of its discretion, and within the strictures inherent in the underlying objectives of the rule." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981) (internal quotes and citation omitted). While federal courts do not ordinarily reopen a case and reconsider a final judgment because they favor finality, this case presents one of the rare situations where reopening the case is equitable and appropriate. *See Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009) (courts favor finality, but change in law may compel reopening).

(1) This Case Should Be Reopened Pursuant to Rule 60(b)(6)

A change in decisional law is a proper basis for relief under Rule 60(b)(6). *See, e.g., Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985); *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (Rule 60(b)(6) relief granted after change of the state law doctrine relied on in the federal diversity case), *cert. denied*, 423 U.S. 1079 (1976). While a change in decisional law alone does not *compel* a Rule 60(b) decision to provide relief from judgment and reopen a case, unique facts or equitable concerns can combine with a change in decisional law to compel such relief. *See Overbee*, 765 F.2d at 580 (unusual and rapid change in state law precedent qualified as a circumstance that warranted relief under Rule 60(b)(6)); *Thompson*, 580 F.3d at 442

(abuse of discretion for trial court to deny Rule 60(b)(6) motion where there was a change in state court rules and constitutional rights were at stake).

Here, the change in decisional law combines with the unique circumstances of the case to compel Rule 60(b)(6) relief. The fact that the underlying merits of this case have still never been litigated weighs heavily in favor of reopening this case. "There is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits." *MIF Realty L.P. v. Rochester Associates*, 92 F.3d 752, 756 (8th Cir. 1996); *see also Erick Rios Bridoux v. E. Air Lines*, 214 F.2d 207, 210 (D.C. Cir. 1954) ("courts universally favor trial on the merits"); *Manos v. Fickenscher*, 62 A.2d 791, 793 (D.C. 1948) ("It is the policy of the law to have every case tried on its merits."). Moreover, granting review will "accomplish justice" because it will allow the Plaintiffs the opportunity to vindicate their constitutional rights and have their day in Court. *Overbee*, 765 F.2d at 580 ("Relief from judgment under Rule 60(b)(6) is appropriate to accomplish justice in an extraordinary situation and is addressed to the sound discretion of the court."); *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 604-05 (5th Cir. 1986) ("Clause (6) is a residual clause used to cover unforeseen contingencies; that is, it is a means for accomplishing justice in exceptional circumstances."). Because Plaintiffs have never fully litigated the merits of their case, and the courts favor litigation on the merits, this Court should grant Plaintiffs' Rule 60(b) motion.

(2) This Case Also Satisfies the Requirements of Rule 60(b)(1) and (2)

Although Plaintiffs think this case is best treated as falling under Rule 60(b)(6), this case also warrants reopening under Rule 60(b)(1) and (5). Rule 60(b)(1) allows this Court discretion to provide relief from a final judgment when "mistake, inadvertence, surprise, or excusable neglect" warrant it. A claim of legal error in the underlying judgment may fall within the definition of

mistake under Rule 60(b)(1). *United States v. Reyes*, 307 F.3d 451, 456 (6th Cir. 2002). A mistake that warrants relief from judgment occurs "when the judge has made a substantive mistake of law or fact in the final judgment or order." *Id*. at 455. Here, the Sixth Circuit and subsequently this court dismissed Plaintiffs' takings claims based on the mistaken belief that state court provides a remedy, thus Rule 60(b)(1) could apply.

Courts consider three factors when assessing a Rule 60(b)(1) motion: (1) culpability for the adverse judgment, (2) prejudice to the opposing party, and (3) whether the underlying claim or defense is meritorious. *See Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012). Because Plaintiffs have alleged from the beginning that Michigan courts do not provide a remedy to them, they are not culpable for the Sixth Circuit's mistake of sending them to state court. The County will not be prejudiced by this Court reopening consideration of this case. Indeed, this Court is already familiar with the issues and facts in this case and thus may be able to reach a judgment in a more efficient manner than if the Plaintiffs are forced to pursue their claim in state court. Moreover, if Plaintiffs are forced into state court, they will likely be forced to pursue their claim all the way to the Supreme Court of the United States, since Michigan state courts have not yet recognized the merits of such takings claims. Finally, the takings claim here is meritorious for the reasons articulated in subsection (4) below.

Federal Rule of Civil Procedure 60(b)(5) allows a party to seek relief from a previous judgment when that judgment "is based on an earlier judgment that has been reversed or vacated." In this case, the Sixth Circuit largely based its decision on the state litigation holding in *Williamson County*. *Wayside Church v. Van Buren County*, 847 F.3d at 822. In *Williamson County*, the Supreme Court held that so long as state courts provide a remedy for an uncompensated taking, takings claims against state and local governments generally had to be filed in state court, before

they could be filed in federal court. By granting review in *Knick v. Township of Scott*, No. 17-647, 2018 WL 1143827, the Supreme Court on March 5, 2018, agreed to reconsider the state litigation doctrine in its next term and thus may soon overturn *Williamson County*. Accordingly, pursuant to Rule 60(b)(5), this case warrants a stay pending a decision by the Supreme Court in *Knick* and, if the property owners prevail in *Knick*, this Court should provide relief from judgment and reconsider the merits of their takings claims.

(3) This Motion Is Timely Filed

This motion for relief from this Court's March 28, 2017, judgment is timely. Courts require motions filed pursuant to Rule 60(b)(5) and (6) to be filed within a "reasonable time." *Thompson*, 580 F.3d 423. Courts have found timely motions filed many years after the final judgment. *See, e.g., Thompson*, 580 F.3d 423 (motion to reopen his original habeas petition more than four years after change in decisional law was filed within reasonable time). "Whether the timing of the motion is reasonable ordinarily depends on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief." *Id.* at 443 (internal quotations omitted).

Here, the final judgment of this Court issued one year ago on March 28, 2017. And *Rafaeli*, the state court decision upon which Plaintiffs rely, occurred only five months ago. Rafaeli's application seeking review by the Michigan Supreme Court is still pending. Plaintiffs would prefer to wait to see whether the Michigan Supreme Court grants review of the decision in *Rafaeli*, but in an abundance of caution have filed this motion within one year of this Court's judgment dismissing the case. In light of the unique facts of this case, and the lack of prejudice caused to the defendants, this motion was filed within a reasonable time. *See, e.g.*, *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. 1976) (motion for vacating judgment and reopening case filed within

one year of judgment and several months after change in state decisional law); *Heirs-at-Law & Beneficiaries of Gilbert v. Dresser Indus., Inc.*, 158 F.R.D. 89, 95 (N.D. Miss. 1993) (finding reasonable time where "plaintiffs' motion was filed one year and two months after th[e] court's judgment, eight months after affirmance by the Fifth Circuit and slightly over five months after the Mississippi Supreme Court ruled" on the state law question).

To reopen a case under Rule 60(b)(1), the party must file the motion within one year of the pertinent judgment. Plaintiffs have met this requirement.

(4) Granting This Motion Will Advance Justice, Because the Constitution Protects Plaintiffs' Right to Just Compensation and State Law Cannot Regulate That Right Away

Because the heart of a Rule 60(b) motion is advancing justice, this Court will also consider whether Plaintiffs' claims are meritorious when weighing a Rule 60(b) motion. *See* Fed. R. Civ. P. 60(b) (providing terms should be "just"); *Heirs-at-Law & Beneficiaries of Gilbert*, 158 F.R.D. at 96 ("what constitutes a 'reasonable time' is interrelated with all other circumstances either mitigating against or justifying relief under the rule"). The fundamental issue in this case is whether the County violated Plaintiffs' Fifth Amendment right to just compensation when, pursuant to the Act, the County refused to refund the excess proceeds from the tax sale of their properties.

This Court previously held that state law controlled whether Plaintiffs were entitled to the surplus proceeds from the sale of the property at issue. ECF No. 38 at PageID 418. Plaintiffs respectfully ask the Court to reconsider that determination.

Numerous courts have recognized that the confiscation of surplus proceeds from the sale of tax indebted property violates constitutional protections against uncompensated takings. *See, e.g.*, *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) (statute granting government surplus proceeds from tax sales violates state constitution's Takings Clause);

Bogie v. Town of Barnet, 270 A.2d 898, 903 (Vt. 1970) (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation, contrary to . . . Vermont Constitution"); *Anderton v. Bannock County*, No. 4:14-CV-00114-BLW, 2015 WL 428069, at *5 (D. Idaho 2015) (plaintiffs may plead takings claim where government keeps surplus proceeds from tax sale); *Coleman through Bunn v. D.C.*, 70 F. Supp. 3d 58, 80 (D.D.C. 2014) (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *Coleman II,* No. 13-01456, ECF 60 at 8 (June 11, 2016 Order) (recognizing district law treats equity as a form of property in other contexts and thus takings claim should proceed to the merits).

Moreover, Judge Kethledge of the Sixth Circuit wrote that the Act at issue in this case works a "gross injustice—both equitably, and from the standpoint of the interests protected by takings law." *Wayside Church,* 847 F.3d at 823 (Kethledge, J., dissenting from dismissal for lack of jurisdiction). Likewise, Judge Berg of the Eastern District of Michigan raised concerns about the "manifest injustice" caused by the taking of the surplus property. *Rafaeli*, No. 14-13958, 2015 WL 3522546, at *3, n.2 (E.D. Mich. June 4, 2015). And while the Michigan Court of Appeals rejected the takings claim in *Rafaeli*, one judge on the panel, Judge Shapiro, concluded that the claims alleging taking of the surplus equity "call out for relief," but he believed that such relief could only be remedied by the legislature or the United States Supreme Court. Exhibit 2 at 2-3.

Judge Shapiro was correct about the injustice of Michigan's Act, but mistaken to think that the United States Supreme Court has spoken directly on the matter at issue in this case. The United States Supreme Court acknowledged the question raised by the takings claims here, but has never ruled on the question. In *Nelson v. City of New York*, the City took the plaintiffs' valuable properties via state tax sale procedures to pay relatively small overdue water bills. *See Nelson v. City of New York*, 352 U.S. 103, 105-06 (1956). The dispossessed owners brought a takings

challenge because the City kept the excess proceeds from these sales. *Id.* at 109. In *Nelson*, the New York statute provided dispossessed owners with the opportunity to recover the surplus proceeds by raising a claim for the surplus in the foreclosure proceedings. The Supreme Court held there had been no taking because the plaintiffs failed to avail themselves of the statutory remedy. *Id.* at 110. In so holding, the *Nelson* Court reserved the question raised here. *See id.* ("But we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale."); *Coleman through Bunn*, 70 F. Supp. 3d at 77-79 (*Nelson* "expressly reserved" the question at issue here).

While takings law directly dealing with confiscatory tax laws is not conclusive, federal takings law has developed in a manner that shows the County here must pay just compensation—*regardless of what state law says about surplus proceeds from tax sales*.

a. Takings Law

The Takings Clause in the Fifth Amendment prohibits the government from taking private property for a public use without paying just compensation.[4] U.S. Const. amend. V. When government action invades a protected property interest, courts focus on the nature of the governmental action to determine whether the action effects a taking. While regulatory actions that restrict the use of property are weighed under a balancing test, *Penn Central*, 438 U.S. at 124, actions that physically invade or occupy a property interest are subject to a strict, *per se* test. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). An uncompensated physical taking violates the Constitution, regardless of the circumstances of the taking or its

[4] The Fifth Amendment of the federal Constitution is applicable to the states through the Fourteenth Amendment. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978).

economic impact. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

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

b. The Takings Clause Protects Equity

When the County applied the Act to retain the proceeds that exceeded Plaintiffs' outstanding tax debts, it invaded and unconstitutionally took a protected property interest. This Court previously held that Plaintiffs did not have a property interest in the surplus proceeds, because the Act did not recognize such a right. ECF No. 38, PageID 418. But state law is not the only source from which property rights arise. *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30 (2001). Indeed, "the right to the surplus exists independently of such statutory provision." *Farnham v. Jones*, 19 N.W. 83, 85 (Minn. 1884). This Court did not address whether these other sources require the County to refund the surplus proceeds to the Plaintiffs. Plaintiffs respectfully request that this Court do so upon reopening this case.

"Property" protected by the Constitution includes those interests recognized by common law, federal or state law, or that arise from custom and practice or other "background principles" of property law. *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30 (2001); *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426-27 (2015) (Takings Clause protects property interests recognized

by Magna Carta and Founders); *Nixon v. United States*, 978 F.2d 1269, 1276 n.18 (D.C. Cir. 1992) ("law or custom may create property rights where none were earlier thought to exist"); *see also Bott v. Comm'n of Nat. Res. of State of Mich. Dep't of Nat. Res.*, 415 Mich. 45, 83-85 (1982) (Takings Clause protects common law property rights).

The Supreme Court has already held that regardless of what state or federal law says, the Takings Clause applies to protect a diverse array of property interests from government confiscation, including personal property, intangible property, money, interest on money, liens, mortgages, and homes. *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. at 2426 (personal property); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 616 (2013) (money and real property); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 168 (1998) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (mortgages).

The property interest at issue in this case is privately generated and owned equity. "Equity" is, by definition, the fair-market cash value of the property after deduction of all encumbering debts (like tax debts). *See Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Ultimately, "equity" is money directly tied to the use and enjoyment of private property. And, as noted above, the Supreme Court has clearly indicated the same type of interests—like money and liens—are protected by the Takings Clause. Moreover, although the Michigan Court of Appeals rejected the takings claims in *Rafaeli*, Michigan courts have traditionally recognized that the Takings Clause protects "everything over which a person may have exclusive control or dominion" including intangible property like an "identifiable fund of money." *AFT Michigan v. State*, 497 Mich. 197, 217-18 (internal quote omitted). And Michigan common law has consistently treated equity as private "property." *See, e.g.*, *McCallister v. McCallister*, 300 N.W.2d 629, 633 (Mich. Ct. App.

1980) (treating "home equity" as "property" in divorce proceeding). Thus all the protections of the Takings Clause must attach. Because the law recognizes home and land equity as "property," the government may not confiscate it without paying just compensation or providing the means to collect the surplus taken by the government. *Armstrong v. United States*, 364 U.S. at 41 (government effects a taking when it takes more than owed, at expense of inferior lienholders).

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

The government may constitutionally take and sell foreclosed properties for the public purpose of collecting a valid tax debt. But to avoid violating the Takings Clause, the government must either pay just compensation for the surplus value taken, or take that property subject to a fiduciary responsibility to the former owner to refund the surplus proceeds after a tax sale. *See Bogie*, 270 A.2d at 899-900 (explaining that the government may only take property foreclosed for delinquent taxes subject to a fiduciary responsibility to sell the property and refund the former owner, or it would violate the constitutional right to just compensation). The government has no legitimate entitlement or claim to equity that exceeds the owner's tax debt. That equity was created during and through private ownership of the subject property and is rightly treated as private property. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 168 (1998).[5] Thus, when the government confiscates the surplus proceeds from a tax sale, it causes a quintessential *per se*, physical taking. *See Webb's Fabulous Pharmacies*, 449 U.S. at 164; *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (confiscation of privately owned interest is a taking).

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

The system challenged here conflicts with a line of takings cases that hold that government violates the Fifth Amendment when it confiscates pre-existing property interests by redefining private property as public property. In *Webb's Fabulous Pharmacies*, 449 U.S. at 158-59, the Supreme Court held that it was an unconstitutional taking for a state to keep the interest earned on private, principal funds which had been deposited with a court. The Supreme Court held that state government could not avoid the protections of the Takings Clause by redefining private property as public property, simply because the state holds that property for some period of time: "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. To the same effect is *Phillips*, 524 U.S. at 167 ("at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests"); *see also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) (states effect a taking when they re-characterize private property as public property).

Yet that is exactly what the Act purports to do to Plaintiffs' property. The Act purports to statutorily convert any surplus equity in tax-indebted properties to "public" property at the time of foreclosure, merely because the County takes title to the property. The Takings Clause will not permit such a state-authored transformation of a private interest to public property.

This Takings Clause protection doesn't simply disappear because the property owner owes the government money. In *Armstrong*, 364 U.S. at 41, a shipbuilder contracted by the United States defaulted on a contract to build ships, and the United States took title to its unfinished boats and materials, pursuant to its contractual and common law rights. *Id*. at 41. Material suppliers claimed the United States had unconstitutionally taken their liens on some of the materials when the government took the shipbuilders' unfinished boats and supplies, and refused to compensate them.

Id. The Supreme Court agreed, holding that property rights in liens do not disappear when the government takes title. *Id.* at 48. Before the government took the property, the plaintiffs had a cognizable financial interest in the boats; afterwards, they had none. *Id*. "This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens." *Id*. The government could only take the underlying property subject to the "constitutional obligation to pay just compensation for the value of the liens." *Id*. at 49.

Armstrong confirms that the transfer of private equity into public coffers after the sale of homes and payment of outstanding debts is a taking. As in *Armstrong*, the County here, "for its own advantage," destroyed the private value of the equity when it took possession of homes in which it had a limited interest. *See id*. at 48. More accurately, it changed that value from a private interest into a public one. This transformation of a private interest to public property is a taking. The County thus has the "constitutional obligation to pay just compensation" or to return the private property it takes. *See id*. at 49.

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

d. Michigan Courts Cannot Escape the Takings Clause by Labeling These Takings "Civil Asset Forfeitures"

Rather than a straightforward application of takings law to the Act, the Michigan Court of Appeals in *Rafaeli* strayed from constitutional law by radically expanding civil asset forfeiture law to avoid the takings question. *Rafaeli*, at 5 (Exhibit 1); Exhibit 2 at 2-3 (Shapiro, J., concurring) (disagreeing with the majority's extension of civil asset forfeiture law). The *Rafaeli* opinion conflicts with the limits on forfeiture law recognized by the United States Supreme Court, and it conflicts with the intent of the statute and Michigan common law. This Court should not follow *Rafaeli*.

In American law, civil asset forfeiture has historically been used to punish an owner putatively guilty of some crime, or to hold the owner "accountable for the wrongs of others to whom he entrusts his property." *Austin v. United States*, 509 U.S. 602, 615-17 (1993) ("If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner."); *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., concurring with denial of certiorari) (describing historical limits of forfeiture law); *Boyd v. United States*, 116 U.S. 616, 633-634 (1886) ("We are . . . clearly of [the] opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.").

The Michigan Court of Appeals departed from this limitation on civil asset forfeiture by misapplying *Bennis v. Michigan*, 516 U.S. 442 (1996). In *Bennis*, the police used civil asset forfeiture to seize full title to a car, which had been used to facilitate the crime of prostitution. *Id.* at 443-44. The police then sold the car—an 11-year-old Pontiac—for $600, leaving "'practically nothing' to divide after subtraction of costs." *Id.* at 458 (Ginsburg, J., concurring). Although one co-owner of the car was innocent of any criminal offense, the Supreme Court held that the

government could constitutionally seize the vehicle and keep the proceeds from the sale without violating the Takings Clause. *Id*. at 455-56. Importantly, the Court rejected the just compensation claim because the vehicle had been entrusted to the co-owner who used it to commit criminal activity. *Id.* at 452-53 (forfeiture is a "deterrent mechanism" to "illicit use" of property); *see also id* at 453-55 (Thomas, J., concurring) (showing the narrow grounds of the bare majority decision rested on the fact that the property had been "an 'instrumentality' of the crime").

Bennis and other civil asset forfeiture decisions offer no guidance on the takings claims here because it is not a crime to underpay property taxes in Michigan.[6] The property owners in this case did not commit a crime or immoral action by failing to pay property taxes; nor was the property itself used as an instrumentality of crime. *See Rafaeli*, Exhibit 1 at 5 (noting it is not a crime to fail to pay property taxes).

Also "key" to the slim majority decision in *Bennis* was the fact that the statute acted in a remedial manner, because the taking of the proceeds from the sale of the car ($600), did not measurably exceed the costs of seizing and selling the car, and of enforcing the anti-prostitution law in that instance. *Id*. at 457-58 (Ginsburg, J., concurring). In contrast, here, the County is keeping thousands of dollars that have no correlation to any injury it suffered or costs it incurred to collect Plaintiffs' debts.[7] Moreover, the Michigan Court of Appeals improperly expanded the already controversial[8] body of civil asset forfeiture law to include situations where an individual

[6] Any attempt to make it a crime to underpay property taxes would likely be unconstitutional, because the Constitution does not permit "punishing a person for his poverty." *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

[7] The Act already includes the cost of selling the property to collect on the debt, adding 40% in interest and administrative fees to the underlying tax debt. Mich. Comp. Laws § 211.78a (4% administrative fee, plus 1% interest per month for two years); § 211.78g(3) (adding another 0.5% per month).

[8] Civil asset forfeiture is already highly controversial among jurists, academics, and the public, because it is riddled with abuses and has allowed government to profit at the expense especially

acts generally against the public "welfare." This violates the longtime common law principle that construes forfeiture provisions against the government,[9] and it exceeds the scope of traditional civil asset forfeiture law which the United States Supreme Court has only reluctantly allowed in cases involving criminal activity. *See Bennis*, 516 U.S. at 454 (noting civil asset forfeiture law seems unfair and should be strictly limited). This expansion of forfeiture law threatens traditional protections in takings law and should be rejected by the federal courts.

CONCLUSION

This case warrants relief pursuant to Rule 60(b). The change in decisional law allows this Court to reopen the case and recognize jurisdiction. The equities at issue in this case weigh in favor of granting jurisdiction, because the law favors reaching the merits of a party's claims, and they should be permitted to vindicate their constitutional rights. Plaintiffs respectfully request that this

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off the poor. *Leonard v. Texas*, 137 S. Ct. at 850 (Thomas, J., commenting on denial of cert.) ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses" that especially hurt the poor); *see also, e.g.*, Dick M. Carpenter II, et al., Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (2d ed. Nov. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

[9] *See, e.g., People v. Campbell*, 198 N.W.2d 7, 10 (Mich. Ct. App. 1972) (Because the law disfavors forfeitures, the government has the burden of proving that its forfeiture is valid.); *United States v. One 1936 Model Ford V-8 DeLuxe Coach*, 307 U.S. 219, 226 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875) ("When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred."); *Sogg v. Zurz*, 905 N.E.2d 187, 191 (Ohio 2009) (Fairness and justice instruct that courts should "favor individual property rights when interpreting forfeiture statutes."); and *Loeser v. Gardiner*, 1 Alaska 641, 645 (D. Alaska 1902) ("Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them."); *see also Spoon-Shacket Co. v. Oakland County*, 97 N.W.2d 25, 28 (1959) ("[E]quity can and should intervene whenever it is made to appear that one party, public or private seeks unjustly to enrich himself at the expense of another on account of his own mistake and the other's want of immediate vigilance—litigatory or otherwise."); and *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., plurality opinion) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

Court provide them relief from its March 28, 2017, order dismissing this case and that it enter judgment in their favor.

DATED: March 28, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court Western District of Michigan Southern Division by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ CHRISTINA M. MARTIN
CHRISTINA M. MARTIN

EXHIBIT 1

STATE OF MICHIGAN

COURT OF APPEALS

RAFAELI, LLC, and ANDRE OHANESSIAN, Plaintiffs-Appellants,	UNPUBLISHED October 24, 2017
v	No. 330696 Oakland Circuit Court
OAKLAND COUNTY and ANDREW MEISNER, Defendants-Appellees.	LC No. 2015-147429-CZ

Before: MARKEY, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs, Rafaeli, LLC, and Andre Ohanessian, appeal as of right an order granting summary disposition to defendants, Oakland County and its treasurer Andrew Meisner, in this case involving the General Property Tax Act, MCL 211.1 *et seq*.[1] We affirm.

Each plaintiff owned property on which defendants foreclosed because of tax delinquencies. Plaintiffs' lawsuit, styled as a putative class action, alleged various constitutional violations. The trial court found no such violations and ruled, in connection with a motion for summary disposition, that plaintiffs had forfeited their properties.

On appeal, plaintiffs first argue that the GPTA is unconstitutional on its face because it violates due process guarantees by prescribing insufficient steps for a governmental entity to take when it knows or has reason to know that its efforts to provide notice of tax delinquency to a taxpayer have failed.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). We likewise review de novo issues of statutory or constitutional interpretation. *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010).

The Michigan Supreme Court, recognizing the applicability of *Jones v Flowers*, 547 US 220, 225; 126 S Ct 1708; 164 L Ed 2d 415 (2006),[2] ruled in *Sidun v Wayne Co Treasurer*, 481

[1] Pacific Legal Foundation filed an amicus curiae brief in support of plaintiffs.

Mich 503, 505; 751 NW2d 453 (2008), that, where notices of tax delinquencies were returned to a county treasurer as undeliverable, the county was not entitled to proceed with foreclosure without undertaking "reasonable follow-up methods . . . ." The Court noted that "[r]easonable follow-up measures directed at the possibility that the addressee had moved would be to post notice on the front door or to send notice addressed to 'occupant.' " *Id*. at 512. The Court also pointed out that, "although the government must take reasonable additional steps to notify the owner, it is not required to go so far as to search for an owner's new address in the phonebook and other government records such as income tax rolls." *Id*. (quotation marks, indications of alterations, and citation omitted).

Plaintiffs argue that the GPTA falls short of the requirements of *Jones* and *Sidun* that foreclosing governmental units take additional steps when knowing that attempts to serve notice have failed and that, therefore, the GPTA is unconstitutional on its face. However, a statutory provision is not unconstitutional on its face unless there is no set of circumstances under which it could be applied constitutionally. *Bonner v City of Brighton*, 495 Mich 209, 223 n 26; 848 NW2d 380 (2014); see also *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 303; 586 NW2d 894 (1998). The GPTA does not authorize proceeding to foreclosure where notice consists of a single attempt at mailing known to have failed, but rather, it specifies alternative means of identifying a valid address, mandates personal visits to the subject property, and sets forth requirements for notice by publication. See MCL 211.78i. It is reasonable to presume that following the notice requirements of the GPTA usually results in providing the affected taxpayer with actual notice of foreclosure proceedings. We reject plaintiffs' claim of facial unconstitutionality.

Plaintiffs next argue that the GPTA, *as applied to each plaintiff*, resulted in a deprivation of constitutional due process in connection with notice.

We do not agree. We note, initially, that under MCL 211.78i(10), "The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States."

Plaintiffs' emphasis on *Jones* and *Sidun* notwithstanding, defendants did not simply rely on a mailing to an address they learned was ineffective. Rafaeli paid taxes in August 2012 and January 2013 in response to notices of deficiencies sent to its address as indicated on the subject property's deed, but a third such notice prompted no such response; apparently defendants had no reason to doubt that that address ceased to be effective but for that lack of a response. Additional steps then included a personal visit to the property, where notice was left with a tenant, plus the identification of a resident agent, and notice sent to Rafaeli at the agent's address. Plaintiffs identify no major misstep on defendants' part when they complain that notice

[2] The Court in *Jones* stated, "We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable stops to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Jones*, 547 US at 225.

sent to the corporation's identified resident agent's address was addressed to the corporation instead of the agent. Further, plaintiffs specify no additional step defendants might have taken that would have better provided Rafaeli with notice. The efforts defendants undertook to serve notice on Rafaeli satisfied the minimal requirements of due process, insofar as the notice was intended to advise the corporation of its tax liabilities and that its property would be subject to foreclosure proceedings to satisfy those liabilities.

Concerning Ohanessian, he paid taxes on his property for years before moving to California in 2011. Defendants sent notices of tax delinquencies to Ohanessian's former Michigan address in June 2013, December 2013, and February 2014. Defendants filed with their motion for summary disposition an affidavit from their chief of tax administration, who attested that notices were sent to both of the addresses on file for Ohanessian, respectively in Livonia and Eastpointe, but that the treasurer's office had no record of any California address for that taxpayer. The affidavit further reported that "the Treasurer published three notices of the properties subject to foreclosure in the 2013 foreclosure case: December 27, 2013, January 3, 2014 and January 10, 2014."

The validity of the foreclosure depended not on perfect compliance with the GPTA, but on satisfying minimal constitutional due process requirements. MCL 211.78i(10). By pointing out that defendants' agent failed to arrange for return receipt in connection with notice sent by certified mail, plaintiffs essentially admit that defendants had no reason, but for the lack of a response, to doubt that the attempted mail service was successful. Further, plaintiffs offer no basis for doubting defendants' chief of tax administration's account of having published notice on three occasions. Here again, defendants did not simply rely on a mailing they knew was unsuccessful.

Regardless, to the extent that the United States Supreme Court's admonishment that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice" is applicable, so is the qualification that such additional steps are required only "*if it is practicable to do so*." *Jones*, 547 US at 225 (emphasis added). And, as was the case with regard to plaintiff Rafaeli, plaintiffs specify no additional reasonable step defendants might have taken that would have better provided Ohanessian with notice.[3] For these reasons, we conclude that the efforts defendants undertook to serve notice on Ohanessian satisfied the minimal requirements of due process, insofar as the notice was intended to advise him of his tax liabilities and that his property would be subject to foreclosure proceedings to satisfy those liabilities.[4]

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[3] Although plaintiffs complain of a lack of evidence of a personal visit to Ohanessian's property, they do not address whether it would have been practicable to do so, and stop short of stating that such a visit would have satisfactorily supplemented the unsuccessful mailings for purposes of due process.

[4] Plaintiffs complain that discovery had not been completed at the time of the grant of summary disposition, yet also state that "the parties had stipulated to withholding discovery." At any rate, there was no fair likelihood that further discovery would have yielded any information allowing

Plaintiffs next argue that defendants' administration of the GPTA's show-cause hearing requirement, see MCL 211.78j, "allows them to play judge, jury, and executioner without any of the procedural safeguards required by the Due Process Clause." Plaintiffs contend that the show-cause hearings deprive a delinquent taxpayer of a meaningful opportunity to be heard because of the way defendants conduct the hearings.

We agree with defendants that plaintiffs do not have standing to raise this issue. In Michigan, a party has standing if it has a legal cause of action, if the party is seeking declaratory relief and satisfies the requirements of the pertinent court rule, or "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

Plaintiffs did not participate in any show-cause hearings below, and so suffered no injury from the manner in which such hearings are conducted. Although they put forward the attendant lost opportunity to "show cause why absolute title to that property should not vest in the foreclosing governmental unit" as required by MCL 211.78j(2) as one of the consequences of their allegedly not having received adequate notice, for purposes of this issue they object in general terms to how defendants purportedly conduct show-cause hearings. Further, plaintiffs explain neither how they came to understand how defendants normally conduct such business, nor why they are so certain that, had they appeared for their show-cause hearings, defendants would have prevented them from exercising their statutory right to show cause in fact.

Plaintiffs insist that they are entitled to declaratory relief in this regard. According to MCR 2.605(A)(1), "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." A court is thus authorized to entertain an action for declaratory judgment where "necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000). However, because plaintiffs did not participate in the show-cause hearing offered by defendants, their objections are based on a hypothetical scenario. See *id*.

In addition, plaintiffs' having missed their opportunity to participate in a show-cause hearing in connection with their respective parcels rendered moot any questions concerning how well such a hearing would have comported with the statute requiring them. "A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). "As a general rule, an appellate court will not decide moot issues." *Id*.

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for recovery by plaintiffs. *Liparoto Construction, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33; 772 NW2d 801 (2009).

Because plaintiffs suffered no injury relating to how defendants conduct show-cause hearings, and can only speculate concerning what might have transpired had they appeared for one and demanded their attendant statutory rights, and because their having missed that opportunity in connection with their respective property interests rendered the issue moot, we affirm the circuit court's decision not to grant relief with regard to this issue.

Plaintiffs next argue that the GPTA is unconstitutional because it mandates that governmental entities retain proceeds beyond those required to satisfy delinquent tax bills; they argue that the GPTA therefore allows unconstitutional takings. We disagree. This issue is easily resolved by reference to *Bennis v Michigan*, 516 US 442, 452; 116 S Ct 994; 134 L Ed 2d 68 (1996), a United States Supreme Court case that post-dates other United States Supreme Court cases cited by plaintiffs. In *Bennis*, *id*. at 443, the Court set forth the following summary: "Petitioner was a joint owner, with her husband, of an automobile in which her husband engaged in sexual activity with a prostitute. A Michigan court ordered the automobile forfeited as a public nuisance, with no offset for her interest, notwithstanding her lack of knowledge of her husband's activity. We hold that the Michigan court order did not offend the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment." With regard to the takings argument, the Court stated:

> Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the [due process requirement of the] Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain. [*Id*. at 452.]

Defendants obtained the property by way of a statutory scheme that did not violate due process. The constitution does not require them to compensate plaintiffs for the lawfully-obtained property. *Id*.[5] Plaintiffs' taking argument is without merit.[6] The trial court did not err in granting defendants summary disposition and in denying plaintiffs' motion for reconsideration.

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[5] Plaintiffs attempt to distinguish *Bennis* by stating that it involved an "overt, intentional act of the [d]efendant in taking part in the crime of pandering." First, the petitioner in *Bennis* was the wife of the person who was "pandering" and took part in no "overt, intentional act" herself. See *Bennis*, 516 US at 443. Second, plaintiffs here also "acted" contrary to the welfare of the state by failing to pay their taxes.

[6] Plaintiffs failed adequately to address an ostensible additional issue, involving the Eight Amendment of the United States Constitution, set forth in their primary brief and thus have abandoned this issue. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (discussing inadequate briefing). Plaintiffs mention the issue briefly in footnotes and then, in discussing their takings issue, plaintiffs undercut their ostensible Eight Amendment claim by

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter

stating: "Neither the [c]ourt nor the [t]reasurer has characterized the GPTA's forfeiture scheme as punishment for a crime. If they had, the law's application to [p]laintiffs and thousands of others would raise other constitutional issues, like the Eight Amendment's ban on excessive fines." We reject plaintiffs' attempt to revive the issue by way of their reply brief. Plaintiffs have also abandoned their ostensible issue regarding substantive due process by mentioning it only in passing. *Id*. Plaintiffs have also failed adequately to brief an issue relating to unjust enrichment. They complain that the lower court failed to provide a detailed explanation for its ruling on this issue but then provide insufficient details themselves, setting forth no rules and offering no analysis regarding the extent to which the GPTA did or did not displace the common law with regard to unjust-enrichment claims.

EXHIBIT 2

STATE OF MICHIGAN

COURT OF APPEALS

RAFAELI, LLC, and ANDRE OHANESSIAN,

Plaintiffs-Appellants,

v

OAKLAND COUNTY and ANDREW MEISNER,

Defendants-Appellees.

UNPUBLISHED
October 24, 2017

No. 330696
Oakland Circuit Court
LC No. 2015-147429-CZ

Before: MARKEY, P.J., and METER and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur with my colleagues in concluding that constitutional notice was provided and that plaintiffs lack standing to attack the hearing methodology. I also concur with my colleagues' conclusion that plaintiffs have failed to state a claim in their constitutional challenge to MCL 211.78g. However, I reach that conclusion through a different analysis.

The challenged statute provides that if a property owner fails to cure a tax delinquency within the time provided, the individual's entire interest in the property is forfeited to the county treasurer regardless of the amount of the deficiency and the value of the property. MCL 211.78g. Plaintiffs assert that the statute violates the Fifth Amendment's Takings Clause, and rely in large measure on the United States Supreme Court decision in *US v Lawton*, 110 US 146; 3 S Ct 545; 28 L Ed 100 (1884). In that case, the heir of a person, whose property valued at $1,110 was seized in response to a tax delinquency of $88, which with penalty, interest, and costs had grown to $170.50, sought the difference between the value of the property and the total tax liability. *Id.* at 147. The United States Supreme Court stated, "To withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and deprive him of his property without due process of law or take his property for public use without just compensation." *Id.* at 150.

Plaintiffs' argument fails however because the United States Supreme Court later disavowed the constitutional aspect of *Lawton,* concluding that it was decided solely on statutory grounds. *Nelson v City of New York*, 352 US 103, 110; 77 S Ct 195; 1 L Ed 2d 171 (1956). In *Nelson*, a taxpayer challenged the city's retention of the foreclosure sale proceeds above the amounts owed for the delinquent taxes. *Id.* at 109-110. The Supreme Court rejected the challenge stating, "What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recovery any surplus,

retain the property or the entire proceeds of its sale. *We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.*" *Id*. at 110 (emphasis added). The ruling of the United States Supreme Court rejecting a constitutional challenge to such statutes appears clear and unequivocal.

My colleagues also affirm the dismissal of plaintiffs' claims, but rather than relying on *Nelson,* conclude, erroneously I believe, that this case is controlled by *Bennis v Michigan*, 516 US 442, 452; 116 S Ct 994; 134 L Ed 2d 68 (1996), which addressed forfeiture of property involved with, or resulting from, criminal activities. By resting solely on *Bennis*, the majority implicitly concludes that all "forfeitures" are equal under the law, whether based upon a criminal enterprise or a property owner's failure to pay $8.41 in taxes. I respectfully disagree, and suggest that the substance and not the nomenclature should control. I think that this case bears little, if any, relation to *Bennis*, and that it is a mistake to conclude that *Bennis* addresses, let alone controls, the issues in this case.[1]

Despite my concurrence, I recognize that plaintiffs' claims call out for relief.[2] Although Rafaeli LLC's federal court suit was dismissed on jurisdictional grounds, Judge Berg recognized the need for some action in his opinion:

> It cannot be denied that the concept of the state confiscating all of the equity of a citizen's property, worth between $24,500 and $70,000, and selling it and keeping the entire proceeds—all to collect $8.41 in property taxes and $277.40 in interest and fees, is a manifest injustice that should find redress under the law. Property taxes must be paid, but for the County Treasurer to reap such an overwhelming windfall by depriving a property owner of his entire interest in the

[1] Looking to civil asset forfeiture as a model for enforcement of taxation laws is unsound for other reasons. First, no other area of the law seems to draw as much advocacy for reform. See, e.g., Ford, *Due Process for Cash Civil Forfeitures in Structuring Cases*, 114 Mich L Rev 455 (2015); Kornfeld & De Corso, *Uncivil Forfeitures*, LA Law 39 (2003); O'Brien, *"Caught in the Crossfire": Protecting the Innocent Owner of Real Property*, 65 St John's L Rev 521 (1991). Second, in *Bennis*, the majority simply deferred to "a long and unbroken line of cases," 516 US at 446, over the objections of four dissenting justices, while admitting that the "argument that the Michigan forfeiture statute is unfair because it relieves prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners . . . has considerable appeal . . . ." *Id*. at 453. The *Bennis* majority further declined to concern itself with the potential for an asset of great value to be seized over a trivial criminal violation, on the ground that the case before it did not present such an extreme situation. *Id*. at 450-451.

[2] Rafaeli, LLC owed $8.41 in taxes, which with interest amounted to a delinquency of $330 on real property that the city then sold for $24,000. Ohanessian owed approximately $8,000 in taxes, and the city sold the property for $80,000.[2]

> property, and gain tens of thousands of dollars more than the tax bill ever was, looks more like an abuse of power than like a local government's reasonable measures to ensure the collection of property taxes. . . . [*Rafaeli, LLC v Wayne Co* unpublished opinion of the United States District Court for the Eastern District of Michigan, issued June 4, 2015 (Docket No. 14-13958), p 3 n 2.]

Similarly, dissenting from the dismissal of a similar case on jurisdictional grounds, Chief Judge Kethledge opined that the pertinent statute is a "gross injustice—both equitably, and from the standpoint of the interests protected by takings law . . . ." *Wayside Church v Van Buren Co*, 847 F3d 812, 823 (CA 6, 2017) (KETHLEDGE, C.J., dissenting).[3]

In light of the United States Supreme Court's decision in *Nelson*, I conclude we must reject plaintiffs' claim despite what appears to be an obvious injustice that requires remedial action. However, until such time as the United States Supreme Court revisits the issue, it is the Legislature, and not this Court, that must take such action.

/s/ Douglas B. Shapiro

[3] Plaintiffs also point out that Michigan is one of only eleven states that do not return the surplus value of the property to the taxpayer. However, plaintiffs concede that those states that do require return of the surplus value all do so as a result of legislation, not judicial action.