No. ____

In The
Supreme Court of the United States

TAWANDA HALL, CURTIS LEE,
CORETHA LEE, and KRISTINA GOVAN,
Cross-Petitioners,

v.

ANDREW MEISNER, Treasurer,
in his official capacity, et al.,
Cross-Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the forfeiture of property worth far more than needed to satisfy a debt plus interest, penalties, and costs is a fine within the meaning of the Eighth Amendment.

PARTIES TO THE PROCEEDING

Conditional Cross-Petitioners are Tawanda Hall, Curtis Lee, Coretha Lee, and Kristina Govan.

Conditional Cross-Respondents are Andrew Meisner, in his official capacity as Oakland County Treasurer; Oakland County; Southfield Neighborhood Revitalization Initiative, LLC; City of Southfield, Michigan; Frederick Zorn; Kenson Siver; Susan P. Ward-Witkowski; Gerald Witkowski; Irv Lowenberg; Mitchell Simon; E'toile Libbett; and Southfield Non-Profit Housing Corporation.

LIST OF ALL PROCEEDINGS

Meisner v. Hall, No. 22-874, Petition for Writ of Certiorari (U.S. Mar. 9, 2023).

Hall v. Meisner, U.S. Court of Appeals for the Sixth Circuit, No. 21-1700, judgment entered October 13, 2022, en banc review denied January 4, 2023.

Hall v. Meisner, U.S. District Court for the Eastern District of Michigan, No. 2:20-cv-12230-PDB-EAS, opinion and order against Respondents Andrew Meisner and Oakland County on Petitioner's Takings Claim issued May 21, 2021, and two opinions and orders on other claims and involving additional plaintiffs and defendants issued October 4, 2021.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Petitioners Tawanda Hall, Curtis and Coretha Lee, and Kristina Govan respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit, if the Court grants the Petition for Writ of Certiorari in *Meisner v. Hall*, No. 22-874.

OPINIONS BELOW

The decision of the Sixth Circuit is published at *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), and reproduced in the Appendix to the Petition for Writ of Certiorari (Pet.App.1a). The Sixth Circuit's denial of rehearing en banc is available at 2023 WL 370649 (6th Cir. Jan. 4, 2023) and reprinted at Pet.App.65a.

The district court's unpublished opinion dismissing all claims against Andrew Meisner and Oakland County is available at 2021 WL 2042298 (E.D. Mich. May 21, 2021) and reprinted at Pet.App.27a.

The district court's opinion dismissing the claims against Southfield Non-Profit Housing Corporation, Southfield Neighborhood Revitalization Initiative, LLC, Mitchell Simon, and E'toile Libbett is published at 565 F.Supp.3d 928 (E.D. Mich. 2021) and reprinted in the attached appendix at CrossPet.App.1.

The district court's opinion dismissing the claims against the City of Southfield, Frederick Zorn, Kenson Siver, Susan Ward-Witkowski, Gerald Witkowski, and Irvin Lowenberg is published at 565 F.Supp.3d 953 (E.D. Mich. 2021) and reprinted at CrossPet.App.45.

The district court's judgment is reprinted at Pet.App.67a.

JURISDICTION

The Sixth Circuit entered judgment on October 13, 2022, and denied the petition for rehearing en banc on January 4, 2023. Andrew Meisner and Oakland County filed a petition for writ of certiorari on March 9, 2023. This conditional cross-petition is filed within 30 days of that petition pursuant to Supreme Court Rule 12.5.

Lower courts had jurisdiction under 28 U.S.C. §§ 1331, 1346(a), and 1361. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Because this case only questions the constitutionality of a previous, now-repealed version of the statute at issue, Cross-Petitioners do not believe 28 U.S.C. § 2403(b), which allows a state to intervene to defend the constitutionality of a statute, applies. *See* Order, *Hall v. Meisner*, No. 21-700 (6th Cir. Sept. 16, 2022) (denying intervention). However, in an abundance of caution, pursuant to Supreme Court Rule 29.4(c), Cross-Petitioners alert the Court that they are questioning the constitutionality of a prior state statute and sent a courtesy copy to the Michigan Attorney General.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part, "No state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

INTRODUCTION

Oakland County and Andrew Meisner (collectively, County) foreclosed on the homes of Tawanda Hall, Curtis and Coretha Lee, and Kristina Govan (Homeowners) to satisfy a tax debt but took far more than was owed. Pet.App.5a–6a. The County took absolute title to the homes, all of which were free of other encumbrances and valued at many times more than their tax debts. The total debts included added penalties, interest, and costs. Pet.App.5a–6a. The iteration of Michigan's tax statute operative at the time authorized the confiscation of the entirety of these debtors' home equity. Pet.App.4a–5a.

The County did not conduct any public sale of the homes. Pet.App.5a–6a. Instead, the City of Southfield exercised a statutory option to purchase the homes "for a public purpose" directly from the County by paying only the tax debt on each property. *Id.*; Mich. Comp. Laws § 211.78m (2017). The City then transferred the properties to the Southfield Neighborhood Revitalization Initiative, LLC (SNRI) for $1 each to fulfill the City's public purposes.[1]

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[1] The City of Southfield sought to "revitalize and stabilize neighborhoods" and return homes to "productive use and purchase by individuals and families seeking housing opportunities within the City of Southfield." City Resolution, R.44-5, PageID.1254. To that end, the City partnered with the Southfield Non-Profit Housing Corporation, which set up the for-profit Southfield Neighborhood Revitalization Initiative, LLC, to sell the properties. *See id.*; CrossPet.App.53. Both organizations

Pet.App.5a. Ms. Hall, Ms. Govan, and the Lees did not receive or have an opportunity to recover compensation for the equity (i.e., the value of their homes beyond the tax lien, penalties, interest, and collection costs) taken by the County during the foreclosure or at any later time from the City or SNRI.

On appeal to the Sixth Circuit, the court held that, consistent with hundreds of years of Anglo-American history and tradition, and the Michigan Supreme Court's decision in *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 474–84 (2020), the County unconstitutionally took private property when it took the equity in the homeowners' properties. The County's failure to pay just compensation upon taking the properties violated the Fifth Amendment of the U.S. Constitution. Pet.App.4a, 21a.

Whether the government's confiscation of home equity is an unconstitutional taking or a fine within the meaning of the Excessive Fines Clause are questions currently pending before this Court in *Tyler v. Hennepin County*, No. 22-166. *See also Meisner v.*

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are controlled by City officials. Mayor Siver is president of the Non-Profit and signed the paperwork creating the Company. CrossPet.App.53. 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 district court below denounced the structure in two separate orders: "[T]he fact that elected officials were using their political status . . . by obtaining properties before they could go to auction following tax foreclosure is, at a minimum, troubling. Clearly, defendants, particularly the elected officials, have [not] even attempted to avoid the appearance of impropriety, as a clear conflict of interest exists regarding their involvement with SNPHC and SNRI. This type of behavior is not only shocking to the consc[ience], but also rightfully breeds distrust among their electorate." CrossPet.App.43–44; CrossPet.App.90–91.

Hall, No. 22-874, Petition for Writ of Certiorari at i ("The question presented is substantively the same one this Court is already considering in *Tyler*[.]"). While the County here petitions for review and remand[2] solely of the takings claim, the Sixth Circuit decision addressed additional claims. The court below reached and rejected the Homeowners' excessive fines claim, which was pled in the alternative. If this Court grants the County's petition to evaluate or remand the Homeowners' takings claims, then this Court also should evaluate or remand the Homeowners' excessive fines claim.[3]

STATEMENT OF THE CASE

A. Oakland County took property worth substantially more than Ms. Hall, Ms. Govan, and the Lees owed the County

In 2010, Tawanda Hall bought a five-bedroom, four-bath, single-family home in Southfield, Michigan, where she and her family lived for many years. *Hall v. Meisner*, No. 2:20-cv-12230-PDB-EAS, Compl. Exh. B, R.1-3, PageID.35–37 (E.D. Mich. Aug. 18, 2020).[4] On February 14, 2018, the County foreclosed and took title to Ms. Hall's home to collect $22,642 in property taxes, interest, penalties, and fees. Pet.App.5a, 31a. Under Michigan's tax statute,

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[2] The County primarily requests this Court to hold its petition pending the result in *Tyler*, then vacate and remand for reconsideration in light of *Tyler*. *See* Pet. at 2, 5, 11, 18, 22.

[3] This Cross-Petition does not request review of the other state and federal claims alleged in the Complaint. *See* CrossPet.App.121–26.

[4] The Complaint (without exhibits) is reprinted at CrossPet.App.92.

she then entered into a payment plan with the County. CrossPet.App.100. Without notice and despite the existing payment plan, the County deeded itself the property, extinguishing her interest in it.[5] Then, on June 29, 2018, the County Treasurer deeded the property to the City, which paid only the tax debt. CrossPet.App.97. On October 23, 2018, the City gave the property to the Southfield Neighborhood Revitalization Initiative, LLC, for $1, which in turn later sold it for $308,000—$285,000 more than Ms. Hall's total tax debt. *Id.* Ms. Hall received nothing for her equity.

Pursuant to that same process, the County foreclosed on the home of Curtis and Coretha Lee for

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[5] Curiously, even though state law suggests that payment plans should be entered into prior to foreclosure, *City of Dearborn Heights v. Wayne Cnty. Treasurer*, Nos. 327928, 327950, 2016 WL 6825434, at *1, *6–*8 (Mich. Ct. App. Nov. 17, 2016) (unpublished), the County gave Ms. Hall a payment plan for $650 per month only two days before her right to redeem ended. Payment Plan, R.32-2, PageID.353. She was told that she would not need to make timely payments and only needed to pay it off before the following February. She made one substantial payment. *Id.*; *Hall v. Meisner*, No. 2:18-cv-14086, Compl. R.1, PageID.30 (E.D. Mich. Dec. 28, 2018). Because her case was dismissed before fact-finding, it is unclear whether the County cancelled the payment plan on April 1, when she failed to redeem and Michigan's statute granted absolute title to the County, or whether the County waited until she missed her next payment. *Cf. In re Matter of Petition of the Treasurer of Oakland*, No. 17-159297, Opinion and Order (Mich. Cir. Ct. Nov. 6, 2018), *available at* R.43-10, PageID.1132 (finding that Oakland County had said "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 City of Dearborn Heights*, 2016 WL 6825434, at *8 ("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).

$30,547 in property taxes, penalties, interest, and costs; after the same series of conveyances, the Southfield Neighborhood Revitalization Initiative sold the home for $155,000—approximately $124,000 more than the Lees' total tax debt. Pet.App.6a. The County likewise foreclosed on the home of Kristina Govan for a tax delinquency of $43,350; the Initiative (after the same conveyances) still holds title to the property, which, like the others, is worth more than her total tax debt. *Id.*

When the County took absolute title to each Homeowner's property, the homes were worth more than each debtor owed. CrossPet.App.109. None of the Homeowners had mortgages on their properties. CrossPet.App.100. None of the Homeowners recovered even a dime for the value of their homes that far exceeded their debts, because a prior version of Michigan's tax statute purported to authorize the forfeiture of all their equity. CrossPet.App.116.

The County now alleges for the first time in its petition for writ of certiorari—without any support in the record—that the properties were "rehabbed" before they were sold, Pet.3. This new factual assertion is inappropriate for consideration on a motion to dismiss. *See Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060, 1063 (4th Cir. 1984). In fact, the Complaint—the allegations of which are presumed true on a motion to dismiss—alleges only that the City contracted with Habitat for Humanity to make "needless repairs." CrossPet.App.102. Moreover, once the government took absolute title to the properties, the act of "taking" was complete. Pet.App.20a, 25a (The County's taking "absolute title to plaintiffs' homes . . . was the action that caused the

injury giving rise to this suit; what happened afterward had no effect upon their legal rights."). The condition of the properties at the time of the taking may go to the amount of just compensation, but does not affect the validity of the constitutional claims.

B. Michigan's tax foreclosure scheme

Michigan's property tax statutes at the time provided that on March 1 any taxes owed from the prior calendar year are "delinquent." Mich. Comp. Laws § 211.78a(2). If still unpaid one year later, the government began a year-long preparation to foreclose on the property. *Id.* § 211.78g(1); *Rafaeli,* 505 Mich. at 444. By the following spring, if the debt was unpaid and procedures were followed, Michigan's circuit court would enter a foreclosure judgment that vested "absolute title" to the property in the county if the debt was not paid by March 31. Mich. Comp. Laws § 211.78k(6) (2019). By the time of foreclosure, more than 40% in interest, costs, and penalties were added to the original property tax debt. Mich. Comp. Laws § 211.78a; Mich. Comp. Laws § 211.78g(3). Once the County took title, a city or town in which the property was located could purchase the property "for a public purpose" by paying only the outstanding tax debt. If not purchased by another government entity, a County would ordinarily sell the property at auction and keep all the proceeds to fund its activities.

Michigan's Legislature amended the laws that applied to the Homeowners in 2020 in response to the Michigan Supreme Court's decision in *Rafaeli*.[6] That

[6] The amendments went into effect on December 22, 2020, with the following explanation: "This amendatory act is curative and intended to codify and give full effect to the right of a former

case held that, consistent with common law protections developed over hundreds of years in English and American law, 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. 505 Mich. at 476–84. The case arose when Uri Rafaeli inadvertently underpaid his property taxes by $8.41, Oakland County foreclosed and took absolute title, then sold the property at auction for $24,500, keeping all the proceeds. *Id.* at 473. The court held that the County violated the Michigan Takings Clause when the County kept the surplus proceeds from the sale of Rafaeli's property, *id.* at 474, and declined to rule on whether it effected a federal taking. *See id.* at 458 n.65.[7]

After the Michigan Supreme Court issued its decision in *Rafaeli*, the state legislature made significant amendments to its tax foreclosure statutes. Crucially, homeowners should no longer lose their equity when the government forecloses to recover tax debts. Regardless of whether this Court grants and evaluates or remands these Cross-Petitions, Michigan law now gives debtors like the

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holder of a legal interest in property to any remaining proceeds resulting from the foreclosure and sale of the property to satisfy delinquent real property taxes under the general property tax act, 1893 PA 206, MCL 211.1 to 211.155 , as recognized by the Michigan Supreme Court in *Rafaeli, LLC v. Oakland County*, docket no. 156849, consistent with the legislative findings and intent under section 78 of the general property tax act, 1893 PA 206, MCL 211.78."

[7] The *Rafaeli* case did not present an excessive fines claim to the Michigan Supreme Court. *See Rafaeli*, 505 Mich. at 484 n.134 (noting abandonment of claim).

Homeowners a right to claim the surplus proceeds from a public sale of their property. Mich. Comp. Laws § 211.78m. Cities that want to exercise a right of first refusal must pay fair market value for the property, and the surplus proceeds from that sale are returned to the debtor. *Id.*

C. Procedural history

Homeowners filed this lawsuit, a putative class action, in federal court one month after the Michigan Supreme Court decided *Rafaeli*.[8] Homeowners alleged, *inter alia*, that the defendants effected a taking without just compensation by taking more than they owed the County, or alternatively violated the Excessive Fines Clause, incorporated through the Fourteenth Amendment. CrossPet.App.112–21.

The district court dismissed Homeowners' claims on a motion to dismiss for failure to state a claim, misconstruing the Michigan Supreme Court's decision in *Rafaeli* as preventing Homeowners' takings and excessive fines claims. Pet.App.53a–60a. The district court issued separate opinions and orders dismissing the non-County defendants, and dismissing certain plaintiffs (not Petitioners or Cross-Petitioners here) on procedural grounds. Pet.App.25a, 51a; CrossPet.App.43, 91.

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[8] The proposed class consisted of "all titleholders of real property and associated property rights including equity and/or surplus proceeds generated by the involuntary transfers orchestrated by Defendants in the City of Southfield during the relevant statutorily-limited time period who were subject to the unconstitutional conduct and concerted actions which resulted in the taking and/or unconstitutional forfeiture of their surplus or excess equity beyond the tax debt owing and due." CrossPet.App.108.

On appeal, the Sixth Circuit held that the government violates the Fifth Amendment's Takings Clause when it confiscates equity in property to satisfy a debt of lesser value. Pet.App.21a. The "self-dealing" Michigan statute allowed the state and counties, "alone among all creditors," to take a landowner's equity "without paying for it, when it collects a tax debt." Pet.App.3a. The court held that confiscation of the equity was "an aberration from some 300 years of decisions by English and American courts" and "[t]he government may not decline to recognize long-established interests in property as a device to take them." *Id.* By taking the Homeowners' equity, the County violated the Fifth Amendment. *Id.*

The court affirmed dismissal of the excessive fines question for "substantially the reasons stated by the district court." Pet.App.22a. The district court, for its part, held that the forfeiture of the Homeowners' equity was not punishment, and therefore outside the scope of the Excessive Fines Clause, because the Michigan Supreme Court in *Rafaeli* said "that the GPTA 'is not punitive in nature.'" Pet.App.59a (quoting *Rafaeli*, 505 Mich. at 449).[9]

The court reversed dismissal of the state law claims and held that on remand the district court must abstain from deciding those. Pet.App.21a–22a (Michigan courts must decide whether the facts alleged violate the Michigan Constitution's Takings Clause).

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[9] The Sixth Circuit also affirmed dismissal of some plaintiffs on procedural grounds. Pet.App.23a–24a.

REASONS FOR GRANTING THE CONDITIONAL PETITION

I. The Lower Court's Treatment of the Excessive Fines Claim Conflicts with This Court's Precedent

The County confiscated the Homeowners' equity, hundreds of thousands of dollars more than the taxes, penalties, interest, and fees owed. This confiscation, imposed to deter noncompliance with tax laws, is at least partly punitive and therefore a "fine" within the meaning of the Excessive Fines Clause.

A. The decisions below conflict with this Court's precedents applying the Excessive Fines Clause to civil punishments

The "[p]rotection against excessive punitive economic sanctions secured by the [Excessive Fines] Clause is . . . both fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition." *Timbs v. Indiana*, 139 S.Ct. 682, 689 (2019) (citation and quotation omitted). To determine whether an economic sanction falls within its protection, the Court considers "whether it is punishment," not whether it is criminal or civil. *Austin v. United States*, 509 U.S. 602, 610 (1993). The Clause applies to forfeitures that are "at least partially punitive." *Timbs*, 139 S.Ct. at 690; *see also United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998) (the Clause "limits the government's power to extract payments, whether in cash or in kind [like forfeiture of an interest in real property] as punishment for some offense"). A forfeiture or fine has the hallmark of punishment when 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." *Austin*, 509 U.S. at 610–11 (emphasis added).

In *Austin*, the Court held that the civil forfeiture of a mobile home and auto body shop used in an illicit drug sale was "punishment," and therefore a fine subject to the Eighth Amendment. *Id.* at 604–06. The Court noted that forfeitures under the statute in that case looked like punishment because they were neither fixed in amount nor linked to the public harm caused by the property owner's actions. *Austin*, 509 U.S. at 621. They "var[ied] so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental," thus defying description as "remedial." *Id*. at 622 n.14.

The same is true of Michigan's former home forfeiture scheme. Ms. Hall, for example, lost her home worth approximately $308,000 to satisfy a debt of $22,642 in taxes, penalties, interest, and costs. The government confiscated property more than 13 times greater than her debt. Had her property been worth twice as much with the same or lesser debt, the penalty would have been capriciously greater. As in *Austin*, there is no relationship between the debt owed and the sanction imposed.

The type of offense here differs from *Austin*—the offense of depriving the sovereign of timely revenue and causing the trouble of collections versus the offense of allowing one's property to be used in criminal activity—but that does not change the fact that the forfeiture here works a "payment to a sovereign as punishment for some offense, and, as

such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin*, 509 U.S. at 622 (quotation and citation omitted). Although the obligation to pay taxes is nonpenal, tax *penalties* are consistent with the conception of public offenses described as punitive in *Huntington v. Attrill*, 146 U.S. 657, 668 (1892): "The test whether a law is penal, in the strict and primary sense, [has been] whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." *See also Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 278–80 (1935).

Yet the lower courts held that the sanction here could not be punitive, because the Michigan Supreme Court said the purpose of the statute was primarily to collect taxes. Pet.App.59a. Taxation does not hold such power to immunize itself from constitutional scrutiny. *See Child Labor Tax Case*, 259 U.S. 20, 36–38 (1922) (striking down a tax penalty under the Tenth Amendment and noting, "[t]o give such magic to the word 'tax'" when imposed for an offense against the public as to allow taxes to escape constitutional scrutiny—it would "break down all constitutional limitation of the powers of" the government). And although this case arises in the overall context of taxation, Homeowners are *not* challenging the amount of the tax and its associated penalties, interest, and costs. They are challenging the confiscation of property *above and beyond* the tax. This aspect of the decisions below conflicts with *Austin* and *Timbs*, which said that a statute only needed to be partly punitive.

Thus, the lower courts' dismissal of the Homeowners' Excessive Fines Clause claim conflicts with this Court's precedent and warrants review.

B. The lower courts' decisions conflict with standards established by this Court in *Kokesh v. S.E.C.* for determining when a civil sanction constitutes a punishment

Kokesh v. S.E.C., 581 U.S. 455, 457 (2017), confirms the punitive nature of a statute that takes more than necessary to remedy a harm. *Kokesh* was not an Excessive Fines Clause case, but one that determined the meaning of the term "penalty" in a statute of limitations governing federal prosecution "for the enforcement of any civil fine, penalty, or forfeiture." *Id.* (quoting 28 U.S.C. § 2462). At issue was whether the U.S. Securities and Exchange Commission was subject to a five-year limitation period in seeking disgorgement of money as a remedy for the violation of securities laws. *Id.* at 457–59.

After defining a "penalty" as "a punishment . . . imposed and enforced by the State for [an] . . . offense against its laws," *id.* at 461 (quoting *Huntington*, 146 U.S. at 667), the Court engaged in a careful discussion of the concept of punishment that bears directly on Excessive Fines questions, including the one presented by the Homeowners. "When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Kokesh*, 581 U.S. at 465 (citation omitted). Disgorgement is in many cases a punishment because it "go[es] beyond compensation" for loss, stripping the penalized person of more funds than needed to provide restitution or compensation for a loss. This element of the sanction

can only be understood as having a deterrent effect, and "[s]anctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'" *Id.* at 464, 467 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979), and citing *Bajakajian*, 524 U.S. at 329 ("Deterrence . . . has traditionally been viewed as a goal of punishment.")).

The district court said that the law's aim was to "encourage" timely tax payments and therefore not punitive, which precluded application of the Excessive Fines Clause. Pet.App.59a. But this conclusion, affirmed by the Sixth Circuit, is contrary to *Kokesh*'s analysis of the Court's Excessive Fines jurisprudence, which "emphasized 'the fact that sanctions frequently serve more than one purpose.'" *Kokesh*, 581 U.S. at 466 (quoting *Austin,* 509 U.S. at 610). "'A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Id.* at 467 (quoting *Bajakajian,* 524 U.S. at 331 n.6).

Michigan's former scheme stripped property owners, including the Homeowners here, of more than needed to satisfy their debts plus reasonable interest, penalties, and costs to compensate the government for loss. Just as in *Kokesh*, Michigan's statute went "beyond compensation," and accordingly had the effect of punishing property owners for violating a public law. *Id.* (quotation omitted). The Eighth Amendment applies when a civil sanction is "at least partially punitive," *Timbs*, 139 S.Ct. at 690, and therefore applies to the penalty imposed on the

Homeowners. *See Sessions v. Dimaya*, 138 S.Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("Today's 'civil' penalties include confiscatory rather than compensatory fines . . . .").

This Court has counseled that "[t]here is good reason to be concerned [about] fines, uniquely of all punishments" because most types of punishment cost a state money whereas "fines are a source of revenue . . . . [I]t makes sense [therefore] to scrutinize government action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991). The penalty imposed on Ms. Hall, the Lees, and Ms. Govan in this case, resulting in a large windfall to the government—and the even greater sums commonly captured in other similar cases—are testimony in support of that concern.

II. Lower Courts Have Conflicting Approaches to Civil Confiscations Under the Excessive Fines Clause

While this Court's decisions in *Timbs* and *Bajakajian* hold that the Excessive Fines Clause applies to civil confiscations in some circumstances,[10] lower courts remain confused about whether confiscations of money or property in a purely civil context is subject to constitutional limits.

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[10] In *Bajakajian*, the offense was solely a failure to report the transportation of money outside the United States, with no relation to other illegal activities, and the defendant was not a money launderer, drug trafficker, or tax evader, the type of individual the statute was designed to punish. 524 U.S. at 337–38.

In *Yates v. Pinellas Hematology & Oncology, P.A.*, the Eleventh Circuit considered whether a monetary award imposed under the False Claims Act is a fine for the purposes of the Excessive Fines Clause. 21 F.4th 1288, 1308 (11th Cir. 2021). Like the lost home equity, the amount of the award did not correspond to any monetary injury caused by the person subject to the penalty. Because the False Claims Act fines are "compulsory irrespective of the magnitude of the financial injury to the United States, if any," the court held that the penalties were "at least in part punitive" and therefore fines subject to analysis under the Excessive Fines clause. *Id.*

The Ninth Circuit takes the same approach to penalties that bear no connection to the offense. In *Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000), the court considered a fixed deduction from funds received by prison inmates that supported a victim's compensation fund. Because the money was "[e]xtract[ed] . . . from each and every inmate, without regard to the existence and extent of any injury to a victim," it was not purely remedial, but was "punitive and subject to Eighth Amendment scrutiny." *Id.*; *see also Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020) (late fees connected to parking tickets are subject to Excessive Fines Clause per *Bajakajian*); *United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001) (similar ruling regarding False Claims Act penalties); *Hays v. Hoffman*, 325 F.3d 982, 992 (8th Cir. 2003) (same).

The Seventh Circuit also applied an excessive fines analysis to a flat $500 administrative penalty imposed on owners of vehicles found to contain illegal drugs or guns in *Towers v. City of Chicago*, 173 F.3d

619, 621 (7th Cir. 1999). The court held that the penalty could not be "solely remedial" because it does not compensate the city for any losses. *Id.* at 624. Instead, its plain "punitive purpose" was to "deter[] owners from allowing their vehicles to be used for prohibited purposes." *Id.* Even if this deterrence was only a part of the reason for imposing the penalty, that was enough to warrant consideration of whether the amount violated the Excessive Fines Clause. *Id.* (applying *Austin*, 509 U.S. at 609). *See also Dorce v. City of New York*, 608 F.Supp.3d 118, 143–44 & n.10 (S.D.N.Y. 2022) (noting discrepancy between taxes owed and equity seized and that "incentivizing prompt payment is merely another way of saying deterring late payment, which 'reflects a purpose that is deterrent in part, and therefore punitive, as opposed to furthering the sole goal of compensating for lost revenue'") (citation omitted).

Some state courts have also analyzed civil penalties as fines subject to the Excessive Fines Clause. For example, the California Supreme Court analyzes purely civil penalties under the Excessive Fines Clause. In *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 712 (2005), the court considered a statute that penalized "nonsale distribution" of cigarettes on public property where minors may be present. "Each distribution of a single package . . . to an individual member of the general public" is subject to "a civil penalty of not less than $200 for one act, $500 for two acts, and $1000 for each succeeding act." *Id.* After handing out cigarettes at several events in 1999, R.J. Reynolds was fined

$14,826,200.[11] *Id.* The California high court unanimously held that the penalty plainly qualified as a fine under *Bajakajian*[12] and remanded for a determination of whether the fine was unconstitutionally excessive. *Id.* at 731 (fine would be excessive if the company believed, in good faith, that it acted in compliance with the law and if the Attorney General delayed notifying the company that it was out of compliance in order to run up the amount of the penalty).

Similarly, in *Colorado Department of Labor and Employment v. Dami Hospitality, LLC*, 442 P.3d 94, 96 (Colo. 2019), *cert. denied*, 140 S.Ct. 849 (2020), the Colorado Supreme Court applied the Excessive Fines Clause to civil penalties ranging from $250 per day to $500 per day, imposed each day that a business was out of compliance with the state's workers' compensation law. The court held that the penalties were imposed regardless of any underlying criminal offense, and that there is no relevant distinction between penalties that "are part of a criminal scheme or a civil one." *Id.* at 100. Relying on *Austin* and *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 285 (1989), the court held that the

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[11] R.J. Reynolds gave away cartons and packages containing a total of 108,155 packs of cigarettes to 14,834 people at its booth or tent at a street fair, motorcycle race, car show, beer festival, and similar events. Each recipient showed proof that they were current smokers and at least 21 years old. *Id.* at 713.

[12] *See also Hale v. Morgan*, 22 Cal.3d 388, 407–08 (1978), in which concurring Justice Newman opined that a $100 daily fine for cutting off a nonpaying tenant's utilities to prompt him to leave violated the state constitutional provision barring excessive fines. The majority struck down the fine on due process grounds. *Id.* at 397–403.

Excessive Fines Clause applied, even to corporations. *Dami Hosp.*, 442 P.3d at 100. It then remanded for the lower court to consider whether the fine was unconstitutionally disproportionate to the gravity of the offense, in conformity with the test adopted in *Bajakajian*. *Id.* at 101.[13] *See also Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 554 (Minn. 2003) (penalty on employers who disregard wage levy notices from the state that exceeds costs needed to investigate or recover lost revenue is punishment because it can only be explained by and "*must* be calculated to deter").

To the contrary, the First Circuit's decision in *United States v. Toth*, 33 F.4th 1 (1st Cir. 2022), held that the civil FBAR penalty was not a fine subject to the Excessive Fines Clause because it was "not tied to any criminal sanction," *id.* at 16, and served a remedial purpose, even without any correlation between the penalty and the financial loss, if any, caused by the underlying violation. *Id.* at 18–19. *See also McNichols v. Comm'r*, 13 F.3d 432, 434 (1st Cir. 1993) (in a case involving a convicted drug dealer challenging penalties for income tax evasion, the court limited *Austin* to its facts and the specific statute at issue). Although this Court denied Monica Toth's petition for writ of certiorari, Justice Gorsuch observed that the First Circuit's decision is "difficult to reconcile with our precedents." *Toth v. United States*, 143 S.Ct. 552, 553 (2023) (Gorsuch, J., dissenting from denial of certiorari) (noting that "civil" and "remedial" labels should not insulate partially

[13] Additionally, the court held that "courts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment." *Id.* at 102.

punitive penalties from analysis under the Excessive Fines Clause).

CONCLUSION

If the County's petition is granted, so too should the Homeowners' Cross-Petition be granted.

DATED: April 2023.

Respectfully submitted,

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