

## Short Circuit | Episode 142

### *Excessive home foreclosures and parking fines*

ANTHONY: Hello and welcome to *Short Circuit*. Your podcast on the Federal Courts of Appeals. I'm Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice.

With me here today is Wesley Hottot also of the Institute for Justice, but also a special guest Christina Martin of the Pacific Legal foundation. Welcome both of you to short circuit.

Well today, we're going to be talking about foreclosures and excessive fines, and both of these attorneys know an excessive amount about both subjects. So, we're going to start with Christina who's going to tell me about a piece that she actually argued and won just recently at the Michigan Supreme Court.

CHRISTINA: Thanks. So, the Michigan Supreme Court just issued a great opinion in a case involving our client Uri Rafaeli. Mr. Rafaeli underpaid his property taxes by \$8.41 on his Southfield Michigan house. And so the Oakland County treasurer did what they do in Oakland County and across Michigan, they foreclosed on the house, sold it at an auction for \$24,500, and then the County kept all \$24,500. Rather than refund the, the profits back, the County actually uses that money to fund other government projects. We said, that's obviously wrong and it's also unconstitutional, so we sued. We got a great opinion from the Michigan Supreme court, recognizing that what happened there was unconstitutional.

ANTHONY: I understand you made a few different claims this case, but it ended up being about the state Takings Clause. Is that right?

CHRISTINA: That's right. So the constitution requires in Michigan, the same thing as really the federal constitution, which is when government takes your private property, it has to pay you for it. That's pretty common sense. And the Michigan Supreme Court held that yes, there is in fact, a traditional right under Michigan law, that when government takes your property to collect a debt, it does so subject to traditional protections that is sell the property and then refund all the extra money back to the former owner.

That's a pretty common-sense decision, but we were very happy to see it, especially after the lower courts across Michigan had largely rejected that idea.

ANTHONY: And what I understand, there's this older case that we've talked about on *Short Circuit*, many times called *Bennis v. Michigan* from the US Supreme Court that is a civil forfeiture case and that was getting in the way of courts finding a constitutional violation in this, this kind of situation. Can you tell us a bit about *Bennis* and then how the court was able to get around it?

CHRISTINA: Yeah, so *Bennis* was as civil forfeiture case where the property owner's car was taken and obviously that was in the context of, there was some criminal activity in that case. And fortunately, Institute for Justice actually filed an Amicus, brief explaining very nicely why that case doesn't apply, which we found quite helpful. But the bottom line was the court agreed that it doesn't apply—this, this is not a civil forfeiture. This is not the sort of instance where you can justify taking everything from someone because the property is tainted with criminal activity. This is an entirely different circumstance.

ANTHONY: Also, I understand there was a, there's a concurrence and there's a dispute between the concurrence and the, and the majority opinion about exactly what the property right is here, which frankly to me, was a little mysterious of what the difference is, can you enlighten us?

CHRISTINA: Well, I think that in a technical sense the concurrence is probably more right, but it's pretty high-level thinking going on in that concurrence. And I think for most people, they just want to cut to the bottom line, which is if government's going to take your property to collect a debt, it ought to only take as much as it's owed.

And the concurrence by Justice Viviano was focusing sort of what is the property that's actually taken? Well, it's a person's entire property, it's their equity and not the proceeds after the property is sold. And really his, his opinion would help. I think it would have prevented some of the cases that could come to the court down the road, if the, especially if the legislature doesn't fix things now because there are many properties in Michigan that are taken and then not sold at all.

ANTHONY: Wesley, your thoughts?

WESLEY [4:53]: I was also very puzzled by the Viviano concurrence, but I think I understand it now. It's really the difference between whether they have to pay, the government has to pay you compensation for, the equity, which is Viviano's opinion, versus, you know, with the government seems to be arguing in this case, was that, you know, we shouldn't have to act as your real estate agent and once we've sold something, share the proceeds with you. Is that the distinction?

CHRISTINA: From my perspective, it's more about the technical interpretation of the state constitution. And I think Justice Viviano's would answer a lot more questions. Whereas the majority opinion leaves a lot to be left decided down the road. I don't think, some of the concerns that he has I don't share because I think there's a good possibility that the traditional right that's recognized by the court would be enough to prevent some of the harm he's worried about. For instance, what happens in those cases where the state municipalities don't actually sell the property, instead, they just take it and give it to a government entity, for instance.

WESLEY: Yeah, it's almost like property law is hard. You know, I, I just want to say that it was a real honor and pleasure for us to have the opportunity to support PLF in this case. It seemed like such a hard case to win and, you know, having lost in the trial court, having lost on appeal, I just want listeners to appreciate what a heavy lift this was and the fact that you won and won unanimously with this sort of hairsplitting concurrence agreeing with the outcome, is just remarkable. And it shows the power of public interest work generally, and, and just the superb litigation shop that you all run.

ANTHONY: And yet the amazing thing, I mean, to, to someone who isn't averse to the, this area of law is that this could even be a question in the first place. That someone cannot have paid \$8 a property tax, and yet, somehow that ends up in losing the entire property--not just penalties and interest in that kind of thing, but every single penny of your equity, all of a sudden can be taken away. It's just astounding. And yet two courts agreed with, with you on that-- I'm sorry-- two courts agree with the government on that.

I understand also that this, this is Michigan is one of nine states. I think the opinion said where this is the law. Do you think this will have an impact there?

CHRISTINA: Yeah, it's actually more than nine states where the government takes everything to collect on a small debt. In some of those States, they actually arguably do something worse: they take all of your equity and they give it to another private party. And then there's a handful of states like Michigan, where they take the property, sell it and use all that extra money to fund other pet projects that the government wants to fund--sometimes affordable housing, sometimes, which is really quite funny when you think--I mean, it's, it's bizarre that they would kick people out of their houses and turn them into renters, essentially.

But yeah, I think this could have an impact across the country. We've been taking on legislative efforts along with litigation, trying to end this, this, what we call home equity theft in the United States, it's not a traditional practice. Like the Michigan Supreme Court recognized traditionally, if government wants to collect the property tax, it has to sell the property and, then give, to the highest bid of course, and then give you the extra money. And back in the 1800s, if they didn't do so, you could sue in trespass, you could sue in trover. You, you had, you could actually Sue the sheriff who sold the property.

Somewhere along the way in these dozen or so states, that idea was lost. But we will be pushing very hard to try to bring that traditional right, which is protected by the Takings Clause, not just trespass. We want to bring it back to all of those States.

ANTHONY [9:15]: Yeah, let's do it again. It's just an amazing story that it even got to this point, but a real shout out to Pacific Legal Foundation for bringing this case and rectifying this wrong.

Wesley was part of that Amicus brief that the Institute for Justice filed in the Michigan case.

And he's going to tell us a bit about some, I think else he knows about, which is excessive fines and the, some of you may have heard a show about, we talked about how he argued the excessive fines clause at the Supreme Court couple of years ago. That case is now having reverberations across the nation, including on the, the nation's streets where people who are fined for parking are, are bringing it up in, in their cases, including one involving the city of Los Angeles. So, Wesley take it away.

WESLEY: Thanks. So the night circuit last week in a case called *Pimentel v. City of Los Angeles* held that Los Angeles is \$63 fine for overstaying a parking meter was not excessive under the Eighth Amendment Excessive Fines Clause, but reversed holding that, the district court should consider whether or not the \$63 late fee on top of the \$63 fine might be excessive. And in the course of the opinion the, the panel holds that municipal fines under the case that you were alluding to *Timbs v. Indiana*, are fines within the meaning of the Excessive Fines Clause. And that matters because it brings them under judicial scrutiny as to whether they are a grossly disproportionate to the gravity of a given offense. That's the Supreme Court's test from a case called *Bajakajian v. United States*. So really what was at issue here was can something as, if you will, pedestrian, as a parking fine, or the penalty that you have to pay for paying it late, can that be a fine within the meaning of the Eighth Amendment? And the panel says, two to one, yes, it can.

Now there's a concurrence from Judge Bennett saying, look, I agree with that only in this case because the City of Los Angeles conceded, that its, that its fines were within the meaning of the clause. But in general, I don't think that municipal fines should be subjected to excessiveness analysis.

And you know, I think that highlights, for our listeners, what was at stake in the case. It's not so much, is this given \$63 penalty excessive--although they're going to decide on remand, whether or not the, the late fee is. I think the signal from the court or that it probably isn't going to be excessive. But rather, what kinds of fines and fees are, are subject to constitutional limitations?

For the longest time, it's really only been understood as being criminal fines. But there are many cases as the, as the panel points out, in which civil fines have been subjected to excessiveness analysis. And there's no principled reason for excluding those fines that are labeled as being perhaps remedial or, or municipal in character. They are, as the Supreme court has defined the word fine, payments to the sovereign as punishment for some offense. And as, as *Timbs* pointed out is, as we argued in the case from the beginning, and that is a, a, the protection against excessive financial extraction from people is a bedrock principle of Anglo-American law going back to Magna Carta. You know, the traditional lawyer wisdom is that if you're citing Magna Carta, you're losing. But, but, but here, and, and I think in, in Christina's case in Michigan, too, these bedrock principles are, are very important to return to because they illustrate how far courts have gotten from applying the constitution as written. You know, we, we live in an era where Justice Kagan says--I think correctly--we're all originalists now. But it's bananas that, the, the bedrock document of our, of our judicial system, the Constitution is very seldom read, its language is very seldom taken seriously or applied. And I think that this *Pimentel* decision does a great job of, of saying, look, they call it a fine, it acts like a fine, it enriches the government and takes money away from people, punishing them for something. There's no, de minimis exception to the Excessive Fines Clause.

And you know, this tension is really well illustrated by Bennet's concurrence where, you know, he seems to think that assessing municipal parking fines is something that's just beneath the dignity of the federal courts. You know, he says, "I simply don't believe that every time a city or town imposes a municipal fine, that is subject to a 1983 action."

Why? He doesn't say, he just doesn't believe it. And you know, he says the Congress in enacting the Civil Rights Acts, following the adoption of the 14th Amendment--these are, for listeners, these are the laws that make federal constitutional principles applicable to states and municipalities--he says that the Congress certainly did not intend for these noble statutes to redress the types of "rights" asserted here, and rights is in quotation. Well, maybe they did and maybe they didn't, but the, the, the text of the Constitution doesn't make this distinction between noble rights and ignoble rights, rights deserving redress and rights not deserving redress. So, I think this is a good example of the tension even today on the federal bench about when the Constitution matters and when for reasons of ipse dixit, it, it just doesn't, you know, we say so, we just think it doesn't matter because it's too small for us.

I think the, the, the majority on the panel did a great job and, and says, you know, at one point something to the effect of the Excessive Fines Clause is not relegated to the era of parchments and parliaments. It's still a vital protection for people today. And, you know, I, I think that the panel had the sentiment that if people are going to bring challenges to municipal fines, let them bring them, you know, and, and we'll decide them on a case by case basis. Obviously excessive fines are the exception, not the rule.

So, you know, I think it's a great outcome. I don't know that it amounts to much for the litigants in this particular case, but it, it definitely illustrates something important about what's happening and what's not happening on the federal bench these days.

ANTHONY [16:47]: Christina, have you ever been fine for parking in Los Angeles?

CHRISTINA: Not Los Angeles, but Sacramento and I had the same thing happened to me, my fine doubled after like two weeks, maybe it was a little longer, but yeah, it was pretty frustrating.

And I just want to say I was really excited by this opinion, because one of the arguments that we've gotten in these tax cases when we assert that if it doesn't it's, it's not a taking, it's certainly an excessive fine, is that it doesn't apply in the civil context and that it only applies in the criminal context. And that to me is very, it's ridiculous, but it's a very frustrating argument to have to make. And so it's exciting to see this opinion very clearly say, say, yes, it's going to apply in the civil context.

WESLEY: Absolutely. You know, this is not, as we said in *Timbs* a labeling game. The, the Excessive Fines Clause and other protections of the Constitution are designed to limit government power and you completely neuter those protections if you say, "well, if you call it civil, then you can do whatever you want." There, it would have to be in the Constitution that it said only criminal fines may not be excessive. As I point out, you know, the cruel and unusual punishment clause does. You know what I mean?

It says like in, in cases involving, well, it's not the cruel and unusual punishment clause, right, that I'm thinking of. It's the Sixth Amendment that says in cases involving serious criminal allegations or offenses or something like that. So, it's not like the framers didn't know how to limit things to one context or another. We've just invented these exceptions for the convenience of courts. And, and that's not what they're there to do.

ANTHONY: Wesley, I seem to remember in the *Timbs* argument, perhaps it was, it was in the briefing that there was a parade of horribles type of argument that, you know, if, if, if you apply the Excessive Fines Clause, we're going to have a bunch of litigation about parking tickets. And here we are now with litigation, about parking tickets. Am I right in remembering that? And what kind of limiting principles do you think into the courts might try here?

WESLEY [19:03] : Well, Yes, you're right. That, that came up in *Timbs*. I think the limiting principle is that, you know, there has to be some measure of punishment. The Supreme Court has been clear about that since the early nineties, in a case called *Austin v. United States* that look, fines, fees, forfeitures, they often serve several different purposes, like in Christina's case, they're, they're designed to retrieve the money that the government has lost. They're designed to deter people from failing to pay in the first place, they're designed to punish people that don't pay. So, in the real world, these, these governmental tools often serve several functions, but if any of those functions is punitive, that is that the government is attempting to punish someone, then the clause applies. And the question becomes not, do you have a right to be free from excessive fines, but rather is this fine excessive or not? And as I was saying earlier, I think that the floodgates argument is overblown because, in order to be excessive, it's going to have to be out of the mainstream. Every parking ticket that I get might piss me off, and, you know, I feel like it's more than what the city really deserves, but if it's not grossly disproportionate to the gravity of the offense, it's not gonna, it's not gonna result in a winning constitutional claim. And of course, there are other limitations on, you know, federal court jurisdiction and how you can, you know, make a claim out of a parking ticket. I, I don't see it.

But even if we were going to have some sort of flood of litigation about parking tickets, if that's what the Constitution commands, then we should be doing it.

ANTHONY: What do you make, Wesley, of the application of the *Bajakajian*, if I'm mispronouncing that test. Because I thought after *Timbs* it was a little open, what tests actually applied in, in this kind of case.

WESLEY: Oh, it remains open. It remains the subject of an active circuit split. It's something that the Institute for Justice is currently litigating in Indiana on remand from the *Timbs* decision. We got a great decision out of the Indiana Supreme Court; they're applying what we think is the correct standard for excessiveness.

In short, you have to look at all of the circumstances. Some relevant considerations for example, are, you know, the extent to which the conduct that's being punished was related to other criminal conduct. One of the really interesting wins that we had in Indiana was that the court agreed with us.

That you look also to the offender's ability to pay that what is excessive for a rich man might be very different for a poor man, and that you have to contextually take these things into account.

The Ninth Circuit and the *Pimentel* decision points to that possibility as the Supreme Court did in *Timbs* and reserves the question for later decision.

So, you know, *Timbs* was in my view, yes, it was about clarifying that the clause applies to state and local forfeitures, but it was also about reinvigorating interest in and litigation around the clause. And *Pimentel* is a great example of how there are still a lot of interesting questions out there.

How do you decide when something is excessive, do you take into consideration a person's ability to pay? And you know, believe it or not the Supreme Court hasn't answered those questions. And so, I think in another 25, 50, a hundred years, we will have developed some case law that makes clear when things are excessive and when they're not with like a little bit more precision than what we have today.

Everyone seems to be searching for some sort of mathematical standard but, um, that that's never going to work in the real world because what we're trying to prevent is from the government using its power too much. And that's always going to require a careful contextual analysis rather than some sort of formula.

CHRISTINA: Yeah. I think that, especially in the tax foreclosure context, that will also apply because you know, some of these States impose really hefty penalties and interest on people who are struggling to pay their bills in the first place. And then when they go further and they take even more at the end of that process, then that's especially a hefty penalty for somebody who can't pay in the first place as compared to someone who maybe just doesn't want to pay.

WESLEY [24:07]: Yeah. And you know, what are we trying to do here? Are we trying to create a permanent underclass of people who can never get out from under their fines, or are we trying to deter the conduct in question and sort of help people reform?

I mean, I can't help, but go back to Magna Carta. I mean, Anglo American law had figured this out in the 13th century with the idea of *salvo contentamento*: the, that, that the government cannot take from a person, the things that he or she needs to carry on with life. So, like, you know, the example in the ancient or, you know, sort of medieval English context is, you know, you can take a man's horse, but you can't take, you know, his oxen, his plow too cause then he can't even like, you know, farm.

And similarly, here, it, it doesn't make a lot of sense to have a constitutional standard or a policy that allows the government to break people permanently. And we see that in a lot of different contexts, you know, it's, it's being discussed right now in the criminal context. And I think we need a national reckoning about this sort of taking diffuse burdens and, and, and dropping them like a hammer on one person, making them pay for society's costs.

CHRISTINA: Yeah, it, Magna Carta also said that you, the king could not take a person's land when he could take personal property sufficient to pay a debt. And it was for the same reason--it's the idea that you can't break a person and you can't take their ability to be able to continue making money. Which, you know, in a, in a largely grew up agriculture, I guess, agrarian society that, that was land was especially important, but today it's still important. People need land to live, so they need someplace to live. And when people lose their homes, their biggest source of savings, obviously that's devastating. But I think also, I mean, we see a lot of fines and fees and, in a land use context where people don't mow their lawn or they don't get a permit for a burglar alarm or they, they get their permit late and the amount of fees they keep on people. It's just outrageous. And it's something that definitely needs to be dealt with.

Like the 11th Circuit for instance, had an opinion where they said that if the fines accrue by the day, it's by definition proportional, that's just outrageous because people lose everything over small debts. And I mean, ultimately, it's going to happen, someone's going to have to put a stop to this.

WESLEY [26:52] Well, it makes, it makes me wonder that 11th circuit case, if, if the fines accrue by the second, does that make them even more proportional?

CHRISTINA: I've wondered the same, the same thing? Why is the day special? I mean, is it a new offense each day that your grass has not been mowed? It doesn't quite make sense to me.

WESLEY: Well, each day is a new opportunity to serve the government

CHRISTINA: Well, and if it's, so if it's such a huge injury to people that have their, you know, for this lawn, not to be mowed or the permit that they didn't get when they installed their burglar alarm, then why doesn't the government have to go through the hassle of giving you a new citation each and every day that they want to find you? And they don't, they don't, you have to do that. They can just say no. Where from henceforth, you shall be fined a hundred dollars per day.

WESLEY: And, you know, I think some people might be tempted to kind of dismiss this conversation as us being overly focused on the rights of individuals as, as against like the rights of the community. But I don't look at it that way. mean, there's, there's a community interest in not making people permanently poor based on how they're disproportionately policed, how they're disproportionately fined or the like. And in an era where no one ever wants taxes to go up, we are in like, as the Supreme court said in *Timbs* in a, in an opinion by justice Ginsburg: there's good reason to be concerned that the government will disproportionately try to extract money from individuals.

CHRISTINA: Yeah. I mean, we don't see this from Comcast or like for private companies, you know. If I'm late on my Comcast bill, because I missed the bill or whatever, they're not fining me the same amount, the other hundred bucks a month or something. They don't start fining me daily a hundred dollars per

day for being late on paying my bill. Everybody would be outraged if they did that and they also don't come and take my TV, you know, as punishment, if I don't pay my hundred dollars. And yet when government does it, some people just want to shrug.

Now, fortunately, when you get an outrageous enough facts, like somebody who underpays their property taxes by \$8, people can see the injustice there or you know, I read a case, unfortunately, too late, but I read a case where a man failed to get an administrative, you know, an over the counter permit for a burglar alarm. He failed to register it. And the fine ended up being something like \$80,000. For something that there was literally no harm inflicted.

ANTHONY: I would call that excessive.

CHRISTINA: So would I, so would I. Unfortunately, the local government didn't agree and, and the, the court that reviewed the decision thought it was fine.

WESLEY: Hey, at that point, you're better off without the alarm, just let the robbers come in and take your stuff.

CHRISTINA: That's what I thought. I mean that the alarm sure. It keeps the burglars out, but the government could come and rob you in broad day life.

ANTHONY: Well, I appreciate your thoughts from both of you about this, the excessive amount of fines that we have in foreclosures due to the governments. But I think we can all be agreed that a solution to this, not the only solution, but a solution to this is for courts to be engaged. And it seems like the courts, both of these opinions this week were engaged in trying to protect our property rights. And so, I will ask all of you listeners to stay engaged and thank you for joining us on *Short Circuit*.