No. 25-95

IN THE

Supreme Court of the United States

MICHAEL PUNG, PERSONAL REPRESENTATIVE OF THE ESTATE OF TIMOTHY SCOTT PUNG,

Petitioner,

v.

ISABELLA COUNTY, MICHIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

By historical analysis looking back to the Magna Carta, the Michigan Supreme Court has held that the former owner of tax-foreclosed property has a common law property interest (protected by the Michigan Constitution) in "surplus proceeds," if any, produced by the tax-foreclosure sale (i.e., the sale price, minus the amount of the tax delinquency and fees incurred by the government relating to the foreclosure process that had to be undertaken as a consequence of that delinquency). *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 477, 482-4, 952 N.W.2d 434, 462, 465-6 (2020). By similar historical analysis, this Court has described that the Fifth Amendment likewise protects this interest in the "overplus," "excess" or "surplus" proceeds from a tax-foreclosure sale. *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631, 639-43 (2023).

Looking to case law from the alternative contexts of eminent domain and regulatory appropriation, Petitioner Pung insists that the former owner of tax-foreclosed property is constitutionally entitled to be compensated for the supposed "fair market value" of the property, regardless of the amount actually yielded by that tax-foreclosure sale. The questions presented are:

I. Whether the Fifth Amendment requires that compensation in the context of tax foreclosure be determined by the supposed "fair market value" of the foreclosed real estate, rather than the foreclosure sale proceeds actually obtained?

II. Whether the "Excessive Fines Clause" of the Eighth Amendment provides an alternative source of protection, whereby the former owner of tax-foreclosed property can recover the "fair market value" of the real estate (and possibly more) as "damages"?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Michael Pung was the Plaintiff in the United States District Court for the Western District of Michigan (*transferred to the United States District Court for the Eastern District of Michigan*) and the Appellant/Cross-Appellee in the United States Court of Appeals for the Sixth Circuit.

Respondent Isabella County, Michigan, was a Defendant in the United States District Court for the Western District of Michigan (*transferred to the United States District Court for the Eastern District of Michigan*) and an Appellee/Cross-Appellant in the United States Court of Appeals for the Sixth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Respondent is not a publicly owned corporation or a subsidiary or affiliate of such.

RELATED PROCEEDINGS

1. In re Petition of Isabella County Treasurer, No. 2014-011664-CF, Isabella County Circuit Court. Judgment entered October 8, 2015.

2. In re Petition of Isabella County Treasurer, No. 329858, Michigan Court of Appeals. Judgment entered April 18, 2017.

3. In re Petition of Isabella County Treasurer, No. 155846, Michigan Supreme Court, Order Denying application for appeal entered October 31, 2017.

4. *Pung v. Koepke, et al.*, No. 1:18-cv-01334, United States District Court for the Western of Michigan. Judgment (in part) entered September 29, 2020.

5. *Pung v. DePriest, et al.*, No. 1:20-cv-13113, United States District Court for the Eastern District of Michigan. Judgment entered September 29, 2022 (amended *nunc pro tunc* June 5, 2025).

6. *Pung v. Koepke, et al.*, Nos. 22-1919, 22-1939, United States Court of Appeals for the Sixth Circuit. Judgment entered January 28, 2025.

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COUNTER-STATEMENT OF THE CASE

Under Michigan law, township assessors are responsible to determine the taxes owed upon real estate within their township. Mich. Comp. Laws §§211.19 and 211.24. The township assessor is "certified" to fulfill that function. Mich. Comp. Laws §41.61(10).

If the assessed taxes are not paid, the county treasurer is notified of the deficiency. Mich. Comp. Laws §§211.55 and 211.57. The county treasurer is then obligated to commence foreclosure proceedings to enforce collection. Mich. Comp. Laws §211.78a et seq. There is no authority for a county treasurer to second-guess the assessor's determination. Rather, the treasurer's statutory obligation is to act in accordance with the notice of delinquency.

As representative of the Estate of Timothy Scott Pung, Petitioner Michael Pung had a long-running dispute with the Union Township Assessor (Patricia DePriest) regarding whether the estate's property was entitled to Michigan's "Principal Residence Exemption" (PRE). DePriest denied the PRE. Pung refused to pay the resulting additional tax.

Union Township reported the tax delinquency to the Isabella County Treasurer (Steven Pickens). The Treasurer instituted tax-foreclosure proceedings against the Pung Estate's property as required by Mich. Comp. Laws §211.78a et seq. The Michigan Court of Appeals upheld the foreclosure against a due process challenge by Pung. *In re Petition of Isabella County Treasurer*, No. 329858, 2017 WL 1393854 (Mich. Ct. App. April 18, 2017).

Petitioner Pung commenced this litigation in the United States District Court for the Western District of Michigan alleging that the assessor, the treasurer and a clerk of Michigan's Tax Tribunal engaged in a "conspiracy" to violate the due process rights of Michael Pung, as Personal Representative of the Pung Estate with regard to the PRE. (W.D. Mich. R. 1, Pg ID 1-8, Original Complaint). Those claims were ultimately rejected by the courts below and are not at issue in Pung's petition to this Court.

But during the pendency of this litigation, the Michigan Supreme Court decided *Rafaeli, LLC v Oakland County*, 505 Mich. 429, 952 N.W.2d (2020). By historical and legal analysis looking back as far as the Magna Carta, the Michigan Supreme Court confirmed that the former owners of tax-foreclosed property in Michigan retain a common law interest (protected by Article 10, §2 of the Michigan Constitution) in the "surplus proceeds," if any, yielded by the tax-foreclosure sale. *Rafaeli, LLC*, 505 Mich. at 477, 482-4, 952 N.W.2d at 462, 465-6.

Even before the *Rafaeli* decision, Pung amended his Complaint to add claims that the Pung Estate was entitled to just compensation for its property having been "taken" so as to require "just compensation" under the Fifth Amendment or, alternatively, that the Estate should be similarly compensated in damages for having been subjected to an "excessive fine" in violation of the Eighth Amendment. (W.D. R. 19, Pg ID 135-141, First Amended Complaint, Counts II-V). These claims were reiterated in the operative Second Amended Complaint. (W.D. Mich. R. 65, Pg ID 519-522, Second Amended Complaint, Counts III-V).

By reference to the *Rafaeli* decision, the United States District Court for the Western District of Michigan entered a Fifth Amendment "liability" judgment in favor of Pung against Isabella County, while "leaving open all questions of damages." (Petitioner's App., 61a-62a). The Western District then transferred the case to the United States District Court for the Eastern District of Michigan.

After additional discovery and briefing, the Eastern District entered final judgment in favor of Petitioner Pung, again by reference to *Rafaeli*, for the amount the court calculated to be the "surplus proceeds" from the tax-foreclosure sale, together with "interest from the date of the foreclosure sale." (Petitioner's App., 43a-44a). The district court expressly rejected Pung's argument that he should receive compensation for his alleged "equity interest" as measured by the supposed "fair market value" of the real estate. *Id.*

Pung appealed to the United States Court of Appeals for the Sixth Circuit to press his argument that compensation under the Fifth Amendment or, alternatively, under the Eighth Amendment, should be measured by the fair market value of the Pung Estate's former property. Isabella County cross-appealed against the award of interest as an improper diminution of the tax receipts to which the public collectively represented by the County were entitled for maintenance of government services.

The Sixth Circuit rejected both sides' arguments. The Sixth Circuit affirmed the Fifth Amendment judgment (with correction of an arithmetic error in the district court's calculation of the surplus proceeds amount).

The Sixth Circuit also rejected Pung's Eighth Amendment argument, in light of previous case law restricting application of the Eighth Amendment to instances of payments extracted as "punishment" for some offense. (Petitioner's App., 14a). Observing that the Michigan Supreme Court's *Rafaeli* decision had rejected characterization of Michigan tax foreclosure as punitive, the Sixth Circuit held that Michigan's tax foreclosure system "does not fall within the ambit of the Eighth Amendment." (Petitioner's App., 15a).

Petitioner Pung contends that "surplus proceeds" (even with interest from the date of the foreclosure sale) is constitutionally "inadequate compensation." (Petition, p. 13). He insists that either as "just compensation" under the Fifth Amendment or as damages under the Excessive Fines Clause of the Eighth Amendment, he is entitled to "the difference between the fair market value of the Pung property . . . and the tax debt." (Petition, p. 6). By Pung's calculations, he is entitled to recover $192,158.07, despite the foreclosure sale of the Pung Estate's former property having yielded only $76,008.00. (Petition, pp. 5-6, 12, 20, 21).

Pung's contentions defy centuries of legal development that have been reiterated and confirmed by this Court, the Sixth Circuit and the Michigan Supreme Court. Pung's petition should be denied.

ARGUMENT FOR DENYING PETITION

I. PUNG'S POSTULATED ENTITLEMENT TO "FAIR MARKET VALUE" COMPENSATION DEFIES LONG-ESTABLISHED LAW (AND WOULD RENDER TAX FORECLOSURE NONVIABLE AS A MEANS OF TAX COLLECTION).

Context matters. By reference to cases addressing physical appropriation of property for government use or diminution of property value through government regulation, Petitioner Pung argues that compensation following tax foreclosure should be measured to the supposed pre-foreclosure "fair market value" of the real estate. But lengthy historical analysis by this Court, by the Sixth Circuit and by the Michigan Supreme Court, focused on the specific context of tax foreclosure, has already shown Pung's contentions to be false.

"[T]axes are not themselves a taking, but are a mandated contribution from individuals for the support of the government for which they receive compensation in the protection which government affords." *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631, 637 (2023). "In collecting these taxes, the State may impose interest and late fees. It may also seize and sell property, including land, to recover the amount owed." *Id.*, at 637-8.

In *Tyler*, this Court considered whether funds obtained by the State through the foreclosure process in excess of the tax delinquency, interest and fees constituted a separate property interest that could be deemed "taken" in violation of the Fifth Amendment, if such proceeds were not disbursed to the former owner of the foreclosed

real estate. This Court answered the question in the affirmative.

But this Court did not alter the underlying principle that "taxes themselves are not a taking." Nor did this Court suggest that the property interest potentially lost in tax foreclosure should be measured by the supposed "fair market value" of the foreclosed real estate.

Rather, by historical review back to the Magna Carta, this Court confirmed that compensation in the tax-foreclosure context is measured by the "overplus," "excess" or "surplus" of proceeds generated by the tax-foreclosure sale beyond the tax debt, interest and fees. *Id.*, at 639-643. As elaborated by the Sixth Circuit in its own lengthy historical analysis, the price obtained at public sale of the foreclosed property has long been deemed "the truest test of the value of the landowner's equitable interest in the land," and the surplus is "the embodiment in money of the value of that equitable title." *Hall v. Meisner*, 51 F.4th 185, 193, 195 (6th Cir. 2022).

Michigan recognizes these principles. By its own historical analysis, again back to the Magna Carta, the Michigan Supreme Court has declared that the former owner of tax-foreclosed property has a common law interest (protected by Article 10, §2 of the Michigan Constitution) to receive the "surplus proceeds," if any, yielded by the tax-foreclosure sale. *Rafaeli, LLC v Oakland County*, 505 Mich. 429, 473, 477, 482-4, 952 N.W.2d 434, 460, 462, 465-6 (2020).

The Michigan Supreme Court also confronted in *Rafaeli* the same demand now argued by Petitioner

Pung, i.e., that the former owner's "equity" in the foreclosed property requires compensation measured by the supposed pre-foreclosure "fair market value" of the property. In response, the court emphasized that "the remedy for a government taking is just compensation for the value of the property taken." *Rafaeli*, 505 Mich. at 482, 952 N.W.2d at 465. And in the tax-foreclosure context, the property potentially "taken" is "the surplus proceeds, not plaintiff's real properties." *Id.*, 505 Mich. at 482-483, 952 N.W.2d at 465.

The Michigan Supreme Court emphatically rejected a "fair market value" measure of compensation. As the court explained, "[i]f plaintiffs were entitled to collect more than the amount of the surplus proceeds," they would "be taking money away from the public as a whole." *Rafaeli*, 505 Mich. at 483, 952 N.W.2d at 465-6.

Ignoring context, Pung argues that the Fifth Amendment requires compensation to the former owner of tax-foreclosed property for the "total value" of the real estate at some supposed pre-foreclosure "fair market value." (Petition, p. 10). Pung relies upon cases in which government exercise of eminent domain or regulatory appropriation took possession of real property for the government to use for its own purposes. He recites (Petition, p. 3) that "where private property is taken for public use and there is a market price prevailing at the time and place of the taking, that price is just compensation," quoting *United States v. New River Collieries Co.*, 262 U.S. 341, 344 (1923).

But it must be remembered that foreclosure (for tax delinquency or otherwise) is a "forced sale"—a legal

process developed to ensure payment to the creditor and to avoid lengthy clouds on title to the land. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541-2 (1994). Because foreclosed property must be sold "within time and manner strictures" of state-prescribed procedures to accomplish these purposes, "[m]arket value cannot be the criterion of equivalence [of value] in the foreclosure-sale context." *Id.*, at 538. "[P]roperty that *must* be sold within those strictures is simply *worth less*," and this is not ground for objection by the former owner. *Id.*, at 539-40, *emphasis in original*. In this Court's words, "[w]e deem, as the law has always deemed, that a fair and proper price, or a reasonably equivalent value, for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *Id.*, at 545.

There is no certainty that sale of the foreclosed property will yield proceeds greater than the former owner's tax debt at all. And if the former property owners are entitled to more than surplus proceeds actually yielded by the sale, tax foreclosure becomes a money-losing proposition. Foreclosure would become nonviable as a means of tax collection—with no readily apparent alternative means for timely collection of the delinquent revenue, particularly if such is to be done without added costs reducing or even dissipating entirely the collected sums.

In this latter regard, it must be observed that Pung condemns the tax-foreclosure auction as a "fire-sale." (Petition, p. 15. n. 5). Pung implies that the government should be required to undertake affirmative marketing efforts and/or delay sale until favorable market conditions arise.

But such notions work against the goals of timely recovery of delinquent tax revenue (without the dissipation by expense) and prompt clearing of title of the foreclosed land. Delaying sale in hope of improved future market conditions or undertaking a marketing campaign both work against prompt collection of tax revenue and generate additional expense. And every foreclosure sale would be subject to costly litigation by the former owner nitpicking whether the government took all possible steps to optimize the sale result.

In short, tax foreclosure does not take real estate for "public use." Rather, foreclosure collects a tax delinquency. To the extent the foreclosure sale does not yield proceeds equal to what the former owner believes might have been gained by a private sale at leisure, this is no ground for objection. *BFP*, 511 U.S. at 538-9, 545.

It also should be observed that Michigan affords options to taxpayers facing financial distress to avoid foreclosure. First, the foreclosure proceedings themselves encompass nearly two years from first notice to the taxpayer of delinquency through the foreclosure hearing and then the subsequent effective date of the foreclosure judgment, Mich. Comp. Laws §§211.78b, 211.78e, 211.78f, 211.78h and 211.78k. Second, the property can be redeemed by payment of the tax delinquency at any time during the process. Mich. Comp. Laws §78g(3). Third, the process can be halted by the taxpayer agreeing to participate in an "installment payment plan" with the Treasurer. Mich. Comp. Laws §211.78q.

Convinced that the assessor's denial of the PRE was improper, Pung did not to avail himself of these options.

And his objections to the foreclosure were rejected by the Michigan Court of Appeals.

In this litigation, the Pung Estate has obtained judgment from the district court for the surplus proceeds that the Estate could claim (together with interest atop that). And the County has paid the surplus proceeds judgment. (E.D. Mich. R. 58-2, Pg ID 1408, Endorsed Check). This is as much as Pung can demand under long-established law. *Tyler*, 598 U.S. at 639-43, *Hall*, 51 F.4th at 190-4, *Rafaeli*, 505 Mich. at 462-473, 952 N.W.2d at 454-460.[1]

II. THE EIGHTH AMENDMENT'S "EXCESSIVE FINES CLAUSE" IS CATEGORICALLY INAPPLICABLE TO TAX FORECLOSURE.

This Court has confirmed that the Eighth Amendment "was designed to protect those convicted of crimes." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). But Pung asserts an "expansive role for the Excessive Fines Clause." (Petition, p. 14). Citing *Austin v. United States*, 505 U.S. 602 (1983), Pung contends that all "*in rem* civil forfeitures" constitute "in kind punishments" constrained by the Eighth Amendment. (Petition p. 14). According to Pung, "post-*Austin*, a statutory civil *in-rem* forfeiture, like the type effectuated here is a 'fine' within the meaning of the Excessive Fines Clause and thusly is subject to challenge on excessiveness grounds." (Petition, p. 15).

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1. Isabella County is still awaiting the district court's determination of a rate for calculation of interest (a determination which Pung long neglected to obtain in his quest to increase the underlying judgment to "fair market value").

But *Austin* did not expand the scope of the Eighth Amendment beyond the protection of persons "convicted of crimes." In *Austin*, the petitioner pled guilty to drug offenses, and the United States sought forfeiture of the petitioner's home and business under statutes that authorize forfeiture of property used in such criminal offenses. *Austin*, 509 U.S. at 604, 620. It is in *that* context—where the "in rem forfeiture" is directly tied to criminal conviction of the person whose property is subject to forfeiture—that the Eighth Amendment applies, because the forfeiture is effectively an additional punishment of the convicted person. As expressly confirmed in *Austin*, "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense." *Id.*, at 609-10, 621-2, *emphasis in original.*

This was confirmed again in *United States v. Bajakajian*, 524 U.S. 321 (1998). In that case, the respondent pled guilty to the criminal offense of illegally transporting currency. *Id.*, at 324-5. As in *Austin*, the statute under which the *Bajakajian* respondent was convicted authorized "forfeiture as an additional sanction when imposing sentence on a person convicted of a willful violation," so the forfeiture could be deemed "punishment" of the "convicted" offender. *Id.*, at 328.

This principle was confirmed yet again in *Timbs v. Indiana*. The petitioner in *Timbs* lost property to forfeiture after pleading guilty to transporting heroin. With direct reference to *Austin* and *Bajakajian*, this Court reiterated in *Timbs* that the Eighth Amendment applies only where there has been a forfeiture "as punishment for some offense." *Id.*, at 687.

Conversely, property taxes in Michigan are "not punitive in nature." *Rafaeli*, 505 Mich. at 449, 952 N.W.2d at 447. In fact, the Michigan Supreme Court admonished against "improperly conflat[ing]" tax foreclosure with forfeitures tied to criminal offenses. *Id.*, 505 Mich. at 450, 952 N.W.2d at 447-8. As explained by the court, the *Rafaeli* plaintiffs "did not use their properties for illicit purposes. They simply failed to pay their taxes, which is not a criminal offense." *Id.* The Sixth Circuit has confirmed this distinction in the context of an Eighth Amendment claim in another Michigan tax foreclosure case. *Freed*, 81 F.4th at 659.

Relevant in this regard this Court's analysis in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). In *Kingsley*, this Court held that claims by pretrial detainees alleging excessive force by jail officers must be analyzed under the standards of the Fourteenth Amendment, rather than the standards of the Eighth Amendment that are applicable to a convicted inmate. Obviously, there is no practical distinction between acts of excessive force by jail officers against a pretrial detainee and such acts of force by officers against a convicted offender. Nevertheless, the Eighth Amendment applies only to a convicted offender subject.

Likewise, the Eighth Amendment Excessive Fines Clause should apply only against monetary penalty or property forfeiture imposed as punishment following conviction for a criminal offense. A compensation claim arising from tax foreclosure falls categorically outside the scope of the Eighth Amendment.

III. PUNG PRESENTS NEITHER A VIABLE ISSUE, NOR A "CIRCUIT SPLIT," FOR THIS COURT TO RESOLVE.

Pung tells this Court that his case is an "ideal vehicle" for resolving his supposed right to fair market value compensation under the Fifth or Eighth Amendments and to resolve a supposed "circuit split." (Petition, pp. 18-9). But his case is nothing of the sort.

First, there is no issue requiring resolution at all. This Court already confirmed in *Tyler* that "surplus" or "excess" proceeds are the measure of compensation in the tax-foreclosure context.

Second, there is no "circuit split" on the issue. Pung fails to cite any circuit court decision even suggesting (much less holding) that the former owner of tax-foreclosed property is entitled by the Fifth or Eighth Amendments to "fair market value" compensation. He cites only a pair of district court opinions—and even these two cases cannot be read to authorize any recovery greater than surplus proceeds.

Although both *Coleman ex rel. Bunn v. District of Columbia*, No. 13-1456, 2016 WL 10721865 (D.D.C. June 11, 2016) and *Polizzi v. County of Schoharie*, F. Supp. 3d 141 (N.D.N.Y. March 12, 2024) use the phrase "surplus equity," neither case actually awards such recovery.

Indeed, *Coleman* was predicated upon *United States v. Lawton*, 110 U.S. 146 (1884) and *Nelson v. City of New York*, 352 U.S. 103 (1956), in both of which this Court addressed recovery of surplus foreclosure sale proceeds,

not supposed market value of the foreclosed property. *Coleman*, 2016 WL 10721865 at *3. In turn, *Polizzi* was predicated upon the surplus proceeds cases of *Tyler* and *Nelson*. *Polizzi*, 720 F. Supp. 3d at 150-1.

Moreover, *Coleman* was a district court ruling on a Fed. R. Civ. P. 12(c) motion seeking dismissal on the pleadings, while *Polizzi* was a district court ruling on a pre-answer motion seeking dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. These district court decisions do not represent a "circuit split" on any issue, much less regarding Pung's "fair market value" compensation demand. It is disingenuous for Pung to claim that they do.

CONCLUSION

Pung's petition offers neither an open legal issue nor a genuine "circuit split" for review by this Court. In the specific context of tax foreclosure, this Court has already confirmed that the constitutionally cognizable measure of compensation consists of the "surplus" or "excess" proceeds yielded by the tax-foreclosure sale, not the supposed "fair market value" of the foreclosed property.

The Sixth Circuit affirmed Pung's judgment on that basis. No circuit has ruled otherwise. Pung's petition should be denied.

Respectfully submitted,

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