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, MICH.,

Respondent.

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

BRIEF OF PROFESSOR BETH A. COLGAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 5, 2025

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INTEREST OF *AMICUS CURIAE*[1]

Beth A. Colgan is Professor of Law at the UCLA School of Law. She is one of the country's leading experts on constitutional and policy issues related to the use of monetary sanctions as punishment, and particularly on the Eighth Amendment's Excessive Fines Clause.

SUMMARY OF ARGUMENT

A deprivation of property constitutes a fine subject to the protections of the Eighth Amendment's Excessive Fines Clause if it "serves, at least in part, to punish the owner." *Austin v. United States*, 509 U.S. 602, 618 (1993). The imposition of a property forfeiture under Michigan's General Property Tax Act (GPTA) is akin to eighteenth- and nineteenth-century use of fines and forfeitures as punishment for tax violations. Respondent's argument, and the Sixth Circuit's cursory analysis concluding, that GPTA forfeitures are not punitive are, therefore, out of accord with a long history and tradition by which tax penalties generally, and tax forfeitures specifically, were deemed punishment.

First, Respondent contends that a pecuniary penalty unrelated to a criminal conviction may not be treated as a fine—no matter how excessive—simply because it is not technically criminal in nature. Brief for Respondent in Opposition to Certiorari at 11-12,

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[1] Pursuant to this Court's Rules 37.2 and 37.6, amicus states that all counsel of record received timely notice of her intent to file this brief, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus made a monetary contribution to this brief's preparation or submission.

Pung v. Isabella County (No. 25-95). This conflicts with the historical record in three ways:

I. A substantial volume of early American legal texts show that punishment was not restricted to technically criminal matters. Rather, fines and forfeitures serving as punishment were commonly imposed in both technically criminal matters and penal matters processed civilly. As this Court explained in 1805, "[a]lmost every fine or forfeiture under a penal statute, [could have been] recovered" through civil processes, with those pecuniary penalties serving as "punishment for the offence." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 340-41 (1805). The relevant question for whether a pecuniary penalty constituted punishment historically was whether it was imposed in response to a public offense regardless of the form of prosecution. Therefore, even if the failure to pay taxes is not a "criminal" offense, that does not render the GPTA nonpunitive.

II. Tax violations constitute a quintessential public offense for which fines and forfeitures were historically understood to serve as punishment. From the country's earliest days, revenue laws were critically important to the nation's founding and development, and lawmakers authorized the imposition of fines and forfeitures through civil processes as an essential enforcement tool. Unsurprisingly, the Supreme Court, lower courts, and attorneys representing

the government routinely treated and described tax fines and forfeitures as punishment. Further, akin to the GPTA today, eighteenth- and nineteenth-century lawmakers used such civil processes to gain title to private property on the grounds that owners or their agents engaged in tax offenses and used the value of that property to satisfy tax arrears, with the remainder serving as a punishment.

III. Further evidence of the public nature of tax offenses and, therefore, the punitive nature of tax fines and forfeitures, can be found in early American legal texts. Tax offenses were investigated and prosecuted on behalf of the government. The fines and forfeitures imposed for tax offenses were forgivable by the government through pardon and remission. And when interpreting tax statutes, eighteenth- and nineteenth-century courts applied the rule of lenity.

Second, the Sixth Circuit—without engaging in any historical analysis—posited that a forfeiture pursuant to the GPTA did not constitute a fine "because the statute's "aim is to encourage the timely payment of property taxes." Pet.App. at 15a. (quoting *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434, 448 (Mich. 2020)).

That the GPTA encourages compliance with tax laws is entirely consistent with an understanding that forfeitures imposed for tax violations serve as punishment. Historically, encouraging the payment of taxes was central to both the enforcement of customs laws through the imposition and forgiveness of tax fines and forfeitures, structures that carried forward from

the customs context to other revenue laws throughout the nineteenth century.

The historical materials related to each point made in this brief are set out in greater detail in Beth A. Colgan, *Of Guilty Property and Civil/Remedial Punishment: The Implications and Perils of "History" for the Excessive Fines Clause and Beyond*, 3 J. of Am. Const. Hist. 697 (2025). The argument below includes a more limited set of historical examples along with references to the portion of that article from which additional historical evidence may be found. The focus of that article and this brief are on the question of what constitutes a fine. Should the Court determine that the deprivation of the surplus and uncompensated equity at issue was at least partially punitive and thus a fine, it would not necessarily render the fine unconstitutional. It would, however, offer Petitioner an opportunity to seek protection against those deprivations on the grounds that they are unconstitutionally excessive.

ARGUMENT

As detailed below, both the civil nature of GPTA forfeitures and the goal of ensuring compliance with Michigan's tax code are consistent with early American treatment of tax fines and forfeitures as punishment.

I. The Civil Nature of GPTA Forfeitures Is Consistent with Early American Practices for Imposing Punishment.

Respondent has posited that a pecuniary penalty unrelated to a criminal conviction may not be treated as a fine—no matter how excessive—simply because it is not technically "criminal." Brief for Respondent in

Opposition to Certiorari at 11-12, Pung v. Isabella County (No. 25-95).

Respondent's attempt to cabin punishment to technically criminal matters is out of accord with historical records exhibiting the centuries-old understanding that punishment could be imposed in "penal" proceedings that were civil in nature. Colgan, *supra*, at 743-59, 764. As detailed below, the use of civil processes to punish was commonplace in the eighteenth and nineteenth centuries for public offenses broadly speaking. Further, tax offenses—including those processed civilly—are a quintessential public offense for which fines and forfeitures have historically been imposed as punishment. And finally, the public nature of tax offenses and the punitive nature of tax fines and forfeitures processed civilly, are further evident through their modes of prosecution, forgiveness, and interpretation.

A. Civil Process Were Routinely Employed to Impose Punishment for Public Offenses in the Eighteenth and Nineteenth Centuries.

Colonial statutes, and those passed by the federal government and American states in the eighteenth and nineteenth centuries, allowed certain offenses for which fines and forfeitures were the typical form of punishment to be adjudicated in civil proceedings. Such proceedings were distinguishable from private disputes litigated civilly given the public nature of the underlying offense. Colgan, *supra*, at 748-59, 764.

The distinction between public and private offenses, and in turn the ability to adjudicate certain public offenses civilly, was borrowed from the English common law. *See Huntington v. Attrill*, 146 U.S. 657,

668-69 (1892) (citing Blackstone for the premise that "[t]he test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual"). As Blackstone explained, private actions involve "an infringement or privation of the civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries.'" 3 Blackstone, *Commentaries on the Laws of England* 2 (12th ed. 1793-1795). In contrast, public wrongs "are a breach and violation of public rights and duties, which affect the whole community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'" *Id.*

Following the English tradition, offenses were understood to necessitate full criminal process if the punishments that could be imposed included death, periods of incarceration, and corporal punishment, at times along with pecuniary penalties. E.g., *Slaughter v. People*, 2 Doug. 334, 335-39 (Mich. 1842) (holding that a statute making "keeping a bawdy-house, or house of ill-fame … punishable by fine or imprisonment" was unconstitutional because it was adjudicated without indictment by a grand jury). Such matters were typically described as "criminal" in early American legal texts. Colgan, *supra*, at 743-48.

Lesser public offenses for which the primary form of punishment was pecuniary were frequently prosecuted without full criminal process under both the English common law and in the United States. 3 Blackstone, *supra* at 271, 281-83. *See also* 2 Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 620 (Boston, Little, Brown, & Co. 1879) (defining "summary conviction" as "authorized by the statutes of many of

the states … chiefly for the lesser offenses"). Laws allowing for civil prosecutions were typically described as "penal" in early American legal texts. Colgan, *supra*, at 743-48. As the Court explained in 1805, "[a]lmost every fine or forfeiture under a penal statute, [could have been] recovered" through civil processes despite being "punishment for the offence." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 340-41 (1805) (holding that a statute of limitations on cases in which a person is "prosecuted" "appl[ied] not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offence," including the civil action at issue).

Therefore, despite the distinction in procedural form, pecuniary penalties imposed in response to public offenses—whether the offenses were technically criminal in nature or prosecuted civilly—were widely understood to constitute punishment. As the Court explained:

> The real nature of the case is not affected by forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of [the state], the prosecution must be by indictment or by action; … In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense.

Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 299-300 (1888) (holding that the rule precluding one jurisdiction from enforcing the penal laws of another extended to penal laws processed civilly), *limited on other grounds Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273-74 (1935); see also *United States v.*

Mann, 26 F. Cas. 1153, 1154-57 (C.C.D. N.H. 1812) (No. 15,718) (Story, Circuit Justice) (stating that "without question all infractions of public laws are offences; and it is the mode of prosecution and not the nature of the prohibitions, which ordinarily distinguish penal statutes from criminal statutes"); *People v. Stevens*, 13 Wend. 341, 342 (Mass. 1835) (describing both a fine imposed civilly and fines and imprisonment imposed criminally: "they both constituted *the* punishment which the law inflicts upon the offense").

In other words, what mattered for discerning whether a pecuniary penalty was punishment was the substance of the law—that it was imposed in response to a public offense—rather than its procedural form.

B. Tax Violations Constitute a Quintessential Public Offense for Which Pecuniary Punishments Have Long Been Imposed Civilly.

As noted above, public offenses include those that involve breaches of "public … duties, which affect the whole community." 3 Blackstone, *supra*, at 2. The imposition of early American taxes in the first instance would not meet this test and such taxes were unquestionably nonpunitive. E.g., John MacPherson Berrien, *Customs—Forfeitures*, 2 Op. Att'y Gen. 358, 359 (July 10, 1830) (distinguishing customs duties from "the penalty or forfeiture" imposed for "an attempted fraud upon the revenue, by means of false or fraudulent invoice"); see also *Carpenter v. Com. of Pennsylvania*, 58 U.S. (17 How.) 456, 463 (1854) (declining to apply the Ex Post Facto Clause to an estate tax law because the tax did not constitute a punishment). But the failure to adhere to the public duty to pay taxes, and the implications of that lost revenue for the community,

make tax code violations a quintessential public offense, with the resulting fines and forfeitures historically understood to serve as punishment. Colgan, *supra*, at 759-67.

At the dawn of the new republic, the federal government's ability to generate revenue through taxation and to regulate commerce—along with the authority to punish violations of those laws—were understood to be among the "great powers" afforded by the Constitution, essential to the young nation's survival. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 417 (1819). Unsurprisingly, then, among its earliest acts, Congress adopted an array of laws, which were designed to and did generate revenue through taxation of goods entering the nation's seaports. E.g., Act of July 31, 1789, ch. 5, 1 Stat. 29 (regarding customs duties) (1789 Collections Act).

As essential as they were, the enforcement of such laws in the nation's busy ports and waterways was also notoriously difficult. Those engaging in fraud were seen as "exceedingly ingenious in resorting to various subterfuges to avoid detection." *The Brig Burdett*, 34 U.S. (9 Pet.) 682, 690 (1835).

A crucial part of enforcement, therefore, was an effort to encourage compliance by responding to wrongdoing with punishment. For example, Congress imposed upon a ship's master (the person in command of the vessel, including its cargo and its crew) fines for offenses related to the employment of the vessel. E.g., Act of Aug. 4, 1790, ch. 35, § 4, 2 Stat. 153; Colgan, *supra*, at 716-17. In addition, Congress continued an English practice employed during the colonial period, imposing upon the owners of the ships and cargo associated with customs offenses the *in rem* forfeiture of

the property itself.[2] This allowed for the civil prosecution and punishment of owners who conspired with offending mariners to violate customs laws, for their own direct efforts to avoid customs and related regulations, and through an agency theory for the misconduct of the masters in their employ. E.g., 1789 Collections Act, *supra*, §§ 22-23, 1 Stat. 42-43; *see also* Colgan, *supra* at 717-22.

Given how inherently public in nature tax offenses were, it is unsurprising that tax penalties—whether imposed through criminal or civil processes—were understood to constitute punishment.[3]

Early American courts routinely treated and described tax fines imposed civilly as punishment. For example, when the question arose as to whether the Ex Post Facto Clause—which applied only to criminal and penal statutes—was applicable to civil tax fines, the Court answered in the affirmative, describing the

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[2] The Court has taken contradictory positions on the relevance of the legal fiction underlying *in rem* prosecutions, in which the property was treated as "guilty," when discussing the punitive nature of early *in rem* customs forfeitures. *Compare United States v. Bajakajian*, 524 U.S. 321, 333-34, 343, n.18 (1998) (suggesting *in rem* forfeitures were not understood to be punitive) *with Austin*, 509 U.S. at 614-18 (positing that early *in rem* customs forfeitures were punitive). For an assessment of historical records supporting the conclusion that the use of the fiction is consistent with the punitive nature of those early forfeitures, see Colgan, *supra*, at 712-36, 759-64, 778-80.

[3] Lawmakers could, and at times did, authorize the criminal prosecution of tax offenses. E.g., James Speed, *Penal Duty Under the Revenue Law*, 11 Op. Att'y Gen. 280, 284-85 (July 10, 1865) (opining that "penal taxes" for the submission of fraudulent invoices must be imposed by the assessor, but that the United States had the alternative of seeking "punishment by fine or imprisonment … on the conviction").

tax fines as having "punished" the delinquent tax-payer. *Burgess v. Salmon*, 97 U.S. 381, 382, 384 (1878) ("The case presents but a single point: Can a manufacturer be punished, criminally and civilly—civilly here—for the violation of a statute, when the statute was not in force at the time when the act was done?"). See also, e.g., *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 274 (1853) (regarding additional duties imposed for the fraudulent undervaluing of goods to be taxed, as a "penal duty" that "do[es] not fall within the regular administration of the revenue system"); *United States v. McKee*, 26 F. Cas. 1116, 1117 (C.C.E.D. Mo. 1877) (No. 15,688) (Miller, Circuit Justice) (treating double taxes imposed through a civil action as punishment in a double jeopardy analysis); *Lott v. Hubbard*, 44 Ala. 593, 600 (1870) (explaining that "[t]he plain letter of the law makes it the duty of the assessor to ascertain the amount, and, as punishment, assess the delinquent a double tax"); *Jones v. Town of Bridgeport*, 36 Conn. 283, 386-87 (1869) ("This addition of ten percent is distinguished by the law from the tax on the valuation of the property, and is in the nature of an additional tax made to punish a resident tax-payer for neglecting to give in his list according to law."); *Buckwalter v. United States*, 11 Serg. & Rawle 193, 195-97 (Pa. 1824) (describing double duties "given for the … offense" of failing to pay a tax to secure a distillery operator's license as "penal" though imposed through a civil action); *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 34, 38 (1815) (declining to analyze whether a tax penalty was penal because "[t]hese are self-evident propositions, which would only be obscured by any attempt to elucidate them").

Likewise, the Supreme Court also described *in rem* forfeitures of property imposed for tax violations as

"punishment" throughout the nineteenth century. See *Coffey v. United States*, 116 U.S. 436, 444-45 (1886) (describing an *in rem* forfeiture for a violation of a revenue law as a "statutory punishment"); *Caldwell v. United States*, 49 U.S. (8 How.) 366, 379-80 (1850) (describing *in rem* forfeitures as "punishment of [revenue] fraud"); *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (explaining that an *in rem* forfeiture for violation of the revenue law "punishes the owner with a forfeiture of the goods"); *United States v. Riddle*, 9 U.S. (5 Cranch) 311, 312 (1809) (interpreting a tax-evasion statute as imposing an *in rem* forfeiture "to punish … the *attempt* to defraud the revenue"); see also *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 410 (1833) (describing an *in rem* forfeiture for the false entry of goods as "the penal consequences of an infraction of the law").

In case after case, the lower courts followed suit. They described *in rem* tax-forfeitures as "punishment" in the early part of the nineteenth century. E.g., *United States v. Twenty-Four Coils of Cordage*, 28 F. Cas. 276, 279 (C.C.E.D. Pa. 1832) (No. 16,566) (Baldwin, Circuit Justice) (describing a statute as "creat[ing] the forfeiture, as a punishment for the omission of the duties previously prescribed"). They did so as the country emerged from the Civil War. E.g., *Dorsheimer v. United States*, 2 Ct. Cl. 103, 117-18 (1866) (differentiating between taxes due and the "punishment" of an *in rem* forfeiture), aff'd 74 U.S. 166 (1868). They did so in the years immediately following the ratification of the Fourteenth Amendment. E.g., *250 Barrels of Molasses v. United States*, 24 F. Cas. 437, 440 (C.C.D.S.C. 1869) (No. 14,293) (describing an owner as "properly punished" through *in rem* forfei-

ture for the use of a false invoice to defraud the revenue). And they did so throughout the latter part of the nineteenth century. E.g., *United States v. Two Barrels of Whisky*, 96 F. 479, 481 (4th Cir. 1899) ("the forfeiture of a man's property is one of the severest punishments that the law can inflict"), *overturned on other grounds United States v. One Saxon Auto*, 257 F. 251, 252-55 (4th Cir. 1919). See also Colgan, *supra*, at 736-39 (providing additional examples of the Supreme Court and lower federal and state courts describing *in rem* forfeitures as "punishment" in regulatory and embargo violation cases).

The courts were not alone; those prosecuting tax offenses to obtain *in rem* forfeitures as well as attorneys general also argued that such forfeitures constituted punishment. For example, in 1833 a U.S. District Attorney argued that "the revenue laws have beenfounded, from the beginning of the government," on the principle that "forfeiture accrues" in response to fraud, and that such laws "punished [an invoice's] falsification"). *United States v. Twenty-Eight Packages of Pins*, 28 F. Cas. 244, 247 (E.D. Pa. 1833) (No. 16,561). See also, e.g., *Priestman v. United States*, 4 U.S. (4 Dall.) 28, 33 (1800) (argument for the United States) (arguing that a forfeiture is "punishment [that] is inflicted for [customs] offenses committed by the master, or owner, of the vessel"); Ebenezer R. Hoar, *Informer's Shares Under the Internal-Revenue Laws*, 13 Op. Att'y Gen. 228, 239-41 (May 13, 1870) (regarding the duty of customs officers to ensure that "offenders against [the revenue laws were] punished" in discussing the imposition of a "fine, penalty, or forfeiture").

What is more, akin to the GPTA today, tax fines or the value of property forfeited for tax violations could be employed to satisfy tax arrears, with the remainder understood to serve as punishment.[4] For example, in the mid-nineteenth century the Court took up a case in which property had been seized on the allegation that the property owner made a false return and fraudulently withheld taxes owed. *Dorsheimer v. United States*, 74 U.S. 166, 167 (1868). Following the seizure, a company in the process of purchasing the seized property negotiated with the Commissioner of the Internal Revenue, who released the majority of the property upon obtaining a bond from the owner for $220,102. *Id.* at 168. In assessing how the funds were to be distributed, the Court distinguished between the $195,102 needed to cover the deficient taxes, which it deemed non-punitive, and the remainder of $25,000, which served as punishment. *Id.* at 173-74.

Simply put, tax offenses are necessarily public offenses, and therefore historically the fines and forfeitures imposed in response to those violations would have been understood to constitute punishment.

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[4] The *Bajakajian* Court relied on a case decided in 1871 and a set of mid-twentieth century cases in positing that early *in rem* customs forfeitures were non-punitive because the liquidated value of the property could cover tax arrears. 524 U.S. at 341-43 & n.18. For a discussion of how those sources are out of step with a broader examination of historical practices, see Colgan, *supra*, at 780-86.

C. The Public Nature of Tax Offenses Is Further Evident Through Their Modes of Prosecution, Forgiveness, and Interpretation.

The status of tax offenses as public offenses for which pecuniary penalties were imposed as punishment is further evident given that they were investigated and prosecuted on behalf of the government, that the penalties imposed were subject to pardon and remission, and that tax statutes were interpreted through application of the rule of lenity.

1. Tax Offenses Were Subject to Investigations and Prosecutions on the Public's Behalf.

In addition to the public importance of customs enforcement and the treatment and description of tax fines and forfeitures as punishment, the public nature of tax offenses is also evident in their mode of investigation and prosecution.

The use of *qui tam* prosecutors—private citizens who investigated, reported, and prosecuted public offenses—was central to the early American enforcement of penal laws. Colgan, *supra*, at 753-55; see also Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1269-1305 (2018) (collecting statutes). *Qui tam* prosecutors enforcing the penal laws were compensated through a moiety of fines imposed "to induce persons from motives of gain, who would not be otherwise wrought upon, to prosecute to effect, the violations of this law." *Hylliard v. Nickols*, 2 Root 176, 177 (Ct. 1795) (regarding the apportionment of part of a £100 fine to the *qui tam* prosecutor). See also, e.g., *Inhabitants of Wiscasset v. Trundy*, 12 Me. 204, 208 (1835) (explaining

that "the reason for sharing a [$50 fine for a liquor law violation] with an informer, is to make self-interest subservient to public convenience, by interesting a third party in bringing offenders to justice, whose ill deeds might otherwise remain undiscovered or neglected"). Incentivizing citizens to prosecute public offenses was intended to "give force and vigor to the laws, by showing the community, that they cannot be violated with impunity." *State v. Blennerhassett*, 1 Miss. 7, 15 (1818) (distinguishing a *qui tam* prosecution from a private lawsuit by noting that "[t]he whole community is interested in the execution of the penal laws"). Further, *qui tam* prosecutors authorized to prosecute public offenses were widely understood to be prosecuting "popular actions" despite the frequent use of civil processes to do so. E.g., *Huntington*, 146 U.S. at 673.

The use of *qui tam* prosecutors to enforce penal laws generally mirrored the structure for enforcing revenue statutes throughout the nineteenth century. Early federal customs statutes primarily tasked various customs officers and staff known as "informers" with identifying evidence of and prosecuting customs violations, with the role of prosecutor eventually taken over by U.S. attorneys. Hoar, *supra*, at 230-35, 239 (stating that revenue officers had a duty "to see that the internal-revenue laws are faithfully administered, and offenders against them punished"); see generally Nicholas R. Parrillo, Against the Profit Motive (2023). Those informers were compensated for their efforts by being awarded a moiety of the value of the goods and vessels forfeited for customs—and later other revenue—violations. Colgan, *supra*, at 725-26. As with penal laws generally, those payments were

designed "to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes." *Dorsheimer*, 74 U.S. (7 Wall.) at 173. Doing so increased the likelihood offenses would be "detected and punished." Hoar, *supra* at 238 (explaining that moieties of pecuniary penalties were employed "to stimulate the vigilance and activity of revenue officers to discover evidence"). Like *qui tam* prosecutors enforcing other penal laws, these informers were understood to be investigating and prosecuting public offenses. E.g., *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 289 (1825) ("the seizing officer is the agent of the government from the moment of the seizure up to the termination of the suit").

2. Tax Fines and Forfeitures Were Forgivable Through Pardon and Remission.

Yet another indicator of the public nature of tax offenses and punitive nature of their corresponding pecuniary penalties involves the procedures through which they could be forgiven: pardon and remission. Colgan, *supra*, at 723-27, 733-34, 763-64.

Pardons are the vehicle by which the executive—in the case of federal revenue laws, the president—forgives an offense and relieves the offender of punishment. See, e.g., 3 Joseph Story, Commentaries on the Constitution of the United States, Book III, Ch. 37, § 1498, at 353-54 (1833) (describing pardon powers generally as applying to the "remission of fines, penalties, and forfeitures"); Henry Stanbery, *President's Pardon*, 12 Op. Att'y Gen. 81, 81 (Nov. 2, 1866) (stating that the pardon power "is co-extensive with the punishing power, and is applicable to the remission of fines, penalties, and forfeitures which are imposed by law as punishment for offenses"). That includes fines

and forfeitures imposed for violations of the revenue laws. See, e.g., Pardon of Jan. 17, 1834, Nat'l Archives Record 5989411 (restoring a ship forfeited due to the failure to obtain a customs license because "it does not appear by the evidence exhibited before me that there was intention on the part of the said Capt. Dillingham to evade or violate the Revenue Laws"); John MacPherson Berrien, *Pardons and Remissions of Forfeitures*, 2 Op. Att'y Gen. 329, 330 (Mar. 17, 1830) (stating that "the pardoning power is considered to be coextensive with the power to punish," and that it therefore applies to "[t]he remission of fines, penalties, and forfeitures, under the revenue laws").

In addition to pardons, another protection was afforded by the First Congress, which created a failsafe to remit forfeited property in cases in which a truly innocent party (the original owner lacking intent to defraud or a bona fide purchaser uninvolved in the offense) was deprived of property via *in rem* forfeiture. Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449, 1482-91, 1506-09 (2019). By 1790, just one year after the passage of the first customs act, Treasury Secretary Alexander Hamilton and members of Congress recognized the harsh consequences resulting from the use of *in rem* forfeiture proceedings for some owners of vessels and cargo. He reported to Congress that "considerable forfeitures have been incurred, manifestly through inadvertence and want of information." Alexander Hamilton, Report on the Petition of Christopher Saddler, in 6 The Papers of Alexander Hamilton 191-92 (Syrett ed., 1962). At his urging, and out of concern that "no person ought to be liable who is not guilty of a violation of the laws intentionally or willfully," Congress passed the 1790 Remission Act. Arlyck, *supra* at 1483 (quoting 1 Annals

of Cong. 1228 (1790) (Joseph Gales ed., 1834) (statement of Sen. Sturgis). The Remission Act allowed the owners of forfeited property to petition the Treasury Secretary for a return of items if the forfeiture was "intended without willful negligence or any intention of fraud." Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23.

That Congress intended the Treasury Department's remission program to protect innocent owners from punishment is evident in the resolution of disputes raised when the Secretary remitted property to which informers involved in identifying and prosecuting alleged wrongdoing would otherwise have had a claim. Despite the importance of prosecutions instituted by informers, their claims to the value of forfeited goods and vessels were not understood as more important than those of innocent owners who engaged in the remission program. For example, in 1818, when the Treasury Secretary remitted "all the right, claim, and demand of the United States" on a set of seized goods, the informers claimed that they still should have been awarded a moiety of the forfeited items' value. *United States v. Morris*, 26 F. Cas. 1336, 1342-43 (C.C.D. N.Y. 1822) (No. 15,816) (Livingston, Circuit Justice), aff'd 23 U.S. (10 Wheat.) 246 (1825). Though the circuit court acknowledged that by statute informers had a right to a moiety, it saw that statute as part of a larger body of regulations that included the Remission Act. Therefore, unless the monies had already been distributed, the Secretary was allowed to compromise their moiety via remission. *Id.* at 1344-47. In doing so, the circuit court reasoned that the Remission Act was adopted because without it "the system here would justly have exposed the American government to the charge of injustice in making no discrimination

between the innocent and guilty," and that the statutes collectively must be understood as protecting the innocent through the return of all that was wrongly taken, rather than all minus a moiety. *Id.* at 1345. On appeal, the Supreme Court agreed, reasoning that to hold otherwise "would be subjecting the innocent to great and inequitable losses, contrary to the manifest spirit and intention of the law." *Morris*, 23 U.S. (10 Wheat.) at 292.

In other words, both the president's pardon power and the Treasury Secretary's remission authority were available to forgive fines and forfeitures incurred for alleged tax violations only because they were punishment. *Dorsheimer*, 74 U.S. at 173 (distinguishing between taxes, which were not subject to remission, and forfeitures, which were); Hugh S. Legare, *Penalties Under the Tariff Act of 1842, and Their Remission*, 4 Op. Att'y Gen. 182, 182-83 (June 7, 1843) (opining that remission of an additional 50 percent duty was subject to remission because it was "very clear that [it] … is a penalty").

3. Statutes Imposing Tax Fines and Forfeitures Civilly Were Subject to the Rule of Lenity.

Yet another indication that tax violations constituted public offenses—and therefore that the pecuniary responses to them constituted punishment—is evident in early caselaw regarding the treatment of the rule of lenity in interpreting tax statutes authorizing *in rem* customs forfeitures. Colgan, *supra*, at 768-80.

Dating back to the English common law and continuing forward in the United States, the rule of lenity held that, in a case of ambiguity as to legislative intent, criminal and penal statutes were to be interpreted in favor of the person who might be punished,

whereas other statutes—described as "remedial" for the purposes of the rule—were to be liberally construed. See John Comyns, A Digest of the Laws of England, 322-3, R. 19-20 (5th ed., corr. 1822); *Respublica v. Weidle*, 2 U.S. (2 Dall.) 88, 90-91 (1781). The rule, therefore, called for the strict interpretation of criminal and penal statutes imposing punishment through either criminal or civil processes. As a general matter, due to difficulties detecting and thus prosecuting offenses involving fraud, such statutes were at times categorized as "remedial" for the sole purpose of applying a liberal statutory construction even though they were "penal" in the broader sense of imposing punishment. E.g., 1 Blackstone, *supra*, at *88 (explaining that strict construction should not be required when interpreting statutes involving frauds). This approach was consistent with the understanding that "though penal laws [were] to be construed strictly they [were] not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Put plainly, the rule of lenity did not mandate an interpretation of any statute—including a revenue statute—that would effectively neuter the law.

From America's earliest days, courts respected the balance between employing the rule of lenity to protect those alleged to have committed public offenses and ensuring that it did not go so far as to wholly undermine Congress's efforts to collect tax revenue. In 1787, the Court of Common Pleas in Philadelphia County took up the case *Phile v. The Ship Anna*, which involved the interpretation of the following statutory language: "Every vessel or boat, from which any goods, wares, or merchandize shall be unladed,

before due entry thereof at the office of the collector of the port of Philadelphia, &c. shall be forfeited." *Phile v. The Ship Anna*, 1 U.S. (1 Dall.) 197, 205 (1787). The claimants—whose crew allegedly unlade forty-two hampers of porter though the master only declared twenty in the official manifest—argued that the statute should be interpreted to mandate the forfeiture of only the twenty-two hampers not declared, rather than the full forty-two unladed. *Id.* The court spoke in terms of the rule of lenity, remarking that "it is requisite that such laws should be strictly worded," and that "undoubtedly, there are cases where the construction of the words must be such, as to prevent more injury being done than was intended." *Id.* at 206. And yet, the court ultimately interpreted the statute to allow forfeiture of all of the unladen goods, given the evidence of legislative intent inherent in statutes designed to protect against revenue fraud, explaining: "This has been repeatedly called a hard law: but the truth is, that revenue laws are of a harsher nature than any others, and necessarily so; for, the devices of ingenious men, render it indispensable for the legislature to meet their illicit practices with severer penalties." *Id.* at 205-06. See also, e.g., *Taylor v. United States*, 44 U.S. (3 How.) 197, 209-11 (1845) (declining to interpret a tax-fraud statute in favor of the defendant though describing the statute as "penal" given that it "impos[ed] a penalty or forfeiture").[5]

Where it would not effectively eviscerate enforcement across the board, courts did, in fact, employ the

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[5] The *Bajakajian* Court read *Taylor* as indicating that the customs statute at issue was non-punitive. 524 U.S. at 331. For a detailed discussion of why that reading of *Taylor* is inconsistent with the broader historical record, see Colgan, *supra*, at 768-80.

rule of lenity to protect the owners of cargo and vessels at risk of forfeiture. For example, in 1808, the Court took up a case in which customs officers sought the forfeiture of cargo salvaged from a stranded vessel, arguing that the owners failed to comply with a customs statute requiring that imported cargo carry certain marks and certifications. *Peisch*, 8 U.S. (4 Cranch) at 358-59. In light of the accidental nature of the failure to comply, and "the extreme severity of [the government's proposed interpretation of the] regulation," the *Peisch* Court determined that such a "construction of the law could only be made where the words would admit of no other." *Id.* at 362-64. The Court declined to read the statute as allowing an owner to be "punish[ed]" through *in rem* forfeiture under circumstances in which the crew would have been unable to comply with the statute given the catastrophe at hand. *Id.* at 363-64. See also, e.g., *United States v. Eighty-Four Boxes of Sugar*, 32 U.S. (7 Pet.) 453, 462-63 (1833) (employing the rule of lenity to interpret a "highly penal" statute as excluding cases where, due to "accident or mistake" sugars were miscategorized for the purpose of establishing customs duties).[6]

The applicability of the rule of lenity to statutes setting out tax penalties—and thus their punitive nature—is also evident in a late-nineteenth century attorney general opinion responding to a likely attempt

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[6] For an example of the application of the rule of lenity to interpret a tax statute outside of the customs context, see *Judson v. State*, Minor 150, 153 (Ala. 1823) (agreeing that a statute "as relates to the laying and fixing the amount of the tax" was not subject to strict construction, "[b]ut, as to penalties for failing to pay the taxes, it must be subject to the rules of construction which apply to all other penal statutes").

by Congress to sidestep the rule of lenity in the customs context. The opinion surmised that, when drafting a customs statute, Congress used the word "duty" rather than "penalty" "in accordance with the extreme high-tariff policy of the framers of this famous act, to prevent a strict construction in favor of the importer." Richard Olney, *"Additional Duties"—Penalties—Remission of Forfeiture*, 20 Op. Att'y Gen. 660, 664 (Sept. 9, 1893). Rejecting that attempt, the opinion explained that a tax penalty "is in its essence a fine inflicted to promote honesty; nor is it less a penalty because it is called something else. The law looks at facts, not names." *Id.* at 661.

In sum, the rule of lenity allowed for an interpretation of tax statutes as favoring the government where doing so was necessary to avoid rendering the protection of the revenue against fraudulent behavior effectively meaningless, but those statutes remained penal in the sense that they imposed punishment.

II. That the GPTA Encourages Payment of Property Taxes Is Consistent with the Historical Use of Tax Fines and Forfeitures as Punishment.

In assessing whether forfeitures imposed through the GPTA were at least partially punitive and thus fines subject to the Excessive Fines Clause, the Sixth Circuit's abbreviated analysis focused on the idea that such forfeitures did not constitute fines because the GPTA's "aim is to encourage the timely payment of property taxes." Pet.App. at 15a (quoting *Rafaeli*, 952 N.W. at 448). In doing so, it failed to engage in any historical analysis of the centuries long use of pecuniary penalties, including property forfeitures, as punishment in the tax context. See *id.* at 13a-15a. So too

the cases upon which it relied. *Freed v. Thomas*, 81 F.4th 655, 659 (6th Cir. 2023) (engaging in no historical analysis); *Hall v. Meisner*, 51 F.4th 185, 196-97 (6th Cir. 2022) (adopting the district court's analysis); *Hall v. Meisner*, 565 F.Supp.3d 953, 974-75 (E.D. Mich. 2021) (engaging in no historical analysis); *Rafaeli*, 952 N.W.2d at 462-73, 448-50 (analyzing historical sources regarding property owners' common law right to surplus proceeds from tax-foreclosure sales, but with respect to whether the GPTA is punitive only comparing it to modern civil asset forfeitures).

The fact that a statute encourages lawful behavior and responds to unlawful behavior through a pecuniary deprivation is entirely consistent with those deprivations constituting punishment. Encouraging a behavior is another way of describing the deterrence of its inverse. To be sure, lawmakers may seek to deter certain activities through the imposition of taxes. See *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 780-81 (1994) (providing the example of taxes paid by purchasers of cigarettes and alcohol). But deterrence of unlawful behaviors is also fundamentally related to punishment. *Id.* (holding that a "tax" constituted a punishment in part because lawmakers "intended the tax to deter people from possessing marijuana," which "len[t] support to the characterization of the drug tax as punishment"); *Rummel v. Estelle*, 445 U.S. 263, 284 (1980) (describing deterrence as one of the "primary goals" of a recidivist statute).

The use of fines and forfeitures was central to encouraging compliance with (or, stated differently, deterring violations of) eighteenth- and nineteenth-century tax codes. See *supra* Part I.B. For example, when an importer undervalued cargo to avoid paying duties

for which the revenue laws imposed additional duties—a version of a civil tax fine—the Court understood that those additional duties "were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty." *Bartlett*, 57 U.S. (16 How.) at 274. The same is true with respect to property forfeitures imposed for tax law violations, where "[t]he purpose of penalties inflicted upon persons who attempt to defraud the revenue, [was] to enforce the collection of duties and taxes" a response designed to "act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hopes of profit." *Dorsheimer*, 74 U.S. (7 Wall.) at 173 (regarding a settlement by which a sum of money was substituted for liquors, distilling equipment, and other property seized in response to a liquor tax violation). See also *United States v. Three Parcels of Embroidery*, 28 F. Cas. 141, 142-43 (D. Mass. 1856) (No. 16,512) ("The sole purpose of the penalties and forfeitures with which they are so profusely studded, is the protection of the revenue.").

Incentivizing compliance was, in fact, woven throughout early revenue codes from stem to stern. As detailed above, at the front end, informers were awarded moieties of fines and forfeitures as an incentive to enforce compliance. See *supra* Part I.C.1; Benjamin Harris Brewster, *Customs Laws—Additional Duty Under*, 17 Op. Att'y Gen. 268, 274 (Jan. 27, 1882) ("Obviously the additional duty of the act of 1865 was a penal duty, designed to enforce the entry of imports by the importer according to the actual market value or wholesale price thereof[.]"). At the back end, the federal government's remission program, by which owners of forfeited property could seek relief, was de-

signed specifically to ensure that those who did comply, or at least attempted to comply, with the revenue laws were not punished. See *supra* Part I.C.2; Arlyck, *supra*, at 1491-98 (examining 578 remission cases between 1789 and 1807 and determining that remission was granted in part or in full for nearly ninety-one percent of petitions).

Not only was the use of fines and forfeitures to incentivize compliance a key component of early customs laws, lawmakers extended their use to other tax settings for the same purpose. For example, by the mid-nineteenth century, fines and forfeitures were employed to enforce tax codes related to liquor and tobacco manufacturing. See Colgan, *supra*, at 730-36. Like the customs laws, the revenues generated from these taxes were understood to be of public importance. *United States v. 1,412 Gallons of Distilled Spirits*, 27 F. Cas. 332, 332 (C.C.D.N.Y. 1873) (No. 15,960) ("From the passage of the Revenue law of 1862 on down, the legislation of congress manifestly looked to distilled spirits and distillers, and to tobacco and its manufacturers, for a considerable revenue."). Additionally, courts often remarked on the public importance of deterring the excesses that could result from liquor consumption. E.g., *Mugler v. Kansas*, 123 U.S. 623, 662 (1887) (linking liquor consumption to "idleness, disorder, pauperism, and crime"). The pecuniary penalties imposed for failure to abide by those laws, including forfeitures of liquor, tobacco, and related property, were "framed to secure to the United States fair payment of taxes imposed for the support of the government," and were thereby designed to promote compliance. *United States v. Distillery in West Front Street*, 25 F. Cas. 866, 867 (D. Del. 1870) (No. 14,965). And for those who did or attempted to comply

with the law, pardons and remissions remained available to ensure punishment was not suffered. E.g., *United States v. Malone*, 26 F. Cas. 1147, 1148-49 (S.D.N.Y. 1876) (No. 15,713) (noting, with respect to a $100 fine, that "the secretary of the treasury has the power to remit the forfeiture, and undoubtedly will do so, on being satisfied that there was no wilful negligence or intent to defraud the revenue").

In short, the GPTA, pursuant to which Michigan deprived Petitioner of the value of the estate's property over and above the amount of taxes owed, is consistent with the efforts of early American lawmakers to incentivize compliance with tax laws by punishing delinquent property owners through tax fines and forfeitures.

CONCLUSION

Both Respondent's arguments and the Sixth Circuit's position are inconsistent with the long history and tradition by which civilly imposed tax fines and forfeitures were employed as punishment to incentivize compliance with tax laws. A substantial volume of historical materials supports a holding that property forfeitures made pursuant to the GPTA are at least partially punitive, and thus constitute fines eligible for review under the Excessive Fines Clause.

Respectfully submitted,

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December 5, 2025