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

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

BRIEF FOR THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

SAMUEL B. GEDGE
Counsel of Record
PRASHANTA G. AUGUSTINE
INSTITUTE FOR JUSTICE
901 North Glebe Road,
Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a public-interest law firm committed to securing constitutional protections for individual liberty. Among our areas of expertise are the Fifth Amendment's Takings Clause and the Eighth Amendment's Excessive Fines Clause. (Cases in which we have represented the petitioners include *DeVillier* v. *Texas*, 601 U.S. 285 (2024); *Timbs* v. *Indiana*, 586 U.S. 146 (2019); and *Kelo* v. *City of New London*, 545 U.S. 469 (2005).) We have a keen interest in the proper resolution of this case.[*]

SUMMARY OF ARGUMENT

In 2018, "[f]ee simple title" to petitioner's property "vest[ed] absolutely" in Isabella County. Mich. Comp. Laws Ann. § 211.78k(6) (West 2015). The parties appear to agree that the county effected a taking; the property's value far exceeded the tax debt owed. The parties likewise appear to agree that, under this Court's precedent, petitioner "is entitled to just compensation." *Tyler* v. *Hennepin County*, 598 U.S. 631, 639 (2023). The dispute is over how that just compensation should be calculated. And on that question, the court of appeals erred. "Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules." *United States* v. *Toro., Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949). Yet the court of appeals implemented just such a rule. It treated as dispositive of just compensation the price the county fetched at auction—and, worse, an auction that postdated the county's having acquired title to the property by over a year. Pet. Br. 8.

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[*] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

That is an unprecedented way to determine just compensation. The court of appeals' error on this ground warrants vacatur and remand.

As an alternative, petitioner raises as his second question presented whether Isabella County's failure to fully compensate him for his property amounted to an Eighth Amendment fine. No matter how petitioner's first question presented is resolved, the Court need not address this second question. Under *Tyler* v. *Hennepin County*, petitioner undisputedly has a takings claim and is "entitled to just compensation." 598 U.S. at 639. However that just compensation is calculated, it necessarily will reflect "a full and perfect equivalent for the property taken." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893). As in *Tyler*, therefore, the Court "need not decide whether [petitioner] has also alleged an excessive fine under the Eighth Amendment." 598 U.S. at 647-48; *see also id.* at 648 (Gorsuch, J., concurring).

To the extent the Court addresses the second question presented further, the decision below implicates only a narrow excessive-fines issue: not whether an "excessive" fine was imposed, but whether any "fine" was imposed in the first place. On that question, the Court should not accept the arguments pressed by the county at the certiorari stage and by the federal government elsewhere. Those arguments break with this Court's precedent and would, if accepted, badly distort the Excessive Fines Clause.

ARGUMENT

I. Because the court of appeals' bright-line valuation rule was flawed, the first question presented can be resolved straightforwardly.

Under this Court's decision in *Tyler* v. *Hennepin County*, Isabella County effected a taking of petitioner's property under the Fifth Amendment, in turn "entitl[ing] [petitioner] to just compensation." 598 U.S. 631, 639 (2023). In interpreting that guarantee of just compensation, "[p]erhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules." *United States* v. *Toro.*, *Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949). Yet the court of appeals' rule of decision amounted to precisely that: It held that petitioner's just compensation was irrebuttably "determined" by the price fetched at a public auction long postdating the taking of his property. Pet. App. 11a; *see also* Pet. Br. 8.

In this, the court erred twice over. To start, treating the auction price as dispositive of just compensation reflects just the sort of inexorable rule this Court has disapproved. A public-auction price certainly may be evidence of the just compensation due. It may even be powerful evidence. But as petitioner's case spotlights, using it as the basis for an irrebuttable presumption breaks with this Court's precedent and with the promise of the Takings Clause.

The court of appeals compounded its error by treating as dispositive an auction that postdated Isabella County's taking by well over a year. *See* Pet. Br. 8. Under the Takings Clause, the moment at which "[f]ee simple title . . . vest[ed] absolutely" in the county (Mich. Comp. Laws Ann. § 211.78k(6) (West 2015)) was the point the taking occurred. That is the date on which the original owner's

"right to full compensation arises." *Knick* v. *Township of Scott*, 588 U.S. 180, 190 (2019). And that is the date as of when the amount of just compensation must be calculated. *See First Eng. Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U.S. 304, 320 (1987). For petitioner, that date was, at the latest, June 12, 2018. *See* Judgment at 3, *Isabella Cnty. Treasurer* v. *Pung*, No. 14-11664-CF (Mich. Isabella Cnty. Trial Ct. June 12, 2018) ("[T]he Judgment of Foreclosure entered in this proceeding on February 20, 2015 . . . is reinstated . . . ."); Opinion and Order on Respondent's Objection to Proposed Order at 3, *Isabella Cnty. Treasurer* v. *Pung*, No. 14-11664-CF (Mich. Isabella Cnty. Trial Ct. June 12, 2018) ("[R]espondent's request to reinstate the redemption period is denied."). Under the court of appeals' standard, however, the date that mattered was long after: mid-2019. A standard that treats such an after-the-fact auction price as dispositive is an unprecedented way to determine just compensation.

The court of appeals justified its standard by suggesting that "[t]he government commits a Fifth Amendment taking when it retains the proceeds from a tax foreclosure sale that exceed the delinquent property tax debt." Pet. App. 10a-11a. On that view, it is the surplus sale proceeds that are the property "taken," such that restoring those proceeds equates to just compensation. But it is unclear how that can be correct. At the latest, Isabella County acquired absolute title to petitioner's property in June 2018. It was that acquisition of absolute title that effected the Fifth Amendment taking. And that the county happened later to sell the property does not have any obvious bearing on that taking—much less give rise to a dispositive metric for calculating the just compensation long-since owed. (Under Michigan's statute, in fact, properties like petitioner's might end up never being sold at all. Mich.

Comp. Laws Ann. § 211.78m(7) (West 2015).) Whatever questions may be presented by other tax-foreclosure systems, correcting the court of appeals' error on this ground presents the most straightforward basis for resolving this case.

II. To the extent petitioner's second question presented need be addressed at all, the county's arguments are without merit.

A. Whatever its resolution of the first question presented, the Court need not address petitioner's second question presented.

As an alternative to his Fifth Amendment takings claim, petitioner presents a question relating to whether Isabella County imposed an excessive fine. Pet. i. No matter how petitioner's first question presented is resolved, the Court need not address this second question. Under *Tyler*, petitioner undisputedly has a takings claim and is "entitled to just compensation." 598 U.S. at 639. And however his just compensation ends up being calculated, it must needs reflect "a full and perfect equivalent for the property taken." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893). What was true in *Tyler* is thus equally true here. As in *Tyler*, the "relief under 'the Takings Clause w[ill] fully remedy [petitioner's] harm.'" 598 U.S. at 647-48. In turn, as in *Tyler*, the Court "need not decide whether [the petitioner] has also alleged an excessive fine under the Eighth Amendment." *Id.*; *see also id.* at 648 (Gorsuch, J., concurring) ("Given its Takings Clause holding, the Court understandably declines to pass on the question whether the Eighth Circuit committed a further error when it dismissed Ms. Tyler's claim under the Eighth Amendment's Excessive Fines Clause."). On the second question presented, the Court need say no more than that.

B. The excessive-fines question before the Court is narrow, and the county's arguments on that question lack merit.

To the extent the Court addresses the second question presented, the decision below implicates a narrow excessive-fines issue: not whether an "excessive" fine was imposed on petitioner, but whether any "fine" was imposed at all. Broadly speaking, excessive-fines challenges present two distinct questions: (a) whether any "fine" has been imposed, and (b) if one has, "whether the particular sanction in question is so large as to be 'excessive.'" *United States* v. *Ursery*, 518 U.S. 267, 287 (1996); *see also Austin* v. *United States*, 509 U.S. 602, 622-23 (1993) (holding that civil forfeiture was a "fine" and remanding for lower courts to evaluate excessiveness in the first instance). Below, the court of appeals addressed only the first of those questions, holding that Isabella County imposed no fine at all. Pet. App. 15a. If the court of appeals erred on that point, the proper course would thus be for this Court to correct that threshold error, remand, and leave any dispute about the excessiveness of petitioner's fine for the lower courts to address in the first instance—a result petitioner appears to agree would be the appropriate course. Pet. Br. 44 ("This Court should remand for the lower courts to determine the extent to which the confiscation of Pung's property was an excessive fine . . . ."); *see generally Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

On that first-order question—whether a fine was imposed—the Court should not accept the arguments pressed by the county at the certiorari stage (and by the federal government in *Tyler* and elsewhere). Those arguments depart from this Court's precedent and would, if accepted, dramatically undermine the Excessive Fines

Clause's protections across a range of punitive economic sanctions.

1. The county argued at the certiorari stage that the Excessive Fines Clause applies only to economic sanctions "imposed as punishment following conviction for a criminal offense." Br. in Opp. 12. This Court, however, has rejected that proposition emphatically: The "notion of punishment" contemplated in the Excessive Fines Clause "cuts across the division between the civil and the criminal law." *Austin*, 509 U.S. at 610 (citation omitted). In *Austin* itself, in fact, the civil-forfeiture statute lacked the criminal-civil link the county ascribes to it. It is true, as the county has pointed out (Br. in Opp. 11), that Richard Austin happens to have been convicted (in state court) of the crimes giving rise to the federal government's civil-forfeiture action against his property. *Austin*, 509 U.S. at 604-05. But that conviction had no bearing on the applicability of the federal forfeiture statute; on its face, "forfeiture under § 881(a) is not conditioned upon an arrest or conviction for a drug offense." *United States* v. *$10,700.00*, 258 F.3d 215, 223 n.6 (3d Cir. 2001). For that matter, the federal government filed its action to civilly forfeit Austin's property *before* he had been convicted criminally. Pet. Br., *Austin* v. *United States*, 1993 WL 347335, at *6 (U.S. Mar. 1, 1993) (No. 92-6073). The same was true of the civil-forfeiture action in *Timbs* v. *Indiana*. *State* v. *Timbs*, 62 N.E.3d 472, 474 (Ind. Ct. App. 2016); *see generally State* v. *Timbs*, 134 N.E.3d 12, 35 (Ind. 2019) (noting more broadly that Indiana's statute can apply to property owners "who may not have committed the underlying crime"). In turn, courts across the Nation have accepted that the Excessive Fines Clause applies to fines, forfeitures, and penalties "whether those fines are part of a criminal scheme or a civil one." *Colo. Dep't of Lab. & Emp.* v. *Dami Hosp., LLC*, 442 P.3d 94, 100 (Colo.

2019); *see also, e.g.*, *United States ex rel. Grant* v. *Zorn*, 107 F.4th 782, 797 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 2812, 2816 (2025); *New York* v. *United Parcel Serv., Inc.*, 942 F.3d 554, 599 n.36 (2d Cir. 2019).

As the Court recognized in *Austin*, the Clause's text fully supports this reading. Unlike other parts of the Constitution, some of which "are expressly limited to criminal cases," the text of the Excessive Fines Clause "includes no similar limitation." *Austin*, 509 U.S. at 607, 608; *see also id.* at 614 n.7 (reviewing founding-era definitions of "fine"). Whether an economic sanction is subject to the Excessive Fines Clause thus turns not on whether it is "civil or criminal," but on whether it serves at least partly "to deter and to punish." *Id.* at 610, 622; *see also United States* v. *Bajakajian*, 524 U.S. 321, 329 & n.4 (1998). Simply, the county's view (Br. in Opp. 11) that the Clause applies only to economic sanctions "directly tied to criminal conviction of the person whose property is subject to forfeiture" breaks with text and precedent alike.

In *Tyler*, the federal government, as amicus, offered a similarly flawed perspective: Even if a civil penalty need not be linked directly to a criminal conviction, the Excessive Fines Clause is implicated only if the penalty can be said to punish "a criminal offense." Br. of United States as Amicus Curiae at 28, *Tyler* v. *Hennepin County*, 598 U.S. 631 (2023) (No. 22-166). But the government's perceived distinction between "[c]ivil deterrence" and "deterrence . . . to prevent crime" (*id.* at 29 (quoting J.A. at 42, *Tyler*, 598 U.S. 631 (No. 22-166))) is wrong for much the same reasons Isabella County's more blunt-force formulation is wrong. Most obviously, the government was mistaken to divine from *Austin*'s "context" that the Clause applies only "to sanctions with the purpose of deterring *criminality*." *Id.* In truth, *Austin* said just the

opposite. 509 U.S. at 610 ("The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." (citation omitted)). Taking *Austin* at its word, courts across the Nation have thus applied the Clause to civil penalties associated with no criminal wrongdoing. *See, e.g.*, *Colo. Dep't of Lab. & Emp.*, 442 P.3d at 97; *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 410, 420-23 (Cal. 2005).

Practically speaking, the federal government's litigating positions betray the unworkability of its rule. In cases involving federal FBAR penalties, for example, the government has argued that the Excessive Fines Clause does not apply because "there is no necessary tie to a criminal offense or criminal culpability." Br. in Opp. at 15, *Toth* v. *United States*, 143 S. Ct. 552 (2023) (No. 22-177). In litigation involving federal False Claims Act penalties, meanwhile, it has conceded the opposite: that the Excessive Fines Clause does indeed apply. *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1314 n.8 (11th Cir. 2021) ("The United States, as amicus curiae, agreed at oral argument that the Excessive Fines Clause applies in this case."). How those two positions can coexist is anyone's guess. The simpler approach is the correct one: Regardless of whether the misconduct to be punished is labeled civil or criminal (or criminal-ish), the Excessive Fines Clause applies to economic sanctions that are "payment to a sovereign as punishment for some offense." *Austin*, 509 U.S. at 622 (citation omitted); *see also Toth* v. *United States*, 143 S. Ct. 552, 553 (2023) (Gorsuch, J., dissenting from denial of certiorari) (noting that the protections of the Excessive Fines Clause "would mean little if the government could evade constitutional scrutiny under the Clause's terms by the simple expedient of

fixing a 'civil' label on the fines it imposes and declining to pursue any related 'criminal' case").

2. At times, the federal government has also suggested that if a civil penalty or forfeiture does not qualify as "criminal" for purposes of Fifth and Sixth Amendment protections, it cannot qualify as a "fine" for purposes of the Eighth Amendment. *See, e.g.*, *Landa* v. *United States*, 153 Fed. Cl. 585, 600-01 (2021) (accepting government's arguments and applying "the factors established in *Kennedy* [v. *Mendoza-Martinez*]"). That, too, is wrong. As relevant here, the Fifth and Sixth Amendments secure protections "that attend a criminal prosecution" specifically. *Austin*, 509 U.S. at 610 n.6. But as discussed, that inquiry is materially different from whether a penalty is a "fine" within the meaning of the Eighth Amendment.

In fact, the Court has been down this road before. In *Austin*, the government devoted itself to arguing that "the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), and *United States* v. *Ward*, 448 U.S. 242 (1980)." *Id.* at 607. Yet the Court rejected that contention root and branch. *Id.* at 610 n.6 ("[T]he United States' reliance on *Kennedy* v. *Mendoza-Martinez* and *United States* v. *Ward* is misplaced."). The *Kennedy* standard, the Court reasoned, is designed to identify those civil penalties that are rightly viewed as "criminal" and thus implicate constitutional protections reserved for criminal-court proceedings alone. *Id.* But whether a penalty is an Eighth Amendment "fine" presents a different question altogether—asking not whether the penalty "is civil or criminal," but whether it serves at least in part to punish. *Id.* at 610. In years to come, the Court would hold

that same line: It reaffirmed that *Austin* remains the yardstick for the Excessive Fines Clause even as it held that the *Kennedy* standard applies to the Fifth Amendment. *Hudson* v. *United States*, 522 U.S. 93, 102-03 (1997).

3. In other contexts, the federal government has argued that civil penalties and forfeitures serve "remedial" purposes and are thus categorically not Eighth Amendment fines. That contention is equally unfounded.

First, the government often misdescribes the relevant legal framework. Under this Court's precedent, a monetary payment might not be subject to the Excessive Fines Clause if it is one-hundred percent compensatory and zero percent punitive. If it serves a mix of remedial and punitive ends in combination, however, the Clause applies. "Because 'sanctions frequently serve more than one purpose,'" the Court "has said that the Excessive Fines Clause applies to *any* statutory scheme that 'serv[es] *in part* to punish.'" *Tyler*, 598 U.S. at 648 (Gorsuch, J., concurring) (quoting *Austin*, 509 U.S. at 610). Thus, "[i]t matters not whether the scheme has a remedial purpose, even a predominantly remedial purpose. So long as the law 'cannot fairly be said *solely* to serve a remedial purpose,' the Excessive Fines Clause applies." *Id.* (quoting *Austin*, 509 U.S. at 610); *see also Bajakajian*, 524 U.S. at 329 n.4; *Toth*, 143 S. Ct. at 553 (Gorsuch, J., dissenting from denial of certiorari). Routinely, however, the federal government seeks to exempt civil penalties from the Excessive Fines Clause on the theory that, even if crushingly punitive, they are "at least partially" remedial as well. *See, e.g.*, *United States* v. *Collins*, No. 18-cv-1069, 2021 WL 456962, at *8 (W.D. Pa. Feb. 8, 2021), *aff'd on other grounds*, 36 F.4th 487 (3d Cir. 2022). That contention inverts the teaching of this Court's precedent.

Second, the government also distorts the concept of "remedial." For excessive-fines cases, a purely "'[r]emedial action' is one 'brought to obtain compensation or indemnity.'" *Bajakajian*, 524 U.S. at 329; *see also*, *e.g.*, *Yates*, 21 F.4th at 1308; *United States* v. *Viloski*, 814 F.3d 104, 109 (2d Cir. 2016). Yet even for economic sanctions that are non-compensatory, the government often seeks to label them "remedial" even so. How? By looking, not to excessive-fines precedent, but to mid-century precedent involving the Double Jeopardy Clause, which at times used "remedial" loosely to describe a variety of non-criminal sanctions. *See*, *e.g.*, *United States* v. *Toth*, 33 F.4th 1, 16-19 (1st Cir. 2022) (invoking, e.g., *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), and *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam)); *see also* Br. of United States at 59-62, *United States* v. *Rund*, No. 24-1958 (4th Cir. Mar. 17, 2025) (Doc. 28).

That is a stark category error. While double-jeopardy decisions certainly have made use of the term "remedial," they have done so in a way that differs from how the term is used in excessive-fines precedent. In the double-jeopardy context, "remedial" developed into a shorthand for all non-criminal penalties—"a catchall label for sanctions that courts did not want to define as punitive in the criminal sense, but that were clearly not simple compensatory damages." Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1829 (1992) (citing, among other decisions, *Mitchell*, *supra*). That shorthand may be useful in double-jeopardy cases, which distinguish between punishments that are and are not "criminal." *Hudson*, 522 U.S. at 99. But, at risk of belaboring the point, the Excessive Fines Clause is different: It "cuts across the division between the civil and the criminal law." *Austin*, 509 U.S. at 610 (citation omitted). Many penalties thus are

"remedial" (i.e., civil) enough to fall outside the Fifth Amendment while still being "punitive" enough to implicate the Eighth. Indeed, the Court has said so explicitly: While a civil economic sanction may be "subject to review for excessiveness under the Eighth Amendment," the Court has admonished that "this does not mean" it is "so punitive as to constitute punishment for the purposes of double jeopardy." *Ursery*, 518 U.S. at 287; *see also id.* at 286 (remarking that the Double Jeopardy Clause and the Excessive Fines Clause are not "parallel to, or even related to" one another).

4. Lastly, the federal government has cautioned that treating "deterrence" as the touchstone for the Excessive Fines Clause "would threaten to transform every civil penalty into a form of punishment for Eighth Amendment purposes, since every civil penalty presumably deters to some extent the conduct for which the penalty is assessed." Br. in Opp. at 18, *Toth*, 143 S. Ct. 552 (No. 22-177); *see also* Br. of United States as Amicus Curiae at 30, *Tyler*, 598 U.S. 631 (No. 22-166). Yet as this Court has made clear, that is precisely how the doctrine is meant to work. In *Hudson*, for example, the Court construed the Double Jeopardy Clause narrowly as "protect[ing] only against the imposition of multiple *criminal* punishments for the same offense." 522 U.S. at 99. But the Excessive Fines Clause, the Court noted, is different: It "protects against excessive civil fines" as well. *Id.* at 103. Contrary to the government's suggestion, moreover, applying the Excessive Fines Clause in this way does not imperil civil penalties writ large; it simply ensures that they are subject to a measure of judicial review for excessiveness. *Ursery*, 518 U.S. at 287 (noting that if a penalty is a fine, "the second stage of inquiry under the Excessive Fines Clause asks whether the particular sanction in question is so large as to be 'excessive'").

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

SAMUEL B. GEDGE
Counsel of Record
PRASHANTA G. AUGUSTINE
INSTITUTE FOR JUSTICE
901 North Glebe Road,
Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org

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