

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 Writ Of Certiorari To The
United States Court of Appeals for the Sixth Circuit*

**BRIEF OF *AMICUS CURIAE*
LEGAL SERVICES OF NEW JERSEY
IN SUPPORT OF PETITIONER**

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Identity and Interest of *Amicus Curiae*

Legal Services of New Jersey (“LSNJ”) respectfully submits this brief *amicus curiae* in support of petitioner Michael Pung, Personal Representative of the Estate of Timothy Scott Pung.¹ LSNJ is a non-profit corporation that supports and coordinates New Jersey’s statewide Legal Services system, consisting of a network of five regional Legal Services programs in addition to LSNJ (“Legal Services” collectively). The Legal Services system is New Jersey’s primary provider of free legal assistance to low-income people in civil matters.

LSNJ frequently participates as *amicus curiae* in New Jersey cases involving issues of major significance to the State’s low-income population. In so doing, it presents perspectives of low-income people as a group rather than the views or interests of the individual litigants. *See, e.g., McGee v. Alger Cnty. Treasurer*, Nos. 363803, 363804 (Mich. Ct. App. Sept. 12, 2024), *petition for cert. filed*, No. 25-203 (U.S. Aug. 15, 2025); *257-261 20th Ave., Realty, LLC v. Roberto*, 259 N.J. 417 (2025); *Bank of Am., N.A. v. Maher*, 260 N.J. 225, 332 A.3d 710 (Mem) (2025); *257-261 20th Ave. Realty, LLC v. Roberto*, 477 N.J. Super. 339

¹ Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission.

(App. Div. 2023, *aff'd* as modified, 259 N.J. 417 (2025); and *Invs. Bank v. Torres*, 243 N.J. 25 (2020).

Since 2002, LSNJ has provided statewide representation in homeowner foreclosure defense cases through a specialized project concentrating on the full range of foreclosure-related issues. Through its Foreclosure Defense Project, LSNJ is New Jersey's largest provider of free legal defense for families facing foreclosure. The LSNJ hotline, website, and outreach have provided legal assistance in more than 10,500 foreclosure cases during the past 17 years. LSNJ has assisted even more residents facing foreclosure through educational materials accessed on our website. LSNJ represents and advocates for indigent, elderly, and vulnerable populations in New Jersey, including property owners whose Fifth Amendment rights are violated by state forced sale procedures.

Summary of Argument

This Court's unanimous decision in *Tyler v. Hennepin County*, 598 U.S. 631 (2023) mandates payment of surplus equity just compensation to dispossessed property owners in tax foreclosures under the Fifth Amendment. However, throughout the country, dispossessed owners are continually being deprived of just compensation when their property is taken by the government or state actors in tax foreclosure forced sales. Michigan and New Jersey

are two states utilizing forced sale procedures that fail to produce just compensation.

The brief first argues that forced sales in tax foreclosure cases fail to achieve just compensation for surplus equity. Fair market value is the measure of just compensation under the Fifth Amendment and forced sales do not produce fair market value. Second, the brief contends that a constitutional tax foreclosure process must ensure that surplus equity reflects fair market value. This section discusses existing sale procedures in Oregon, Maine, and Massachusetts that meaningfully seek to recover fair market value for dispossessed property owners; sets forth suggestions for statutory safeguards that seek to protect fair market value as mandated by *Tyler*; and provides examples of harmful consequences when fair market value recovery is not ensured. Section three discusses inapplicability of the *BFP* decision that defined “reasonably equivalent value” in bankruptcy mortgage forced sales as distinguishable from “fair market value” which is required by the Fifth Amendment in property tax foreclosure sales.

Argument

I. Forced sales fail to achieve just compensation for surplus equity in tax foreclosure cases.

Fair market value – “what a willing buyer would pay in cash to a willing seller” – has long been

the touchstone for measuring just compensation in takings cases. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (citation modified). “The Court has repeatedly held that just compensation normally is to be measured by ‘the market value of the property at the time of the taking.’” *Horne v. Department of Agriculture*, 576 U.S. 350, 368-69 (2015) (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984)); see also *United States v. Reynolds*, 397 U.S. 14, 16 (1970) (“owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.”). The fair market value standard traditionally sets a floor rather than a ceiling on just compensation – until now, interpretive questions have consistently focused on whether just compensation requires payment of an amount in excess of fair market value in certain circumstances. *564.54 Acres*, 441 U.S. at 511; *Coniston Corp. v. Village of Hoffman Ests.*, 844 F.2d 461, 464 (7th Cir. 1988) (Posner, J.) (observing that owners who “value their property at more than its market value . . . are hurt when the government takes their property and gives them just its market value in return”).

The respondent here, a Michigan county, urges the Court to go in the opposite direction and to confer constitutional legitimacy on tax foreclosures that rely on a type of disposition long known to result in transfers at far less than fair market value – an involuntary forced sale. The problem is not unique to Michigan: New Jersey, like Michigan, enacted just such a regime in response to this Court’s holding in

Tyler.² As the facts here clearly illustrate (the decedent’s estate received less than half of the property value as “just compensation”), this systematically strips wealth from low-income and other economically vulnerable households. It is unconstitutional because it plainly fails to meet the Court’s longstanding fair market value test of just compensation.³

a. Extensive evidence shows that mortgage foreclosure auctions result in prices far below fair market value.

Until the mid-twentieth century, tax foreclosure auctions transferring fee simple title to a new owner were used in only about half of the states⁴ and attracted considerably less attention than mortgage foreclosure auctions (at least outside of the bankruptcy context).⁵ Almost all states use public

² The New Jersey Supreme Court acknowledged in *Roberto II*, 259 N.J. at 434, “[a]fter we granted certification, the Legislature amended the state’s tax foreclosure laws in response to *Tyler*. . . . See N.J.S.A. 54:5-87(b) (2024).”

³ Emilio R. Longoria, *Properly Construing the Just Compensation Clause*, 64 B.C. L. Rev. 1377, 1395–96 (2023). “In an effort to articulate a usable standard for adjudicating the Just Compensation Clause’s mandate, ‘the courts early adopted, and have retained, the concept of market value.’”

⁴ Laura B. Bartell, *Tax Foreclosures As Fraudulent Transfers - Are Auctions Really Necessary?*, 93 Am. Bankr. L.J. 681, 694-96 (2019).

⁵ See FN 7, *infra*. Tax foreclosure auctions have recently become more common, as states like Michigan and New Jersey have looked to their existing mortgage foreclosure procedures to

auctions as a primary method of property disposition in mortgage foreclosure cases,⁶ and therefore have been widely studied. While mortgage foreclosures do not raise Takings Clause issues – since they are rarely, if ever, undertaken for a public purpose and the foreclosing mortgagee is typically a private party acting on its own behalf – the fairness of mortgage foreclosure auctions has nonetheless attracted considerable attention, including the question of whether they are effective as a means of recovering fair market value. Especially because in states like New Jersey the auction process is generally the same under current mortgage and tax foreclosure statutes,⁷ case law and scholarship concerning mortgage foreclosure auctions is a good place to start in evaluating the adequacy of tax foreclosure auctions.

It is widely known and acknowledged that forced sale mortgage foreclosure auctions are ineffective at achieving fair market value prices for property. “Although foreclosure by auction was [originally] intended to generate a fair price for the foreclosed property, it has been unsuccessful in doing so almost since its inception. The many deficiencies in

replace strict foreclosure systems found unconstitutional under *Tyler*.

⁶ Aaron Byrkit, *Reforming Foreclosure Disposition: A Tool for Tempering the Financial Meltdown*, 63 Consumer Fin. L.Q. Rep. 275, 277 (2009). “Foreclosure in almost all states is carried out through a public auction method.”

⁷ N.J.S.A. 54:5-87b.

the process render that result inevitable.”⁸ As Justice Scalia famously observed:

[M]arket value, as it is commonly understood, has no applicability in the

⁸ Ann M. Burkhardt, *Fixing Foreclosure*, 36 Yale L. & Pol’y Rev. 315, 326-29 (2018). Evidence shows both that (1) voluntary or involuntary real property auctions in the United States realize prices well below private sales, with two studies showing auction sale prices 37% lower than privately sold properties, and (2) involuntary (i.e., foreclosure forced sale) auctions are “vastly inferior.” See also Thomas W. Mitchell et. al., *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 Fla. St. U. L. Rev. 589, 602-06 (2010) (discussing the reasons why “a forced-sale price is likely to represent a significant discount from an asset’s fair market value”); Basil H. Mattingly, *The Shift from Power to Process: A Functional Approach to Foreclosure Law*, 80 Marq. L. Rev. 77, 95 (1996) (“[F]oreclosure sales are neither conducted in a commercially reasonable manner nor by a method that can be expected to produce true competitive bidding. This absence of competitive bidding generally results . . . in inadequate sale proceeds obtained at the foreclosure sale.”); Edward Goodman, Note, *Regularly Conducted Non-Collusive Mortgage Foreclosure Sales: Inapplicability of Section 548(a)(2) of the Bankruptcy Code*, 52 Fordham L. Rev. 261, 274, 281 (1983) (“It is very likely . . . that a price below fair market value will be paid for property sold at . . . a [mortgage foreclosure] sale.”); Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. Cal. L. Rev. 843, 848, 850 (1980) (collecting evidence “that judicial sales do not serve their intended function and that they have the same consequences as common law strict foreclosure. Foreclosure sale prices are often greatly below actual fair market values because they reflect the fact that the sale is a forced sale rather than an arm’s length, free market sale between a willing buyer and a willing seller. . . . [S]ale at an inadequate price deprives the debtor of his equity in the property.”).

forced-sale context; indeed, it is the very *antithesis* of forced-sale value. “The market value of . . . a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property.” Black’s Law Dictionary 971 (6th ed. 1990). In short, “fair market value” presumes market conditions that, by definition, simply do not obtain in the context of a forced sale.

BFP v. Resolution Trust Corp., 511 U.S. 531, 537-38 (1994) (emphasis in original).⁹ *See also Gelfert v.*

⁹ Because takings are forced transfers, the willing buyer and seller invoked in the fair market value test are in the first instance hypothetical – and they remain so if the government or a state actor private party keeps the property. Since many tax foreclosed properties are, by design, quickly resold by initial transferees (who may themselves be fire-sale auction purchasers), actual arm’s-length transactions providing strong evidence of fair market value are relatively common. *See Martinett v. Maczkewez*, 59 N.J.L. 11, 14 (Sup. Ct. 1896) (“When

National City Bank of New York, 313 U.S. 221, 233 (1941) (“[there] has been the realization that the price which property commands at a forced sale may be hardly even a rough measure of its value”).

This Court has recognized the critical role of non-legal sources, including scholarly articles, when reviewing constitutional law questions. “[E]xamination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation.” (*D.C. v. Heller*, 554 U.S. 570, 605 (2008) (emphasis original); see also *Regents of Univ. of California v. Bakke*, 438 U.S. 265, n. 25 (1978) (noting that “[this critical battle over the scope of judicial review] has generated a considerable amount of scholarly controversy,” and citing multiple scholarly articles addressing the issue). Here, fleshing out the mechanisms by which mortgage foreclosure auctions have come up short, one author explained that inadequate notice is a central issue:

Foreclosure statutes require that notice of the impending sale be posted to alert potential bidders; however the extent of the notice, and the judicial

a willing seller and a willing buyer agree and fix the price of an article, it is obvious that it is reasonable to infer that such estimation approximates closely to the real value of such article; but in an official sale by auction the owner has no voice in the affair, and each bidder is striving to obtain the thing sold, not at its actual worth, but at a bargain.”)

interpretation of the requirement vary substantially. . . . [T]he circumstances under which the advertising methods are challenged often results in different outcomes as to whether the advertising was appropriate. . . . Minimal information communicated to the market results in fewer prospective bidders attending the auction, and those who do attend are not equipped with enough information to adequately bid up the price. Consequently, the market is unable to function efficiently.¹⁰

Another scholar observed that:

[Early c]ourts and legislatures believed that a public auction of the property was the best way to determine its fair value because, with appropriate advertising and sales procedures, third parties would bid the price to the land's value.

However, the predictions about the benefits of foreclosure by auction soon proved to be wrong. One critical error was allowing the foreclosing lender to

¹⁰ Pamela Giss, *An Efficient and Equitable Approach to Real Estate Foreclosure Sales: A Look at the New Hampshire Rule*, 40 St. Louis U. L.J. 929, 941–42 (1996); accord. Mitchell, *Forced Sale Risk*, 37 Fla. St. U. L. Rev. at 602-06.

bid at its foreclosure sale. With the [foreclosing lienholder's] right to bid at the auction, [there was] little incentive to spend time and money advertising the sale and otherwise attempting to stimulate competitive bidding Therefore, from an early date, the foreclosing lender frequently was the only bidder.¹¹

Empirical studies of mortgage foreclosure auction results bear these shortcomings out. In Onondaga County, New York, 77% of properties were purchased by the foreclosing lender;¹² in Cook County, Illinois, about 90%;¹³ and in Mercer County, New Jersey, 89%.¹⁴ In the Illinois study, data showed that “[w]hile

¹¹ Burkhardt, *Fixing Foreclosure*, 36 Yale L. & Pol’y Rev. at 321 (citations omitted). New Jersey’s tax foreclosure auction statute rehearses this mistake, as it fails to prohibit foreclosing lienholders from bidding at forced sales.

¹² Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale As De Facto Strict Foreclosure- an Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 Cornell L. Rev. 850, 874–75 (1985).

¹³ Debra Poggrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and A Proposal for Reform*, 30 U. Mich. J.L. Reform 639, 663 (1997) (“Third parties successfully bid in only 11.2% of the 1993 judicial sales cases and only 9.6% of the 1994 judicial sales cases.”)

¹⁴ Myron C. Weinstein, 30A *N.J. Prac., Law of Mortgages* § 38.1, Westlaw (November 2025 update) (citing “*Foreclosure and Deficiency Actions in New Jersey*,” 118 N.J.L.J. Index Page 809 (December 11, 1986)) (also noting that “[v]ery few [New Jersey foreclosure] sales . . . result in any surplus, because there is no real competition at such sales, except for bidding by persons

third parties rarely were the successful bidders at the foreclosure sales . . . , when they were successful, and resold the properties within one year, they frequently resold the properties for very large profits” ranging from 32% to 326%.¹⁵ In another example, the U.S. Department of Housing and Urban Development conducted a public auction study that reinforced the obvious underpayment of fair market value in public auctions: “Despite [extensive] marketing efforts, the very favorable selling terms, and a strong economy, the [auction] selling prices averaged 17.45 percent less than the market values.”¹⁶

In short, the overwhelming evidence is that while competitive bidding at mortgage foreclosure auctions – and the potential to generate returns approximating fair market value – is theoretically possible and was once intended, it rarely if ever occurs today.

- b. Tax foreclosure judgment strike prices are even lower than mortgage foreclosure strike prices, thus worsening the taking of surplus equity without just compensation.**

holding subsequent encumbrances and so-called professional bidders”).

¹⁵ Stark, *Facing the Facts*, 30 U. Mich. J.L. Reform at 667-68.

¹⁶ Burkhart, *Fixing Foreclosure*, 36 Yale L. & Pol’y Rev. at 327-28, (citing Marcus T. Allen & Judith Swisher, *An Analysis of the Price Formation Process at a HUD Auction*, 20 J. REAL EST. RES. 279 (2000)).

Because property tax rates are assessed at cents-per-dollar of actual property market value, underlying tax assessments create the breeding ground for tax foreclosures where judgment prices are cents-per-dollar of real and actual property market value.¹⁷ Thus, property owners in tax foreclosure are at heightened risk of taken surplus equity without just compensation. Unlike mortgage foreclosures which typically involve properties encumbered by substantial judgment amounts (and even inducing negative equity during economic recessions),¹⁸ by their design property tax foreclosure judgment amounts are usually insubstantial compared to real and actual property market value.¹⁹

¹⁷ “The property tax rate is often stated as certain number of mills or cents per hundred dollars of value. Traditionally, the base against which the rate is levied is the fair market value of the property subject to the tax. Thus, for example, if there is a tax on real property imposed at the rate of twenty-five cents per one hundred dollars of value, then a home worth one hundred thousand dollars would generate a property tax liability of two hundred fifty dollars.” John A. Miller, *Rationalizing Injustice: The Supreme Court and the Property Tax*, 22 Hofstra L. Rev. 79, 84 (1993).

¹⁸ Kasey Curtis, *The Burst Bubble: Revisiting Foreclosure Law in Light of the Collapse of the Housing Industry*, 36 W. St. U. L. Rev. 119, 128 (2008). “[O]ne study even indicated that in a typical foreclosure it is common for the mortgagor to possess negative equity.”

¹⁹ Lauren Rogers, *The Case for Abolishing Tax Foreclosure of Primary Residences: Can Originalists and Progressives Agree?*, 47 W. New Eng. L. Rev. 217, 219–20 (2025) “The harsh penalty of homelessness [after tax foreclosure] appears especially unjust when the past due taxes are a relatively small amount compared

As explained in section I.a. the problems of missing or inadequate compensation for taken equity are a near certainty in all foreclosure auctions – whether for a mortgage or a property tax judgment. In tax foreclosure auctions, the likelihood of inadequately compensated takings is substantially increased due to proportionally miniscule property tax assessments and related judgment amounts compared to actual property value. In acknowledgment and recognition of the foregoing, all jurisdictions grant redemption periods so that property owners may avoid the severe consequences of tax foreclosure judgments.²⁰

to the value lost.” *See also* John Rao, Nat’l Consumer Law Center, *The Other Foreclosure Crisis: Property Tax Lien Sales*, 40 (2012). “A forced sale [in the tax foreclosure context] almost never produces a sale price reflecting the fair market value of the property.”; Lawrence Ponoroff, *The Curious Case of Tyler v. Hennepin County*, 43 Va. Tax Rev. 131, 149 (2023) (cautioning against “unrealistically assum[ing] the kind of lively concourse of bidders necessary in order to improve the chances of receiving fair value at the sale” in tax foreclosure auctions).

²⁰ Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 774 (2000). “Recognizing the severity of the consequences to the property owner from enforcement of a property tax lien, the fact that the amount of delinquent property taxes may commonly be a small percentage of the fair market value of the property, and the difficulty a property owner may have in obtaining sufficient cash to pay the necessary taxes, every jurisdiction in the country grants some period of time to the owner to make the necessary payment even after the taxes are delinquent.”

II. A constitutional tax foreclosure process must ensure that surplus equity reflects fair market value.

Because foreclosure public auctions fail to return all fair market value to dispossessed owners and are not designed to do so, they do not meet the Takings Clause mandate of paying just compensation to dispossessed owners in tax foreclosure. Michigan and New Jersey utilize auctions in ineffective attempts to meet the mandate, but such auctions fail for the reasons explained in section I.²¹

An appropriate standard, *amicus* respectfully suggests, would be – by analogy to this Court’s test for adequacy of notice under the Due Process Clause – to require that legislation providing for takings by way of sale to a new owner must call for procedures such as a person actually desirous of obtaining fair market value (less reasonable costs of sale) would reasonably adopt. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-99 (1983) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Such a standard could be met in a number of ways, but the forced sale auction processes in Michigan and New Jersey – with no other test of market sufficiency – clearly fail to meet the standard. Alternatively, post-*Tyler* statutes in Oregon, Maine, and

²¹ Property owners are harmed by auctions that are not “reasonable, certain, and adequate to secure the just compensation to wh[ic]h the owner is entitled.” *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890).

Massachusetts meet the suggested standard of taking reasonable efforts to obtain fair market value.

- a. **Statutes in Oregon, Maine, and Massachusetts meaningfully seek to ensure fair market value as just compensation.**

Procedures enacted in Oregon,²² Maine,²³

²² See 83rd Oregon Legislative Assembly--2025 Regular Session House Bill 2089 “*Relating to surpluses from the disposition of foreclosed property; creating new provisions; amending ORS 98.352, 279A.025, 312.040 and 312.125; and prescribing an effective date.*” for all legislative changes which impacted several sections of Oregon’s tax sale laws. *See also* Association of Oregon Counties, *New Foreclosure Surplus Process for Counties Becomes Law on Sept. 26* (Aug. 29, 2025), <https://oregoncounties.org/new-foreclosure-surplus-process-for-counties-becomes-law-on-sept-26/> (last visited Dec. 5, 2025) (“For Residential and Formerly Occupied Properties (appraisals required if the property has a \$250k+ RMV): Make 3 attempts to contract with a realtor and sell the property via realtor; If it doesn’t sell via realtor, move to an auction with a 2/3 FMV starting bid.; If it doesn’t sell via 2/3 FMV starting bid, move to a minimum bid price sale (the minimum bid would be the sum of delinquent property taxes, special assessments, penalties, interests, and costs assigned to the property by counties).; If it doesn’t sell via minimum bid price sale, the county can forgive all that is owed by the former owner and then may proceed to dispose/keep the property on books as they see fit. No surplus or proceeds exist, and so nothing is required to be sent out to former owners.”)

²³ 36 M.R.S.A. § 943-C. *See also* Rudman Winchell, *Your Guide to Recent Shifts in Selling Tax-Foreclosed Properties in Maine*, <https://rudmanwinchell.com/2024/04/03/your-guide-to-recent-shifts-in-selling-tax-foreclosed-properties-in-maine/> (last visited

and Massachusetts²⁴ (collectively “OMM”), in response to *Tyler*, shed light on what a constitutional

Dec. 5, 2025) (“Effective August 9, 2024, a municipality must inform the former owner, using a form prepared by Maine Revenue Services, at least 90 days before the proposed sale; The municipality must list the property with an independent real estate agent or broker; The property must be sold at the best possible price at which the property is able to be sold within twelve months after listing; A post-closure notice of intent to disburse proceeds must be provided to the former owner, or published, and any excess proceeds, after covering all costs, must be returned to the former owner; and A notice shall be recorded in the registry of deeds confirming distribution of excess proceeds.”); *and* Maine Municipal Association, *2024 Changes to Sale Procedures for Tax-Acquired Property* (May 15, 2024), <https://www.brunswickme.gov/AgendaCenter/ViewFile/Item/1918?fileID=30067> (last visited Dec. 5, 2025).

²⁴ M.G.L.A. 60 § 1 *et seq.* effective November 1, 2024. *See also* KP Law, *Recent Changes in Tax Title Foreclosure Procedures* (Aug. 26, 2024), https://k-plaw.com/wp-content/uploads/2024/08/KP-eUpdate_-_Recent_Changes_in_Tax_Title_Foreclosure_Procedures.pdf (last visited Dec. 5, 2025) (“Selling Property After Foreclosure. If a municipality elects to sell the property following foreclosure, it will no longer proceed with an auction, at least initially. Instead, the municipality must list the property with a licensed real estate agent or broker within 180 days of the issuance of a final judgment. If after 12 months the property has not sold, the municipality must then seek to sell the property by public auction. A municipality cannot accept a bid that is less than 2/3 of the appraised value of the property. Therefore, while an appraisal is not required in order to list the property with a broker, municipalities will be required to obtain an appraisal from an independent, licensed appraiser prior to proceeding with an auction.”); Massachusetts Court System, *Tax lien foreclosure informational outline*, <https://www.mass.gov/info-details/tax-lien-foreclosure-informational-outline> (last visited Dec. 5, 2025).

process may look like. Despite some variations, the OMM statutes all converge in mandating bona fide efforts to obtain just compensation by first listing properties for sale at market value via real estate brokers or real estate agents. If a realtor listing is unable to proceed in Oregon, then a public auction is allowed where the minimum strike price at auction is 2/3rds of fair market value – as opposed to cents-per-dollar tax judgment amounts that may occur in states like Michigan and New Jersey. Maine requires lienholders to list foreclosed properties with real estate brokers and accept the best offer made within twelve months of the listing, and authorizes other sale processes (that also mandate payment of surplus equity)²⁵ if lienholders are unable to list or sell the property through an agent. Massachusetts shares components of the Oregon and Maine statutes: lienholders must list the property for twelve months and accept the best offer, and if no offers then may proceed to public auction with a 2/3rds appraised value strike price.

b. Constitutional processes seek protection of fair market value in forced sales.

Constitutional statutes implementing *Tyler's* mandate must provide direct protection of fair market

²⁵ 36 M.R.S.A. § 943-C 4-A. “[M]unicipal officers may sell the property in any manner authorized by the municipality's legislative body, as long as the municipality pays the former owner any excess sale proceeds as calculated in subsection 3, paragraph C.”

value, bolstered by additional protections. As the OMM laws illustrate, real estate listings and fair market value percentage minimum strike prices are core components of constitutional statutes. In addition to statutory measures ensuring recovery of fair market value, constitutional statutes can include safeguards that seek to protect fair market value even in forced sales.²⁶ Statutory safeguards to secure just compensation for dispossessed property owners may include these provisions:

- (i.) Elimination of strict foreclosure (i.e. foreclosure without sale) except in rare instances where verified proof establishes that amounts due for tax liens exceed the property fair market value.²⁷

²⁶ New Jersey’s tax laws, however, illustrate the dangers – in the absence of clear guidance on just compensation – of post-*Tyler* procedures that are not designed to produce fair market value, perhaps even more starkly than Michigan’s. For instance, New Jersey property owners are required to affirmatively demand their surplus equity or forfeit it completely. New Jersey further completely excludes some owners from any affirmative claim right upon unilateral determination of the foreclosing lienholder that the property was abandoned. (*See also* FN 32, *infra*.) For property owners who affirmatively demand equity, New Jersey limits and defines “fair market value” for just compensation “conclusively” as the amount received at the forced sale, with no exceptions. N.J.S.A. 54:5-87b.

²⁷ Lawrence Ponoroff, *The Curious Case of Tyler v. Hennepin County*, 43 Va. Tax Rev. 131, 165-166 (2023) (proposing an approach to tax sales that protects the property owner’s true equity interest, attracts a broad pool of bidders with incentivized

- (ii.) Preservation of post-sale redemption rights during a legislatively-determined appropriate timeframe in which “the owner would retain title and the right to occupancy.”²⁸
- (iii.) Requiring the party conducting the public auction to (1) obtain an arms-length appraisal of the property prior to sale; (2) set a minimum strike bid equal to a specified percentage of the appraised value of the property . . . (3) “surround the sale with robust publicity, including direct notice to the taxpayer;” and, after sale, (4) “file with a court of proper jurisdiction a summary of the sale process, including an accounting of taxes due . . . and a proposed distribution of sale proceeds among all claims, including return of net surplus to the taxpayer.”²⁹
- (iv.) Ensuring adequate and informative notices. Fair market value sale prices would have a higher likelihood of being achieved prior to a forced sale if owners receive notice of their right to cooperate with real estate agents for listings and

bidding, provides judicial oversight, and protects the taxing entity’s need for prompt collection of tax delinquencies).

²⁸ *Id.*

²⁹ *Id.*

ability to complete fair market value sales prior to dispossession.

(v.) Making payment plans available as of right. Such plans would achieve the goals of (i) enhancing the tax-collecting ability of local government and (ii) protecting property owners from the devastating consequences of foreclosure.³⁰ Respondent acknowledges that the availability of repayment plans is a relevant factor in the constitutionality of Michigan’s statutory scheme. By contract, New Jersey lienholders are not required to offer repayment plans. N.J.S.A. 54:5-19, -65, -68. Private lienholder investors in New Jersey may offer installment agreements subject to the rules governing municipalities, but are not required to do so. *Varsalona v. Breen Capital Servs.*, 180 N.J. 605 (2004).

(vi.) Ensuring only reasonable costs of sale are added to the tax lien. By example, New Jersey’s tax laws authorize unlimited additional fees and costs incurred by the foreclosing lienholder – above and beyond

³⁰ *Simon v. Cronecker*, 189 N.J. 304, 315 (2007) (“New Jersey’s ‘Tax Sale Law embodie[s] two competing public policy goals—one to enhance the tax-collecting ability of municipalities by encouraging tax sale foreclosures and the other to protect property owners from the devastating consequences of foreclosure.’”).

the taxpayer's mandated contribution to the public fisc – in the redemption or “minimum bid” amount, thus worsening takings of surplus equity without just compensation. Such additional fees and costs may result in irrationally and unaffordably high judgment amounts that make redemption near impossible for homeowners.

Without safeguards such as these, tax foreclosure laws will not satisfy the Takings Clause because forced sales (without more) neither protect nor produce fair market value.³¹ Michigan and New Jersey's ordinary forced sale procedures lack fair market value measures applied in OMM. In both states, property owners receive one ineffective method to pursue just compensation after a taking: they must allow their properties to go through forced sales that are almost guaranteed to not result in fair market value sale prices.³²

³¹ *BFP*, 511 U.S. at 545.

³² New Jersey law provides weaker constitutional protections than Michigan. NJ does not guarantee just compensation for all dispossessed property owners, as its surplus claim procedure both requires property owners to file a written demand for forced sale before final judgment enters in a judicial action or forfeit their equity (N.J.S.A. 54:5-87) and categorically excludes certain owners from the right to demand a forced sale to claim surplus equity compensation (N.J.S.A. 54:5-87a., excluding properties alleged as statutorily “abandoned” by the lienholder, under N.J.S.A. 54:5-86b., from the right to demand a forced sale). The constitutionality of preclusive claims procedures is pending before the U.S. Supreme Court in *McGee v. Alger Cnty.*

c. Failure to ensure recovery of fair market value is likely to have widespread harmful consequences.

The burdens of constitutionally inadequate compensation in takings cases tend to “fall disproportionately” on “poor,” “predominantly minority,” and “lower-income and elderly” communities and neighborhoods, in ways that can be devastating to those communities. (*Kelo v. City of New London*, 545 U.S. 469, 521-22 (2005) (Thomas, J., dissenting) (internal quotations and citations omitted)).³³ In the tax foreclosure context, vulnerable communities in particular are subjected to “[the] numerous devastating impacts of property tax foreclosure from negative health impacts, to lingering financial hardship, to the costs borne by the public. . . . While tax foreclosure is a unique process that ousts homeowners, the impact on the homeowner is similar

Treasurer and Beeman v. Muskegon Cnty. Treasurer, No. 363764 (Mich. Ct. App. Oct. 26, 2023), *petition for cert. filed*, No. 24-858 (U.S. Feb. 7, 2025). LSNJ’s *amicus* brief in support of the *McGee* petitioners argues the unconstitutionality of preclusive surplus claims procedures in further detail.

³³ Lauren Rogers, *The Case for Abolishing Tax Foreclosure of Primary Residences: Can Originalists and Progressives Agree?*, 47 W. New Eng. L. Rev. 217, 222–23 (2025) (reflecting these concerns, property tax systems have historically included certain “exemptions for the poor, elderly, sick, and farmers,” – but such abatements can be inadequate and difficult to access).

to both mortgage foreclosure and rental eviction--the family is deprived of their home.”³⁴

In LSNJ’s experience, it is common for vulnerable homeowners facing tax foreclosures to have meaningful equity in their homes, but little else in the way of assets needed to afford the costs of tax arrears redemption. Homeowners who are unable to redeem are more likely to experience the devastating impacts of home loss, which is exacerbated by the deprivation of just compensation under existing law. The following are just two recent examples that highlight the issues faced by homeowners in such proceedings:

Client 1 was an 80-year-old widow, partially paralyzed, who lived alone on a fixed income from Social Security and fell behind on bills due to health-related issues. She contacted LSNJ for assistance late in the foreclosure action, after the Plaintiff filed a motion for final judgment. She nearly lost her \$200,000 home to foreclosure for just \$17,000 in tax arrears. In other words, there was more than \$180,000 equity above the tax arrears. With LSNJ’s assistance, the client was able to redeem through private sale and prevent her equity from being taken.

Client 2 was a 66-year-old homeowner who suffers from schizophrenia and extreme paranoia (living on Social Security Disability income). He owed approximately \$70,000 in tax arrears on his home

³⁴ *Id.* at 231.

worth \$470,000 at the time. He did not understand the consequences of non- payment of tax arrears and almost lost his home to tax foreclosure, contacting LSNJ for help after his time to file an answer in the case had already expired. With LSNJ's assistance, he was able to redeem through financing and prevent his equity from being taken, thus saving the home. Since saving his home from foreclosure, the property value appreciated to over \$500,000. If the foreclosure had reached its conclusion, this equity appreciation would have been taken from him without just compensation, and much of it inequitably given to a private investor.

As demonstrated in these examples, many New Jersey property owners in tax foreclosure have substantial home equity. In 2023 alone, LSNJ was contacted by more than 50 households in or at risk of property tax foreclosure, residing in 18 of New Jersey's 21 counties. Collectively, these households had asset values of approximately \$16.5 million with tax debt of approximately \$1.8 million – there was a combined total of \$14.7 million equity at stake in just over 50 property tax cases. This amounts to an average of nearly \$300,000 in equity per household. According to data published by the New York Times, from 2014 through 2021, \$115 million in home equity was confiscated through New Jersey tax foreclosure proceedings for 661 properties in 31 towns, averaging \$174,000 in equity taken per property over and above the tax debt.³⁵

³⁵ Tracey Tully, *She Lost Her Childhood Home Over Taxes. Then It Erupted in Flames.*, New York Times, February 1, 2023, at

Property tax foreclosure often results in the complete loss of a family's only significant asset, accrued generational wealth, community stability, and housing for at-risk individuals. In LSNJ's experience, these foreclosure actions disproportionately impact vulnerable homeowners who are elderly, disabled, of Limited English Proficiency, or historically disenfranchised.³⁶

As discussed above, meaningful safeguards for just compensation would involve procedures for real estate agent listings and would require fair market value-based minimum bid amounts if listing does not lead to a sale. A real estate agent listing, combined with requirements to "act in a commercially reasonable manner in setting the listing price" generally provide the most significant protection against unconstitutional loss of equity.³⁷ There are strong indications that this is a feasible solution: in British Columbia, Canada, which uses such a system for mortgage foreclosures, "[m]ore than 95 percent of owners recognize that, if they are unable to pay the [lien], the property must be sold, and they cooperate with the [lienholder]'s realtor and others involved in

<https://www.nytimes.com/2023/02/01/nyregion/nj-maplewood-home-arson.html>.

³⁶ See Andrea Bopp Stark and Odette Williamson, *Property Tax Foreclosures on Heirs Property: The Devastating Consequences and Recommendations for Prevention* (2023), https://www.nclc.org/wp-content/uploads/2023/08/202308_Property-Tax-Foreclosures-on-Heirs-Property.pdf.

³⁷ Ann M. Burkhart, *Fixing Foreclosure*, 36 Yale L. & Pol'y Rev. at 356–57 (2018).

the sale process. . . . [and] allowing [homeowners] to retain possession during the listing period ‘works remarkably well.’”³⁸ Similarly, federal bankruptcy court trustees routinely utilize real estate agents to list and sell land for financial benefit of the estate as opposed to selling land at public auction.³⁹

In addition to realtor listing and minimum bids if an auction becomes necessary, the safeguards outlined in argument II.b. – while they may not all be required in order to meet a robust constitutional standard – can also help to reduce the downstream effects of inadequate compensation on vulnerable communities.

III. The *BFP* decision construing “reasonably equivalent value” under the Bankruptcy Code is inapplicable to governmental takings, which require “just compensation.”

In *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), this Court reviewed whether a mortgage foreclosure forced sale produced a “reasonably equivalent value” of the asset for a federal bankruptcy debtor’s estate and creditors under 11 U.S.C. § 548. In

³⁸ *Id.*

³⁹ *Id.* at 318, n.4 “11 U.S.C. § 327(a) (2012) (trustee can employ “professional persons” to carry out trustee’s duties); 11 U.S.C. § 328(a) (2012) (trustee can pay a “professional person” a commission) (some citations omitted); *In re McConnell*, 82 B.R. 43 (Bankr. S.D. Tex. 1987) (real estate agents are “professionals” within meaning of Bankruptcy Code); *In re Eastern Inns of New Hampshire, Inc.*, 72 B.R. 418 (Bankr. D. Me. 1987) (same).”

defining “reasonably equivalent value” for purposes of the estate and creditors, *BFP* distinguished that term from “fair market value” which is the benchmark for just compensation under the Takings Clause. The majority stated:

[F]air market value is not necessarily the benchmark against which determination of reasonably equivalent value is to be measured. It may be presumed that Congress acted intentionally when it used the term “fair market value” elsewhere in the Bankruptcy Code but not in § 548, particularly when the omission entails replacing standard legal terminology with a neologism.⁴⁰

The Court defined “reasonably equivalent value” as not being “‘fair market value’ or ‘fair foreclosure price’ (whether calculated as a percentage of fair market value or otherwise),”⁴¹ and further “emphasize[d] that [the] opinion . . . covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different.” *Id.* at n.3 (emphasis added).

Specifically, the 11 U.S.C. §548 test for “reasonably equivalent value” in the federal bankruptcy context is not the test for “fair market

⁴⁰ *Id.* at 531.

⁴¹ *BFP*, 511 U.S. at 545.

value” in the Takings context. *BFP* acknowledged the uncertain and inadequate nature of forced sales for fair market value recovery, stating that “the terms for foreclosure sale are not standard . . . [and] vary considerably from State to State, depending upon, among other things, how the particular State values the divergent interests of debtor and creditor.”⁴² Forced sales for purposes of mortgage foreclosure “reasonably equivalent value” under 11 U.S.C. § 548 do not result in “fair market value” for purposes of tax foreclosure just compensation.

Nevertheless, Respondent here conflates the two tests and asks this Court to rely on its *BFP* decision even though reasonably equivalent value is the bankruptcy test under 11 U.S.C. § 548 and not the measure of just compensation for a taking. Respondent argues that fair market value (the test required for a taking) cannot be the measure of reasonably equivalent value for a forced sale (not the required test for a taking) – and then asks this Court to apply the reasonably equivalent value test applicable to bankruptcy. Although existing forced sale procedures may produce “reasonably equivalent value” for debtors and creditors in federal bankruptcy proceedings, those procedures fail to produce fair market value for a taking which is the just compensation measure and mandate. Therefore the “reasonably equivalent value” test is inapplicable.

⁴² *BFP*, 511 U.S. at 540 (emphasis original).

Cases addressing applicability of *BFP* to property tax sales are “all over the board,”⁴³ but a consistent theme is that the opinions review and hinge upon congruence between the state property tax foreclosure procedures and mortgage foreclosure procedures. This congruence occurs despite *BFP* stating that its opinion did not directly extend to tax sales or other forced sales.⁴⁴

While reasonably equivalent value is the 11 U.S.C. § 548 test for asset value in the federal bankruptcy context, the *BFP* Court’s own acknowledgment and statements concerning the fact that forced sales do not produce fair market value explain why it is the improper test for a taking. Inherently, forced sales do not provide the property owner with just compensation – they fail to produce fair market value and fail to put the property owner in the same position monetarily as if the property had not been taken. Thus, the *BFP* holding is not dispositive on the Petitioner’s first question before this Court.

⁴³ Lawrence Ponoroff, *Non-Collusive Foreclosure Sales and the Limits of the Preference Law: Please, Sir, I Want Some More*, 97 Tul. L. Rev. 519, 531-543 (2023) (summarizing analyses and decisions from several cases applying *BFP*, with some cases holding that reasonably equivalent value was satisfied by a tax foreclosure auction (e.g. *In re T.F. Stone Co.*, 72 F.3d 466 (5th Cir. 1995)) and other cases holding the opposite (e.g. *In re Smith*, 811 F.3d 228 (7th Cir. 2016))).

⁴⁴ *Id.* at 544.

Conclusion

For the foregoing reasons, LSNJ respectfully asks this Court to reverse the decision below in favor of Petitioner.

Respectfully submitted,

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