No. 25-95

IN THE

Supreme Court of the United States

MICHAEL PUNG, Personal Representative of the Estate of Timothy Scott Pung,

Petitioner,

v.

ISABELLA COUNTY, MICHIGAN,

Respondent.

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

BRIEF FOR AMICUS CURIAE NATIONAL CONSUMER LAW CENTER SUPPORTING PETITIONER

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE[1]

The National Consumer Law Center ("NCLC") is recognized nationally as an expert in consumer protection issues. For more than 55 years, NCLC has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a twenty-one volume Consumer Credit and Sales Legal Practice Series. Many of these volumes address tax foreclosure issues including Home Foreclosures (1st Ed., 2019), which has an appendix containing summaries of the tax foreclosure procedures in each state. A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices perpetrated against low-income and older consumers, and to promote protections against such practices. NCLC frequently appears as *amicus curiae* in consumer law cases before trial and appellate courts throughout the country.

NCLC has a substantial interest in the outcome of this case, which concerns the proper measure of just compensation when government takes property to satisfy an outstanding tax debt. For more than a decade, NCLC has advocated for state and federal policy reforms to prevent homeowners from losing their homes and accumulated equity due to small unpaid property tax bills, and has supported legislation that requires fairer tax foreclosure processes. *See, e.g.*, John Rao, *The Other Foreclosure*

[1] No part of this brief was written by counsel for any party. No party, or any other person or entity other than amicus, monetarily contributed to the preparation or submission of this brief.

Crisis: Property Tax Lien Sales, Nat'l Consumer Law Ctr 5, 8-10 (Jul. 2012), available at *http://bit.ly/1MLTZMc*.

INTRODUCTION

A. A Brief Overview of Tax Foreclosure Systems in the United States

Tax foreclosure systems in the United States have evolved continuously since the country's founding, often reflecting shifts in national demographic and economic patterns and broader changes to property law and local government finance. Today, these systems vary widely, not only from state to state, but also sometimes among local jurisdictions within a state. *See* Frank Alexander, Tax Liens, Tax Sales, and Due Process, 75 Ind. L.J. 747, 748 (2000) (noting that "there are over 150 different systems in the United States for collecting the property tax."). The result is a patchwork of processes with different notice requirements, sale procedures, redemption periods, and post-sale remedies.

Despite this diversity, overarching themes run through the myriad systems. Local taxing authorities generally have the ability to place a lien on real property when an owner fails to pay property taxes. These tax liens almost always have priority over all other encumbrances, including mortgages, regardless of when the tax lien is imposed. If the delinquent taxes remain unpaid for a certain period after notice is provided, the local government can initiate a tax foreclosure process. The process usually culminates in either the sale of the property or the sale of the lien at public auction, followed by a process, with or without court oversight, that conveys absolute title upon foreclosure of the owner's right of redemption.

The primary tax lien enforcement mechanisms for properties with delinquent taxes usually follow one of three approaches.

Tax Deed Sale: In some states, a deed to the property is sold at a tax sale auction.[2] The proceeds from the sale are used to satisfy the outstanding tax bill and pay any costs of the sale. These states typically provide a period for the owner to redeem the property after the sale, and the tax deed does not convey absolute title to the purchaser until the redemption period expires. The owner is permitted to remain in possession, with full use of the property, until the right of redemption is foreclosed.

Tax Lien Sale: In other states, a purchaser at a tax sale receives an assignment of a tax lien on the property. This is often referred to as a tax lien "certificate."[3] If the redemption period expires without payment by the property owner, the purchaser can then initiate a judicial or administrative proceeding to foreclose the redemption right and obtain absolute title to the property. As in tax deed states, the owner may continue to occupy and use the property until the redemption rights are foreclosed. Bidding methods for tax liens vary widely and include redemption interest rate bid-down, overbids, and percentage ownership bids. *See* II.B, *infra*.

Strict Foreclosure: In a few states, there is no property sale at all, or it may not occur until after title

[2] *See, e.g.*, Ark. Code Ann. §§ 26-37, 26-37-202; Ga. Code Ann. § 48-4-1(a)(1); N.C. Gen. Stat. § 105-374.

[3] *See, e.g.*, Colo. Rev. Stat. §§ 39-11-115, 39-11-117, 39-11.5; Fla. Stat. 197.432, 197.502; N.J. Stat. Ann. §§ 54:5-46.

to the property is transferred to the taxing authority, which simply executes on its tax lien by taking the property.[4] Once the property is taken, state law generally has a procedure for final disposition of the property, usually permitting the taxing authority to keep the property for public use or sell it at public auction.

Some jurisdictions also provide alternative avenues for disposition of the property, including bulk transfers of tax liens through a negotiated sale to private third parties, or through a securitization process.[5] For certain tax delinquent property, such as vacant or abandoned, state law may permit transfers to other governmental entities or retention of the property for public use. Collectively, these approaches not only illustrate the extraordinary diversity of tax foreclosures schemes, but also the complexity of many systems.

SUMMARY OF ARGUMENT

Michigan's strict tax foreclosure scheme results in a taking when the government obtains absolute title to property worth more than the tax debt owed. The Sixth Circuit below correctly recognized that just compensation must be measured as of the date of the taking, when the owner's title is extinguished. But it erred in allowing compensation to turn on the results of a public auction held more

[4] *See, e.g.*, Alaska Stat. §§ 29-45-390, 29-45-450; Mich. Comp. Laws § 211.78m.

[5] *See*, *e.g*, Ohio Rev. Code Ann. § 5721.33 (giving county treasurer discretion to negotiate bulk sale of any number of tax certificates); Georgette C. Poindexter, *Selling Municipal Property Tax Receivables: Economics, Privatization, and Public Policy in an Era of Urban Distress*, 30 Conn. L. Rev. 157, 186–200 (Fall 1997).

than a year later, which reflected neither the value of the property when taken nor the owner's actual loss. The uncontested value of Petitioner's property was $194,000 and the total tax debt owed was a mere $2,241.95. The difference represents the value of Petitioner's lost equity and the just compensation to which he is entitled.

The Sixth Circuit's "public auction" rule is also untenable beyond this case. Across the country, tax foreclosure schemes are extraordinarily diverse and often complex. In some states the only thing offered at public auction is a tax lien, not absolute title to the property. Bidding methods for these auctions are not designed to approximate the property's market value, and, as a result, proceeds from these auctions cannot constitutionally serve as the basis for determining just compensation. Instead, the surplus equity beyond an owner's tax debt must necessarily begin with the fair market value of the property at the time of the taking.

Safeguarding the value of surplus equity is critical to all property owners, but especially to populations—older adults, communities of color, and heirs' property owners—who are most affected by tax foreclosures and concomitant lost equity for they make "far greater contributions to the public fisc" than they owe. *See Tyler v. Hennepin*, 598 U.S. 631 (2023).

ARGUMENT

I. UNDER MICHIGAN'S TAX FORECLOSURE LAW, A FIFTH AMENDMENT TAKING OCCURS AND JUST COMPENSATION MUST BE DETERMINED ON THE DATE THE GOVERNMENT TAKES ABSOLUTE TITLE TO THE PROPERTY

The Fifth Amendment, which is made applicable to the States through the Fourteenth Amendment, states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. As this Court has explained, this constitutional guarantee is self-executing with respect to compensation, meaning that a property owner acquires an irrevocable right to just compensation immediately upon a taking. *See Knick v. Township of Scott*, 588 U.S. 180, 189-192 (2019). And, this Court has consistently recognized that a property owner's right to just compensation arises "as soon as the government takes his property without paying for it." *Knick*, 588 U.S. at 190.

In the tax foreclosure context, the government has the undisputed power to take property to recover unpaid taxes, *see Jones v. Flowers*, 547 U.S. 220, 234 (2006), but it may not "use the toehold of the tax debt to confiscate more property than was due." *Tyler v. Hennepin*, 598 U.S. 631, 639 (2023). If government retains more than what is needed to satisfy the tax debt without paying just compensation for this surplus value, it violates the Takings Clause.

Under Michigan law, if a tax-foreclosed property is not timely redeemed, absolute title vests in the government and all inferior liens are extinguished. Mich. Comp. L. § 211.78k(6). The property may then be retained by a governmental entity, *see id.* § 211.78m(1), (3), (6) (describing government purchases and transfers), or sold at public auction. *Id.* § 211.78m(2).[6] A public auction may not occur for months and possibly even more than a year after the government obtains absolute title.

The Sixth Circuit, relying on its earlier decision in *Hall v. Meisner*, correctly concluded that "[a] Fifth Amendment taking occurs when a county takes absolute title of the property." *Pung v. Kopke*, 2025 WL 318222, at * 4 (6th Cir. Jan. 28, 2025) (citing *Hall v. Meisner*, 51 F.4th 185, 186 (6th Cir. 2022). It also correctly recognized that just compensation is achieved by paying "the property owner for 'the total value of the property when taken, plus interest from that time.'" *Pung*, 2025 WL 318222, at *4 (citing *Knick,* 588 U.S. at 191). But, in a strict foreclosure scheme, it does not follow that the price obtained at a public auction held months or years after the taking is a reliable measure of the value of the owner's surplus value at the time of the taking.

Hall v. Meisner is instructive in this regard. 51 F.4th 185 (6th Cir. 2022). At issue in that case were several properties foreclosed upon by Oakland County, Michigan, in order to collect delinquent taxes, interest, penalties, and fees. *Id*. at 483-84.

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[6] Michigan amended its General Property Tax Act, Mich. Comp. L. §§ 211.1, et seq., in the wake of *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434 (2020). In this case, the government took and disposed of Pung's property under the prior version of the statute. However, the portions of the statute relevant to the questions presented in this case did not meaningfully change.

After the county obtained absolute title to the properties, it conveyed two of the properties for an amount equal to the tax debt to the city in which the properties were located. *Id.* at 189. The city then conveyed the properties to a for-profit entity for $1 each. *Id.* In the case of Mrs. Hall, her home was seized for a delinquent tax debt of $22,642, and the for-profit entity later sold it for $308,000. *Id.* Relying on the Michigan's Supreme Court's decision in *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434 (Mich. 2020), the county argued that it had never obtained any "surplus proceeds" because it conveyed the properties for the exact amount of the tax debts. *Id.* The Sixth Circuit rejected that argument, holding that the Takings Clause of the Fifth Amendment protected a former owner's "equitable title" in the property, which had value even in the absence of a public sale. *See id.*

Here, Petitioner's entitlement to just compensation accrued in June 2018, when the county obtained absolute title to the property. Pet. App. 25a; *see United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (just compensation is "'what a willing buyer would pay in cash to a willing seller' at the time of taking"). Subsequently, the government could keep the property or sell it at public auction. At the time of the taking, an auction was merely a future possibility. Petitioner claims that the value of the property was at least $194,000, and Respondents did not challenge that assertion. Pet. App. 29a. The tax debt owed was $2,241.93. Pet. App. 11a. The value of the Petitioner's surplus equity was $192,158.07, and this is the amount of just compensation to which Petitioner is entitled.

Respondents nevertheless ask the Court to limit compensation to the surplus proceeds from a public auction held in July 2019, more than a year after the taking. *See* Exhibit L to Pung's Motion for Summary Judgment, Dkt. No. 8-13 (E.D. Mich. filed Nov. 25, 2020). Petitioner rightly argues that an "unnecessary fire sale resulting in depressed auction values" cannot serve as the measure of just compensation. Pet. Br. 19-21. But, reversal here is warranted for another reason. Because Michigan has chosen a strict tax foreclosure system, it must be prepared to pay just compensation based on the property's value at the moment it takes absolute title and not on results of a later sale.

II. BECAUSE TAX LIEN FORECLOSURE SALES ARE NOT DESIGNED TO APPROXIMATE FAIR MARKET VALUE, A PUBLIC AUCTION PRICE CANNOT SERVE AS THE MEASURE OF JUST COMPENSATION

A. In Twenty-Two States, the Tax Foreclosure Process Begins with the Government Selling Something Less than Absolute Title to Property

In approximately twenty-two states (and the District of Columbia), the tax foreclosure process begins with the local municipality conducting a tax sale in which potential purchasers bid on a tax lien interest in the property, either a tax lien certificate or tax deed. This lien interest does not vest absolute title to the property in the purchaser. Rather, it provides the purchaser with a conditional interest in the property, subject to the owner's right of redemption. *See*, *e.g.*, *State ex rel. Baumann v.*

Marburger, 353 Mo. 187, 182 S.W.2d 163, 165 (1944) (noting that during two-year redemption period after a tax sale, a certificate holder is vested with an inchoate interest in the property subject to the absolute right of redemption in the record owner in whom the title remains vested; after redemption period and "demanding a deed," a tax sale purchaser "call[s] in the legal title").

These states include: Alabama, Arizona, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Rhode Island, South Carolina, South Dakota, West Virginia, Wyoming.[7]

A tax lien certificate or deed carries with it the possibility of eventual title transfer to the purchaser if all of the statutory conditions are met. However, the amount a potential purchaser may bid reflects the

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[7] Ala. Code §§ 40-10-1 to 40-10-201; Ariz. Rev. Stat. Ann. §§ 42-18001 to 42-18403; Colo. Rev. Stat. §§ 39-11-100.3 to 39-11-152, 39-12-101 to 39-12-113; Fla. Stat. §§ 197.102 to 197.602; 35 Ill. Comp. Stat. Ann. §§ 200/21-5 to 200/21-445, 200/22-5 to 200/22-95; Ind. Code §§ 6-1.1-24-1 to 6-1.1-24-17.5; Iowa Code §§ 446.1 to 446.45, 447.1 to 447.14, 448.1 to 448.17A; La. Const. Art. VII, § 25; La. Stat. Ann. §§ 47:2151 to 47:2197, 47:2241 to 47:2247; Md. Code Ann., Tax-Prop. §§ 14-808 to 14-854; Mass. Gen. Laws ch. 60, §§ 1 to 105; Mo. Ann. Stat. §§ 140.010 to 140.722; §§ 141.820 to 141.970; Mont. Code Ann. §§ 15-17-121 to 15-17-326, 15-18-111 to 15-18-221; Neb. Rev. Stat. §§ 77-1801 to 77-1863, 77-1901 to 77-1941; N.H. Rev. Stat. Ann. §§ 80:18 to 80:91; N.J. Stat. Ann. §§ 54:5-1 to 54:5-137; Ohio Rev. Code Ann. § 5721.30 to § 5721.43; R.I. Gen. Laws §§ 44-9-1 to 44-9-56; S.C. Code Ann. §§ 12-49-1110 to 12-49-1290, §§ 12-51-40 to 12-51-170; S.D. Codified Laws §§ 10-23-1 to 10-23-33, §§ 10-24-1 to 10-24-17, §§ 10-25-1 to 10-25-45; W. Va. Code §§ 11A-3-1 to 11A-3-13; § 11A-3-33 to 11A-3-63; Wyo. Stat. Ann. §§ 39-13-101 to 39-13-112.

limited interest that is purchased. The purchaser is not granted the right to possession or other use of the property, and is not permitted to collect rents, during the redemption period.

Auctions for lien interests occur months or years before there is a final taking of the property when the owner's redemption right may be foreclosed. In assessing what to bid at a tax lien auction, potential purchasers must consider that their outlay of capital invested for the lien purchase price will be tied-up over months and years without use of the property. In addition, purchasers typically incur additional costs in navigating the final foreclosure process. It can be expected that these potential costs are factored into what a buyer will bid at a tax lien sale.

The process may involve costs for conducting title searches and providing notice of redemption rights to interested parties. For example, following a tax lien sale in West Virginia, the purchaser must prepare a list of all entities to be served with notice of the right to redeem, usually by conducting a title examination of the property, and then must provide the West Virginia State Auditor's Office with the funds needed to serve notice on the interested parties. W. Va. Code § 11A-3-56(a)(3); § 11A-3-52. In states with judicial oversight over the final foreclosure process, there also may be additional legal fees and costs for the purchaser.

B. Public Auctions of Tax Liens Do Not Necessarily Seek the Highest Monetary Offer

In addition to practical considerations, the local taxing authority may not seek the highest monetary bid for the tax lien at the tax sale. In many states that sell tax liens, there generally is no competitive, value-based bidding. Often, the amount bid for the tax lien can be no more than the delinquent taxes, penalties, interest and costs. *See, e.g.*, Iowa Code § 446.16; Mo. Ann. Stat. § 140.190.

Tax lien states have devised a proxy for competitive bidding (but not based on fair market value) through three primary methods: the interest rate method, the percentage ownership method, and the overbid method. These proxy bidding procedures are not intended to recover the highest value for the property.

The interest rate method assigns the tax lien to the bidder who accepts the lowest rate of interest due upon redemption in addition to the unpaid taxes. For example, state law may set the maximum interest to be paid by the owner upon redemption at 12 percent per annum, but the winning bid may be awarded to the potential purchaser who is willing to accept redemption interest at a lower rate, such as 8 percent. The interest rate method for bidding is used in five states that sell tax liens (Arizona, Florida, New Jersey, Ohio, South Dakota).[8]

In the percentage ownership method, the "highest" bidder is the purchaser who is willing to accept the smallest proportional share or fraction of the total tax sale interest in the property that is sold. For example, if the winning bid is a 40 percent

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[8] Ariz. Rev. Stat. Ann. § 42-18114; Fla. Stat. § 197.432(6); N.J. Stat. Ann. § 54:5-32; Ohio Rev. Code Ann. § 5721.32; S.D. Codified Laws § 10-23-7. Ohio has an alternative procedure in which a tax deed is sold at a high-bid auction. Ohio Rev. Code Ann. § 5721.19, 5721.191.

interest and the owner does not redeem the property, then when the right of redemption is foreclosed, the purchaser would receive a 40 percent interest in the property and the owner would retain a 60 percent interest. Because fractional interests are not as marketable as full title in property, this form of bidding is generally less desirable to potential tax purchasers. If the purchaser later seeks to acquire full title or force a sale of the property, this will require bringing a partition action, at a substantial cost to the purchaser. The percentage ownership method is used in four states that sell tax liens (Iowa, Massachusetts, New Hampshire, Rhode Island).[9]

Another bidding method, the overbid method, assigns the lien certificate or deed to the bidder who pays the highest additional amount or premium after paying the unpaid taxes, interest, and penalties on the property. Even in these states that seek the highest bid, certain aspects of state law may chill bidding at the auction.

For example, in Mississippi, if a tax lien certificate is sold at tax sale for more than the amount of taxes due and costs, the tax collector must pay the surplus or overbid into the county treasury. Miss. Code Ann. § 27-41-77. While the lien purchaser receives interest that accrues during the two-year redemption period on the amount paid for the taxes due, the purchaser is not entitled to interest on the overbid amount. Miss. Code Ann. § 27-45-3, § 21-33-61. If the property is redeemed, or the purchaser's title is set aside for any reason, the surplus shall be retained by the county subject to a claim of the owner.

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[9] Iowa Code § 446.16; Mass. Gen. Laws ch. 60, § 43; N.H. Rev. Stat. Ann. § 80:24; R.I. Gen. Laws § 44-9-8.

Miss. Code Ann. § 27-41-77. If the owner does not request payment of the surplus within two years from the expiration of the redemption period, the surplus shall be retained by the county. *Id*.

Despite the limited interest being purchased and the restrictions on bidding, in thirteen of the states that sell tax liens (and the District of Columbia), no other public auction of absolute title to the property is held after the tax lien auction. These states (and the District of Columbia)[10] that effectively base just compensation solely on tax lien sales include: Illinois, Indiana, Iowa, Louisiana, Maryland, Mississippi, Missouri, New Hampshire, Ohio, Rhode Island, South Carolina, West Virginia, Wyoming.

Bidding at these pre-taking tax lien auctions typically result in sale prices that have no relation to the property's fair market value. This is not simply because there is a forced sale.[11] When the government conducts a tax sale before final foreclosure, and the only interest offered is a tax lien certificate, which remains subject to the owner's right of redemption and confers no possessory right, the sale is not designed to reflect the fair market value of the

[10] In the District of Columbia, a subsequent auction is held only for residential property with five or fewer units in which a record owner or heir had been occupying the property as his or her principal residence when the complaint to foreclose the right of redemption was filed. D.C. Code Ann. § 47-1382.01.

[11] *See* LaPoint, Cameron, Property Tax Sales, Private Capital, and Gentrification in the U.S., p. 1 (September 15, 2022) (noting that "tax liens sell at a much larger haircut compared to mortgage foreclosed homes - for less than 10% of *ex ante* assessed value in over 80% of cases, with an underlying average tax debt of just $3,700"), available at SSRN: https://ssrn.com/abstract=4219360.

property and it does not maximize surplus proceeds. As a result, it cannot adequately compensate former owners for the loss of their surplus value. *See Edmondson Community Organization, Inc. v. Mayor and City Council of Baltimore*, 2025 WL 2430345, *19 (D. Md. Aug. 22, 2025) ("Plaintiffs have plausibly alleged that the auction price of the tax lien is lower than the value of the property itself, and that receiving only the difference between the sale price of the lien after their tax bill is paid, not the difference between the value of the property and their outstanding taxes, was not just compensation under the Takings Clause").

The Court should reject a measure of just compensation that involves a public auction of something less than absolute title to the property and that occurs months or years before the owner's redemption rights are foreclosed. Such statutory schemes do not provide a constitutionally adequate mechanism to compensate former owners for the taking of their property. Without guidance from this Court, lower courts will struggle in evaluating the adequacy of the surplus from public tax lien auctions, as shown in two recent opinions from West Virginia. The amount of the "surplus" a former owner is entitled to claim under the West Virginia statutory scheme is limited to the difference between the amount the purchaser paid for the tax lien and the amount of taxes, costs, and interest due at the time of sale.[12] In *Grady v. Wood County*, No. 2:24-CV-00214, 2025 WL 72160 (S.D.W. Va. Jan. 10, 2025), where

[12] W. Va. Code § 11A-3-65 (former owner entitled to the surplus received from the tax lien sale if a claim is filed in the county circuit court within two years after the date of confirmation of the sale).

state law granted the former owner surplus proceeds from a tax lien auction in which a third-party purchaser paid $3,467.79 for a tax lien based on a tax debt of $1,282.41, on property with an appraised value of $150,000, the court found that the former owner had sufficiently pleaded a claim for an uncompensated taking because the process deprived the owner of the substantial surplus equity in the property. In contrast and based on similar facts, the court in *Wright v. Rollyson*, No. 2:24-CV-00474, 2025 WL 835040 (S.D.W. Va. Mar. 17, 2025) held that the availability under West Virginia law of a surplus based on the auction purchase price of $2,700 for a tax lien based on $79.89 tax debt, which the former owner failed to request, precluded him from stating a claim for an unconstitutional taking.

C. States Using Public Auctions That Do Not Convey Absolute Title Must Create an Alternative Mechanism for Determining Just Compensation

In *Tyler v. Hennepin Cnty.,* 598 U.S. 631 (2023), this Court did not address the question of how "just compensation" should be calculated in property tax foreclosure cases. In response to *Tyler*, a number of states were compelled to assess whether their tax foreclosure process could result in an unconstitutional taking, and if so, how the process should be reformed to ensure that any surplus value in the property after payment of the tax debt would be returned to the former owner.

States engaged in this process were guided by several foundational principles this Court has set out in takings cases. The constitutional requirement is premised on the principle of indemnity, that the amount of compensation is "measured by the property owner's loss rather than the government's gain." *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235–36 (2003). The private party "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255 (1934).

With that in mind, several states that had previously sold at auction only a tax lien or something less than absolute title to the property have amended their state tax foreclosure process post-*Tyler*. They have devised methods for determining excess value later in the process, near the time of the actual taking, and in some cases by reference to the property's market value.

For example, in South Dakota, one of the first states to reform its system following *Tyler*, a tax lien certificate for tax-delinquent property is sold at public auction to the person who bids the amount of taxes, interest, and costs due, and offers the lowest interest rate for the redemption amount. S.D. Codified Laws §§ 10-23-7, 10-23-8. Before the law was amended, this had been the only public auction that was conducted. In response to *Tyler*, South Dakota law now requires that a certificate purchaser who acquires absolute title to the property by tax deed after the three-year redemption period has expired must then offer the property for sale at a public auction. S.D. Codified Laws § 10-25-39.2. Following the sale, any excess sale proceeds must be returned to the former owner. S.D. Codified Laws § 10-25-39. While these amendments acknowledge that the initial tax certificate auction could not be used to determine just compensation, South Dakota did not adopt any procedures to maximize surplus value for the former owner.

Two other states that initially sell only a tax lien, Arizona and New Jersey, have also given owners the opportunity post-*Tyler* to request a public auction of the property. *See* Ariz. Rev. Stat. § 42-18204; N.J. Stat. Ann. § 54:5-87(b). However, both states have created procedural burdens that are likely to deter owners from accessing any surplus value in excess of the tax debt owed.[13]

In Nebraska, after a public auction of a tax lien certificate, the purchaser can submit an application for a tax deed to obtain absolute title to the property no sooner than three years after the auction, giving time for the owner to redeem. Neb. Rev. Stat. §§ 77-1824, 77-1837. The long time period between the auction and actual taking of the property would make it difficult to use the auction for determining surplus value. In response to *Tyler*, Nebraska now requires the purchaser to pay the "surplus" to the former owner within thirty days after recording the tax deed. Neb. Rev. Stat. § 77-1838. The surplus is calculated as either: 1) the amount received from a sale if the property has been sold since recording of the deed, or

[13] In Arizona, the owner must incur costs in filing a request for an auction in the proceeding brought to foreclose the right of redemption, together with an estimate of the property's market value, and offer proof to the court that a sale is reasonable. *See* Ariz. Rev. Stat. § 42-18204. In New Jersey, the owner must file a written motion in the Superior Court, before the date that final judgment is entered in an action to foreclose the right to redeem, requesting a judicial sale or, in the alternative, an Internet auction through the county sheriff's office. *See* N.J. Stat. Ann. § 54:5-87(b).

2) the assessed value of the property if the property has not been sold.[14] *Id.*

Montana amended its tax foreclosure process post-*Tyler* to require that a public auction of the property be held after the tax lien certificate purchaser applies for a tax deed. Mont. Code Ann. § 15-18-220. The minimum bid that the county treasurer may accept is the amount of the delinquent taxes, penalties, interest, and costs, plus an amount equal to one-half of either the most recent assessed value of the property or the value of the property as determined by an independent appraisal. *Id.* If an independent appraisal is used, it must be provided to the county treasurer, meet state-specific standards, and have been conducted within six months of the auction date. *Id.*

In Massachusetts, if the purchaser of a tax lien obtained a court judgment foreclosing the right of redemption, state law did not require the purchaser to sell the property at a public auction, and the purchaser was free to keep any surplus value as a windfall. In response to *Tyler*, state law now gives the purchaser two options, either retain or sell the property. If the purchaser elects to retain the property, it must obtain an appraisal of the property and the appraised value must be used to establish the amount of excess equity that will be paid to the former owner. If the purchaser elects to sell the property, it must be listed for sale with a licensed real estate

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[14] The lien purchaser may deduct from the surplus amount: (1) the amount that would have been needed to redeem the property, (2) amount needed to pay all encumbrances on the property, and (3) an administrative fee of five hundred dollars or reasonable attorney's fees in the event of judicial foreclosure. Neb. Rev. Stat. § 77-1838.

agent or broker. Property listed for sale that does not sell within twelve months of the listing date shall be sold at public auction, provided that the auctioneer must not accept bids that are less than two-thirds of the appraised value of the property. The former owner of the property may claim any excess equity from the sale or retention of the property. *See* M.G.L. ch. 60, § 64A.[15]

Similar changes to the tax foreclosure laws providing for payment of a surplus based on appraised market value for retained property or the listing with a real estate agent for property being sold, as a means to generate surplus value to compensate the former owner, were made in Maine and Oregon in the wake of the *Tyler* decision. *See* Me. Stat. tit. 36, § 943-C; Oregon H.R. 2089, 2025 Reg. Sess., Ch. 475 (Or. 2025).[16]

While this Court may conclude that these state law reforms are constitutionally deficient, they stand in stark contrast to the states that continue to offer only the surplus proceeds from a tax lien sale as just compensation following a tax foreclosure. These states must create an alternative mechanism for determining just compensation.

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[15] This same process applies to property acquired by a municipality through a tax taking. M.G.L. ch. 60, § 64A.

[16] In Oregon, similar to Massachusetts, if the property is not sold within twelve months of listing with a realtor, it is sold at a public auction with a minimum bid set at two-thirds of the property value. Oregon H.R. 2089, 2025 Reg. Sess., Ch. 475, Section 6(3)(c)(C) (Or. 2025).

III. TAX FORECLOSURE PROCEDURES THAT DEPRIVE OWNERS OF SURPLUS VALUE EXPLOIT VULNERABLE POPULATIONS

"The Takings Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Tyler*, 598 U.S. at 647 (quoting *Armstrong v. United States*, 364 U.S. 40 (1960). The loss of surplus value from tax foreclosures significantly affects older adults, communities of color, and heirs' property owners, often leading to substantial wealth loss and community instability. Because government inadequately compensates former owners for loss of surplus equity in tax foreclosure cases, these populations make "far greater contributions to the public fisc" than they owe. *Tyler*, 598 U.S. at 647.

Many older adults face a disproportionate risk of losing their homes and surplus equity to property tax foreclosures, often for reasons beyond their control.[17] Fixed incomes and major life changes make them highly susceptible to delinquency, where interest and fees quickly snowball. *See, e.g., Tyler*, 598 U.S. at 635 (Tyler owed about $2300 in unpaid taxes and $13,000 in interest and penalties). Overly complex property tax exemption procedures create barriers for otherwise eligible seniors.[18] And, the

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[17] Rao, *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat'l Consumer Law Ctr. 5, 8-10 (Jul. 2012), http://bit.ly/1MLTZMc

[18] *See* Eisenberg A., Mehdipanah R., Dewar M., "'It's like they make it difficult for you on purpose': barriers to property tax relief and foreclosure prevention in Detroit, Michigan."

factors that make this population vulnerable to tax default also can prevent them from taking steps necessary to protect their interests and redeem their property in the foreclosure process.[19] Many older adults rely on their homes for a retirement safety net and financial security but that is taken away in a tax foreclosure process that deprives them of the fair market value of their surplus equity.

For communities of color, tax foreclosures are frequently concentrated in lower-income areas where homeowners are more likely to have suffered from economic shocks that made it harder to pay property taxes. The sale of tax foreclosed homes for less than fair value strips homeowners in these communities of earned equity, contributing to wealth destruction and housing instability through either gentrification or blight.[20]

The impact is also severe for heirs who inherit property without a will, resulting in a "tangled title" that prevents them from accessing critical tax relief programs, such as homestead exemptions and tax credits, not unlike the Principal Residence Exemption (PRE) property tax credit for principal residences that

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Housing Studies. 2020; 35(8):1415-1441, available from: https://pmc.ncbi.nlm.nih.gov/articles/PMC7785121/ (documenting how complex and burdensome property-tax-relief procedures prevent eligible homeowners—including seniors—from accessing exemptions, leading to avoidable tax foreclosure).

[19] *Id.*

[20] *See* LaPoint, Cameron, Property Tax Sales, Private Capital, and Gentrification in the U.S. (September 15, 2022), available at SSRN: https://ssrn.com/abstract=4219360; Avenancio-Leon, Carlos and Howard, Troup, The Assessment Gap: Racial Inequalities in Property Taxation (October 5, 2019), available at SSRN: https://ssrn.com/abstract=3465010.

Petitioner was initially denied as an heir. Improper denial of access to such programs can make heirs highly susceptible to tax foreclosure.[21]

Homeownership is a key way to build and transfer intergenerational wealth, and for many multi-generational households, the family's wealth is tied up in the home. The loss of surplus equity in tax-foreclosed properties strips heirs' property owners of the ability to transfer intergenerational wealth, contributing to neighborhood destabilization.[22] Ensuring the sale process provides a fair and equitable opportunity for homeowners to realize the full value of equity in their homes is crucial for promoting wealth retention and building in these specific populations.

CONCLUSION

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

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[21] *See* Andrea Bopp Stark & Odette Williamson, National Consumer Law Center, Property Tax Foreclosures on Heirs' Property, NCLC (Aug. 2023).

[22] *See* Nketiah Berko & Sarah B. Mancini, Asset Funders Network, Heirs' Property: Policies to Preserve Wealth 1 (2024), https://assetfunders.org/wp-content/uploads/AFN_Heirs Property_Policies-to-Preserve-Wealth.pdf; Sean Doolittle '24, The Lurking Dangers of Heirs' Property, B.C. L. Sch. Mag. Online (May 28, 2024), https://lawmagazine.bc.edu/2024/05/the-lurking-dangers-of-heirs-property/

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