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 OF CITIZEN ACTION DEFENSE FUND, MANHATTAN INSTITUTE, REASON FOUNDATION, AND OREGON PROPERTY OWNERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The **Citizens Action Defense Fund** ("CADF") is an independent, nonprofit organization based in Washington State that supports and pursues strategic, high-impact litigation in cases to advance free markets, restrain government overreach, or defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files *amicus* briefs to support constitutional rights, including, *inter alia*, protections against the uncompensated taking of private property without just compensation and the imposition of excessive fines.

The **Manhattan Institute for Policy Research** ("MI") is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has historically sponsored scholarship and filed briefs supporting constitutional protections for property rights and meaningful judicial review of government actions that violate those protections.

The **Reason Foundation** ("Reason") is a national, nonpartisan, nonprofit think tank founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based policies that allow and encourage individuals and voluntary institutions to flourish. Reason

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[1] Pursuant to Rule 37, counsel for *amici* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amici*, their members, or counsel, made any monetary contribution to fund its preparation or submission.

advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports.

The **Oregon Property Owners Association** ("OPOA") is a nonpartisan, nonprofit public interest organization focused on legislation and litigation to protect the constitutional rights of landowners against excessive federal, state, and local regulations. OPOA, which is the assumed business name for Oregonians in Action, successfully represented the petitioner in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). OPOA has filed other cert. petitions in this Court and has appeared as *amicus* in many land use and property rights cases in state and federal courts in the last two decades.

Amici have a strong interest in the outcome of this case because they are committed to the protection of property rights throughout the United States. Specifically, *amici* worry that if the lower court's opinion stands, it will incentivize other state and local governments to further erode the constitutional protections afforded to private property.

QUESTIONS PRESENTED

1. Whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Takings Clause of the Fifth Amendment when the compensation is based on the artificially depressed auction sale price rather than the property's fair market value?

2. Whether the forfeiture of real property worth far more than needed to satisfy a tax debt but sold for fraction of its real value constitutes an excessive fine under the Eighth Amendment, particularly when the debt was never actually owed?

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1991, Timothy Scott Pung purchased a home in Isabella County's Union Township for $125,000.00. He died in 2004, but immediate family members have continued occupying the home ever since. There was a legal dispute over whether Pung's next-of-kin properly recorded the deed transfer from Pung's estate and thus maintained a state property tax exemption, resulting in a judgment that the estate owed a mere $2,241.93. The County rushed to foreclose to collect that amount, an action the estate's representative, petitioner here, learned of too late to redeem the property. The County auctioned the property for $76,000 (far less than its market value) and retained all proceeds. The buyer then resold the property for $195,000.

The petitioner sued in federal court, alleging a Fifth Amendment taking and an Eighth Amendment excessive fine. The district court dismissed the fines claim but awarded $73,766 in surplus proceeds under *Rafaeli, LLC v. Oakland Cnty.*, 505 Mich. 429 (2020). The Sixth Circuit affirmed. Petitioner filed in this Court to recover the difference between the depressed auction price and the fair market value, and this Court granted cert. to examine the question under both the Fifth and Eighth Amendments.

That dispute is well-documented in the record and thoroughly argued by the parties. *Amici* limit this brief to discussing the implications of a ruling against the petitioner. The County's arguments, if allowed to stand, could serve as a roadmap for future governments to freely sell taken properties at artificially depressed prices and to avoid the

constraints of the Excessive Fines Clause by not using words like "crime" or "convicted."

Many of the core issues in this case were generally resolved in *Tyler v. Hennepin County*, 598 U.S. 631 (2023) (holding that when a government sells a home to satisfy a debt it cannot retain proceeds exceeding the amount owed). Yet the County argues that it merely sold the property for less than it was worth, rather than keeping any windfall proceeds, and thus is under no obligation to further compensate the owner. But the text of the Takings Clause is not limited to situations when the government benefits from the property that is taken. Neither language, precedent, nor background principles of law suggest that the Takings Clause hinges on governmental gains rather than property owners' losses. If it were otherwise, this Court's takings jurisprudence would look markedly different, with numerous cases focusing on whether and how much a government has gained instead of what was taken from the owner.

The Takings Clause facially makes no distinction between a seizure of property and the total destruction of its value depending upon *cui bono*, or based on what form that benefit manifests. This Court has long recognized that a taking can occur when "a regulation goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), such as when a regulation "denies all economically beneficial or productive use of land," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Yet, in those situations, the focus is not on the value of what government purportedly gained, but what the property owner lost. The rule should be the same here.

This case shows that, despite federal and state legislation requiring local tax authorities to diligently pursue fair market value for auctioned properties, the system is still rife with corner-cutting at best and official circumvention at worst. The reasons for this are myriad, but at the core is state courts' inability—or even unwillingness—to properly interrogate local authorities' conduct around foreclosures. *Tyler* sent a clear statement: no longer may counties and municipalities hide behind technicalities to avoid making a foreclosed owner as whole as feasible, and efforts to secure as close to fair market value as plausible must be bona fide and in good faith. But apparently that message was not loud enough. The only lasting remedy, at this late juncture, is to extend *Tyler*'s logic to the case at hand: depriving a foreclosed owner of his equity in excess of the tax owed constitutes a taking *unless* the local government has met all its common law and statutory obligations.

In addition to the Takings Clause violations, the County's failure to make a bona fide, good-faith effort to recover a foreclosed owners' remaining equity also violates the Excessive Fines Clause. As this Court has held, excessive fines are not limited to whether the word "crime" is invoked. *See, e.g.*, *Austin v. United States*, 509 U.S. 604, 610 (1993). Moreover, the Pungs' saga to recover the full value of their taken home—one that displays the County's peculiar doggedness in enforcing the disputed tax assessment—is an example of the type of moral hazard the Clause was designed to prevent. The County moved quickly in a fire-sale auction and had little incentive to get fair market value for the Pungs' home, which is all too typical. Counties across the United States continue initiating forced sales to enrich themselves at the expense of

owners, some of whom might owe a relative pittance in unpaid taxes. *See* Jonathan Klick & Gideon Parchomovsky, *Restraining "Theft by the State"*, REGULATION 12 (Spring 2025) (summarizing research on home-equity theft that found systemic abuse, including a forced sale on a tax debt of $8.41 that netted the local government $24,000).

And while recent favorable rulings outside the Sixth Circuit have shown promise, it is still far too early to gauge their practical and precedential impact. *See, e.g.*, *Polizzi v. Schoharie Cnty.*, 720 F. Supp. 3d 141 (N.D.N.Y. 2024) (recognizing a property interest in "surplus equity"); *Coleman v. Dist. of Columbia*, 2016 U.S. Dist. LEXIS 200937, at *5 (D.D.C. June 11, 2016) (same regarding "home equity"). Too many homeowners are still left to the whims of local tax officials. A ruling in petitioner's favor here will send a strong message in *Tyler*'s wake that state and local governments cannot drape destruction of owners' equity beneath layers of legal contrivances.

ARGUMENT

I. THE TAKINGS CLAUSE ENTITLES OWNERS OF FORECLOSED PROPERTIES TO ANY EQUITY LOST DUE TO THE GOVERNMENT'S ARTIFICIAL DEPRESSION OF A PROPERTY'S VALUE

A. The Takings Clause Focuses on Just Compensation for What Is Taken, Not the Value That Is Received or Given

Equity *is* property. Government is not absolved of paying for its destruction simply by following its own prescribed rules for doing so. *See Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private

property into public property without compensation."). Throughout this litigation, the County has vastly overstated the "strictures" of "state-prescribed procedures" that, by its lights, explains the entire $118,000 discrepancy between the Pung home's fair market value and its "forced sale" price at auction. Resp. Cert. Br. at 6.

The "forced sale" may explain some of the discrepancy in the same way that selling a Picasso at a flea market will not bring the highest price. Yet the County incredibly suggests that "the goals of timely recovery of delinquent tax revenue . . . and prompt clearing of title" are per se shields against *any* consideration of fair market value. *Id.* at 9. Such a rule ignores the "takings" part of the Takings Clause—it's not the "Receivings Clause"—and allows the government to create the conditions for the disparity between a property's assessed value and its depressed price at auction—*i.e.*, it can choose to sell the Picasso at the flea market. As petitioner aptly puts it, the County has "sought refuge in the fiction that justice was limited by the outcome of its own inferior auction processes." Pet. Br. at 13.

Taken to its (il)logical conclusion, the county's argument would permit a local government to confiscate title to collect a simple tax lien, "attempt" a public sale at a swap meet, and—after that sale predictably fails—claim it did everything in its power to secure *any* price, let alone a fair-market-value one. Once the dust settles, the government could then resell at a steep profit without the former owner's pesky equity stake eating into that margin.

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court emphasized that proper analysis should "be

informed by the purpose of the Takings Clause, which is to prevent the 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.'" *Id.* at 617–18 (quoting (*Armstrong* v. *United States,* 364 U.S. 40, 49 (1960)). Here, the Pungs are bearing a significant loss to raise the County's revenues. Squeezing a small subset of property owners to raise general revenues flies in the face of the principle articulated in *Armstrong* and affirmed in *Palazzolo*.

The parties already jointly stipulate that the home's appraised value was $194,000 (it did, after all, immediately re-sell after auction for $195,000). Pet. Cert. Br. at 5. That is the value that was taken. The County is not excused for having had the minimal foresight to stage an auction that netted just two-fifths of the property's fair market value. *Id.* at 9.

B. An Unfair Fire-Sale Auction Does Not Determine Fair Market Value, Which Courts Regularly Employ to Determine Just Compensation

In a situation like this one, fair market value is not accurately gauged via the price the government obtains in a market *it* controls. "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *United States v. Causby*, 328 U.S. 256, 261 (1946). Had the Pungs sold the property in a normal sale, they would have realized a "[m]arket value fairly determined" as a normal measure of just compensation. *Id.* If "depreciation of value . . . by reason of preliminary activity" does not factor into the calculation of just compensation, neither, surely, can inaccurate auctions. *See First English Evangelical*

Lutheran Church of Glendale v. L.A. Cnty., 482 U.S. 304, 320 (1987).

On this, Justice Viviano's concurrence in *Rafaeli* is instructive, clarifying that "the property right at issue" in fire-sale auctions "[i]s the taxpayer's equity in the property." 952 N.W.2d at 486. Justice Viviano noted also that he could not find a single case in which a court has held that "the right to surplus proceeds is a freestanding property interest independent of the underlying equity interest." *Id.* at 511.

From this perspective, fair market value is the obvious starting point for any compensation calculus in the tax-foreclosure context. In such cases, the government has an outsized role in setting the price at auction. Petitioner's briefing goes into detail on the various entry barriers and carrying costs that render the foreclosure market largely inaccessible to the general public.

Even in jurisdictions that recognize an owner's equity interest in his foreclosed property, the government would have no real incentive to reduce private actors' high transaction costs of participating in the foreclosure market. Nor, of course, do the select few (mostly financial institutions) participating in such auctions have any reason to push for broader access. This system *will not change* unless and until this Court expressly confirms that the amount of an owner's equity interest is measured by a property's fair market value, or the closest approximation thereof, at the time government takes title. No actor in these fire sales—not the government and certainly not the small number of bidders—have any incentive to ensure a higher, market-based sale price.

II. *IN REM* FORECLOSURES ARE NOT CATEGORICALLY IMMUNE TO THE EXCESSIVE FINES CLAUSE

The County argues that it did not violate the Excessive Fines Clause when it seized the Pungs' $194,000 home to settle a $2,241 tax debt, insisting the Court does not extend the scope of the Eighth Amendment beyond the "protection of persons 'convicted of crimes.'" Resp. Cert. Br. at 11 (quoting *Austin*, 509 U.S. at 620). This is incorrect; an honest reading of the caselaw plainly shows the opposite.

The County first bypasses the ethical implications its conduct here generates—ethical improprieties the Excessive Fines Clause was adopted to curtail. The County rests its case on the argument that "[a] compensation claim arising from tax foreclosure falls categorically outside the scope of the Eighth Amendment." Resp. Cert. Br. at 13. It makes no attempt to explain what it is about tax foreclosures that make them singularly impermeable to the moral hazards against which prohibitions on excessive fines were, in the first place, imposed. Indeed, the County's willful oversight is itself a *product* of this moral hazard (discussed in Part I, *infra*), betraying government's ready propensity to push the limits of its power as far as it *will*, not as far as it *ought* go.

The Court in *Austin* noted that its "cases also have recognized that statutory *in rem* forfeiture imposes punishment." *Austin*, 509 U.S. at 614. Nothing in *Austin* or its progeny suggests that "punishment" requires there be an underlying criminal offense. In fact, *Austin* clearly says that "the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *Id.* at 610. *See also Tyler*,

598 at 648–49 (Gorsuch, J., concurring) ("Nor, this Court has held, is it appropriate to label sanctions as 'remedial' when (as here) they bear 'no correlation to any damages sustained by society or to the cost of enforcing the law,' and 'any relationship between the Government's actual costs and the amount of the sanction is merely coincidental.'") (cleaned up).

The County further brushes aside the fact that the plain text of the Eighth Amendment separates "excessive fines" from "cruel and unusual punishments," implying that an excessive fine by itself is not the same as a cruel and unusual punishment. While punishment is relevant, as stated in *Austin*, "this Court has said a statutory scheme may still be punitive where it serves another 'goal of punishment,' such as '[d]eterrence.'" *Tyler*, 598 U.S. at 650 (Gorsuch, J., concurring) (quoting *United States* v. *Bajakajian*, 524 U.S. 321, 329 (1998)). The County is hung up on the fact that *Austin*, *Bajakajian*, and *Timbs* arose from cases concerning underlying criminal charges and therefore highlight the words "convicted" and "some offense," conflating "punishment" with "crime" to the exclusion of the former's broader meaning. Opp. Br. at 11. The County also makes hay of that the Michigan Supreme Court's description of tax indebtedness as "not a criminal offense." *Rafaeli*, 952 N.W.2d at 447–48. Again, "the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *Austin*, 509 U.S. at 610.

The Framers of both the Fifth and Fourteenth Amendment did not limit excessive-fines analysis only to those contexts displaying *crime-y* words, and this Court's jurisprudence on the matter more than bears

this out. While "it is true that early *in rem* forfeitures were adjudicated without the full panoply of procedural protections," it would be an "anachronistic misstep" to suggest, from this, that such forfeitures are always (and forever) only remedial. Beth A. Colgan, *Of Guilty Property and Civil/Remedial Punishment: The Implications and Perils of "History" for the Excessive Fines Clause and Beyond*, 3 J. Am. Const. Hist. 697, 740 (2025). Such formalism invites—and would readily permit—local governments to escape excessive-fines scrutiny via clever branding alone (as the County has attempted here). And while debate "rages" (at least by legal historians' standards) over whether "early *in rem* forfeitures were understood to be punishment"—no interpretation of the historical record answers what to make of a scheme that "serves *in part* to punish." *Austin*, 509 U.S. at 610.[2] That is, the question of when a government's pursuit of remediation becomes punitive necessarily requires a case-specific answer. On this, Justice Gorsuch reminds us that "[s]o long as the law 'cannot fairly be said solely to serve a remedial purpose,' the Excessive Fines Clause applies." *Id.* at 648 (Gorsuch, J., concurring).

The Court in *Bajakajian* clarified that the legal fiction depicting *in rem* forfeitures as actions against "guilty property" does not shield it from excessive-

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[2] Of course, this historical debate has colored—and muddled—excessive-fines jurisprudence, with Professor Colgan noting, perhaps with this (then-pending) case in mind, that "[t]he divergent treatment of the history of early forfeitures between *Austin* and *Bajakajian* created confusion, and has ultimately led the lower courts to split," among other things, "on whether civil fines constitute fines." Colgan, *Of Guilty Property and Civil/Remedial Punishment*, *supra*, at 702–03.

fines analysis; only that, "because they were viewed as nonpunitive, such forfeitures traditionally were considered to occupy a place outside of the domain of the Excessive Fines Clause." 524 U.S. at 331. "It does not follow, of course, that all modern civil *in rem* forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause." *Id.*

So where is the tipping point? As with much in the law, it depends. But at a minimum the Court should not agree with the County's simplistic suggestion that "an object in *rem* stays in *rem*." The precise formula for determining whether and to what extent a remedial action becomes punitive depends, of course, on the input variables. But if the Pungs' saga teaches us anything, it is that nomenclature cannot possibly be among them.

CONCLUSION

For the reasons discussed above and in petitioner's briefing, the Court should hold that the County's forced sale at an artificially depressed price far below fair market value violated Petitioner's Fifth and Eighth Amendment rights, and remand the case accordingly.

Respectfully submitted,

DECEMBER 2025

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