

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

**BRIEF OF AMICUS CURIAE
PIONEER NEW ENGLAND LEGAL
FOUNDATION
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE

PioneerLegal, LLC (PioneerLegal), doing business as Pioneer New England Legal Foundation (Pioneer NELF), is a nonprofit, nonpartisan legal research and litigation entity.¹ PioneerLegal began operating under its new name, Pioneer NELF, after forming a strategic alliance with the New England Legal Foundation (NELF) in May 2025. Pioneer NELF seeks to continue its own work, as well as NELF's mission.

PioneerLegal was founded by its nonprofit, nonpartisan member, the Pioneer Institute, Inc., in 2022, to promote open and accountable government, economic opportunity, freedom of speech, freedom of association, and education opportunities across the country, through legal action and public education. NELF has been a nonprofit, public interest law foundation, which was incorporated in Massachusetts in 1977. NELF's mission has been promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic and property rights.

This case is consistent with Pioneer NELF's mission to advocate for free market solutions to societal problems, combat government over-reach, and prevent unconstitutional takings of private property by the government.

¹ Pursuant to Supreme Court Rule 37.6, Pioneer NELF states that no counsel for a party authored Pioneer NELF's amicus brief, in whole or in part, and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

ARGUMENT

I. The Pung Estate has been subjected to a taking of its home equity that requires just compensation.

In *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564 (2023), this Court stated that “[T]he 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” and held that “A taxpayer who loses her \$40,000 house to the State to fulfill a \$15,000 tax debt has made a far greater contribution to the public fisc than she owed.” 598 U.S. at 647, 143 S. Ct. 1380 .

The outcome of the tax foreclosure sale of the property of Petitioner Michael Pung, as personal representative of the estate of his father Timothy Pung (the “Pung Estate”) by respondent Isabell County, Michigan (the “County”) was even worse, in the sense that the value lost by the Pung Estate did not even end up in the hands of the County. The County took the greater part of the Pung Estate’s equity in the family home and turned it over to an unrelated third party.

In order to collect a tax debt of about \$2,200, the County sold the Pung Estate’s property, a single-family home, at auction for \$76,000. The County paid that amount, reduced by the amount of the tax debt, to the Pung Estate. The purchaser at auction then sold the home for \$195,000 a short time later, thereby establishing clear evidence of the true fair market value of the home, and earning a windfall of over \$100,000 on a short-term investment of \$76,000.

Essentially, the foreclosure sale resulted in a transfer of roughly 60% of the fair market value of the property from a taxpayer to an unrelated third party. Not only is that an unconstitutional taking in violation of the Fifth Amendment, but the potential for corruption is unmistakable.

II. Payment of just compensation must be determined by reference to fair market value.

To avoid such obviously unjust results, taxing authorities should be obligated to conduct a foreclosure sale in a manner that is reasonably calculated to result in the sale of the property at fair market value. “When the government wants to take private property to build roads, courthouses, or other public projects, it must compensate the owner at fair market value.” *Sheetz v. Cnty. of El Dorado, California*, 601 U.S. 267, 273, 144 S. Ct. 893, 899, 218 L. Ed. 2d 224 (2024). “Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation.” *United States v. New River Collieries Co.*, 262 U.S. 341, 344 (1923). The appropriate amount for just compensation is “the full monetary equivalent of the property taken.” *Almota Farmers Elevator & Whse Co. v. United States*, 409 U.S. 470, 473 (1973). In a case involving the condemnation of 250 acres of land for a reservoir, this Court held that the appropriate measure of compensation for a taking of real estate was “the fair market value of the property at the time of the taking.” *U.S. v. Reynolds*, 397 U.S. 14, 15-16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970).

In disregard of this authority, the Court of Appeals in the present case rejected the notion that just compensation should be determined by reference to the fair market value of the property. Instead, the Court limited the amount owed to the Pung Estate to the surplus of the auction sale price over the tax debt, because “the best evidence of a foreclosed property’s value is the property’s sales price, not what it was worth before the foreclosure.” Petitioner’s App., 11A. The Court of Appeals relied on this Court’s decision in *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994), in which this Court recognized that an auction sale price is different from fair market 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 . . .” 511 U.S. at 537-538, 114 S. Ct. at 1761.

BFP was not a constitutional takings case. It arose in the bankruptcy context, involving a determination of “reasonably equivalent value” under 11 U.S.C. 548(a)(2), not a determination of just compensation for a taking of property. This Court’s concern in *BFP* was a matter of statutory interpretation, not application of the Fifth Amendment. Indeed, this Court made it clear in *BFP* that its holding “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.” 511 U.S. at 537, 114 S. Ct. at 1761, fn 3.

Accordingly, *BFP* does not support the decision of the Court of Appeals to disregard existing precedent in the takings context holding that the

appropriate measure of compensation for a taking of real estate is the fair market value of the property at the time of the taking. On the contrary, the *BFP* court foresaw that future courts might be asked to extend its holding to tax foreclosure auctions and flatly rejected that expansion. There is nothing in the *Tyler* decision to suggest that a tax taking should be treated differently from any other taking that violates the Fifth Amendment.

III. Taxing authorities should be required to utilize traditional free market processes which will result in a sale price that approximates fair market value.

Pioneer NELF does not dispute the basic understanding of *BFP* that an auction sale price is fundamentally different from fair market value, which the Court defined as “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.” 511 U.S. at 538, 114 S. Ct. at 1761, citing *Black’s Law Dictionary* 971 (6th ed. 1990). Instead, Pioneer NELF suggests that, given its constitutional dimension, a tax foreclosure sale should be conducted in a manner that most closely approximates a free market transaction as described in this passage from *BFP*. Foreclosure sales do not necessarily have to be conducted by auction.

Several states have recently revised their tax foreclosure statutes to bring them into compliance with this Court’s decision in *Tyler*. These states have adopted procedures designed to sell the property at fair market value by employing traditional free

market methods of selling real estate, with an absolute auction as a last resort if the property cannot be sold by other means.

In other contexts, states have imposed certain duties on foreclosing lenders and secured parties, over and above the obligation to comply with statutory procedures. These include duties of good faith and reasonable diligence in connection with foreclosure sales, and the requirement that collateral that has been taken must be sold in a commercially reasonable manner. Imposing similar duties on taxing authorities will provide those authorities with an incentive to take reasonable steps to protect taxpayers from uncompensated takings of the magnitude of the one suffered by the Pung Estate. Moreover, the potential for corruption in the tax foreclosure process would be muted by these duties.

IV. Several states require taxing authorities to employ traditional free market methods of selling real estate before resorting to an auction sale.

Several states have recognized that a traditional auction sale is unlikely to realize the true fair market value of the foreclosed property. Instead, these states require or at least authorize the use of traditional free market sale procedures in order to sell the property at fair market value, and thereby provide just compensation for a tax taking.

Massachusetts revised its tax lien foreclosure statute in 2024 to provide that a municipality which has taken a property pursuant to a tax lien foreclosure must list the property for sale with a licensed real estate broker. Mass. Gen. Laws ch. 60,

§ 64A (c)(1). If the property does not sell within twelve months, the municipality may then proceed with an auction. The municipality must also get an appraisal of the property before the auction, and cannot accept a bid at auction that is less than 65% of the property's appraised value. Mass. Gen. Laws ch. 60, § 64A (c)(2). If the property does not sell at the auction, the municipality must continue the sale to another day. Mass. Gen. Laws ch. 60, § 64A (c)(3).

Oregon revised its tax foreclosure sale process in 2025. 2025 Or. Legis. Serv. 475 (West). The revised statute provides that for properties in a residential zone that were the principal residence of the former owner, the county must first list the property for sale with a licensed real estate broker and obtain an appraisal from a licensed appraiser. 2025 Or. Legis. Serv. 475, § 6 (2) (West). The county may only hold an auction sale if it is unable to find a broker who will take the listing, or if the broker is unable to sell the property within 12 months. 2025 Or. Legis. Serv. 475, § 6 (3) (West). If an auction is commenced, the minimum bid must be at least two thirds of the fair market value of the property. 2025 Or. Legis. Serv. 475, § 6 (3)(c) (West). If that initial auction fails, the county can reduce the minimum bid to the amount of outstanding taxes plus fees and costs. 2025 Or. Legis. Serv. 475, § 6 (4)(West).

Maine also requires a municipality to list all foreclosed properties for sale with a licensed real estate broker "at the highest reasonable price at which the property is anticipated to sell." Me. Rev. Stat. tit. 36, § 943-C. If the property does not sell within twelve months, the municipality may sell the property in any manner authorized by the

municipality's legislative body. Under either procedure, the proceeds net of the tax debt and costs of sale must be returned to the former owner. 36 Me. Rev. Stat. tit. 943-C (3) and (4-A).

Wisconsin does not prescribe a particular foreclosure sale process. Instead, the applicable statute gives counties the right to choose alternative methods of sale, such as open or closed bid, or engaging a licensed real estate broker. Wis. Stat. 75.35 (2). Wisconsin also requires the county to include the appraised value of the property in all notices advertising the property for sale. Wis. Stat. 75.69 (1).

Listing a property for sale with a real estate broker is the usual free market process by which real estate, and residential property in particular, is sold for its fair market value. Listing the property with a broker also brings someone into the process who has an incentive to maximize the sale price, because brokers typically receive a commission based on a percentage of the sale price. If a broker is unable to sell a property within a reasonable time, that may be an indication that there is no real fair market value of the property, and an auction sale is the appropriate way to dispose of the property.

V. Massachusetts imposes a duty of good faith and reasonable diligence for foreclosure sales.

Massachusetts courts have taken an additional step to protect debtors by holding for over 150 years that technical compliance with statutory foreclosure procedures is not enough. Foreclosing lenders must comply with those procedures, but also must act in

good faith and with reasonable diligence when selling a foreclosed property under a power of sale. The mortgage holder “cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interests of the party who entrusts him with the power.” *Montague v. Dawes*, 96 Mass. 369, 373 (14 Allen) (1867). The foreclosing lender has an obligation “to get for the property as much as it can reasonably be made to bring. Under such circumstances, he should do what a reasonable man would be expected to do to accomplish that result.” *Clark v. Simmons*, 150 Mass. 357, 360, 23 N.E. 108, 108 (1890); accord, *Prop. Acquisition Grp., LLC v. Ivester*, 95 Mass. App. Ct. 170, 175, 122 N.E.3d 10 (2019).

Government entities conducting tax foreclosure sales should be held to a similar standard of good faith and reasonable diligence. It is reasonable to impose these burdens on the government in order to avoid an unconstitutional taking without just compensation.

VI. The Uniform Commercial Code imposes a standard of commercial reasonableness in the sale of collateral.

The drafters of Article 9 of the Uniform Commercial Code also chose to identify a standard of conduct rather than specify precise procedures that must be followed on the sale of foreclosed or repossessed property. Article 9 obliges a secured party who chooses to dispose of collateral to conduct a commercially reasonable disposition. “Every aspect of a disposition of collateral, including the method,

manner, time, place, and other terms, must be commercially reasonable.” U.C.C. § 9-610 (b) (2023). The drafters of the Code recognized that a low sale price, while not dispositive, is a factor to be considered in evaluating whether a sale is commercially reasonable:

The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

U.C.C. § 9-627 (9a) (2023).

To be sure, the question of whether a sale was conducted in a commercially reasonable manner has generated considerable litigation. *See generally* Carlson, David Gray, *Commercially Reasonable Sales in the 21st Century*, Ohio N.U. L. Rev., Vol. 50, Iss. 1, Article 3.² But that is the result of the huge variety of types of collateral covered by the U.C.C. It is reasonable to infer that the courts can handle the litigation generated by imposing a standard of commercial reasonableness, or imposing a duty of good faith and reasonable diligence, with respect to tax takings of real estate. Imposing such duties could reasonably be expected to eliminate or at least

² Available at:

https://digitalcommons.onu.edu/onu_law_review/vol50/iss1/3

ameliorate the kinds of extreme and unconstitutional takings suffered by the Pung Estate in the present case.

CONCLUSION

For the reasons stated above, Pioneer New England Legal Foundation respectfully requests that this Court reverse the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,
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FOUNDATION,

By its counsel,

/s/ Frank J. Bailey

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