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 U.S. Court of Appeals for the Sixth Circuit

BRIEF OF THE CATO INSTITUTE AND PROFESSORS JESSICA ASBRIDGE, JAMES ELY, JULIA MAHONEY, AND ILYA SOMIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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December 8, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CHARTER PROVISIONS & STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE[1]

The **Cato Institute** is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs in state and federal courts. This case interests Cato because the Fifth Amendment's Takings Clause is fundamental to the protection of private property rights.

Jessica Asbridge is an Associate Professor of Law at Baylor Law School. Her scholarship focuses on private property rights and economic sanctions (with a focus on the Takings Clause and the Excessive Fines Clause). She has published multiple articles on these topics, including *Fines, Forfeitures, and Federalism*, 111 VA. L. REV. 67 (2025), regarding the similarities between takings and excessive fines, and *Redefining the Boundary Between Regulation and Appropriation*, 47 BYU L. REV. 809 (2022).

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[1] No other counsel authored any part of this brief, and no other person or entity prepared or funded it. *R. 37.*

Emeritus, at Vanderbilt University. He is a nationally recognized property law expert and legal historian who has written extensively about the Takings Clause and just compensation. This Court, twenty-one other federal courts, and twenty-nine state supreme courts have relied upon his scholarship, *see, e.g.*, *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024). His books include THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (Oxford Univ. Press, 3d ed. 2008).

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SUMMARY OF ARGUMENT & INTRODUCTION

At its heart, this is a simple case. The Takings Clause of the Fifth Amendment requires payment of "just compensation" whenever the government takes "private property" for "public use." U.S. Const. Amend. V. In this case, the government undeniably took the property of the Pung estate and paid far less than just compensation for it. If this Court does not reverse the badly flawed decision of the Sixth Circuit, state and local governments could systematically undercompensate vulnerable property owners who lose their land to tax foreclosure. Such an outcome would gravely undermine the rule set out in this Court's unanimous decision in *Tyler v. Hennepin County*, which held that "home equity theft" violates the Takings Clause and vindicated "[t]he principle that a government may not take more from a taxpayer than she owes." 598 U.S. 631, 639 (2023).

The compensation paid to the Pung estate fell far short of the "fair market value" standard required by this Court's precedents, as indicated by the County's own valuation of the property at $194,400 – more than twice the amount it paid to the estate. Pet. Cert. at 5. The flawed auction held by the county brought in a price of only $76,008, of which the owner received some $73,800 after subtracting the $2241.93 tax debt supposedly owed by the Pung estate. *Id*. The new owner of the property then sold it for $195,000, further underscoring the enormous disparity between

the Pung estate's loss and the compensation received. *Id*.

Part I of this amicus brief explains why reversal of the Sixth Circuit decision is required by basic Takings Clause principles, including those enunciated in *Tyler*. There is no other way to forestall home equity theft and ensure that property owners facing loss of property through tax foreclosure are fully compensated.

Part II outlines historical evidence showing the importance of the requirement of just compensation, and the need to fully compensate property owners for property taken by the government. Mere partial compensation is not enough.

Finally, Part III explains why a ruling upholding the lower court is likely to result in severe abuses of property rights, because local governments often have incentives to undercompensate property owners whose land is subject to tax foreclosure. Elderly, minority, and less affluent property owners are likely to be particularly vulnerable.

I. THE LOWER COURT DECISION VIOLATES FUNDAMENTAL TAKINGS CLAUSE PRINCIPLES.

The Takings Clause requires payment of "just compensation" when property is taken by the government. U.S. CONST. AMEND. V. In *Tyler*, this Court held that a taking occurs when the government forecloses on property for a tax delinquency and then takes more value than is needed to pay what the government is owed. *Tyler,* 598 U.S. at 638-41. The state

"could not use the toehold of the tax debt to confiscate more property than was due." *Id.* at 639. Here, the County has violated that basic precept.

This Court has long held that that "'[j]ust compensation' . . . means in most cases the fair market value of the property on the date it is appropriated." *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 10 (1984) (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979)). Tax foreclosures like the present case should be no exception to this principle.

Here, the county has violated that rule by giving the Pung estate only about $73,800 in compensation for a property it itself valued at $194,400, and which the new owner sold for $195,000. Pet. Cert. at 5. It is irrelevant that the government did not capture the difference in value for itself but ended up transferring it to the winner of the foreclosure auction. "[T]he 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235-236 (2003); *see also Boston Chamber of Commerce v. Boston,* 217 U.S. 189, 195 (1910) (holding that "the question is what has the owner lost, not what has the taker gained"). Put more succinctly, it is the Takings Clause, not the Receiving Clause.

The government must not be allowed to escape takings liability by wasting or destroying the property it seizes, or – as in this case – by allowing a private party (the winning bidder at the auction) to capture it. There is no basis for such a loophole in the text and original meaning of the Takings Clause or in this

court's precedent. If the Court were to bless such practices, it would create dangerous perverse incentives for condemning authorities. For example, they could seize property and then auction it off at bargain-basement prices to cronies or representatives of influential interest groups.

The owner of property taken by the state "is entitled to be put in as good a position pecuniarily as if his property had not been taken." *Olson v. United States,* 292 U.S. 246, 255 (1934). At the very least, that principle requires compensation equal to the fair market value of what he or she has lost.

Many scholars have argued that fair market value compensation is often insufficient, because, among other things, it often fails to account for the "subjective value" numerous owners attach to their property over and above the price it would fetch if sold in a competitive market. *See, e.g.,* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 205-09 (rev. ed. 2016) (summarizing this problem and citing relevant literature); James Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 865– 75 (advocating compensation above fair market value); Testimony of Professor Thomas W. Merrill before the U.S. Senate Committee on the Judiciary, *The* Kelo *Decision: Investigating Takings of Homes and Other Private Property,* at 6 (Sept. 20, 2005).[2] The problem of insufficient compensation is particularly acute in cases involving homes that have been owned by a family for

[2] http://judiciary.senate.gov/testimony
.cfi n?id=1612&wit_id=4661.

many years and the owners have developed ties to the community that are not reflected in the property's market price. SOMIN, *supra*, at 205-06 (discussing this issue).

Amici do not ask the Court here to impose a requirement of compensation beyond fair market value. That issue is best addressed in a case directly raising it. But they do urge that the Court not allow compensation to be set at a level far *below* the market price. Allowing such abuses would go against longstanding precedent and undermine the crucial rule established in *Tyler*.

Amici do not deny that the price for which a property is sold at a tax foreclosure auction may sometimes be an indicator of a property's fair market value. But, contrary to the ruling of the lower court, it cannot be the exclusive and preclusive measure of that value or of the compensation owed to the property owner. *See Pung v. Kopke* (6th Cir. 2025), Cert. Pet. Appx. 11a (holding that "any surplus owed to the owner is determined by the foreclosure sale price").

As the present case indicates, there can sometimes be major divergences between the auction price and fair market value. The likelihood of such divergence is particularly great in situations where the government has little or no incentive to conduct the auction in a way that maximizes the sale price. *See* Part III, *infra* (explaining this issue in detail).

II. HISTORICAL EVIDENCE SUPPORTS REQUIRING AT LEAST FAIR-MARKET VALUE COMPENSATION IN THIS CASE.

In *Tyler*, this Court relied upon multiple precedents and historical sources in holding that a government confiscation of more property than was owed for a tax debt amounted to a "classic taking." 598 U.S. at 639. Those precedents and sources are relevant to this case, which concerns the taking and subsequent sale of property far in excess of what was needed to satisfy a small—and disputed—tax debt. Historical evidence indicates that the government must be required to pay at least fair market value compensation to property owners like the Pung estate.

A. Limits on the Seizure and Sale of Property to Satisfy Tax Debts are a Fundamental and Long-Established Principle.

As the Court recognized in *Tyler*, Magna Carta required a sheriff to follow specific rules and procedures when seizing property to satisfy debts due to the crown. *See* 598 U.S. at 639. Chapter 9 required exhaustion of the personal estate of a debtor before attacking his real estate or its revenues to satisfy such debts. William Sharp McKechnie, *Magna Carta, A Commentary on the Great Charter of King John*, 222, 322 (2d ed. 1914). Relatedly, Chapter 26 required that a sheriff attach and sell chattels only in proportion to the sum due when satisfying a debt of the deceased. *Id.* at 322. To ensure this, Chapter 26 set out a specific procedure to be followed, requiring the cataloging of items in the sight of lawful men. *Id.* at 322. Specifically, "[n]eighbours specially summoned for that purpose, whose function it was to form a check on the actions of the sheriff's officers, to prevent them from appropriating anything not included in the in-

ventory, *to assist in valuing each article* and to see that no more chattels were distrained than necessary." *Id.* at 322-23 (emphasis added).

Subsequent English statutes also provided that a debtor's goods were to be sold first, with land holdings to be reached only when the proceeds from the sale of goods were insufficient. *See Martin v. Snowden*, 59 Va. 100, 136-38 (1868), *aff'd sub nom, Bennett v. Hunter*, 76 U.S. 326 (1869).

That practice carried over to the new world, where early colonial statutes required that tax debts first be satisfied by personal property before reaching the debtor's home. *Id.* at 138. These limitations on selling the lands of debtors to satisfy their debts arose due to the nature of the individual or family home, which "is one of the evidences of modern civilization" and "recognized among the earliest institutions of the common law." *Riggs v. Sterling*, 27 N.W. 705, 707 (Mich. 1886) (tracing the history of the limits on land sales).

With respect to the sale of goods, tax collectors were not authorized to sell more goods than necessary to satisfy the debt due in part to a concern about "subject[ing] the owner to unnecessary losses." *Williamson v. Dow*, 32 Me. 559, 560 (Me. 1851); *see Cone v. Forest*, 126 Mass. 97, 101 (Mass. 1879); *Denton v. Carroll*, 40 N.Y.S. 19, 23 (NY. App. Div. 1896). One court recognized, in selling the property, the collector had a duty to "obtain the best price, he can." *Williamson*, 32 Me. at 560; *cf. Handy v. Clippert*, 15 N.W. 507, 508 (Mich. 1883) (noting, in the context of a seizure of property to satisfy a judgment, the officer

should be "a minister of justice, not of oppression" and "do as little mischief to the debtor as possible").

A tax collector who exceeded his authority and sold more than necessary to satisfy the debt was considered a trespasser. *Denton*, 40 N.Y.S. at 23 (noting the "elementary" rule that collectors are "always liable for excessive sales," as "[w]hen several chattels are seized, and enough have been sold to satisfy the demand, the sale of the remainder is a trespass"). In such a case, the collector was liable for the "full value" of the goods sold. *See Seekins v. Goodale*, 61 Me. 400, 404 (Me. 1873).

Land generally could only be sold to satisfy a tax debt where no personal property could satisfy the debt. *Martin*, 59 Va. at 138. Only that land necessary to satisfy the debt was to be sold. *Stead's Ex'rs v. Course*, 8 U.S. 403, 414 (1808). One statute, passed in 1788, directed that the "smallest number of acres" should be sold that would satisfy the debt, as selling land "produced great oppression." *Martin*, 59 Va. at 139. The government was not allowed to take more than needed to pay off the tax debt.

The same principle applied in the context of a judicial sale to satisfy a judgment debt. For example, the Chancery Court of New York observed that this principle (that only as much land as necessary to pay the debt could be sold) applied "without any positive law for the purpose," as it "rests on principles of obvious policy and universal justice." *Tiernan v. Wilson*, 6 Johns Ch. 411, 414 (N.Y. Ch. 1822). The court there set aside the sale conducted by a sheriff as fraudulent

and void in the law due to the sale of two lots valued at $780.50 for a $10.25 debt. *Id.* at 413-15.

Similarly, courts recognized that a sale to satisfy a judgment debt would be void if the proceeds from the sale of property were "so disproportioned in value to the amount to be raised" that it created the "presumption of fraud or reckless indifference to the obligations of his trust." *See, e.g.*, *Cornelius v. Burford*, 28 Tex. 202, 208-09 (Tex. 1866).

The confiscation of the Pung home, valued at $194,400, for a tax debt of only $2,241.93 stands in direct opposition to the foundational principle that a government may confiscate only what is necessary to satisfy the debt. As in *Tyler*, the fact that a taking occurred means that just compensation is due, and that compensation must be equal to the full value of the owner's loss.[3]

B. The Just Compensation Principle Provides Essential Protection for Individual Rights.

The just compensation principle has deep historical roots. It was first established in the common law and later incorporated in the Fifth Amendment. As the historical record demonstrates, the just compensation

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[3] The confiscation of the Pung home and subsequent sale of it at a price far lower than its value also cannot be justified as constitutionally permissible punishment from a historical perspective. *See* Jessica Asbridge, *Tax Forfeitures and the Excessive Fines Muddle*, 118 NW. UNIV. L. REV. ONLINE 170 (2023); *see also Martin*, 59 Va. at 143.

principle safeguards individuals from being singled out to carry a disproportionate share of the burdens incurred to benefit the community. James W. Ely Jr., *"All Temperate and Civilized Governments": A Brief History of Just Compensation in the Nineteenth Century*, 10 BRIGHAM-KANNER PROP. RTS. J. 275, 275-281 (2021). This norm was well established in both English common law and natural law long before being written into the Bill of Rights. As discussed above, its origins can be traced to Magna Carta. *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). In his influential *Commentaries on the Laws of England* (1765-1769), William Blackstone viewed just compensation as a settled principle. Recognizing that Parliament could acquire private property, Blackstone emphasized that Parliament must give the owner "a full indemnification and equivalent for the injury thereby sustained." 1 Blackstone, *Commentaries* 135 (facsimile, Univ. of Chicago Press 1979).

Jurists outside the English common law tradition also emphasized the need to pay compensation when the state appropriated property. For example, in 1625 the Dutch natural law theorist Hugo Grotius maintained that when the state acquired property, "the state is bound to make good at public expense the damages to those who lose their property." Hugo Grotius, *On The Law of War and Peace* (1625) bk III, at 420.

The compensation principle was widely accepted in America before the adoption of the Constitution. James W. Ely, Jr., "*That Due Satisfaction May be Made": The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM .J LEGAL HIST. 1, 1-13

(1992); William B. Stoebuck, *A General Theory of Eminent Domain,* 47 WASH L. REV. 553, 578-79 (1972)("[C]ompensation was the regular practice in England and America, so far as we can tell, during the whole colonial period."). After the Revolution, the states and Congress began to embed the principle of just compensation into founding documents. The influential Massachusetts Constitution of 1780 declared that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, pt I, art X. Similarly, in the Northwest Ordinance of 1787, Congress declared that if "the public exigencies make it necessary, for the common preservation, to take any person's property . . . full compensation shall be made for the same." Northwest Ordinance of 1787, art 2.

Ultimately incorporated into the Fifth Amendment, the just compensation norm has long been understood as a safeguard for individuals from government abuse. Not surprisingly, therefore, in 1795 Justice William Paterson, who had been a member of the Constitutional Convention, observed that "no one can be called upon to surrender or sacrifice his whole property real and personal, for the good of the community, without receiving a recompence in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large." *VanHorne's Lessee v. Dorrence*, 2 U.S. 394, 304, 310 (1795).

This Court has consistently endorsed the protective purpose of the Fifth Amendment's just compensation

requirement. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken without just compensation 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."); *Sheetz v. County of El Dorado*, 601 U.S. 267, 273-74 (2024) ("By requiring the government to pay for what it takes, the Takings Clause saves individual property owners from bearing 'public burdens which, in all fairness and justice, should be borne by the public as a whole.'") (quoting *Armstrong*, 364 U.S. at 49).

To effectuate the protective function of the Takings Clause, it was essential that courts determine that the notion of "just compensation" amounted to an equivalent value for the property taken. Ely, *"All Temperate and Civilized Governments", supra* at 283-285. Courts and commentators early gravitated to fair market value at the time of the taking as the appropriate standard. For example, in 1851 the Supreme Court of Georgia declared that when land or other property was taken "[t]he value of the land or anything else, is its price in the market." *Harrison v. Young,* 9 Ga. 359, 354 (1851).

Likewise, Michigan Supreme Court Justice Thomas M. Cooley, a leading constitutional scholar and influential treatise writer, insisted in 1868 that when property is acquired the question of just compensation "is reduced to one of market value." Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American* 565 (1868). This Court endorsed the same view in

Mississippi & Rum River Boom Company v. Patterson, 98 U.S. 403, 408 (1878): "The inquiry in such cases must be what is the property worth in the market. . . ." Fair market value, of course, remains the standard for determining just compensation today. *See, e.g., Kirby Forest Indus.*, 467 U.S. at 10.

III. A RULING UPHOLDING THE SIXTH CIRCUIT DECISION WOULD LEAD TO GRAVE ABUSES OF PROPERTY RIGHTS

If this Court affirms the misguided decision of the Sixth Circuit, it is likely to perpetuate and extend grave abuses of property owners' rights. Local governments would be free to provide "compensation" that is only a small fraction of the fair market value of the property seized in tax foreclosure proceedings.

Recent research by economist Cameron LaPoint finds that properties sold in tax foreclosure auctions often sell at a small fraction of assessed market value, less than 10% in the "vast majority" of cases. Cameron LaPoint, *Property Tax Sales, Private Capital, and Gentrification in the U.S*, Yale Sch. of Mgmt. (Aug. 2025), at 1.[4] Even if the true effects are less severe than this estimate – say an average foreclosure sale price of 60% or 70% of market value – there would still be extensive uncompensated takings and, thereby, extensive violations of constitutional rights. Thus, there would be ongoing severe violations of both *Tyler's* holding that equity theft is unconstitutional and

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[4] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219360.

violations of general takings principles requiring full compensation at least equal to fair market value. *See* Part I, *infra*.

It is not surprising that foreclosure auctions frequently result in prices far below fair market value. The local governments that carry out the foreclosures have little incentive to structure auctions that deliver value to the property owner. They stand to benefit only from the part of the auction price that is used to pay off the debt owed to the government. Caesar is at best indifferent to the issue of how much remains after what he is owed is rendered unto him.

Worse, local governments may even have incentives to structure auctions in ways that make a sub-market price more likely. A quick but poorly organized auction will get the government its money faster than one that takes more time to organize but gets higher value for the owner. The government is happy to accept the lower overall price so long as the winning bid is sufficient to defray the property owner's tax debt.

A quickie auction resulting in a submarket price can also benefit political insiders and well-organized interest groups. In a poorly organized, difficult-to-access tax foreclosure auction, such people can acquire property at bargain-basement prices. That possibility creates additional incentives for local governments to organize auctions that result in sales for prices below fair market value.

A ruling affirming the Sixth Circuit will especially impact minorities, the elderly, the poor, and the disabled, among others. Black, Hispanic, and other mi-

nority communities have long been disproportionately harmed by tax foreclosures and resulting home equity theft. *See, e.g.*, Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount,"* 37 FLA. ST. U. L. REV. 589 (2010) (documenting these disparities); *Tyler v. Hennepin Cty.*, Amicus Br. of National Legal Aid Defender Ass'n at 5-7 (same).[5]

The elderly also disproportionately suffer from home equity theft, in part because they are more likely to have medical issues or disabilities that lead to tax delinquencies. *See, e.g.,* Jenna Christine Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 REAL PROP. TR. & EST. L.J. 93, 104-05 (2019) (describing and documenting this effect); *Tyler v. Hennepin Cty.*, Amicus Br. of AARP, AARP Foundation, and National Consumer Law Center, at 13-22[6] (describing these issues in detail). The same is true of people suffering from physical or mental disabilities. Such disabilities may make it difficult for them to keep track of tax obligations or to raise the funds needed to pay them off. *Foos*, *supra* at 104-05; *Tyler v. Hennepin Cty.*, Amicus Br. of New Disabled South and Emory Law School Disabled Law Students Association.[7]

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[5] https://www.supremecourt.gov/DocketPDF/22/22-166/256341/20230306143341766_22-166%20NLADA%20Amicus.pdf.

[6] athttps://www.supremecourt.gov/DocketPDF/22/22-166/256306/20230306130518559_22-166%20tsac%20AARP%20Final.pdf.

[7] https://www.supremecourt.gov/DocketPDF/22/22-166/256389/20230306171632209_22-166%20tsac%20Emory.pdf.

Similarly, it requires no great insight to recognize that poorer property owners are disproportionately vulnerable to home equity theft.

While the magnitude of these violations of constitutional rights is extensive, it need not be difficult for state and local governments to address them. For example, states can mandate that local governments organizing tax foreclosure auctions require a minimum bid comparable to the assessed market value of the property. That would eliminate most of the perverse incentives leading to payment of submarket prices at tax foreclosure auctions. For example, Ohio law requires a minimum bid of two-thirds of assessed market value at regular foreclosure auctions. Oh. Rev. Code § 2127.33. Similar, but stricter, requirements can be imposed for tax foreclosures.

CONCLUSION

For the above-stated reasons, amici urge the Court to rule in favor of the Petitioner.

Respectfully submitted,

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December 8, 2025