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

RESPONDENT ISABELLA COUNTY, MICHIGAN'S BRIEF

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QUESTIONS PRESENTED

1. Whether, after foreclosing on and selling a property to collect delinquent taxes, the government provides just compensation under the Fifth Amendment's Takings Clause when it pays the former property owner the difference between the property's auction sale price and the tax debt?

2. Whether a government violates the Eighth Amendment's Excessive Fines Clause when it forecloses on real property worth more than needed to satisfy a tax debt and pays the former property owner the difference between the property's auction sale price and the tax debt?

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INTRODUCTION

After Timothy Pung passed away in 2004, his personal representative—petitioner here—did nothing to update the ownership records for Timothy's former home in Union Township in Isabella County, Michigan. Nor did he provide the township assessor the simple affidavit required to continue claiming a partial tax exemption on the property. When the assessor denied the tax exemption for 2012, petitioner dug in his heels: he refused to submit the affidavit; he did not appeal the denial; and he did not pay the tax.

Over the next two years, the County treasurer provided petitioner with repeated notices of the delinquency, the consequences of failing to pay it, and the opportunities for petitioner to make his case. During that two-year period, petitioner could have redeemed the property by paying the delinquency. He could have submitted the requisite affidavit. He could have hired a realtor to market and sell the property to maximize the value of the estate's equity in it. He could have appeared at separate, legally required show-cause and foreclosure hearings to contend that the property was exempt from the delinquent tax. Petitioner took none of those off ramps. After the tax remained unpaid for seven years, the County treasurer sold the property at a public auction in 2019.

Consistent with current Michigan statutory law, the lower courts held the Fifth Amendment's Takings Clause entitles petitioner to the surplus proceeds from the auction sale—broadly, the amount realized at the sale less the tax debt. According to petitioner, the Constitution requires more. He says that the Takings Clause requires the County to pay him the difference

between the tax delinquency and the property's purported fair-market value. He also says that the Eighth Amendment's Excessive Fines Clause independently requires some amount more than the surplus proceeds. This Court should reject both arguments.

As this Court recognized in *Tyler* v. *Hennepin County*, 598 U.S. 631 (2023), the proposition that a foreclosing government must pay a property's former owner the "overplus" realized on sale—*i.e.*, the surplus proceeds—is deeply rooted in Anglo-American law. *Id.* at 639-642. English and American governments have seized and sold property to collect debts for centuries. And, for centuries, the majority rule has required the government to return surplus proceeds, if any, to the property's former owner. Petitioner's fair-market-value theory has no foothold in history or precedent. The robust tradition of requiring foreclosing governments to pay surplus proceeds (and no more) to property owners shows that neither the Takings Clause nor the Excessive Fines Clause requires a greater amount.

What's more, petitioner's fair-market-value rule ignores the fundamental differences between a market sale with a willing seller and buyer and a forced sale on foreclosure. Fair-market value "is the very *antithesis* of forced-sale value" and "presumes market conditions that, by definition, simply do not obtain in the context of a forced sale." *BFP* v. *Resol. Tr. Corp.*, 511 U.S. 531, 537-538 (1994). Property in foreclosure "is simply *worth less*" than fair-market value. *Id.* at 539. Using fair-market value as the yardstick for just compensation in the foreclosure context overcompensates for the property owner's loss

and unfairly burdens the public fisc and fellow citizens who pay their taxes.

The Excessive Fines Clause does not independently provide petitioner a basis to recover more than surplus proceeds. That Clause constrains the power to punish, not the power to take property for public use, and taking property for public use is not punishment. *Tyler* settled that tax foreclosures of property worth more than a tax debt implicate the Takings Clause. Regardless, Michigan's tax-foreclosure system is not punitive, so foreclosures are not a fine. Even if they were, just compensation under the Fifth Amendment—however measured—always provides a greater remedy than the Excessive Fines Clause: the former requires full payment for the taken property interest, while the latter allows the government to seize property without compensation, subject only to review for rough proportionality.

Adopting petitioner's rule would conflict with centuries of history and precedent, effectively eliminate foreclosure as an option to collect government debts, and cripple state property-tax collection-systems. Doing so would benefit those who do not pay their taxes while increasing the burden on those who do. This Court should affirm.

STATEMENT OF THE CASE

A. Michigan's property-tax system

Nationwide, property taxes generate roughly 73% of local government tax revenue. Tax Foundation, *Confronting the New Property Tax Revolt* (Nov. 5, 2024), *available at* https://bit.ly/TaxFoundArticle. In Michigan, local governments depend on property taxes for an even greater percentage (92%). *Id*. Over

half of real-property-tax revenue in Michigan funds schools. Mich. Dep't of Treasury, Office of Revenue & Tax Analysis, *The Michigan Property Tax* 15 (Oct. 2023), *available at* https://bit.ly/MichPropertyTax.

Under Michigan's General Property Tax Act (the "GPTA"), taxes are assessed at the local level by city, village, and township assessors. Mich. Comp. Laws § 211.10. Local assessors are also responsible for allowing property-tax exemptions, including the principal-residence exemption. *Id.* § 211.7cc(6).

The principal-residence exemption exempts a taxpayer's primary residence from a portion of certain taxes. *Id.* § 211.7cc(1). To claim the exemption, the property owner must file a simple affidavit with the assessor certifying that the affiant owns and occupies the property as his or her principal residence. *Id.* § 211.7cc(2); see also Mich. Dep't of Treasury, *Form 2368 Principal Residence Exemption (PRE) Affidavit* (July 2022 rev.), *available at* https://bit.ly/Form2368. If the assessor concludes that the property "is not the principal residence of the owner claiming the exemption," the assessor may deny the exemption for the current year and the previous three years. Mich. Comp. Laws § 211.7cc(6). The owner may appeal the denial to the Michigan Tax Tribunal. *Id.* § 211.7cc(13).

Property taxes in Michigan are levied semiannually; the second levy is due in February of the next year. *Id.* § 211.44(3). Taxes that remain unpaid as of March 1 become delinquent. *Id.* § 211.78a(2). Responsibility for collecting delinquent taxes falls not on the city or township that assessed them but on the "foreclosing governmental unit"—generally the county treasurer. See generally *id.* §§ 211.78(8)(a), 211.78a; *Rafaeli, LLC* v. *Oakland*

Cnty., 952 N.W.2d 434, 443 n.11 (Mich. 2020). Counties typically advance the delinquent taxes to the local governments and schools before attempting to collect them. See *Rafaeli*, 952 N.W.2d at 443. This "allows local municipalities to continue with their day-to-day operations." *Id.* at 443 n.14.

Over the next year, the foreclosing governmental unit must send notices of the delinquency and the potential consequences of failing to pay it to the record property owner. Mich. Comp. Laws §§ 211.78b-.78c, 211.78f. On March 1, each property that has had a tax delinquency for at least 12 months is "forfeited" to the county treasurer for the total amount of unpaid taxes, interest, penalties, and fees. *Id.* § 211.78g(1). But "forfeiture" does not affect title to the property, nor does it give the foreclosing governmental unit possession of the property. *Id.* § 211.78(8)(b). Rather, it means that a foreclosing governmental unit may seek a foreclosure judgment if the property's owner does not redeem the property. *Ibid.*

No later than June 15 after the forfeiture, foreclosing governmental units must file a petition with the local court seeking foreclosure of all property forfeited and not yet redeemed. *Id.* § 211.78h(1). The foreclosure hearing generally occurs the following February. See *id.* § 211.78h(5). Before the foreclosure hearing, the foreclosing governmental unit must provide extensive notice, including multiple mailed notices, publication, and a personal visit to the property so notice may be hand delivered to the occupant (if possible) or posted in a conspicuous location at the property. See generally *id.* §§ 211.78f-.78g, 211.78i.

Before the foreclosure hearing, the foreclosing governmental unit must hold a show-cause hearing. *Id.* § 211.78j. There, the property owner or any other person with an interest in the property may appear to contest the foreclosure, *ibid.*, including by demonstrating that "[t]he property was exempt from the tax in question," *id.* § 211.78k(2)(c). The property owner can raise the same objections at the foreclosure hearing. *Ibid.*

If the property owner fails to pay the delinquent taxes, the county treasurer's only avenue to collect the tax is an *in rem* foreclosure proceeding against the property. See generally *id.* §§ 211.78-.78m. The county treasurer lacks the authority to pursue an *in personam* action against the property's owner or seize that person's personal property. See generally *ibid.*

The property owner ordinarily retains a right to redeem by paying the delinquency until the March 31 following entry of the foreclosure judgment. *Id.* §§ 211.78g(3); 211.78k(5)-(6). In other words, the property owner has at least 25 months after failing to timely pay property taxes to redeem the property. If the property owner does not redeem by March 31, fee-simple title to the property vests "absolutely in the foreclosing governmental unit." *Id.* § 211.78k(6). If the property owner contests the foreclosure, the property owner has the right to redeem until 21 days after the entry of the foreclosure judgment. *Id.* § 211.78k(5).

After a property is foreclosed, the foreclosing governmental unit generally must "hold 1 or more property sales at 1 or more convenient locations," among other statutory requirements, beginning in July and ending in November of the foreclosure year. *Id.* § 211.78m(2). The minimum bid at the initial

auction must include all delinquent taxes, interest, penalties, and fees due on the property, *id.* § 211.78m(16), and the property must be sold to the highest bidder, *id.* § 211.78m(2). If a property is not purchased, the property generally is transferred to the municipality where it is located. *Id.* § 211.78m(6).

Property sale "proceeds are often insufficient to cover the full amount of delinquent taxes, interest, penalties, and fees related to the foreclosure and sale of the property." *Rafaeli*, 952 N.W.2d at 446. Nonetheless, foreclosure sales sometimes yield surplus proceeds. Before 2020, surplus proceeds were not distributed to the property's former owner; instead, any surplus went to the foreclosing governmental unit and offset delinquent property taxes on other properties. See Mich. Comp. Laws § 211.78m(8) (2015). But that year, the Michigan Supreme Court held that Michigan's Constitution "requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property[.]" *Rafaeli*, 952 N.W.2d at 466. Thereafter, Michigan amended the GPTA to include a procedure for anyone with an interest in a foreclosed property to claim the surplus proceeds from its sale. See generally Mich. Comp. Laws § 211.78t.

B. Factual background

This appeal arises out of unpaid taxes on property once owned by Timothy Pung in Union Township in Isabella County, Michigan. J.A. 70. Timothy filed an affidavit to claim the principal residence exemption in 1994, which applied through his death in 2004. J.A. 80. Timothy was survived by his wife and two

children, at least one of whom continued to reside at the property for some years after Timothy's death. *Ibid.*

After Timothy died, petitioner (Timothy's uncle) was appointed as his estate's personal representative. J.A. 70. Petitioner did not quickly settle the estate. For more than a decade, petitioner took no action to retitle Timothy's house or file a new affidavit to claim the personal residence exemption.

Because Timothy was long deceased and petitioner did not update the township's records, in 2010, Union Township's assessor denied the principal residence exemption for 2007 forward, consistent with standard practice. J.A. 58. Petitioner appealed to the Michigan Tax Tribunal, which issued its decision in March 2012. E.D. Mich. Dkt. No. 8-4, at 6 (Nov. 25, 2020). In relevant part, the tribunal held that Timothy's wife and son qualified as owners of the property despite not holding title to it and occupied it as a principal residence between 2007 and the date of the decision. J.A. 80-81. The tribunal therefore concluded that the principal-residence exemption should apply for 2007 through 2009. J.A. 81. The tribunal's order did *not* address petitioner's failure to file a new affidavit to claim the exemption or whether the exemption should apply to tax years after 2009.[1]

[1] In related litigation, the Michigan Court of Appeals concluded that petitioner was entitled to the principal-residence exemption for 2010 and 2011. *In re Isabella Cnty. Treasurer*, No. 318616, 2015 WL 558294, at *4 (Mich. Ct. App. Feb. 10, 2015). The court did not address petitioner's failure to file a principal-residence-exemption affidavit.

Petitioner refused to submit a new principal-residence-exemption affidavit for future tax years. J.A. 155. Meanwhile, after receiving the tribunal's decision, Union Township's assessor called the tribunal's chief clerk to inquire about how to apply the decision to future tax years. J.A. 154. The chief clerk told the assessor to deny the principal-residence exemption for years after 2009 because petitioner did not submit an affidavit. *Ibid.*

In early 2013, Union Township's assessor denied the principal-residence exemption again. J.A. 118-19. The denial applied to the 2012 tax year. *Ibid.* The assessor's office orally advised petitioner of the denial when he attempted to pay the winter 2012 taxes in person, followed by a written notice.[2] Petitioner refused to pay the additional tax due for 2012 (around $2,200); he would not submit the requisite affidavit; and he did not appeal the 2013 denial of the principal-residence exemption to the Tax Tribunal. J.A. 85.

Given petitioner's refusal to pay the additional tax due, the 2012 taxes became delinquent in March 2013, and Union Township turned them over for collection to the Isabella County Treasurer as the foreclosing

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[2] In the district court, petitioner declared under oath that he never received notice of the assessor's denial of the principal residence exemption in February 2013, but he later admitted he did receive oral and written notice. Compare J.A. 71 ("I was never provided notice or received any writing of any type that notifying [sic] of the removal of the PRE credit in February 2013[.]"), with J.A. 118 ("[S]he said denied. I went in and paid the taxes on the 13th. I think it was like on the 7th that she wrote up the new bill and charged the PRE. And then the day after or two days after I opened the mail and got it and it said PRE denied or whatever.").

governmental unit. See Mich. Comp. Laws § 211.78a(2). In May 2013, the County treasurer sent petitioner the first of many notices of the tax delinquency and the consequences of failing to pay it. J.A. 86-87. Those included at least five mailed notices to petitioner's address, a recorded certificate of forfeiture, posting a notice "in a bright red packet on the front door" of the property, and publication notice in multiple issues of the area newspaper. *Ibid.* Petitioner still refused to act.

In June 2014, the County treasurer filed a foreclosure petition that included the Pung property. J.A. 86. The County treasurer continued to provide notices of the impending foreclosure to petitioner. J.A. 86-87. The notices included information regarding the date and time of the show-cause and foreclosure hearings. J.A. 87. Although the GPTA explicitly allows a taxpayer to contend at those hearings that "[t]he property was exempt from the tax in question," Mich. Comp. Laws § 211.78k(2)(c), petitioner did not appear at either hearing, J.A. 33, 87.

In February 2015, the state court entered a foreclosure judgment. *Ibid*. Petitioner did not redeem the property by the March 31 statutory deadline, and title vested in the County treasurer. *Ibid.*

Later that year, petitioner filed a motion to set aside the foreclosure judgment in the state court based on his alleged failure to receive notice of the foreclosure. *Ibid*. The trial court granted petitioner's motion and set aside the foreclosure in October 2015. J.A. 106. On appeal, the Michigan Court of Appeals reversed because of the several notices that the County provided to petitioner. J.A. 90-92. But the

foreclosure judgment was not reinstated until 2018 because petitioner unsuccessfully sought review from the Michigan Supreme Court. *In re Isabella Cnty. Treasurer*, 902 N.W.2d 632 (Mich. 2017), recons. den. 906 N.W.2d 799 (2018). Even after the Michigan Supreme Court's decision, petitioner still did not redeem the property by paying the delinquent taxes.

In July 2019, the County treasurer sold the property at auction for $76,008. E.D. Mich. Dkt. No. 8-13 (Nov. 25, 2020). Consistent with then-prevailing Michigan law, the County treasurer retained all the proceeds from the sale. Nearly 18 months later,[3] the auction purchaser sold the property for $195,000. E.D. Mich. Dkt. No. 23-16 (Oct. 12, 2021).

C. Procedural history.

Petitioner sued Union Township's assessor, the County treasurer, and the Tax Tribunal's chief clerk in their individual capacities in the U.S. District Court for the Western District of Michigan in 2018. W.D. Mich. Dkt. No. 1 (Nov. 30, 2018). Petitioner later amended his complaint to add the County as a defendant, W.D. Mich. Dkt. No. 19 (Feb. 23, 2019), and, after the County treasurer sold the property, he amended his complaint again to include allegations related to the County treasurer's retention of the sale proceeds, J.A. 1-24. Petitioner alleged myriad claims, including under the Fifth and Eighth Amendments.

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[3] In his petition, petitioner represented that the purchaser "*immediately* turned around and sold" the property. Pet. 5 (emphasis added). Petitioner's misstatement led at least five amici to make the same mistake. Citizen Action Def. Fund *et al.* Br. 8; Pioneer New England Legal Found. Br. 2.

See generally *ibid.* Petitioner did not challenge the auction process itself. J.A. 10.

The petitioner sought summary judgment on his Fifth and Eighth Amendment claims. Pet. App. 50a. The district court granted partial summary judgment—on liability—to petitioner on his takings claim because Isabella County retained all the proceeds from the tax sale, "leaving open all questions of damages." *Id.* at 61a-62a. Because petitioner "expressly raised" his excessive-fines claim "as only an alternative theory," the court dismissed the claim without prejudice. *Id.* at 62a n.5, 63a.

Later, the court transferred the case to the U.S. District Court for the Eastern District of Michigan, where the County is located. W.D. Mich. Dkt. No. 144 (Nov. 20, 2020). The parties filed cross summary-judgment motions. In late 2022, the court resolved those motions and entered judgment. E.D. Mich. Dkt. Nos. 32-34 (Sept. 29, 2022).

The court rejected petitioner's contention that the difference between a tax-foreclosed property's fair-market value and the amount of the tax debt is the correct measure of compensation. Pet. App. 43a ("Plaintiff has not submitted any constitutional, statutory, precedential, or other authority to support his theory that he is entitled to the equity amount (fair market value less tax debt) of the tax-foreclosure sale."). It held that the Fifth Amendment entitles petitioner only to "the 'surplus proceeds' of the tax-foreclosure sale . . . as well as interest from the date of the foreclosure sale." *Id.* at 44a. The court dismissed petitioner's remaining claims. *Id.* at 45a.

The court of appeals unanimously affirmed in an unpublished decision authored by Judge McKeague and joined by Judges Kethledge and Nalbandian. Pet. App. 22a. Following circuit precedent, the court explained that "a plaintiff whose property is foreclosed and sold at a public auction for failure to pay taxes is [not] entitled to recoup the fair market value of the property." *Id.* at 11a. (quoting *Freed* v. *Thomas*, 81 F.4th 655, 658 (6th Cir. 2023)) (alteration in original). Rather, "any surplus owed to the owner is determined by the foreclosure sale price" because "the best evidence of a foreclosed property's value is the property's sales price, not what it was worth before the foreclosure." *Ibid.* (quoting *Freed*, 81 F.4th at 659). The district court awarded that measure of damages to petitioner. *Id.* at 11a-12a.

The court of appeals also held that the County treasurer's failure to pay petitioner the difference between the property's alleged fair-market value[4] and the amount of the tax debt did not violate the Excessive Fines Clause. *Id.* at 15a. Observing the Michigan Supreme Court's assessment that the GPTA's aim is "to encourage the timely payment of property taxes," not punish property owners, *ibid.*

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[4] Petitioner claims the County "conceded" the property's fair-market-value was $194,400 based on the property's assessed value. See Br. 8, 31. It has not. The County has not disputed the amount thus far because petitioner's fair-market-value theory had been rejected. See *Rafaeli*, 952 N.W.2d at 465; *Hall* v. *Meisner*, 51 F.4th 185, 195 (6th Cir. 2022). Regardless, assessed values do not accurately reflect fair market value. See *Tarrify Props., LLC* v. *Cuyahoga Cnty.*, 37 F.4th 1101, 1107-1108 (6th Cir. 2022); *Taylor* v. *Oakland Cnty.*, 2024 WL 188376 at *6-*7 (E.D. Mich. Jan. 16, 2024) (applying *Tarrify* to assessed values in Michigan).

(quoting *Rafaeli*, 952 N.W.2d at 448), the court followed circuit precedent holding that "the GPTA's tax forfeiture scheme does not fall within the ambit of the Eighth Amendment," *ibid.* (collecting cases).

This appeal against the County, but not the individual defendants, followed.

SUMMARY OF ARGUMENT

History, precedent, economic reality, and equity demonstrate that just compensation under the Takings Clause for a tax foreclosure is the surplus proceeds from the foreclosure sale—*i.e.*, the amount realized at the sale less the tax debt. Anglo-American governments have foreclosed on property to collect delinquent taxes for centuries. For all that time, the majority rule has required the government to return any surplus proceeds from the property's sale to the former owner; a minority of jurisdictions allowed strict foreclosure, under which the government returns nothing. Notably absent from the historical record is a requirement that the government compensate the owner by reference to the property's purported fair-market value. In other words, petitioner's fair-market-value rule is a historical aberration.

Because foreclosure inevitably depresses a property's value, fair-market value is the wrong benchmark in the tax-foreclosure context. Market value "has no applicability" in forced sales like tax foreclosures because "it is the very *antithesis* of forced-sale value." *BFP*, 511 U.S. at 537. Because "foreclosure has the effect of completely redefining the market in which the property is offered for sale, the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself." *Id.*

at 548 (cleaned up). And petitioner's assertions notwithstanding, this Court has never held that the Takings Clause is blind to reality. Just the opposite. *E.g.*, *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 379 (1945) (recognizing that market value sometimes "furnishes an inappropriate measure of actual value").

Petitioner's theory also conflicts with equity. "Just" compensation must be just to the property's owner "and to the public that must pay the bill." *In re City of Stockton*, 909 F.3d 1256, 1268 (9th Cir. 2018) (quoting *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)). The fair-market-value theory overlooks that "plaintiffs are largely responsible for the loss of their properties' value by failing to pay their taxes." *Rafaeli*, 952 N.W.2d at 465.

Worse still, the fair-market-value theory would require the government to pay out more than it receives at auction, benefitting delinquent taxpayers to the detriment of their fellow citizens who pay their taxes on time. In practice, petitioner's approach would effectively eliminate tax foreclosure as a collection method. Requiring the government to return surplus proceeds has no pernicious effect on the public fisc while ensuring that the government keeps no more than it is owed.

The Excessive Fines Clause does not entitle petitioner to more than surplus proceeds. Purpose, precedent, and common sense confirm that the Takings and Excessive Fines Clauses constrain powers that do not overlap—the power to take property for public use and the power to punish. A government action is either a taking that requires full compensation to the owner or an uncompensated fine that is permissible so long as it is not grossly

disproportionate. *Tyler* settled that tax foreclosures fall within the Takings Clause's scope. Therefore, the Excessive Fines Clause has no role here.

But even if tax foreclosures were subject to scrutiny under the Excessive Fines Clause, the Clause would not change the outcome. In Michigan, tax foreclosures are *in rem* proceedings untethered to any owner misconduct—a remedial mechanism to collect delinquent taxes, not punishment. Petitioner's musings about the *township* assessor's subjective punitive intent when she denied the underlying tax exemption are irrelevant. And, anyway, the Excessive Fines Clause always requires less compensation than the Takings Clause. The Takings Clause requires full payment for the property interest taken; the Excessive Fines Clause contemplates uncompensated seizures subject only to rough proportionality review. In other words, just compensation for the foreclosure under the Fifth Amendment more-than-fully remedies any excessive fine.

ARGUMENT

I. Surplus proceeds from an auction sale of tax-foreclosed property are just compensation under the Takings Clause.

Centuries of settled law confirms that "the government may hold citizens accountable for tax delinquency by taking their property." *Jones* v. *Flowers*, 547 U.S. 220, 234 (2006); see also *Tyler*, 598 U.S. at 637-638. The first question presented here is "*how much* the Constitution requires the government to pay for the taking" when the government forecloses on and sells real property to satisfy a tax debt. Br. 3. The answer is the same as it has always been—the

difference between the tax delinquency and the distressed sale value achieved at a properly conducted auction, *i.e.*, the surplus proceeds. See, *e.g.*, *Tyler*, 598 U.S. at 647; *Nelson* v. *City of New York*, 352 U.S. 103, 109-110 (1956); *United States* v. *Lawton*, 110 U.S. 146, 150 (1884).

Historical practice confirms that foreclosing on property for unpaid taxes and returning any surplus proceeds to the taxpayer is not an unconstitutional taking. See *Tyler*, 598 U.S. at 639-640. This Court has never "held that a plaintiff whose property is foreclosed and sold at a public auction for failure to pay taxes is entitled to recoup the fair market value of the property." *Freed*, 81 F.4th at 658.

Adopting petitioner's categorical fair-market-value rule would contravene history, precedent, economic reality, and equity—all of which confirm that surplus tax-foreclosure-sale proceeds are just compensation.

A. Historical practice confirms that surplus proceeds are just compensation.

The foreclosure and sale of property to collect delinquent taxes dates to at least 1692. *Tyler*, 598 U.S. at 639-640. In the succeeding centuries, the law has not required the government to provide the former owner anything more than the surplus proceeds. This tradition confirms that surplus proceeds are just compensation under the Fifth Amendment.

Before the American Revolution, English law required the government to return to former property owners any surplus proceeds from the sale of foreclosed property. By statute, the Crown had "the power to seize and sell a taxpayer's property to recover

a tax debt," but Parliament "dictated that any 'Overplus' from the sale 'be immediately restored to the Owner.'" *Tyler*, 598 U.S. at 639 (citing 4 W. & M., ch. 1, § 12, in 3 Eng. Stat. at Large 488-489 (1692)). And English common law bound a tax collector who seized and sold property to satisfy unpaid taxes "to render back the overplus." *Id.* at 640 (quoting 2 William Blackstone, Commentaries 453 (1771)). In other words, English law treated the restoration of surplus proceeds as appropriate compensation for foreclosed property worth more than the tax debt.

The founding-era states followed the same approach. For example, when Maryland enacted a law permitting the sale of real property to satisfy delinquent taxes, if the sale produced more than needed for the taxes, "such overplus of money" was to be paid to the owner upon demand. 1797 Md. Laws 352-353, ch. 90, §§ 4, 5. And in North Carolina, sheriffs were authorized to seize and sell real property to satisfy delinquent taxes and were "accountable to the owners of the lands for all monies . . . over and above the sums due[.]" 1792 N.C. Sess. Laws 2, ch. 2 §§ 5, 6; see also 1804 Pa. Stat. 878-879, ch. MMDXXIV, § 2 (requiring a bond from the purchaser for the overplus); 1785 Mass. Acts 569 (requiring return of overplus from auction sale of goods and chattels); 1719 N.H. Laws 334 (same).

The practice of paying surplus proceeds as compensation for the sale of property worth more than the owner's debt to the government continued through the Fourteenth Amendment's ratification. For example, in 1852, California enacted a law to enforce the collection of poll taxes, which authorized the seizure and sale of "every and any species of property,

right, claim, or possession" to collect the tax. 1852 Cal. Laws ch. III, art. II § 68. The law required the government to "return the surplus of the proceeds to the owner of the property" after deducting the tax debt and the costs of the sale. *Ibid.* Other states and territories had similar statutes. *E.g.*, 1848 Me. Laws 56, ch. 65, § 4; Wisc. § 123.50 (1850); Iowa Code tit. VI, § 37.496-497 (1851); 1858 Kan. Terr. Laws 362, ch. 66, § 61; 1854 Ore. Terr. Laws 397, ch. I, tit. V, § 39.

These laws were adopted even though, in 1868, 33 of the 37 states (including California, Maine, and Massachusetts) had takings clauses in their state constitutions. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?,* 87 Tex. L. Rev. 7, 72 (2008); Cal. Const. of 1849, art. I, § 8; Mass. Const. of 1780, Part 1, art. X; Me. Const. of 1820, art. I, § 21. Thus, in the ante-bellum period, statutes requiring the repayment of only the overplus coexisted with state constitutional takings clauses requiring just compensation.

By the twentieth century, collecting delinquent taxes by selling land had "the sanction of universal use in the United States." Charles H. Chatters, *The Enforcement of Real Estate Tax Liens* 9 (1928). No state, however, required the government to pay a taxpayer the difference between the property's purported market value and the tax delinquency. To the contrary, "[t]he insignificance of the price as compared with the value of the land sold [would] not defeat a tax; for if it should, the power to collect revenue by this method would be futile." Thomas M.

Cooley, *A Treatise on the Law of Taxation* 959-960 (3d ed. 1903) (collecting cases).

Modern tax-collection systems follow the same practice. Most states require surplus proceeds to be returned when real property is sold for more than the tax debt. See *Tyler*, 598 U.S. at 642. But even though 48 state constitutions contain a takings clause, Maureen E. Brady, *The Damagings Clauses*, 104 Va. L. Rev. 341, 349 (2018), no court has interpreted a state constitutional takings provision to require just compensation that exceeds surplus proceeds after the property is sold at auction, see, *e.g.*, *Richardson* v. *Brunner*, 356 S.W.2d 252, 253-254 (Ky. 1962) (rejecting a claim that a sale for "considerably less than the value of the land" is a taking without just compensation under Kentucky's takings clause).

In short, Anglo-American governments have seized and sold property to collect tax debts for centuries. And, for centuries, legislatures and courts have required the government to pay no more than the surplus proceeds realized at a foreclosure sale. This demonstrates that, at the time of the ratification of the Fifth and Fourteenth Amendments, payment of surplus proceeds was just compensation.

B. This Court's precedents confirm that surplus proceeds are just compensation.

This Court's precedents also treat surplus proceeds as the appropriate compensation due to an owner whose property was sold to pay delinquent taxes. Starting with *United States* v. *Taylor* and ending with *Tyler*, the Court has decided four cases where the property owner sought compensation from the government when it sold property for more than

the debt owed to the government. The Court has never held that the owner was entitled to fair-market value.

In *United States* v. *Taylor*, 104 U.S. 216 (1881), a person whose property was sold to satisfy a tax debt sought to recover the surplus from the sale. *Id.* at 216. During the Civil War, Congress adopted a tax statute that provided for the foreclosure and sale of property to collect delinquent taxes, in which case "the surplus of the proceeds of the sale . . . [would] be paid to the owner." Act of Aug. 5, 1861, § 36, 12 Stat. 304. The next year, Congress adopted a follow-on statute that did not mention the owner's right to surplus after a tax sale. See Act of June 7, 1862, § 1, 12 Stat. 422. Taylor did not pay his taxes, so the government sold his property. Taylor sought to recover the surplus under the 1861 Act. *Taylor*, 104 U.S. at 217. This Court held that Taylor was entitled to the surplus proceeds. *Id*. at 222.

Three years later, in *United States* v. *Lawton*, 110 U.S. 146 (1884), this Court confirmed that paying surplus proceeds satisfies the Fifth Amendment. In *Lawton*, the property owner had an unpaid tax bill under the 1862 Act for $88. *Id.* at 148. The government seized the taxpayer's property and, instead of selling it to a private buyer, the property was "struck off for the United States" for $1,100, which, by law, was no more than two-thirds of its assessed value. *Id.* at 148, 149. This Court held that the taxpayer was entitled to the surplus proceeds because "[t]o withhold the surplus from the owner would . . . take his property for public use without just compensation." *Id.* at 150. The Court did not require the payment of fair-market value even though the

statute required the government to strike off the property for a fraction of its assessed value.

Then, in *Nelson* v. *City of New York*, 352 U.S. 103 (1956), this Court clarified that the government does not violate the Takings Clause when it provides a process for a property owner to recover the surplus proceeds after a foreclosure sale. New York City foreclosed on properties for unpaid water bills. 352 U.S. at 105. Under the governing ordinance, the property owner could request the surplus from the sale. *Id.* at 104-105 n.1. The owners did not do so. *Id.* at 105-106. They later claimed that the city violated the Takings Clause. *Id.* at 109. This Court disagreed. Because the ordinance did not "absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale" but instead defined the process through which the owner could claim the surplus, it did not transgress the Takings Clause. *Id.* at 110.

Most recently, in *Tyler*, this Court determined that the failure to pay the surplus proceeds from a tax-foreclosure sale is a taking. 598 U.S. at 647. Even though the petitioner defined the property interest as her "equity," Pet'r's. Br., *Tyler* v. *Hennepin Cnty.*, No. 22-166, 2023 WL 2339362, at *8, the Court identified the difference between the auction sale price ($40,000) and the tax delinquency ($15,000) as the amount at issue ($25,000). 598 U.S. at 634, 635, 637, 638, 647.

Together, these cases indicate that surplus proceeds are just compensation.

C. Economic reality confirms that surplus proceeds are just compensation.

Foreclosed property is worth less than property sold under normal market conditions. The foundation of "fair market value"—*i.e.*, "what a willing buyer would pay in cash to a willing seller," *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 511 (1979)—is absent in a forced sale. Therefore, fair-market value does not accurately reflect the value of what is taken in a tax foreclosure. The surplus proceeds realized on the forced sale are the proper measure.

This Court's decision in *BFP* v. *Resolution Trust Corporation*, 511 U.S. 531 (1994), explains why. There, this Court addressed the meaning of "reasonably equivalent value" in the context of section 548 of the United States Bankruptcy Code. 511 U.S. at 535-536. After a creditor sold BFP's property to satisfy a mortgage debt, BFP sought to avoid the foreclosure sale as a fraudulent conveyance under section 548. That provision voids fraudulent transfers if the debtor can establish, among other things, that he received "less than a reasonably equivalent value in exchange for such transfer." *Id*. at 535 (quoting 11 U.S.C. § 548(a)(2)(A)).

In analyzing the meaning of "reasonably equivalent value," this Court framed the central question as "*[w]hat is a foreclosed property worth?*" *Id*. at 547. This Court reasoned that "market value, as it is commonly understood, has no applicability in the forced-sale context; indeed it is the very *antithesis* of forced-sale value." *Id*. at 537. "Market value," the Court explained, is the "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." *Id.* at 538 (quoting *Market Value*, Black's Law Dictionary (6th ed. 1990)).

In other words, "'fair market value' presumes market conditions that, by definition, simply do not obtain in the context of a forced sale." *Ibid.* "[F]oreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales." *Id.* at 548. "Given this altered reality, and the concomitant inutility of the normal tool for determining what property is worth (fair market value), the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself." *Id.* at 548-549.

To be sure, the Court noted that "[t]he considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." *Id.* at 537 n.3. But market realities are the same when the government forecloses to collect a debt and sells the property at a public auction with competitive bidding. So courts, including the Sixth Circuit, have extended *BFP* to tax foreclosures. See, *e.g.*, *Freed*, 81 F.4th at 659; *Traylor* v. *Town of Waterford*, No. 24-691, 2024 WL 4615599, at *1 (2d Cir. Oct. 30, 2024); *In re Tracht Gut,* 836 F.3d 1146, 1155 (9th Cir. 2016); *In re Grandote Country Club Co.*, 252 F.3d 1146, 1152 (10th Cir. 2001); *In re T.F. Stone Co.*, 72 F.3d 466, 472 (5th Cir. 1995).

Some courts have not extended *BFP*'s rationale to certain types of tax foreclosures for purposes of fraudulent-transfer liability under the Bankruptcy

Code. But those cases involved tax-foreclosure processes that, by design, delivered no value to the debtor other than resolution of the tax debt. See, *e.g.*, *Gunsalus* v. *Ontario Cnty.,* 37 F.4th 859, 865-866 (2d Cir. 2022) (strict foreclosure); *In re Lowry*, No. 20-1712, 2021 WL 6112972, at *4 (6th Cir. Dec. 27, 2021) (exercise of right of first refusal by local government without public auction); *In re Smith*, 811 F.3d 228, 234 (7th Cir. 2016) (competitive bidding is limited to the penalty-interest rate and not the property). So, it is unsurprising that the courts in those cases held that the tax foreclosure at issue did not deliver "reasonably equivalent value" for section 548's purposes. They have no bearing here.

Tax-foreclosure sales mirror the sale in *BFP*. The sales are forced, not voluntary. They are completed via public auction on a limited timetable, not an open-market process that prioritizes the owner's return on investment. The seller and buyer do not negotiate. Just as in *BFP*, "[a]n appraiser's reconstruction of 'fair market value' could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure." 511 U.S. at 539. "[P]roperty that *must* be sold within those strictures," however, "is simply *worth less*." *Ibid*. Thus, "the only legitimate evidence of" just compensation "is the foreclosure-sale price" less the tax debt. *Id.* at 549.[5]

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[5] Likely for that reason, when petitioner's counsel in *Tyler* was asked how courts would know the value of the property taken, counsel responded, "[T]rial courts . . . could consider the auction price as probably the best proxy for what the property was worth." Oral Arg. Tr. at 6, *Tyler* v. *Hennepin Cnty.*, 598 U.S. 631 (2023) (No. 22-166).

D. Equity confirms that surplus proceeds are just compensation.

Surplus proceeds, rather than fair-market value, strike the proper "balance between the public's need and the claimant's loss" that just compensation seeks to attain. See *United States* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402 (1949). "[T]he dominant consideration" when assessing the appropriate measure of compensation "always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" *In re City of Stockton*, 909 F.3d at 1268 (quoting *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

Treating surplus proceeds as just compensation protects the government's ability to collect delinquent taxes via a tool that governments and private lenders have used for centuries. See *Tyler*, 598 U.S. at 639-642; *BFP*, 511 U.S. at 541; *Hall*, 51 F.4th at 192-194; see also U.S. Br. 23-24. Today, most states allow for an auction process by which tax-delinquent property is sold and the former owner can claim any surplus proceeds.[6]

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[6] See Ala. Code § 40-10-28(b)(3); Alaska Stat. §§ 29.45.480(b), 43.20.270(h); Ariz. Stat. § 42-18236(A); Ark. Code § 26-37-205(b)(2)(A); Cal. Rev. & Tax. Code § 4675(e)(1); Conn. Gen. Stat. § 12-157(i); Del. Code. tit. 9, § 8779; Fla. Stat. § 197.582(2)(a); Ga. Code §§ 48-4-5, 48-4-81(f); Haw. Rev. Stat. § 231-25(b)(7)(D); Idaho Code § 31-808(2)(b); Kan. Stat. § 79-2803; Ky. Rev. Stat. § 91.504(5); Mich. Comp. Laws § 211.78t(4); Minn. Stat. § 282.005, subd. 5; Miss. Code § 27-41-77; Mo. Rev. Stat. § 140.230(2); Mont. Code § 15-18-221(3); Nev. Rev. Stat. § 361.610(5); N.H. Rev. Stat. § 80:88(II); N.J. Stat. § 54:5-87(b);

[footnote continued on next page]

Requiring the government to pay fair-market value would effectively eliminate foreclosure sales as a means of collecting delinquent property taxes. See U.S. Br. 23-24. Among other reasons, a fair-market-value standard would require local governments to pay owners *more* than the government received at auction, draining, not improving, the public fisc and further burdening those owners who pay their taxes. *Rafaeli*, 952 N.W.2d at 465-466 ("If plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from the tax delinquency."). Accord Jenna Christine Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 Real Prop. Tr. & Est. L.J. 93, 125-126 (2019). "The most just way to compensate a property owner in tax foreclosure" is "to satisfy the overdue taxes and then provide the property owner with the surplus recovered from the sale." Foos, *id.* at 126.

A fair-market-value standard also would overlook that "plaintiffs are largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full." *Rafaeli*, 952 N.W.2d at 465; see also U.S. Br. 19-23. Here, petitioner had numerous opportunities to challenge the tax assessment and, failing that, had years to either sell the property or

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N.M. Stat. § 7-38-71(A); N.Y. Real Prop. Tax Law § 1197; N.C. Gen. Stat. § 105-374(q); N.D. Cent. Code § 57-28-20(3); Ohio Rev. Code § 5721.20; Okla. Stat. tit. 68, § 3131(D); 72 Pa. Cons. Stat. § 5860.205(d); S.C. Code §§ 12-51-60, 12-51-130; Tenn. Code § 67-5-2702(c); Tex. Tax Code § 34.021; Utah Code § 59-2-1351.1(7); Va. Code § 58.1-3967; Wash. Rev. Code § 84.64.080(10); W. Va. Code § 11A-3-65; Wyo. Stat. § 39-13-108(d).

pay the tax. Instead, he chose to fight the law. "The meaning of the Constitution should not turn on the antics of tax evaders and scofflaws." *Jones*, 547 U.S. at 248 (Thomas, J., dissenting).

E. Petitioner's arguments do not justify his novel fair-market-value rule.

1. Contrary to petitioner's contention that fair market value is always the proper measure of just compensation (Br. 15), this Court has never adopted that categorical approach. *Commodities Trading Corp.*, 339 U.S. at 123 ("This Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases."). Market value sometimes "furnishes an inappropriate measure of actual value." *Gen. Motors Corp.*, 323 U.S. at 379. This is just such a case. As discussed above, in forced sales—like tax foreclosures—market value "has no applicability" because "it is the very *antithesis* of forced-sale value." *BFP*, 511 U.S. at 537.

2. Petitioner does not (and cannot) anchor his novel fair-market-value standard in either historical practice or precedent. He relies on *Cone* v. *Forest*, 126 Mass. 97 (1879), to assert that "[w]hen the government forcibly takes more property than necessary to collect a debt, it is liable not just to return the surplus proceeds of the sale, but to pay the fair market value." Br. 19.[7] Petitioner's reliance is

[7] Petitioner also cites to *Rafaeli* (Br. 19), which provides neither historical nor concurrent support for his position—the court expressly rejected fair market value as the measure of just compensation. 952 N.W.2d at 465.

misplaced. *Cone* arose after a tax collector separately sold 9 cows to satisfy delinquent taxes even though the revenue from the first 7 cows sufficed. 126 Mass. 97, 100-101. The court did not require the tax collector to pay the taxpayer the difference between the fair-market value of the properly sold bovine and the amount of the tax debt. To the contrary, it acknowledged that when property is sold at public auction "for more than the tax[] and all charges," the collector is required to "render back the overplus." *Id.* at 101 (citing 2 Blackstone, Commentaries 452). Instead, the court remanded for judgment in the amount of "the value of the two cows as found by the jury" because the tax collector sold two more cows than necessary, thereby converting them. *Ibid.*

3. Petitioner is wrong when he suggests that "the County could have seized Pung's money or placed a lien on personal property" to recover the delinquent taxes. Br. 19-20 (citing *Detroit* v. *Walker*, 520 N.W.2d 135, 140 n.14 (Mich. 1994)). The *Detroit* case considered a statute authorizing the state treasurer and township and city treasurers—*not county treasurers*—to seize personal property to satisfy delinquent taxes. 520 N.W.2d at 140 (citing Mich. Comp. Laws § 211.47 (1988)). The County treasurer's only option to fulfill its statutory duty to collect petitioner's delinquent taxes was the process ending in foreclosure. See generally Mich. Comp. Laws § 211.78 et seq.

4. Petitioner argues that tax collectors have a bailee-like duty to care for foreclosed property. Br. 21-27. But the purported sources for petitioner's argument *affirm* that surplus proceeds are all that is required to be repaid by the tax collector. See, *e.g.*, Br.

22-24 (citing 2 Blackstone, Commentaries 452 (discussing the officials' implied contract in law and duty to render back the overplus); *Clute* v. *Barron*, 2 Mich. 192, 201 (1851) ("[I]t is the right of the owner that it shall bring the greatest price, for the reason that he is entitled to the surplus after satisfying such tax and the legal charges thereon."); *Bogie* v. *Town of Barnet*, 270 A.2d 898, 900 (Vt. 1970) (quoting *Lawton* and discussing "the obligation to account for the excess proceeds received from the sale")).

5. Petitioner criticizes the Sixth Circuit's holding as "mischaracteriz[ing] the property that has been taken as an interest in surplus proceeds of an auction." Br. 15. Petitioner asserts that "the actual property at issue is the home, and specifically, the Pungs' equity in it." *Id.* at 15-16. The Court need not resolve the precise nature of the property interest taken in a tax foreclosure here.

Some courts, such as the Michigan Supreme Court, define the interest taken as surplus proceeds. See, *e.g.*, *Rafaeli*, 952 N.W.2d at 465; *Traylor*, 2024 WL 4615599, at *1 ("Under *Tyler*, a plaintiff may state a takings claim for the surplus value of a property after a tax foreclosure and subsequent sale . . . ."). Other courts define the interest taken as equitable title. See, *e.g.*, *Hall*, 51 F.4th at 195 ("The owner's right to a surplus after a foreclosure sale instead follows directly from her possession of equitable title before the sale."); *Cont'l Res.* v. *Fair*, 10 N.W.3d 510, 520 (Neb. 2024) (finding a property interest in "equitable title").

Regardless of how the interest taken is labeled, the courts agree that surplus proceeds are just compensation. Indeed, as the Sixth Circuit explained

in *Hall*, "[t]he surplus is merely the embodiment in money of the value of that equitable title." 51 F.4th at 195; see also *Rafaeli,* 952 N.W.2d at 465 ("We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of position had their properties not been taken at all."). This is because "the best evidence of a foreclosed property's value is the property's sales price, not what it was worth before the foreclosure." *Freed*, 81 F.4th at 659 (citation omitted). Accordingly, regardless of the precise nature of what is taken, surplus proceeds are just compensation.

6. Petitioner complains that the auction here was "unfair" (Br. 12, 26, 28), "inferior" (*id.* 2, 13, 21), and "flawed" (*id.* 20), and just compensation should not be based on the outcome of a sale that the government "[c]ontrols" (*id.* 14, 17, 19). The United States points to petitioner's complaints to suggest remand instead of affirmance. U.S. Br. 26-27. But as the United States acknowledges (*id.* at 26), petitioner did not challenge the sale process below. *See* J.A. 15, 17, 20-21. Thus, petitioner has forfeited any argument regarding the fairness of the auction procedures and no remand is necessary. *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 173 (2016); see *Freed*, 81 F.4th at 659 n.1 (deeming waived similar unraised arguments challenging auction procedures).

Regardless, petitioner's claims of "unfairness" are inaccurate. The auction here undisputedly was conducted in accordance with the GPTA, which requires the auction be public, notice of the auction's time and place, and the opportunity for competitive bidding. See Mich. Comp. Laws § 211.78m(2), (16)(a)

(2015); see also J.A. 90-92. Further, the auction sale generated surplus proceeds, demonstrating competitive bidding because the minimum bid was the amount of the tax delinquency. And petitioner does not allege any type of fraud or collusion in the sale itself.[8]

The surplus proceeds here were the result of the "requisite procedures." U.S. Br. 14 (citing Cooley 334-340). Thus, no remand is necessary to determine the "fairness" of the sale.

II. The Excessive Fines Clause does not apply, and petitioner has already received greater relief than the Clause requires.

A foreclosure of real property worth more than needed to satisfy a tax debt does not implicate the Excessive Fines Clause.[9] And, even if it did, petitioner has already received greater relief than the Clause requires by recovering surplus proceeds. The Eighth Amendment therefore does not entitle petitioner to any relief beyond that afforded by the Fifth Amendment.

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[8] Petitioner challenges the fairness of the auction because it is controlled by the County. But state statute establishes the auction framework.

[9] Petitioner does not challenge the statutory interest, penalties, and fees added to the delinquent taxes.

A. The government's seizure of property cannot be both a taking under the Fifth Amendment and a fine under the Eighth Amendment.

The Takings and Excessive Fines Clauses govern mutually exclusive governmental powers. And, in *Tyler*, this Court determined that a property-tax foreclosure constitutes a taking requiring just compensation where—as here—the property is worth more than the debt. 598 U.S. at 647. Accordingly, the foreclosure at issue cannot also implicate the Excessive Fines Clause.

Decisions addressing the Clauses' relative scopes confirm that they do not overlap. The Takings Clause imposes a limitation upon "[t]he power to take private property for public uses, generally termed the right of eminent domain." *United States* v. *Jones*, 109 U.S. 513, 518 (1883). The Excessive Fines Clause, meanwhile, "limit[s] the government's power to punish." *Austin* v. *United States*, 509 U.S. 602, 609 (1993). Punishment is an exercise of the police power. *United States* v. *Morrison*, 529 U.S. 598, 618 (2000); *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909). And "[t]he exercise of the police power" in a manner that destroys property or causes it to depreciate "is very different from taking property for public use" and therefore does not implicate the Takings Clause. *Mugler* v. *Kansas*, 123 U.S. 623, 669 (1887).

Thus, a government action can be an exercise of eminent domain (and subject to the Fifth Amendment), or it can be an exercise of power to punish (and subject to the Eighth Amendment). But it cannot be both. See, *e.g.*, *United States* v. *Droganes*,

728 F.3d 580, 591 (6th Cir. 2013) (holding that "the government's seizure and retention of property under its police power does not constitute a public use" subject to the Fifth Amendment (cleaned up)); see also *D.A. Realestate Inv., LLC* v. *City of Norfolk*, 126 F.4th 309, 316 (4th Cir. 2025) ("Nuisance abatement under the police power does not trigger a constitutional right to just compensation."); *Johnson* v. *Manitowoc Cnty.*, 635 F.3d 331, 336 (7th Cir. 2011) ("[T]he actions were taken under the state's police power. The Takings Clause claim is a non-starter."); *United States* v. *$7,990.00 in U.S. Currency*, 170 F.3d 843, 845 (8th Cir. 1999) ("[T]he forfeiture of contraband is an exercise of the government's police power, not its eminent domain power.").

Bennis v. *Michigan*, 516 U.S. 442 (1996), confirms as much. There, the Court held that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Id.* at 452. In other words, when the government seizes property to punish, the Takings Clause does not constrain the government's action because the seizure does not effect a taking for public use. The corollary of *Bennis*'s holding is that the Excessive Fines Clause does not apply when, as here, the Takings Clause governs the government's acquisition of property.

It would be illogical to conclude that, when the government takes property for public use, the Excessive Fines Clause applies. The Clauses' distinct purposes and remedies demonstrate why. The Takings Clause ensures that when the government takes property for public use, the owner receives just

compensation. U.S. Const. amend. V. The owner's right- or wrongdoing is irrelevant. The Excessive Fines Clause, by contrast, imposes a rough proportionality cap on fines imposed as punishment for wrongdoing, recognizing that a fine's fundamental purpose is to leave the person fined with less. See *Austin*, 509 U.S. at 621-622. Given these disparate purposes, the same government action cannot implicate both Clauses: if the government's purpose is to secure property for public use, its purpose is not punishing the owner for an offense, and vice versa. See Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 Cal. L. Rev. 53, 93 (1990) ("When the government is clearly preventing or punishing culpable behavior, it is generally accepted that the deprivation of property does not constitute a compensable taking. For example, no one thinks a taking occurs when the government requires *A* to pay a fine for committing a crime[.]").

The Clauses' incongruent remedies cement that they constrain different powers. The Fifth Amendment requires the government to provide "the full monetary equivalent of the property taken." *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970). In contrast, the Excessive Fines Clause does not require payment of the equivalent of the property's value. Rather, the power to fine includes the power to seize property without *any* compensation, subject only to review for excessiveness under the "grossly disproportionate" standard. *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998). In other words, the Excessive Fines Clause always requires less compensation than the Takings Clause. Reviewing

the same action under both standards would be incoherent: either a government action is a taking and requires full compensation to the owner, or it is a fine and permissible if not grossly disproportionate.

The government's acquisition of property cannot be punishment if the government is required to compensate you for it. Accordingly, a foreclosure cannot simultaneously constitute a taking under the Fifth Amendment and a fine under the Eighth Amendment.[10]

B. Property-tax foreclosures under the GPTA are remedial and therefore do not constitute fines.

Petitioner's Eighth Amendment claim also fails because a property-tax foreclosure under the GPTA is not a fine. A payment in kind is a "fine" under the Excessive Fines Clause if it "constitutes payment to a sovereign as punishment for some offense." *Austin*, 509 U.S. at 622 (cleaned up).

To determine whether a payment is punishment under this Clause, this Court takes a "categorical approach," considering a statute's facial application across all cases, rather than a "case-by-case approach." *United States* v. *Ursery*, 518 U.S. 267, 287 (1996) (citing *Austin*, 509 U.S. at 622 n.14). For example, in *Austin*, the Court framed the inquiry as "whether forfeiture under [21 U.S.C.] §§ 881(a)(4) and (a)(7)," generally, is "punishment." *Austin*, 509 U.S. at 602. It then considered how the statute would apply

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[10] Petitioner cites *Erlinger* v. *United States*, 602 U.S. 831 (2024), for the proposition that the Fifth and Eighth Amendments are "'complementary' shields." Br. 12. The *Erlinger* decision says nothing about the Eighth Amendment.

across various cases in assessing whether it could "only be explained as [] serving either retributive or deterrent purposes." *Id.* at 621, 622 n.14. Under this approach, if a statute is not punitive in all its applications, it does not implicate the Excessive Fines Clause. *Austin*, 509 U.S. at 625 n.* (Scalia, J., concurring in part and concurring in the judgment) ("[A] statutory forfeiture must always be at least 'partly punitive,' or else it is not a fine.").

The factors informing whether an appropriation of property is punitive include the circumstances under which it can occur, as dictated by the statutory language; the appropriation's purpose; and the historical understanding of the appropriation. *Bajakajian*, 524 U.S. at 327-334; *Austin,* 509 U.S. at 610-622. None of these factors supports a conclusion that foreclosures under the GPTA are punitive.

1. The statutory language contains no indicia of punitive intent.

Statutory language reflects a punitive intent where the appropriation is premised on criminality or culpability. Foreclosure under the GPTA requires neither.

This Court has found evidence of punitive intent when a statute authorized forfeiture "at the culmination of a criminal proceeding," "require[d] conviction of an underlying felony," and did not permit forfeiture to "be imposed upon an innocent [person.]" *Bajakajian*, 524 U.S. at 328. *Accord Timbs* v. *Indiana*, 586 U.S. 146, 148 (2019) (holding that forfeiture following drug conviction implicated Excessive Fines Clause). Elsewhere, this Court emphasized that the "the inclusion of innocent-owner defenses in

§§ 881(a)(4) and (a)(7) reveal[ed] a [] congressional intent to punish only those involved in drug trafficking." *Austin*, 509 U.S. at 619.

The GPTA is different. The failure to pay property taxes is "not a criminal offense." *Rafaeli*, 952 N.W.2d at 447. It has no innocent-owner defense. It is indifferent to whether the debt resulted from willfulness or negligence. Moreover, the GPTA embodies a preference to avoid foreclosures. Property owners have more than two years to pay delinquent taxes before foreclosure. Mich. Comp. Laws §§ 211.78g(3), 211.78k(5)-(6). Only then does the GPTA require the foreclosing governmental unit to foreclose to attempt to recover the delinquent taxes.

The protracted opportunity to avoid foreclosure reflects that the GPTA's intent is to collect taxes—not punish past conduct. See *Bajakajian*, 524 U.S. at 343 n.18 (reasoning that the "[t]he nonpunitive nature" of early customs forfeitures was "reflected in their procedure"). Unlike the civil-asset forfeitures at issue in *Timbs*, *Bajakajian*, and *Austin*—which penalized culpable people—the GPTA authorizes foreclosure only as a last-ditch means to collect unpaid taxes. And actions taken to collect taxes are not punitive. See *Welch* v. *Henry,* 305 U.S. 134, 146 (1938) ("Taxation is [not] a penalty imposed on the taxpayer . . . . It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens.").

Petitioner contends that indicia of punitive intent lie in sections 211.78k(6) and 211.78m(5) of the GPTA. Br. 37. These provisions, he says, bar former owners from repurchasing their homes and therefore are punitive. *Ibid.* Not so. Section 211.78k(6) says nothing

about who may purchase the property. See Mich. Comp. Laws § 211.78k(6). Rather, section 211.78k(6) addresses the date on which title will vest in the foreclosing governmental unit and the effect of the foreclosure on liens and oil and gas interests. *Ibid.*

Meanwhile, section 211.78m(5) allows former property owners to purchase the properties if they pay the minimum bid. At the first auction, all buyers must pay the minimum bid. Mich. Comp. Laws § 211.78m(2). But if the property is auctioned a second time, the minimum bid falls away for all buyers other than former property owner. Mich. Comp. Laws § 211.78m(5).

The requirement that a former property owner pay the minimum bid serves purely remedial ends. It (1) promotes the property owner's payment of delinquent taxes and expenses, see Mich. Comp. Laws § 211.78m(16)(c); and (2) prevents former property owners from benefitting from their tax delinquency by reacquiring the property for less than they owed and without any liens on the property. Both are remedial purposes. See, *e.g.*, *Ursery*, 518 U.S. at 291 (explaining that "ensuring that persons do not profit from" a criminal offense is a "nonpunitive goal"); *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 237 (1972) (reimbursing government expenses serves "remedial rather than punitive purposes").

Petitioner also suggests that section 211.78m(2) prevents former property owners from purchasing the property. Br. 8. But that provision prohibits persons who currently hold a "legal interest in any property with delinquent property taxes" from purchasing an auctioned property. Mich. Comp. Laws § 211.78m(2).

After the property is foreclosed, the former owner no longer owns the foreclosed property. *Id.* § 211.78k(6). Thus, section 211.78m(2) does not prevent former owners from purchasing their former properties.

Petitioner's assertion that the GPTA is punitive because it allegedly "depress[es] prices" also lacks merit. See Br. 38. When the County treasurer foreclosed on petitioner's property, the GPTA did not allow the return of surplus proceeds. See *Rafaeli*, 952 N.W.2d at 446 (surveying provisions of GPTA applicable at the time petitioner's property was foreclosed). (Indeed, petitioner admits, only two pages later, that the County "expected all proceeds from the sale of the property to flow into its coffers." Br. 40.) So, if the GPTA punitively depressed prices, then the Legislature intended to punish counties, not former property owners.[11]

For these same reasons, the differences between the GPTA's processes and the procedures governing foreclosures in the context of federal taxation also do not reflect any punitive intent. Br. 39. Because the GPTA did not contemplate that former property owners would receive anything after the sale, differences between the GPTA and federal procedures could not have been intended to impose a greater

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[11] Petitioner's argument also fails with respect to the current version of the GPTA, which was amended in 2020 to include a mechanism for seeking surplus proceeds. Now, the government is incentivized to increase sale prices because the statute provides for a sales commission. *Howard* v. *Macomb Cnty.*, 133 F.4th 566, 574 (6th Cir. 2025), cert. denied (citing Mich. Comp. Laws § 211.78t(12)(b)).

economic sanction on petitioner or other former property owners.

2. The statute's express and implied purposes are not punitive.

The GPTA's express and implied purposes lack indicia of punitive intent. Instead, the GPTA's purposes are all remedial—to recover lost revenue and costs, bring delinquent property back to productive use, and provide stability and finality for public revenue streams. See, *e.g.*, *One Lot Emerald Cut Stones & One Ring*, 409 U.S. at 237; *Helvering* v. *Mitchell*, 303 U.S. 391, 401 (1938) ("protection of the revenue" and "reimburse[ment] of the Government" are remedial purposes); *Ursery*, 518 U.S. at 290 ("abat[ing] a nuisance" is an "important nonpunitive goal[]").

The statute itself recounts its remedial purposes. Michigan's legislature expressly stated that it granted the powers "relating to the return of property for delinquent taxes" due to the "continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes." Mich. Comp. Laws § 211.78(1). Likewise, the Michigan Supreme Court has determined that the GPTA "is not punitive." *Rafaeli*, 952 N.W.2d at 447; see also *In re Treasurer of Wayne Cnty. for Foreclosure*, 732 N.W.2d 458, 459 (Mich. 2007) (GPTA "reflect[s] a legislative effort to provide finality to foreclosure judgments and to quickly return property to the tax rolls").

In 1999, the Michigan Legislature adopted the tax-deed foreclosure process at issue here. The

legislative history of the 1999 legislation reaffirms the absence of punitive intent. See Senate Legis. Analysis, SB 507 (Apr. 20, 1999); House Legis. Analysis, HB 4489 (May 10, 1999); House Legis. Analysis, HB 4489 (May 26, 1999); House Legis. Analysis, HB 4489 (July 23, 1999); Senate Legis. Analysis, SB 507 (Sept. 3, 1999). Contemporaneous legislative reports reflect that Michigan enacted the provisions to address the following "public policy problems": "the lack of tax revenue," which was "thwart[ing] local government operations"; impediments that delinquent and abandoned properties were imposing on "redevelopment projects"; "unfair-[ness] to those pay their taxes on time"; and the "labor intensive and time-consuming" nature of the "tax collection process." House Legis. Analysis, HB 4489 (July 23, 1999), at 2.

The statute's operation in practice further reflects its nonpunitive intent. In many cases, the value of the foreclosed property is less than the amount of the taxes owed. *Rafaeli*, 952 N.W.2d at 446. This means a foreclosure can confer an economic benefit on the delinquent taxpayer. The legislature's willingness to benefit delinquent taxpayers so that the government may stabilize tax rolls and restore property to productive use evinces that the GPTA's purpose is not punitive. The civil forfeitures at issue in *Austin*, *Bajakajian*, and *Timbs*, by contrast, had no possible economic benefit.

The fact that bidders at the foreclosure auction dictate whether the property's sale price exceeds the delinquency also undercuts an inference of punitive intent. Because the existence and magnitude of the property owner's purported loss compared to fair

market value depends on third-party choices, the delta between the sale price and alleged fair market value is neither a sanction nor an intended effect. It is simply the result of the variables at a public auction.

Unable to identify any retributive intent in the statute's text or legislative history, petitioner contends that the foreclosure of *his* property was punitive. He cites the township assessor's district court brief describing petitioner unfavorably. See Br. 35. That brief, filed years after the foreclosure, does not establish punitive intent. First, petitioner's reliance on the alleged subjective intent behind a particular foreclosure misapprehends the relevant inquiry, which is "categorical" and not foreclosure-by-foreclosure. *Ursery*, 518 U.S. at 281. Second, even if petitioner's particular circumstances were relevant, the assessor's subjective feelings have no bearing on why the County treasurer foreclosed on the property, because the County and its treasurer did not employ the township assessor, and she did not conduct the foreclosure.

Petitioner's assertion that the GPTA is punitive due to a purported intent to deter is likewise baseless. See Br. 35, 40. To be sure, the GPTA's tax-foreclosure provisions may have incidental deterrent effects. But all tax laws, to some degree, have deterrent effects, and that does not "automatically" make them punitive. *Dep't of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. 767, 780 (1994). A deterrent effect is not necessarily evidence of a deterrent purpose, and petitioner has identified no evidence of a deterrent purpose. The GPTA's lengthy redemption period and other off ramps before foreclosure further undercut its

alleged deterrent purpose. See Mich. Comp. Laws §§ 211.78h(3); 211.78g(3); 211.78k(5)-(6); 221.78q.

Furthermore, even where a statute has a deterrent purpose, not all deterrent purposes are punitive. *Bennis,* 516 U.S. at 452 (explaining that a forfeiture may "serve[] a deterrent purpose distinct from any punitive purpose"); *Ursery*, 518 U.S. at 292 (explaining that "the purpose of deterrence . . . may serve civil as well as criminal goals"). For purposes of the Excessive Fines Clause, a statute with a deterrent purpose reflects punitive intent when it seeks to deter criminality. *Bajakajian*, 524 U.S. at 322 (government conceded intent to "deter[] illicit movements of cash"); *Austin*, 509 U.S. at 620 (legislative history reflected intent to "deter or punish the enormously profitable trade in dangerous drugs"). But the GPTA does not seek to deter criminality because failing to pay property taxes is not a crime.

Holding that the Excessive Fines Clause applies to the GPTA based on its incidental deterrent effects would expand the Clause's scope beyond its "undisputed purpose," which is to curb abuses of the government's prosecutorial powers. *BFI, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989) (explaining that the "undisputed purpose" of the Eighth Amendment "generally," and of the "Excessive Fines Clause specifically" is to curb "governmental abuse of its 'prosecutorial' power"); see also *Timbs*, 586 U.S. at 151 (explaining that Excessive Fines Clause places "limitations" on the "power of those entrusted with the criminal-law function of government" (cleaned up)). For example, the Clause would balloon to cover a broad spectrum of government-mandated payments unrelated to criminal-law functions, such as taxes,

which "deter certain behavior." *Kurth Ranch*, 511 U.S. at 778. The Court should accordingly decline to find that the GPTA is punitive based on its potential incidental effects.

Kokesh v. *Securities & Exchange Commission,* 581 U.S. 455 (2017), is not to the contrary. There, the Court concluded that a statutory disgorgement was a "penalty" because "deterrence [was] not simply an incidental effect," disgorged funds were not always distributed simply to victims, and disgorgement orders were intended to "label defendants wrongdoers." *Id.* at 463-64. The foreclosure here is distinguishable in all those critical respects.[12]

3. History indicates that property-tax foreclosure is remedial.

In assessing the Excessive Fines Clause's scope, this Court has also looked to whether the exaction was considered punishment when the Clause was adopted. *Bajakajian*, 524 U.S. at 330-331, 340-343. The answer is no for property-tax foreclosures.

In *Bajakajian*, this Court concluded that "traditional civil *in rem* forfeitures" were "traditionally [] considered to occupy a place outside the domain of the Excessive Fines Clause" because they were proceedings against the property itself, not against a particular offender, and the "owner of

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[12] Nor does *Bennett* v. *Hunter*, 76 U.S. 326 (1869), establish that this foreclosure is a fine. There, in construing a statutory right to redemption, the Court explained that general forfeiture principles may not allow title transfers "without any inquisition of record or some public transaction." *Id.* at 336. The GPTA requires notice and public foreclosure proceedings and so does not raise the statutory problem *Bennett* addresses.

forfeited property could be entirely innocent of any crime." 524 U.S. at 331. The same is true as to property-tax foreclosures under the GPTA. The proceeding is *in rem*, Mich. Comp. Laws § 211.78h(1), and those with interests in the property can be entirely innocent of any crime. The foreclosure is therefore like the civil forfeitures in *One Lot* and other laws that *Bajakajian* characterized as remedial. *Bajakajian*, 524 U.S. at 330; see also *Stockwell* v. *United States*, 80 U.S. 531, 547 (1871) (in rem forfeiture of goods illegally imported into the United States was not "penal" but "remedial, as providing indemnity for loss," even though the statute imposed both forfeiture of goods and "liability to pay double the value of the goods"); *Taylor* v. *United States,* 44 U.S. (3 How.) 197, 210 (1845) (Story, J.) (in rem forfeitures of goods imported in violation of customs laws, although in one sense "imposing a penalty or forfeiture[,] . . . truly deserve to be called remedial").

Furthermore, unlike the civil-asset forfeiture laws at issue in *Austin*, *Bajakajian*, and *Timbs*, property-tax foreclosure is not a modern invention that has "blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture" by seeking to impose greater financial burdens on criminals through supplemental proceedings. *Bajakajian*, 524 U.S. at 331 n.6. Statutes authorizing property-tax foreclosure have existed since the time of the founding, *e.g.*, 1797 Md. Laws 352-353, ch. 90, §§ 4, 5; 1792 N. C. Sess. Laws, ch. 2 §§ 5, 6; 1792 Va. Acts 141, ch. LXXXIII, § XXXV; this Court has long sanctioned tax forfeiture, *King* v. *Mullins*, 171 U.S. 404, 428-429 (1898); and property-tax foreclosures do not seek to impose greater financial burdens on convicted criminals.

* * *

In short, considering the GPTA's statutory framework, the GPTA's purposes, and the historical understanding of analogous *in rem* forfeitures, foreclosures under the GPTA are remedial, not punitive.

C. If the foreclosure imposed an excessive fine, the proper remedy is less than just compensation.

Even if a property-tax foreclosure were a fine, and even assuming *arguendo* that the fine imposed on petitioner was excessive, the courts here have already given petitioner more relief than the Excessive Fines Clause requires.

The appropriate remedy for a violation of the Clause is to reduce the fine to a non-excessive amount. *United States* v. *Corrado*, 227 F.3d 543, 552 (6th Cir. 2000); *United States* v. *Sarbello*, 985 F.2d 716, 718 (3d Cir. 1993); *United States* v. *Busher*, 817 F.2d 1409, 1416 (9th Cir. 1987). A fine is "excessive" only if it is "grossly disproportionate to the gravity of the defendant's offense." *Bajakajian*, 524 U.S. at 324.

To assess what reduction would avoid gross disproportionality, a court "must compare the amount of the forfeiture to the gravity of the defendant's offense," including the "harm" it caused. *Bajakajian*, 524 U.S. at 336-337. The event resulting in the foreclosure was petitioner's failure to pay taxes owed in 2012.[13] Allowing the government to foreclose on the

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[13] Petitioner insists that the taxes were "un-owed," "incorrectly imposed," "non-owed," "not possibly owed," and not "properly owed." Br. 5, 8, 13, 42, 43. But petitioner forfeited a challenge to

[footnote continued on next page]

property and return only the surplus proceeds is reasonably tailored to that failure, so the return of surplus proceeds reduces any purportedly excessive fine to a non-excessive amount. It allows the government to recover the amount owed in taxes and fees (and no more) while returning any excess value to the property owner, as determined by the "only legitimate evidence of the property's value." *BFP*, 511 U.S. at 548-549.

Indeed, once the government returns the surplus, the concerns animating the Eighth Amendment are no longer implicated. A fine is a "payment to a sovereign," in cash or in kind, "as punishment for some offense." *Austin*, 509 U.S. at 609-610 (cleaned up). Without the surplus, the only payment retained is the tax debt, which is not a fine. See, *e.g.*, *Jones*, 547 U.S. at 234 ("[T]he government may hold citizens accountable for tax delinquency by taking their property."). Any notion that tax foreclosures are an improper revenue-generation mechanism evaporates on the surplus's return.

History confirms that an award of surplus proceeds is a more than sufficient remedy. Eight states had clauses resembling the Excessive Fines

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whether the taxes were owed by failing to challenge the taxes in the foreclosure proceeding before judgment or to appeal that judgment, and the Michigan Court of Appeals ultimately affirmed the foreclosure. See J.A. 87, 92-93. Petitioner is therefore precluded from relitigating whether the taxes were owed. See, *e.g.*, *Adair* v. *State*, 690 N.W.2d 386, 396 (Mich. 2004) (explaining Michigan's claim-preclusion rule).

Clause at the time of the founding,[14] each allowed tax foreclosure,[15] and none required the payment of fair-market value. This indicates that a failure to provide more than surplus proceeds would not have been considered grossly disproportionate to the offense.

Furthermore, if this Court holds that the return of surplus proceeds constitutes just compensation, then, for the reasons explained above, the return of surplus proceeds necessarily reduces the fine to a non-excessive amount. The level of compensation due under the Eighth Amendment is necessarily less than that due under the Fifth Amendment. A payment of just compensation cannot simultaneously be "just" and impose a grossly disproportionate exaction.

For these same reasons, even if the Court decides that surplus proceeds are not the appropriate measure for just compensation, it need not resolve whether the foreclosure constitutes a fine. The value of just compensation necessarily exceeds the amount by which a fine would need to be reduced to make a fine permissible under the Excessive Fines Clause.

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[14] Del. Const. of 1776, Decl. of Rts., § 16; Ga. Const. of 1777, art. LIX; Md. Const. of 1776, Decl. of Rts., art. XXV; Mass. Const. of 1780, pt. 1, art. XXVI; N.H. Const. of 1784, pt. 1, art. XXXIII; N.C. Const. of 1776, Decl. of Rts., § 10; Pa. Const. of 1776, Plan or Frame of Gov't, § 29; Va. Const. of 1776, Bill of Rts., § 9.

[15] 1796 Del. Laws 1260, ch. XCVIII, § 26; Horatio Marbury & William H. Crawford, *Digest of the Laws of the State of Georgia* 457 (1802) (reproducing 1785 Georgia tax foreclosure law); 1797 Md. Laws 352-353, ch. 90, §§ 4-5; 1783 Mass. Acts 644-646; 1784 N.H. Laws 12-13; 1791 Pa. Stat. 28, ch. MDXXXVIII, § 2; 1792 N.C. Sess. Laws 2, ch. 2 §§ 5, 6; 1792 Va. Acts 141, ch. LXXXIII, § XXXV.

CONCLUSION

The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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