No. 25-95

In the

Supreme Court of the United States

MICHAEL PUNG, PERSONAL REPRESENTATIVE FOR THE ESTATE OF TIMOTHY SCOTT PUNG,

Petitioner,

v.

ISABELLA COUNTY, MICHIGAN,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL TAX LIEN ASSOCIATION IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICUS CURIAE[1]

The National Tax Lien Association ("NTLA") respectfully submits this brief as *amicus curiae* pursuant to Supreme Court Rule 37 and urges the Court to affirm the judgment of the Sixth Circuit. NTLA is the leading national organization for the tax lien and tax deed industry and advances the legislative, regulatory, and educational interests of that industry across the United States. Since its formation in 1997 as a nonprofit business league, NTLA has brought together public officials and private stakeholders engaged in all facets of real property tax enforcement, including tax collectors, asset managers, government finance officers, community redevelopment professionals, portfolio servicers, and real estate attorneys.

NTLA consists of 316 members in 35 states and thousands of local jurisdictions, including tax lien bidders, tax collectors, lenders, and portfolio servicers. All depend on clear, lawful, and predictable mechanisms for property tax collection. NTLA maintains rigorous ethical standards, promotes strict adherence to federal and state laws, and provides authoritative education and professional development for industry participants and government officials. NTLA actively monitors legislation, advises policymakers, and participates as *amicus curiae*

1. Pursuant to Rule 37.6, the undersigned certifies that: (A) there is no party or counsel for a party who authored the *amicus* brief in whole or in part; (B) there is no party or counsel for a party who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *amici*, their members, and counsel.

in courts nationwide on property tax enforcement and foreclosure matters. State legislators, regulators, and tax collection officials throughout the country regularly consult NTLA regarding laws and policies governing real property tax sales. Its members offer practical expertise regarding every phase of the tax collection and foreclosure process.

This case will directly affect the NTLA. Changes to the collection of delinquent property taxes nationwide will destabilize the foreclosure system and threaten the fiscal health of local taxing authorities, leading to safety and economic risks for the communities they serve. For these reasons, NTLA has a substantial and legitimate interest in this case.

SUMMARY OF ARGUMENT

Michael Pung ("Pung"), having failed to pay his real property taxes, claims that increased value to his formerly owned property, attributable to others' expense and risk assumption, is justly due to him. Pung claims that the law-abiding public, which funds the County's coffers by paying taxes, should pay him the resale profit, even though he (1) did not own the property at the time of the sale, (2) depreciated its value by incurring a tax lien, and (3) failed to comply with the applicable tax law like other citizens did.

To justify his untenable position, Pung argues the County took equity when it sold the property at auction. Pung is contradicted by more than one hundred years of "Takings Clause" and compensatory damages jurisprudence. Pung, due to his own wrongful failure to pay taxes, was not the owner when the County sold the property. He is therefore not entitled to any increased value from the date he forfeited ownership of it and the resale date. Neither the tax lien system nor the Constitution are mechanisms to manipulate for personal profit at other citizens' expense. The Constitution does not entitle a former owner to additional value created later by the government or tax-paying citizens who assume risk and invest capital to clear title and improve the property. Those later transactions reflect a different asset, at a different time, in a different market. *See United States v. John J. Felin & Co., Inc.*, 334 U.S. 624, 640-41 (1948) (reducing amount of compensation because "just compensation [under the Takings Clause] is a practical conception, a matter of fact and not of fiction").

A property sold at a foreclosure auction often has tainted title, is offered to bidders as is, without an inspection, and subject to various impairments including liens, violations and other clouds on title. The risks are many. That property, resold later, has good title, title insurance, passed inspections and has been restored to a condition that an arms' length buyer expects from ready-to-sell properties. These two types of properties are incomparable. Equating them is fiction.

Pung's attempt to bring tax law under the Excessive Fines clause umbrella is another attempt to pervert the Bill of Rights for profit. There is no legal authority that suggests morphing this Court's civil forfeiture jurisprudence in *Austin v. United States*, 509 U.S. 602 (1993), onto tax lien law. Tax law, and all citizens' payments associated with it, are remedial, not punitive, because they replenish the government's revenue.

History indicates that efficient tax enforcement systems are needed precisely because properties fall into disrepair. *See* Christopher J. Allred, *Breaking the Cycle of Abandonment: Using a Tax Enforcement Tool to Return Distressed Properties to Sound Private Ownership* (Pioneer Inst. for Pub. Policy Rsch. 2000). For example, from the 1970-1990's, New York City lacked an effective mechanism for selling tax-defaulted properties to third parties. The City became an involuntary slumlord to tens of thousands of blighted buildings, bearing enormous maintenance costs. The City managed this deteriorated stock at an annual cost of $300 million in operating and capital expenses, draining more than two-thirds of the federal community development funds. *See* Frank P. Braconi, *Helping the Poor Landlords, and Vice-Versa* (Daily News, Oct. 24, 1994, p. A42). The New York Times noted that such properties were often "dilapidated, deteriorated and neglected" and taken over by drug dealers. *See New York City Keeps Tring to Evict Its Drug-Dealer Tenants* (New York Times, July 10, 1987, Section A, p. 34, column 4). Once the City started selling tax liens in 1996, many owners brought their accounts current upon receiving notice of the annual tax lien sale. Now, most owners cure tax delinquencies quickly and most defaulted properties avoid foreclosure.

During delinquency and foreclosure, owners often have little ability or incentive to invest in basic maintenance. Structures deteriorate, hazardous conditions arise, and blight runs rampant. When owners fail to pay their property taxes, they are often in financial distress, and that distress is not confined to property taxes. Owners stop maintaining the property, the yard, the roof and siding, and they ignore interior repairs. This results in rapidly compounding municipal liens, fines, and violations of local building and sanitation codes. Those liens and violations are senior to tax liens and must be paid by foreclosure investors. The longer these conditions continue, the more expensive and difficult rehabilitation becomes, and the greater the risk that surrounding property values decrease, with economic harm to the community growing daily.

ARGUMENT

Point I

The auction purchase price is just compensation for the taken property because that price is what a willing buyer, in a sophisticated and mature market, paid for that encumbered property as sold at the time of auction

The Sixth Circuit properly determined that Pung was not entitled to the amount paid for his former property after he forfeited his ownership of it by failing to pay his taxes under Michigan's General Property Tax Act ("GPTA"). *See Pung v. Kopke*, 2025 WL 318222 (CA6 2025). The Sixth Circuit relied on its prior holding in *Freed v. Thomas*, which correctly held that "neither this court nor the Supreme Court has ever 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." 81 F.4th 655, 658-59 (CA6 2023).

Following this Court's precedent in *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023), the Sixth Circuit rejected Pung's claim to anything more than the foreclosure surplus. The Sixth Circuit adopted petitioner's counsel's admission in *Tyler* that payment of the surplus satisfied the Takings Clause.[2] It correctly determined that "the best evidence of a foreclosed property's value is the property's sales price, not what it was worth before the foreclosure." *Pung v. Kopke*, 2025 WL 318222 (CA6 2025); *Great Falls Mfg. Co. v. United States*, 16 Ct. Cl. 160 (1880) (owner entitled to what property would sell for at the time of taking, "not what it might bring or perhaps ought to produce at some future period").

As the Sixth Circuit explained in *Freed*, valuing a property above the price paid at a public tax foreclosure sale "would run contrary to the general principle that just compensation is measured by the value of the property taken . . . [and take] money away from the public and allow delinquent taxpayers to benefit from their tax delinquency." *Freed,* at 658-59; *see Hall v. Meisner,* 51 F.4th 185, 194 (CA6 2022) (after a public foreclosure sale, the former owner is "entitled to any surplus proceeds from the sale, which represented the value of the equitable title thus extinguished").

Pung claims the County took an additional $118,000 in equity from him because the foreclosure auction's winner resold the property for $195,000. Under Pung's theory, an owner could fail to pay his taxes, wait for others to clear

2. 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). *See also* Oral Arg. Tr. at 6, where petitioner's counsel acknowledged that petitioner would be "satisfied" with the surplus proceeds from the auction.

title and restore and sell the property, and then demand the increased value attributable to someone else's dime.

Pung wants to use the Takings Clause to convert his failure to pay lawful taxes into an indefinite call option. He wants the risk-free opportunity to obtain the value in a property, that he no longer owns, two or three resales later, regardless of zoning changes, or myriad factors that increase property value. And, according to Pung, he should have unfettered sole discretion to choose which resale value applies. The foreclosing government would never know its exposure on a foreclosure because the former owner could assert a purported lost equity claim at any time. Pung is not entitled to that economic benefit while the government, as Justice Sotomayor noted, is "forced into being the agent of the seller . . . and tak[ing] all the risk and all of the responsibility for whatever happens to that property." Oral Arg. Tr. at 40, *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023) (No. 22-166).

There is nothing fair or just about rewarding a delinquent owner a call option for subsequent increased value created by someone else's investment and assumption of risk and his own deliberate failure to pay taxes. *See Gates v. Collier*, 616 F.2d 1268, 1276 (CA5 1980). Those later profits belong to those who bore the risk of the investment. *See Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973). Requiring the County to pay them to Pung would be unprecedented, costly, and unfair to lienholders, municipalities and the citizens they serve. *See In Re Susco*, 673 B.R. 120 (Bankr. Ct. VT 2025) (no authority that delinquent taxpayer may recoup the fair market value of property from a "forced tax sale").

This Court resolved this issue more than one hundred years ago. In *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910), the Court addressed the proper measure of damages when government takes land. The Court held just compensation is measured by *actual* loss to the owner, not future increased value, to a subsequent buyer, after that buyer purchases unencumbered land or makes that land more valuable. *Id.*, at 193.

The Court considered whether "when a man's land is taken" [is he entitled] "to recover more than the value of it as it stood at the time." *Id.*, at 194. The former owner argued it "had a right, as a matter of law, under the Constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise be limited to a relatively small sum." *Id*. This Court rejected that argument, holding that just compensation does not include that enlargement, but merely payment of the value at the time of the taking.

As Justice Holmes explained:

> "The Constitution does not require a disregard of the mode of ownership, of the state of title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not tracts of land. And the question is, What has the owner lost? not What has the taker gained?"

Id., at 195.

Justice Holmes noted that the City could not "be made to pay for a loss of theoretical creation, suffered by no one." *Id.*, at 194; *see Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 281-83 (1943) (Takings Clause requires compensation solely for land actually taken, not opportunity gained); *City of NY v. Sage*, 239 U.S. 57, 62 (1915) (landowner that lost property in taking not entitled to increased value caused by city's construction); *McGovern v. City of NY*, 229 U.S. 363, 372 (1913) (owner that lost property in taking due to creation of Ashokan reservoir not entitled to increased value attributable to reservoir); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (power company not entitled to value of river rapids and falls after government taking of river); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (market value does not include the increased value in land use); *see also Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406 (2003) (no compensation required unless there is actual pecuniary loss); Salkin, Patricia, *Land Use Planning and Dev. Reg. Law* § 16:15 Noncompensable Damages ("just compensation does not generally require payment for destruction of a business, lost profits, or loss of good will . . . [because] these elements also are considered speculative and personal to the landowner rather than relating to the land").

This Court reaffirmed this principle twenty-five years later in *Roberts v. City of NY*, 295 U.S. 264, 279-80 (1935). In *Roberts*, Justice Cardozo explained just compensation required paying former easement owners the easements' value in or about 1882, when the City seized them, not their value decades later. This Court rejected the owners' argument that the owners were entitled to the $3 million increased easement value attributable to the skyrocketing value of land near Grand Central Station. *Id*., at 281.

According to this Court, "for purposes of the compensation due under the Fifth Amendment, . . . [t]he value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker." "Gain to the taker . . . maybe wholly unrelated to the deprivation imposed upon the owner, [and must be] rejected as a measure of public obligation to requite for that deprivation." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

The best value of the parcel taken from the owner, therefore, *is* the amount paid at auction, *before* an infinite number of events may increase or decrease what a buyer will pay for it. That purchase price is the true "fair market value" for *that* encumbered property *under the circumstances*. All potential purchasers are notified of the auction, aware of the same risks, and competitively bid on the property to determine its true worth. They hedge, without inspecting the property, and consider the risk that an unknown amount must be invested to clear title, rehabilitate the premises, or evict tenants.

Those realities are part of the fair market, the market in which the County must auction the property *because* of the former owner's repeated failure to pay taxes. Traditional fair market value "presumes market conditions that, . . . do not obtain in the context of a forced sale . . . [and] property that *must* be sold within those strictures is simply *worth less.* No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537-529 (1994); *United States v. John J. Felin & Co., Inc.*, 334 U.S. 624, 640-41 (1948) (rejecting claim for open market value of asset seized under Takings Clause because actual market was depressed because of asset's nature); *see* P. Salkin, *Land Use Planning and Dev. Reg. Law* § 16:10 Fair Market Value (3rd ed. 2025).

Any other procedure would give the former owner, who failed to pay taxes, an infinite option for unearned dollars at abiding taxpayers' expense. Each time the property appreciated and sold for a higher value, the former owner could assert a new Takings Clause claim, creating infinite exposure to the government and, in turn, the tax-paying public.

Uncertainties about the future may cause a parcel to be under or overvalued at any time. *See Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 826 (CA2 1990). At the auction, however, investors have opportunity to hedge according to their judgment about the future stream of income from that parcel. If some later time governed, compensation amounts would have to be reduced if the value decreased after the auction or increased when value increased. Courts refuse to adopt this self-serving and open-ended theory of compensatory damages. *See Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171 (CA2 2007) (compensatory damages measured by value at time of loss, because subsequent events, viewed in hindsight, may neither offset nor enhance damages). *Id.*, at 185.

This proposed "wait and see" approach would turn the Takings Clause into a weapon, disrupt all predictability in the real estate market, and allow a wrongdoer to profit at the expense of the tax abiding public. *Sharma*, at 826. That is why compensation should be assessed based on the asset's value on the date of loss. *See Sharma*, at 826.; *Boyce v. Soundview Tech. Group, Inc.*, 464 F.3d 376, 384-85 (CA2 Cir. 2006) (value to be determined as of the date of loss); *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186 (CA2 2003) (compensatory damages measured from value on date of loss - subsequent increase irrelevant); *Hermanowski v. Acton Corp.*, 729 F.2d 921, 922 (CA2 1984) (same); *Van Gernert v. Boeing Co.*, 553 F.2d 812 (CA2 1977) (same); *Simon v. Electrospace Corp.*, *supra*, 28 N.Y.2d 136, 145 (1971) (subsequent increase in share value legally irrelevant to compute compensatory damages); *Aroneck v. Atkin*, 90 App.Div.2d 966 (1982) (same for stock).[3]

Compensation for loss of real estate is measured by value of the real estate on the date of loss, not on a subsequent date. *See Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980) (proper focus . . . "is upon the time of the [defendant's] acts, not [when] the consequences of the acts become most painful"); *Seaboard Air Line Ry. Co. v. United States,* 261 U.S. 299, 305 (1923) ("duty of the government to make just compensation as of the time when the owners [are] deprived of their property");

3. *See also Maxim Group LLC v. Life Partners Holds., Inc.*, 2010 WL 571819, *4-6 (SDNY 2010) (same for corporate shares); *Aristocrat Leisure Limited v. Deutsche Bank Trust Co. Americas*, 618 F.Supp.2d 280, 293-94 (SDNY 2009) (same for bonds); *Waxman v. Envipco Pickup & Processing Servs., Inc.*, 2006 WL 788964, *2-3 (SDNY 2006) (same for depository receipts) *Parker v. Hoppe*, 257 N.Y. 333, 338-41 (1931) (same for rubles); *Cole v. Macklowe*, 64 App. Div.3d 480-81 (1st Dep't 2009) (same for apartment).

Northwest LA Fish & Game Preserve Comm., 446 F.3d 1285, 1291 (Fed. Cir. 2006) ("a claim does not accrue until the claimant suffers damage"); *Anderson v. U.S.*, 179 F.2d 281 (CA5 1950) ("market value of property taken determined as of the date possession acquired").

"[C]hanges in value after breach are not relevant to the calculation of damages." *Kovens v. Paul*, 2009 WL 562280, *4-5 (SDNY 2009). Evidence of the post-breach market value is "not germane." *Kaminsky v. Herrick, Feinstein LLP*, 59 App.Div.3d 1, 11-12 (2008).

Lacking any federal precedent, Pung attempts to rely on *Rafaeli, LLC v. Oakland Co.*, 505 Mich. 429, 952 N.W.2d 434 (2020). But *Rafaeli* merely ensures that former owners receive the surplus proceeds realized *at the tax sale*; nothing more. No language in *Rafaeli* supports any argument that the former owner is entitled to future profits yielded by subsequent investment or market fluctuations. *Rafaeli* rejected the argument that former owners should be awarded an amount that would put them in the same position as if their properties were never taken. *Rafaeli* stressed that the market value compensation measure would contradict the principle that "just compensation" should be measured by the value of the property *taken* and might unfairly enrich tax delinquents. *Rafaeli*, 952 N.W.2d, at 465-466.

Rafaeli does not authorize a former owner to seek any additional "value" or "equity" beyond what the auctioneer obtained at the tax sale. To the contrary, Justice Viviano, in his concurrence, warned that "taxpayers seeking some speculative value beyond the surplus realized in the tax sale might often lack meritorious claims." *Id. Rafaeli*—

both the majority and concurrence, undercut Pung's position.

Accordingly, this Court should affirm the Sixth Circuit.

Point II

The GPTA is remedial because it is designed to generate revenue required for critical government services

The Sixth Circuit correctly held that the GPTA exceeds the Eighth Amendment's scope because the GPTA is remedial, not punitive, and ensures that citizens pay lawful taxes. *See Pung v. Kopke*, 2025 WL 318222 (CA6 2025). By encouraging payment of lawful taxes, the government obtains funds to provide critical community services. *Id.*

This intent to generate revenue is not punitive under the Excessive Fines Clause. *See Bennis v. Michigan*, 516 U.S. 442, 451 (1996) (Excessive Fines Clause inapplicable because ensuring proper conduct was remedial, not punitive); *Licari v. Commissioner*, 946 F.2d 690, 694-95 (CA9 1991) (taxes are designed to enhance revenue, reduce the budget deficit, and reimburse government); *Thompson v. Commissioner*, 148 T.C. 59 (2017) (refusing to apply Excessive Fines Clause because tax penalties are remedial, not punitive).

The Sixth's Circuit's ruling aligns with the "insurmountable wall of cases" holding that a taxpayer's loss attributable to his own failure to pay lawful taxes is remedial, not punitive. *McNichols v. Commissioner*, 13 F.3d 432, 434 (CA1 1993) (rejecting taxpayer's attempt to use *Austin v. United States*, 509 U.S. 602 (1993), as a "springboard" to deem increased tax liability punitive); *see United States v. Toch,* 33 F. 4th 1, 16-17 (CA1 2022) (Excessive Fines Clause inapplicable to tax jurisprudence because taxes are remedial rather than punitive); *Louis v. Commissioner*, 170 F.3d 1232, 1235 (CA9 1999) (refusing to extend *Austin* to tax case because taxes are remedial not punitive); *I & O Pub. Co, Inc. v. Commissioner*, 131 F.3d 1314, 1316 (CA9 1997); *1717 Realty Assocs. LLC v. Borough of Fair Lawn*, 2009 WL 1287245 at *4 (NJ 2009) ("courts have rejected efforts to expand the application of *Austin* to cases in which a tax penalty or 'addition to tax' was imposed").

Property taxes fund the public schools our children attend, the police and fire departments that protect neighborhoods, our roads and infrastructure and critical public health services. Because property "taxes are the lifeblood of government, and their prompt and certain availability an imperious need," a procedure must be maintained whereby payment is enforced and the debtor's property may be seized to satisfy the obligation. *Bull v. United States*, 295 U.S. 247, 260-261 (1935).

The collection of delinquent taxes preserves the public good. When property owners neglect to pay their property taxes, the financial burden does not vanish; it shifts to those who comply. Meanwhile, delinquent owners continue to benefit from police and fire protection, sanitation, street lighting, parks, and other local services.

In *Austin*, this Court held that civil forfeiture under the Drug Abuse Prevention and Control Act ("DAPCA") was punitive, rather than remedial, where a cocaine dealer pleaded guilty and was sentenced to seven years in prison. *Austin v. United States*, 509 U.S. 602 (1993). Pung's attempt to equate tax lien foreclosure to the illegal cocaine distribution landscape ignores that tax law, unlike cocaine-based seizure law, is rooted in the citizens' responsibility to fund the government. As Justice Brandeis explained, payments required due to the unlawful failure to pay taxes are a "safeguard for the protection of revenue and to reimburse the government. . . ." *Helvering v. Mitchell*, 5303 U.S. 391, 401 (1938); *see Stockwell v. United States*, 80 U.S. 531, 547 (1871) (increased payment remedial, providing indemnity for loss to government).

Austin does not even hint that it should apply to *any* actions other than DAPCA forfeitures. *Austin*, at 434. There is no Supreme Court or Circuit level legal authority that suggests applying *Austin* to tax lien foreclosure. To the contrary, in *United States v. Ursery*, 518 U.S. 267 (1996), this Court limited *Austin*, holding that in rem foreclosure was not "so punitive in form and effect" as to invoke the Double Jeopardy clause. *Id.*, at 290.

Pung's attempt to use *Austin* as a springboard to claim loss of equity that did not actually exist at the time of taking is another attempt to exploit a Constitutional safeguard for personal profit at the tax-paying public's expense. First, there was no actual increased equity greater than the surplus when title transferred from Pung to the County. Pung therefore did not incur any *actual* fine. Equity was created, after title transferred, by the subsequent owners' dime. The notion that Pung was "fined" is fantasy.

Second, DAPCA's legislative intent makes clear that DAPCA is punitive. Section 881 was passed because traditional criminal sanctions were "inadequate to deter or punish." S. Rep. No. 98-225, p.191 (1983) (U.S. Code Cong. Admin. News 1984, pp. 3182, 3374).

Third, forfeiture under DAPCA, unlike under tax law, has an innocent owner defense, indicating that culpability is key for forfeiture. All law-abiding citizens must pay taxes, culpable or not.

Fourth, in *Austin*, the government seized tangible property intertwined with illegal cocaine. DAPCA only allows seizure of tangible items affiliated with criminal conduct. It does not provide for seizure of equity or increased value.

DAPCA's procedural rules highlight DAPCA's punitive nature. They provide that "all right, title and interest… shall vest in the United States upon commission of the act giving rise to the forfeiture." 21 U.S.C. § 881(h). As such, the government retroactively acquires title and the owner is not given multiple notices before a taking occurs. When DAPCA requires notice, the government can only extend the notice period when notice will "endanger the life or physical safety of the individual," cause "flight from prosecution," result in "destruction or tampering with evidence," or "intimidation of potential witnesses" or "otherwise seriously jeopardize[e] an investigation" or "unduly delay trial." *Id.* Further, each seizing agency must report to the House of Representatives and Senate on how often the notice period is extended. *Id.*

In a tax lien foreclosure, there is no dispute as to liability, the owner receives numerous notices before any action begins, and has numerous chances to sell or redeem the property.

Because this case arises from the civil application of tax law, and tax laws are designed to remediate the government with revenue, the Court should decline to extend *Austin* to tax law jurisprudence and hold *Austin* and the Excessive Fines Clause inapplicable.

Point III

Property tax foreclosure auctions are essential to the tax collection process that funds community services and restores distressed properties

The functioning of local communities and vitality of their neighborhoods are dependent on tax collection. As Justice Holmes observed, "Taxes are what we pay for civilized society." *Compañía Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). These obligations are not optional. They are the price of participation in a community.

The Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Viewed through this lens, the necessity of foreclosure is telling: the government must act to collect the delinquency, and the property must be rehabilitated and returned to a responsible owner to contribute to the community. This protects the community's revenue base, prevents blight and ensures stability.

For these reasons, the fair and efficient enforcement of property tax obligations must be recognized as a cornerstone of a functioning tax system. Without meaningful enforcement, property taxes become nothing more than a voluntary contribution.

Across the country, properties that accumulate delinquent property taxes often suffer from significant neglect. Tax foreclosure auctions, whether through tax deed or tax lien sales, ensure these distressed properties are returned to productive use and unpaid taxes recovered. These auctions are not conducted secretly. They are advertised, regulated by statute, and open to the public. In that setting, the value generated reflects what a willing buyer is prepared to pay under the specific circumstances, including the risks associated with it. That 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 v. Thomas*, 81 F.4th 655, 659 (CA6 2023).

When investors purchase these distressed properties, they do not simply acquire assets; they assume significant financial and operational risk. Nor are such properties suitable for typical homebuyers. Substantial rehabilitation is often required to address structural decay, environmental hazards, or years of deferred maintenance. Due to these risks, the investor pool is specialized. Investors bring capital, expertise, and patience to navigate the uncertainties of these transactions.

Through their efforts, vacant and derelict structures are rehabilitated and returned to habitable conditions and active tax rolls. The housing supply is increased, neighborhood property values are improved and quality of life is enhanced. Once rehabilitated, these properties are typically transferred to new owner-occupants or placed into the rental market, where new occupants will maintain them and contribute to the tax base. In this way, the tax foreclosure process, coupled with private investment, reintegrates distressed properties to the tax base and community.

Thus, tax lien and deed investors are indispensable participants in community revitalization. Their involvement enables local governments to enforce tax laws, recover lost revenue, and ensure that properties left to languish in abandonment are returned to productive use. Without this participation, the cycle of delinquency, neglect, and blight would continue indefinitely, with the greatest harm inflicted on the most vulnerable neighborhoods.

Pung's proposed rule would require governments to "preserve" a delinquent owner's purported equity by ensuring that properties sell for some estimated fair market value, or by paying former owners the difference between that estimate and the auction price. There is no basis for this in the Court's precedent, the history of tax enforcement, or in hundreds of years of real property jurisprudence.

Under Pung's theory, every foreclosure would be a liability. Unable to sell a property at an asserted market value, the government would face infinite unlimited liability. For every dollar of collected tax revenue, the government would face thousands of dollars in exposure.

Pung suggests that governments should be appraisers and real estate brokers, charged not only with straightforward tax collection, but with the ongoing management, repair, and marketing of properties in the hope of improving auction outcomes. County treasurers and tax collectors, who have neither the statutory mandate nor the resources to manage portfolios of deteriorated properties, would be burdened with unsellable assets and forced into ownership and ongoing management. Imagining a starker departure from the traditional role of government in tax collection is difficult. The litigation and uncertainty invited by this approach would be insurmountable.

Ruling in Pung's favor would require local tax assessors to halt their established practices and reassess the very feasibility of tax enforcement, throwing local budgets into turmoil. Throughout the nation, municipalities and states have their own jurisdiction-specific laws for assessing and enforcing property taxes. Although some jurisdictions assess taxes annually, others do so semi-annually. Assessment criteria also vary by locality. Different types of foreclosure processes are used across the United States (e.g. tax deeds, tax liens, and various hybrid systems), and redemption protocols and auction rules change from state to state.

Requiring tax-foreclosed properties to sell at or near market value assumes demand where none exists. Again, many of these properties are severely distressed, and bidders account for that reality. Imposing a pricing mandate would reduce investor participation and drive many out of the market. The assumption that these properties command retail prices ignore their true nature. They are not assets, but liabilities—often vacant, deteriorated, and burdened by legal, structural, or environmental complications. Investors who participate in tax auctions do so with no guarantee of return. They take on substantial risks, from unknown property conditions, costly repairs, the need for code compliance, and, in some cases, the legal complexities of evicting occupants. They do this using their own capital, not public funds. Yet the benefits of their involvement are undeniable. These investors restore homes, stabilize neighborhoods, create both rental and owner-occupied housing, and cure decay that local governments lack the resources to address. Once rehabilitated, the properties return to the tax rolls, generate new revenue, improve surrounding property values, and relieve municipalities of the burden of blight enforcement, maintenance, and liability.

Pung's proposal is a scheme seeking to modify the financial aftermath of the existing framework by shifting risk and cost to the public. That shift would destabilize the carefully calibrated balance that allows the tax enforcement system to function. It would undermine both the viability of auctions and the community revitalization that flows from private investment.

CONCLUSION

For the foregoing reasons, NTLA respectfully requests that the Court affirm the Sixth Circuit's judgment.

Respectfully submitted,

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