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, MICH.,
Respondent.

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

REPLY OF PETITIONER MICHAEL PUNG

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REPLY BRIEF

The Fifth Amendment does not require an auction; it requires payment of just compensation. And compensation for a taking cannot be "inadequate." *Jacobs v. United States*, 290 U.S. 13, 16 (1933). Confusing a homeowner's equity—the monetized equivalent of the interest in real property—with surplus proceeds inverts the Takings Clause and allows the government to improperly diminish the scope of the property interest taken by equating it to the results of a disposal process it alone controls. The proper inquiry is whether the auction price is adequate compensation for the equity taken, not whether an auction complied with state law.

When governments use a fair sale process, the resulting surplus proceeds may reflect just compensation for the excess equity taken (i.e., the part of the property's value beyond the debt owed to the government). But sometimes it does not, and the Constitution does not allow the government to categorically deem "surplus proceeds" to be just compensation. The State may not define away the value of what it takes. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 638 (2023).

Pung does not seek a rule that would make tax foreclosure or auction sales unworkable. Federal courts need not become appraisers or supervisors of tax auctions. The Takings Clause requires only the more modest calculation of just compensation that starts "based on … the property's fair market value,"

Pet. Br. i, minus the debt owed, and delivers an outcome that puts the property owner in as good a position as he was before the taking—nothing more; nothing less.

CORRECTED FACTS

The County conceded the property's $194,400 value. *Contra* Respondent's Brief (RB) 13 n.4. The district court noted that the County did "not challenge[] that the value of the property is at least $194,400 … a sum significantly in excess of the $76,008 for which the property was sold at the tax foreclosure sale." Pet. App. 29a. The County therefore waived any challenge. If not, any dispute about the value of the property at the time of the taking should be decided on remand. The takings question presented here asks only whether surplus proceeds categorically satisfy the Constitution's "just compensation" mandate.

The County argues Pung should have paid the debt during the two years before foreclosure. RB 1. But Pung lacked actual notice of the peril, JA 102, despite the lower court determination that due process was satisfied. JA 90-92. The County's new suggestion that Pung could have redeemed after that, RB 11, is baseless and irrelevant. *See* JA 91-92 ("only way to invalidate" foreclosure was to prevail on due process claim). The County wrongly asserts that Pung could have bid at the auction of the family's home because he no longer owned the home. RB 40. The legislative history of M.C.L. § 211.78m(2) confirms that it

"prevent[s] individuals and businesses from reacquiring tax-foreclosed property…." Senate Fiscal Agency, Bill Analysis, S.B. 295 (S-4) & S.B. 640 (S-2) (May 2, 2014).

Isabella County's arguments about valuation, redemption, and bidding go to auction fairness—issues the courts below never reached. The just compensation question presented is categorical and antecedent: whether retention of surplus proceeds *always*, as a matter of constitutional law, satisfies the Fifth Amendment's "just compensation" requirement. And none of this bears on the excessive fines question. Any unresolved disputes about value or auction mechanics may be addressed on remand.

I. The Confiscation of the Home Was a Standard Taking Requiring Fair Market Value as Just Compensation

The County suggests the property interest taken and when the taking occurred are irrelevant. RB 30-31. But just compensation cannot be determined without first identifying *what* was taken and *when*. *Palazzolo v. Rhode Island*, 533 U.S. 606, 638 (2001) (Stevens, J., concurring in part and dissenting in part) ("Precise specification of the moment a taking occurred and of the nature of the property interest taken is necessary in order to determine an appropriately compensatory remedy."). Here, the County took title to the Pung home, including the equity. Under the tax forfeiture law in effect when Isabella County confiscated the Pung home, the

taking occurred when the County foreclosure judgment finally and completely extinguished the Pungs' title—June 2018. *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 438 (2020) ("fail[ure] to timely redeem the property ... result[ed] in the transfer to [the county] of fee simple title"). The Fifth Amendment violation occurred because it "use[d] the toehold of the tax debt to confiscate more property than was due" (*Tyler*, 598 U.S. at 639) and refused to pay just compensation. Petitioner's Br. 18; M.C.L. § 211.78k(5). The government was liable for damages calculated from a top-line number consisting of the fair market value at the time of the take, minus the debts and costs owed. Petitioner's Br. 18. *Cf. United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 635-636 (1961) (just compensation "must exclude any depreciation in value caused by the prospective taking").

Fair market value for taken property is the ordinary rule regardless of whether the County kept the property for its own use, razed it, or liquidated it in a future sale. On the facts of this case, the analysis can end there: full value is due as in any other taking of absolute title. Petitioner's Br. 14-17; *see Jackson v. Southfield Neighborhood Revitalization Initiative*, No. 166320, 2025 WL 1959046, at *5-6 (Mich. July 16, 2025); *United States v. Causby*, 328 U.S. 256, 261 (1946) (just compensation comprises "the owner's loss, not the taker's gain").

II. Under Debt Collection Jurisprudence, the County Owes Fair Market Value Because It Sacrificed More Property Than Necessary to Collect the Debt

Alternatively, even in the context of debt collection, Pung is still entitled to fair market value based on traditional rules in the debt context. Rendering back "the overplus" is only *one* duty long imposed on debt collectors to protect the property rights of the indebted. The County misreads the historical record, ignoring important protections and misconstruing others.

The County claims *Tyler*, *Nelson v. City of New York*, 352 U.S. 103 (1956), *United States v. Taylor*, 104 U.S. 216 (1881), and *United States v. Lawton*, 110 U.S. 146 (1884), "indicate that surplus proceeds are just compensation." RB 21-22. But this Court has never held that tax sale proceeds categorically provide just compensation. *Tyler* never specifically identified whether the property interest taken was excess real estate, equity, or surplus proceeds because Ms. Tyler was content in her case to recover surplus proceeds. *Tyler*, 598 U.S. at 638-647; *Tyler*, No. 22-166, Oral Argument Transcript at 22 (April 26, 2023). Likewise, the owners in *Taylor* and *Lawton* sought only the surplus proceeds authorized by a federal statute; the Court never considered whether the Constitution required more. *Taylor*, 104 U.S. at 217; *Lawton*, 110 U.S. at 150.

The County and amici suggest that language in *Nelson*, 352 U.S. at 110, means that government satisfies the Takings Clause when a state provides any path to recover any amount of surplus proceeds. RB 22; Amicus Br. U.S. 17-18. The language referred to in *Nelson* is *dicta*.[1] And the argument is wrong: government does not automatically satisfy its just compensation obligation merely by offering a brief possibility of recovering surplus proceeds. It's also irrelevant here because when the County confiscated the Pung home in 2018, Michigan law offered no path whatsoever to recover surplus proceeds. Pet. App. 27a ("Isabella County ... kept the full amount of the sale proceeds, not just the $2,200 necessary to satisfy the allegedly unpaid taxes."); *Tyler*, 598 U.S. at 644.

A. Foreclosure is unwarranted for the underpayment of a partial year's tax worth 1% of a property's value

The County argues that state law required the confiscatory procedure used here, but that does not absolve the County of liability any more than Hennepin County's strict observance of state law absolved it in *Tyler*. Whatever state law required, the County has an overriding constitutional obligation. *Tyler*, 598 U.S. at 638. It unnecessarily took Pung's $194,400 property for a $2,242 tax debt. The use of a confiscatory approach comes with consequences.

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[1] *See Tyler*, 598 U.S. at 644 (takings argument in *Nelson* was "belated").

Isabella County had options to recover the tax delinquency arising from the government's own mistake, and it chose the harshest one. *Cf.* M.C.L. § 211.78k(9) (2015) ("after entry of a judgment ... a foreclosing governmental unit may cancel the foreclosure ... if … (a) The foreclosed property was not subject to taxation on the date of the assessment of the unpaid taxes for which the property was foreclosed").

The $192,000 difference between the property value and debt made an auction—inherently likely to sacrifice that equity—particularly inappropriate. *See United States v. Rodgers*, 461 U.S. 677, 710 (1983) ("Simply put, the higher the expected market price, the less the prejudice, and the less weighty the Government's interest in going ahead with a sale of the entire property."); Local Gov. Am. Br. App. 15a (Fairfax County, Virginia requires appraisal of properties valued greater than $100,000 prior to auction where county seeks to obtain at least 75% of the appraised value or 60% of the assessed value), 29a (Maine law requires auction price set by real estate broker who advises as to "the highest reasonable price the property is anticipated to sell"). In cases presenting a significant difference between the amount of taxes owed and the assessed value of the property, as here,[2] counties should attach personal

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[2] Michigan counties foreclose on properties for debts of *any* amount. *See Rafaeli*, 505 Mich. at 437 (foreclosed over $8.41 underpayment); *Isabella Cnty. Treasurer v. Krantz*, No. 277017,

property of roughly equivalent value, or place a lien on the property, which would almost certainly result in payment of the taxes. *Cf. Rodgers*, 461 U.S. at 710 (there is "no prejudice to the Government if the proceeds from the sale of the partial interest … would still be more than enough to satisfy the delinquent taxpayer's indebtedness, or if the taxpayer's indebtedness could be satisfied out of other property to which he had sole and complete title"). Where the amount of taxes approaches the value of the property, counties may reasonably employ the foreclosure and auction procedure. Because the counties establish the "true value" of every property,[3] a cursory search would reveal the appropriate—and constitutional—route to recovering the unpaid taxes.

B. Government owes fair market value for excess property unnecessarily sold

The County now believes that it had a singular historical duty when it seized and sold Pung's

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2008 WL 4646151, at *2 (Mich. App. Oct. 21, 2008) ($21.14 underpayment).

[3] The assessed true value reflects an annual procedure by which property owners and the government agree on the value. *Emmet Cnty. v. State Tax Comm'n*, 397 Mich. 550, 560 (1976). Unlike other states, Michigan accepts assessed value as evidence of market value, *Lee v. Lee*, 191 Mich. App. 73, 76 (1991), and no expert testimony or outside appraisal is required. *Jensen v. Jensen*, No. 333569, 2018 WL 341039, at *9 (Mich. App. Jan. 9, 2018) (following *Lee*).

property: to return the surplus proceeds. RB 16-22. But the statutes invoked by the County also forbade excessive sales and required reasonable diligence in the sale of land. *See, e.g.*, 1797 Md. Laws 352-353, ch. 90, §§ 1, 4 (providing sale of land only where the collector "can find no personal property in the said county" belonging to the debtor and prohibiting the sale of "more of any tract … of land than may prove sufficient" except when dividing the land would cause "material injury to the owner"); 1792 N.C. Sess. Laws 2, ch. 2 §§ 4, 5, 6 (selling only "so much" land as necessary "when no personal property is found"); 1804 Pa. Stat. 878-879, ch. MMDXXIV, § 2 (authorizing sale of any part or whole tract "as … necessary"); 1785 Mass. Acts 568-571, ch. 70 (collector may "sell so much of the said land" only when personal property is insufficient); 1850 Acts of Wisconsin ch. 123, §§ 41, 45, 49, 50 (only "so much" real estate as needed); Iowa Code tit. VI, ch. 37 §§ 492-493, 496, 498, 501 (1851) (personal goods before selling "smallest portion" of land); 858 Kan. Terr. Laws 361, 368, ch. 66, §§ 56, 84-88 (same); 1854 Or. Terr. Laws 406, 409-410, ch. I, tit. V, §§ 35, 50, 54 (same).

The County ignores that debtors have held a right against forced sales of excess property since at least Magna Carta. Petitioner's Br. 19-20; *Tyler*, 598 U.S. at 640-641. Chapter 9 of Magna Carta provided, "Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt...." And under chapter 26, "The officers of the law were allowed to attach only

as many chattels as might reasonably be expected to satisfy the debt due to the exchequer; and everything so taken must be carefully inventoried." William McKechnie, *Magna Carta* 221, 322-323 (2d ed. 1914) (chapter 26 limits for collecting debts should be read "in connection with chapter 9"). *See* Br. Amici Curiae of Cato Institute, et al. 8-9. The common law and English statutes followed these terms. *Id.* at 9; 2 Edward Coke, *Institutes of the Laws of England* *394 (1797 ed.) (land could not be sold to collect a debt at common law; only "goods and chattels, … corne, and other present profit"); *id.* at *396 (1285 statute allowed seizure only of as many chattels as necessary, and if not sufficient then up to one half of his land); McKechnie, *supra*, at 223 (1266 statute banned forced sales "when the disproportion was 'outrageous'").

The same traditional limitations—requiring the seizure of goods or chattels before land could be taken and prohibiting the sale of more than necessary—were established and continued through the founding of this nation. Petitioner's Br. 19-20; Cato Am. Br. at 9-11. *See also City of Washington v. Pratt*, 21 U.S. 681, 686-687 (1823) (tax collector's duty to sell no more land than reasonably necessary to pay taxes and related costs); *Cornelius v. Burford*, 28 Tex. 202, 209 (1866) (Sale "disproportioned in value to the amount to be raised" creates "the presumption of fraud or reckless indifference to the obligations of his trust on the part of the officer.... It would be a perversion of the spirit and policy of the power with which the officer is intrusted to tolerate, much less sustain, such an abuse of it.");

Margraff v. Cunningham's Heirs, 57 Md. 585, 587-588 (1882) (tax collector's "duty is to sell no more than is reasonably sufficient to pay the taxes and charges thereon, where a division is practicable without injury"); *Reed v. Carter*, 1 Blackf. 410, 411 (Ind. 1825) ("A sale under such circumstances as are here stated, carries on its face its own condemnation; it is an abuse of the powers with which the sheriff is intrusted, and leads to manifest oppression and injustice.").

States and the federal government commonly codified this duty. *See Stead's Ex'rs v. Course*, 8 U.S. 403, 414 (1808) (discussing Georgia statute); *Stover v. Boswell's Heirs*, 33 Ky. 232, 235 (1835) ("statutes authorizing the sale of land under execution, which are in derogation of the common law, do not authorize the officer to sell more land than is sufficient to satisfy the execution"); 28 U.S.C. § 3203(c)(2)(B). But "[t]he rule must be the same, without any positive law for the purpose. It rests on principles of obvious policy and universal justice." *Tiernan v. Wilson*, 6 Johns. Ch. 411, 414 (N.Y. Ch. 1822).

When the government takes more than necessary to collect a debt, it owes the dispossessed owner either fair market value for the excess property or, where possible and appropriate, to return the property. Petitioner's Br. 19-20. Thus, in *Seekins v. Goodale*, 61 Me. 400, 404-405 (1873), the tax collector was liable for trespass on the excess goods seized and ordered to pay fair market value for extra cloths that he sold. *See also* Cato Am. Br. 9-11 (describing additional

cases). Because governments routinely attached goods rather than land to recover unpaid property taxes, *in rem* foreclosure was disfavored until the uniquely devastating economic Depression of the 1930s. Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 Yale L.J. 1505, 1513 (1975). Even then, this Court sought to reduce the harsh consequences of tax sales on property owners. *See Gelfert v. Nat'l City Bank of N.Y.*, 313 U.S. 221, 232 (1941) ("for about two centuries there has been a rather continuous effort … to prevent the machinery of judicial sales from becoming an instrument of oppression").

Michigan once recognized this same rule. *Rafaeli*, 505 Mich. at 466; *Handy v. Clippert*, 50 Mich. 355, 357 (1883) (seizure of goods worth $800 for an unpaid $68 improper; remedy included potential value of goods and additional damages because an "officer is or should be a minister of justice, not of oppression" with a duty "to do as little mischief to the debtor as possible"). County treasurers sought payment by seizing and selling goods; only if that failed to raise sufficient funds would they seize land. *See Schaefer v. Woodmere Cemetery Ass'n*, 256 Mich. 332, 333 (1931); *Starr v. Shepard*, 145 Mich. 302, 306-307 (1906) (sale of mill and its contents assessed at $8,000 to satisfy $200 tax was illegal when there were multiple machines with value exceeding the tax); *Leaton v. Murphy*, 78 Mich. 77, 79 (1889) (improper to sell two horses when one would suffice). And "rather than selling all of a person's land and risk the sale

being voided, officers charged with selling land for unpaid taxes often only sold that portion of the land that was needed to satisfy the tax debt." *Rafaeli*, 505 Mich. at 466. The Michigan Supreme Court "consistently recognized [these] constitutional precept[s]," and "[t]hese fundamental principles … have remained a staple in this state's jurisprudence." *Id.* at 467-468. *See also Gilken Corp. v. Commissioner*, 176 F.2d 141, 144 (6th Cir. 1949) (rejecting argument that "realty taxes are exclusively in rem and that there is no personal liability for them") (citation omitted); *McAndrews v. Belknap*, 141 F.2d 111, 115 (6th Cir. 1944) (property rights were "prejudiced" when government for taxes sold two separate tracts for an amount substantially less than the appraised value of one tract).

Michigan still requires creditors in other contexts to tailor seizures to the amount owed. *Rafaeli*, 505 Mich. at 466. Debt collectors must first pursue a statutorily limited amount of personal property. *See* Petitioner's Br. 5; Amicus Br. Mackinac Ctr. Legal Fdtn. 16-17 (citing, *e.g.*, *George v. Sandor M. Gelman, P.C.*, 201 Mich. App. 474, 477 (1993)) (attachment of a judgment lien to real property is allowed only if the debtor lacks sufficient personal property). Michigan governments also exceed the bounds of the eminent domain power by taking more property than necessary to effectuate the intended public purpose. *Rafaeli,* 505 Mich. at 467 ("The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie

the right of eminent domain.") (quoting 2 Thomas M. Cooley, *Constitutional Limitations* 1147 (8th ed.)).

Despite this plentiful history limiting unnecessarily aggressive tax seizures, the County acknowledges only *Cone v. Forest*, 126 Mass. 97 (1879), and tries to distinguish it because multiple cows are easily divided, whereas a single piece of property may be indivisible. RB 29. Whether property is easily divisible or not, *Cone* held that "[i]t was the duty of the defendant thereupon to return, or to offer to return, the remaining cows," *or, alternatively*, be "answerable in trover" for the sale of the excess sold. 126 Mass. at 101 (relying on *Seekins*, 61 Me. 400, which required fair market value for the excess). The County offers no authority absolving it from this duty.

C. Government owes fair market value for excess property sold in unfair circumstances

The adequacy of the auction process goes to just compensation,[4] not only due process, as Respondent and its amici imply. RB 32. Government has an affirmative, "categorical duty" to pay owners just compensation, *Horne v. Dep't of Agriculture*, 576 U.S. 350, 358 (2015), with "reasonable, certain, and

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[4] *Contra* RB 31, Pung never waived his claim that the Takings Clause requires fair market value instead of the inferior auction sale price and therefore may make any argument to support that claim. *Yee v. City of Escondido*, 503 U.S. 519, 534-535 (1992).

adequate" procedures for remittance. *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). Logically, it cannot be that any sale (no matter how unreasonable) satisfies the Takings Clause because that would allow the government to accomplish the same confiscatory outcome by selling foreclosed properties for no more than the amount of the tax debt. *See*, *e.g.*, *Continental Resources v. Fair*, 317 Neb. 391, 413 (2024) (on remand from this Court, holding an uncompensated taking occurred where the government sold property for only the amount of the debt); National Consumer Law Center Am. Br. 9-16 (explaining that some states are still engaging in sales akin to *Continental*); Maryland Legal Aid Am. Br. 7-11 (same).

In the debt collection context, courts traditionally have never treated surplus proceeds as conclusively adequate. The surplus proceeds of a fairly conducted auction or forced sale *may* satisfy the duty of just compensation.[5] But that premise must be subject to challenge. Petitioner's Br. 16 (citing *Rafaeli*, 505 Mich. at 485 (Viviano, J., concurring) ("defining plaintiffs' property right as the right to surplus proceeds … would seemingly encourage and endorse many takings of a person's equity without just compensation whenever a foreclosure sale does not

[5] Tax sales are prone to a variety of serious problems. *See, e.g.*, Joseph D. Bourgeois Am. Br. 6-7 (documenting bid-rigging and "bundling"); Chamber of Commerce Am. Br. at 6-7; Buckeye Am. Br. 18-22.

yield surplus proceeds"). This is consistent with *Riggs v. Sterling*, 60 Mich. 643, 653-654 (1886), which rejected a claim that the results of an allegedly unreasonable sale were "conclusive." The auction price here was merely 40% of the home's fair market value when it was taken. Pet. App. 29a. Rather than deeming auction sales to be adequate in every circumstance, as did the court below, the law imposes duties on tax collectors to act as bailees under constitutional obligations to preserve owner equity.[6] The County here did not honor its traditional duties, Petitioner's Br. 21-27, and thus cannot claim a presumption that the auction's surplus proceeds are equivalent to the value for which just compensation is owed.

The County claims it is irrelevant whether the sale price is low. RB 20-26. But "great inadequacy" in the sale price of foreclosed property plus "only *slight* circumstances of unfairness" have long justified setting aside a judicial sale. *Graffam v. Burgess*, 117 U.S. 180, 191-192 (1886) (emphasis added). The rule uses a sliding scale: the more reasonable the price, the greater the unfairness needs to be and vice versa.

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[6] *Contra* Michigan Ass'n of Counties Am. Br. 23, government employees responsible for public money in their care are "special bailees, subject to special obligations," but bailees nonetheless, *Smythe v. United States*, 188 U.S. 156, 169-170 (1903), consistent with the role of government employees holding private property in custody, as in excess property confiscated for tax debts.

Odell v. Cox, 151 Cal. 70, 74 (1907) ("it is universally recognized that inadequacy of price is a circumstance of greater or less weight to be considered in connection with other circumstances impeaching the fairness of the transaction as a cause of vacating it"). In *Ballentyne v. Smith*, 205 U.S. 285, 289 (1907), this Court relied on *Graffam*'s rule, noting that a court "owes [debtors] something more than to merely take care that the forms of law are complied with."

The Amicus Brief of the Wisconsin Counties Association at 6-7 tries to distinguish *Graffam* and related cases as equitable claims, rather than constitutional ones. But as the United States explains, similar equitable cases support the principle that a "just" sale process is required for compensation of surplus proceeds to be deemed "just." U.S. Am. Br. 15-16; *see also Knick v. Twp. of Scott*, 588 U.S. 180, 199-200 (2019) (equitable relief consistent with Takings Clause). Moreover, here Michigan made "monetary damages" the only remedy available for the taking. *See* M.C.L. § 211.78*l* (2018).

The bailee's duties extend beyond mechanically following a statute and returning surplus proceeds. Courts provide relief to debtors from forced sales where the debt collector followed the letter of the law but acted unjustly. *See, e.g.*, *Pender v. Dowse*, 1 Utah 2d 283, 265 P.2d 644, 646-648 (1954) (invalidating sale where creditors' "studious silence" kept the debtor unaware of the creditors' intention, despite that the sale itself was apparently properly noticed

and conducted); *Fletcher v. McGill*, 10 N.E. 651, 654 (Ind. 1887) (where government "must have known that the owner of the property had no actual notice or knowledge of the sale" and imminent redemption deadline); *Fuentes v. Tillett*, 263 Or. App. 9, 23 n.10 (2014). *Cf. Julia Realty, Ltd. v. Cuyahoga Cnty. Bd. of Revision*, 153 Ohio St. 3d 262, 265 (2018) (Under state law, "*all* auction sales give rise to a presumption *against* using the sale price as the property's value, subject to rebuttal if the proponent proves the voluntary and arm's-length character of the sale.") (emphasis original and added); *In re Six*, 80 F.3d 452, 456 (11th Cir. 1996) (rebuttable presumption under state law that a foreclosure bid price represents the property's fair market value allocates the burden of producing evidence, rather than conclusively establishing value).

For these reasons, the County's reliance on *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), is misplaced. RB 23-25. *BFP* was a bankruptcy case about private mortgage foreclosure. The case expressly limited its holding to that context, *BFP*, 511 U.S. at 537 n.3, and left intact cases that voided unfair, depressed auction sales to prevent injustice, describing *Ballentyne*'s holding as "black letter" law. *Id.* at 542 (citing *Ballentyne*, 205 U.S. at 290). Moreover, Pung seeks money damages, not return of the property, a key difference between this situation and the danger in *BFP* that the resolution of bankruptcies among private creditors could be unwound. *BFP*, 511 U.S. at 544.

Here, the County pushed the property into an auction destined to generate a low price for no good reason—in violation of its traditional duties—and now should be accountable for the property owner's loss. *See Olson v. United States*, 292 U.S. 246, 255 (1934) (Fifth Amendment requires government to restore the property owner "in as good a position pecuniarily as if his property had not been taken."). The auction proceeds represent only partial payment of the property's value that was taken. If the government chooses to unnecessarily auction property for far less than its established value, it still must pay the value of the taken property, even if it must draw funds from elsewhere to do so. *Burke v. City of River Rouge*, 240 Mich. 12, 14-15 (1927).

III. The Excessive Fines Clause Is Applicable

Isabella County confiscated the Pung family's home for failing to pay a $2,242 tax bill, resulting in an economic penalty of nearly $118,000. *Austin* long ago established that an economic sanction is subject to the Excessive Fines Clause, whether civil or criminal, if it serves in part "to deter and to punish." 509 U.S. at 610, 622. Its "[p]rotection" is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" *Timbs v. Indiana*, 586 U.S. 146, 154 (2019). Respondent, their amici, and the United States nonetheless contend that the Excessive Fines Clause cannot apply if the Takings Clause does; that the penalty cannot be a fine (or excessive) if the sovereign

does not itself keep the surplus proceeds of the foreclosure auction (U.S. Am. Br. 28); that a harshly punitive tax-foreclosure cannot be a fine because its primary purpose is to collect taxes (RB 38) and that the Excessive Fines Clause only applies to penalties related to crime (U.S. Am. Br. 31). Those objections are unconvincing.

A. Either or both the Takings and Excessive Fines protections can apply

Pung's complaint stated the Excessive Fines and Takings claims in the alternative, so the Excessive Fines Clause is not implicated if the government compensates Pung with the fair market value of the equity. *See* JA-21, ¶ 100. If Pung does not fully prevail on his takings claim, however, the Eighth Amendment applies to avoid a tax penalty that is grossly disproportionate to his purported wrong. *See Soldal v. Cook Cnty.*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands" and "we examine each constitutional provision in turn."). *Bennis v. Michigan* is not contrary in stating that government need not "compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." 516 U.S. 442, 452 (1996). Pung asserted the Eighth Amendment excessive fine claim here because the County confiscated more than 80

times what Pung owed (i.e., it did not "lawfully acquire" his equity). Notably, *Bennis* did not assert, and this Court did not address, an Excessive Fines claim. The two provisions offer complementary protection. Unless this Court holds that the Takings Clause requires the County to pay Pung full fair market value, this Court should rule on both questions to guide the lower courts on remand.

B. The forfeiture is a punitive fine

Respondent and the United States argue that forfeiture of Pung's home is not a fine because Pung's offense was not criminal or because the County's actions were not punitive. RB 37-42; U.S. Am. Br. 28-31. These arguments are refuted by the exhaustive historical research presented in Professor Colgan's amicus brief and in a related article she cites. Colgan Am. Br. 5-24, 28 ("A substantial volume of historical materials supports a holding that property forfeitures pursuant to the GTPA are at least partially punitive and thus constitute fines eligible for review under the Excessive Fines Clause."); Beth A. Colgan, *Of Guilty Property and Civil/Remedial Punishment*, 3 J. of Am. Const. Hist. 697, 712-736 (2025). The County and United States are also wrong as a matter of logic and precedent. The United States avers that the forfeiture of Pung's property is not a fine because "the government does not keep the property's excess value; rather, it returns the excess value by refunding surplus proceeds." U.S. Am. Br. 28. But this begs the question. The gravamen of Pung's Takings claim is

that the return of surplus auction proceeds did *not* make him whole, and the difference between the value of the seized property and what he secured back is a fine by any other name—it is property in excess of anything he owed, seized by the sovereign in response to the public wrong of not paying taxes on time.

The County and its amici insist that tax forfeitures serve primarily remedial rather than punitive purposes and are therefore not fines. RB 36; U.S. Am. Br. 29 (The "purpose is not to punish the taxpayer, but to satisfy the debt."). But labels and intent don't control. *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 56 (2015) (Alito, J., concurring) ("statutory label[s] cannot control for constitutional purposes"). Even if the scheme has "a predominantly remedial purpose," the Excessive Fines Clause applies if its effect is "in part" to punish. *Tyler*, 598 U.S. at 649-650 (Gorsuch, J., concurring) (quoting *Austin*, 509 U.S. at 610). As in *Austin*, the economic sanction here is punishment because "any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." *Austin*, 509 U.S. at 622 n.14; *see also* Pet. Br. 36-37. The County quotes a footnote in Justice Scalia's *Austin* concurrence to say, "a statutory forfeiture must always be at least 'partly punitive,' or else it is not a fine." RB 36. But that is not *Austin*'s holding, and this Court "has never held that a scheme producing fines that punishes some individuals can escape constitutional scrutiny merely because it does

not punish others." *Tyler*, 598 U.S. at 649 (Gorsuch, J., concurring). Moreover, "the ratifying generation would likely not have divided remedial and punitive penalties when determining whether a sanction qualified as a fine." Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 319 (2014).

The United States' comparison of the tax forfeiture here to commercial mortgage foreclosure, which it describes as remedial, is likewise unavailing. The foreclosure remedy in the commercial context is a matter of contract, not government force. *Aubee v. Selene Finance LP*, 56 F.4th 1, 9 (1st Cir. 2022).

The County argues that some monetary payments—like taxes and restitution—may not be punishment even if they have a deterrent effect. RB 43-44. However, taxes and restitution that go too far *are* recognized as punishment. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 567-568 (2012); *Paroline v. United States*, 572 U.S. 434, 455-456 (2014). Nonetheless, Pung is not challenging the *property tax* as an excessive fine. He challenges the forfeiture of his entire property in response to his partial nonpayment of that tax—an economic penalty vastly greater than warranted, especially in the circumstances of this case. Pet. App. 22a (court below "sympathetic to Pung's plight"). This forfeiture penalty is subject to review for excessiveness. *See* Colgan Am. Br. 8-9 ("the failure to adhere to the public duty to pay taxes … make tax code violations a

quintessential public offense, with the resulting fines and forfeitures historically understood to serve as punishment"); *Ellingburg v. United States*, No. 24-482, 2026 WL 135982, at *4 (U.S. Jan. 20, 2026) (Thomas, J., concurring) ("[I]n 1798, 'punishment' for a 'crime' would have been understood to refer to any coercive penalty for a public wrong.").

Finally, the United States urges that "[b]ecause the seizure of a taxpayer's property to satisfy an unpaid tax bill bears no relation to a crime," it escapes Eighth Amendment review. U.S. Am. Br. 31. The County also stresses that failure to pay property taxes is not a criminal offense. RB 38. Yet "the notion of punishment" captured by the Eighth Amendment "cuts across the division between the civil and criminal law." *Austin*, 509 U.S. at 610; *Hudson v. United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines…."). While the few excessive fines cases heard by this Court related to crime, none held that the Excessive Fines Clause is limited to fines or forfeitures in criminal circumstances. The United States suggests that *United States v. Bajakajian*, 524 U.S. 321 (1998), hinged on such a rule, U.S. Am. Br. 30, but it reads too much into the Court's discussion of the history of *in rem* versus *in personam* forfeiture during the Founding Era. That history was truncated, not necessary for the decision, and more recent scholarship demonstrates that *in rem* forfeitures (like the one here) were indeed understood as punitive by the founding generation and beyond. *See* Colgan, *Of*

Guilty Property, *supra*, at 712-736, 759-764, 778-780. Regardless, "[t]he relevant question" in *Austin* "was not whether a particular proceeding was criminal or civil" but whether the forfeiture "constituted 'punishment.'" *United States v. Ursery*, 518 U.S. 267, 281 (1996) (Double Jeopardy case characterizing *Austin*). "Some provisions of the Bill of Rights are expressly limited to criminal cases.... The text of the Eighth Amendment includes no similar limitation." *Austin*, 509 U.S. at 608-609.

CONCLUSION

The Sixth Circuit's ruling should be reversed, and the case remanded to award just compensation in the amount of the fair market value of Pung's equity at the time of foreclosure or, if necessary, to mitigate the forfeiture in an amount required to avoid gross disproportion to the unpaid property tax.

Respectfully submitted,

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