

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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GERALDINE TYLER, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 22-166  
 HENNEPIN COUNTY, MINNESOTA, ET AL., )  
 )  
 Respondents. )  
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Pages: 1 through 114  
Place: Washington, D.C.  
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-166, Tyler versus Hennepin County, Minnesota.

Ms. Martin.

ORAL ARGUMENT OF CHRISTINA M. MARTIN

ON BEHALF OF THE PETITIONER

MS. MARTIN: Mr. Chief Justice, and may it please the Court:

When the government takes property to satisfy a debt and takes more than what is owed, it has a constitutional duty to return or pay for the excess. Here, Geraldine Tyler owed \$15,000, which included nearly \$13,000 in penalties, interest, and related costs. To satisfy that debt, Hennepin County took Ms. Tyler's former home, which was worth much more than that, and later sold it for \$40,000. The county kept all \$40,000 for public uses.

By taking absolute title to Ms. Tyler's property, including the value that exceeded the debt, the county has taken private property without just compensation. The county could have collected the debt without violating

1 the Constitution by following the traditional  
2 common law rule still followed in most states  
3 and still followed in Minnesota in nearly every  
4 other debt collection circumstance. Under that  
5 rule, the county should have taken the property,  
6 sold it, paid the debts from the proceeds, and  
7 refunded the remainder to Ms. Tyler. Instead,  
8 the county took everything.

9           The county apparently does not dispute  
10 that Ms. Tyler had a property interest in her  
11 former home or in its value. Instead, it  
12 asserts that the government may redefine private  
13 property by statute. The consequence of that  
14 would be an unlimited power to define away  
15 private property and to confiscate it to pay  
16 debts, no matter how valuable the property or  
17 how small the debt.

18           But this Court's takings decisions and  
19 hundreds of years of common law, Minnesota's own  
20 treatment of debts in nearly every other debt  
21 collection circumstance confirm that the county  
22 has taken private property for which it must pay  
23 just compensation. If not remedied with just  
24 compensation, then the confiscation acts as a  
25 fine punishing Ms. Tyler for the public offense

1 of failing to timely pay her property taxes.

2 The confiscation of her property  
3 should therefore be subject to scrutiny under  
4 the Excessive Fines Clause because it goes well  
5 beyond compensating the government for any loss.

6 This Court has repeatedly held that an  
7 economic sanction that serves in part to punish  
8 is a fine within the meaning of the Eighth  
9 Amendment.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: If there was no  
12 differential in the -- if there was no surplus  
13 equity, would there be a taking?

14 MS. MARTIN: Yes, Your Honor -- well,  
15 are you asking if the property was worth less  
16 than what she owed the county?

17 JUSTICE THOMAS: Or worth the -- the  
18 \$15,000.

19 MS. MARTIN: There -- there would be a  
20 taking, but just compensation would be paid at  
21 the time of the taking of absolute title because  
22 -- by forgiving the debt.

23 JUSTICE THOMAS: So, normally, we say  
24 that a takings claim accrues when the government  
25 takes the property. And how would we know that

1 -- what the value of the property is at the time  
2 of the taking --

3 MS. MARTIN: In this part --

4 JUSTICE THOMAS: -- when the sale  
5 doesn't occur until years later?

6 MS. MARTIN: So, in this particular  
7 case, it's true the sale was more than a year  
8 later, but trial courts handle valuation  
9 analyses all the time, and so they would just  
10 use the same analysis applicable in other -- any  
11 other circumstance, and they could consider the  
12 auction price as probably the best proxy for  
13 what the property was worth.

14 JUSTICE THOMAS: Normally, we only --  
15 we see these takings claims when you have  
16 eminent domain or something that's traditional.

17 So why should we extend it to areas  
18 such as forfeiture or taxation in -- in the area  
19 of property taxes?

20 MS. MARTIN: Because the right that  
21 we're asserting here is a deeply rooted right  
22 that a debt collector may not take more than  
23 what's owed. The way that debt collectors  
24 ordinarily get around that is by taking the  
25 property subject to that traditional common law

1 rule -- Blackstone called it an implied contract  
2 at law -- that they would take the property,  
3 sell it in a fair arm's length transaction,  
4 usually by auction, and then return any excess  
5 after they pay off the debts.

6 CHIEF JUSTICE ROBERTS: Well, it's a  
7 deeply rooted right that's traditionally defined  
8 by state law. You know, in some places, your  
9 property line goes up to the high water mark.  
10 In other states, it goes -- goes to the low  
11 water mark. And when you take property there,  
12 it's -- it's wherever the state law has defined  
13 it.

14 What -- what if Minnesota has a law  
15 sort of going forward and they say from now on,  
16 in Minnesota, if you get property, you have to  
17 know that we, the state, are going to take it if  
18 you don't pay taxes for three years? And people  
19 go in with that expectation. The market value  
20 is discounted because of that.

21 If the eventuality occurs, there's no  
22 taxes for three years, they take the property  
23 entirely, is that a taking or not?

24 MS. MARTIN: It's still a taking, Your  
25 Honor. I would point this Court to its decision

1 in Horne, which said that no one ever actually  
2 expects their real or personal property to be  
3 taken.

4 And while the government can redefine  
5 the boundaries of property rights with things  
6 like statutes of limitations, what it can't do  
7 is outright confiscate property. Just like the  
8 Court held in Phillips, there was a deeply  
9 rooted traditional right that while states had  
10 carved out exceptions through rules like the  
11 IOLTA programs, that, nevertheless, the  
12 government would not be allowed to carve out  
13 this self-dealing exception.

14 CHIEF JUSTICE ROBERTS: Well, then, if  
15 it's not defined by state law, what's it defined  
16 by?

17 MS. MARTIN: Well, I think Minnesota  
18 state law does support our position here  
19 because, in every other debt collection  
20 scenario, they protect a debtor's interest in  
21 the excess value of their property.

22 So, if you owe -- if you owe a debt,  
23 the -- the debt collector doesn't get to take  
24 everything. He's only entitled to so much as  
25 owed. As -- as Rufus Waples said in his

1       treatise, an indebted thing can only be  
2       condemned to the extent of its indebtedness.

3               CHIEF JUSTICE ROBERTS: Well, there  
4       were states, I guess Virginia and Kentucky, that  
5       had a similar procedure as -- as Minnesota here  
6       today, you know, way back when, I guess before  
7       the founding or at the founding.

8               Now, if you own property in Virginia  
9       and there was that basic -- I don't know if it's  
10      common law or statute in that case -- would you  
11      have a takings claim if somebody acted -- if the  
12      state took your property consistent with a  
13      provision in law that had been in effect from  
14      the beginning?

15              MS. MARTIN: I would say so, yes, Your  
16      Honor. A few -- as this Court noted in Bruen, a  
17      few localized exceptions do not mean that this  
18      isn't a traditional deeply rooted right. And  
19      both --

20              CHIEF JUSTICE ROBERTS: Well, back  
21      then, Virginia was hardly localized. I mean, it  
22      was a -- it was a large and important state, and  
23      I think that the western bounds of it hadn't yet  
24      been defined, and different --

25              MS. MARTIN: Sure.

1 CHIEF JUSTICE ROBERTS: -- different  
2 states had different rules, and they chose to  
3 have a rule that had an exception to what today  
4 we might think of as a common definition of  
5 property.

6 MS. MARTIN: Yes, Your Honor. But  
7 Virginia's rule was short-lived. The  
8 legislature actually ended up extending the  
9 period of redemption almost 50 years. And on  
10 top of that, the courts apparently didn't  
11 enforce the forfeiture. Hennepin County failed  
12 to cite even a single example where there was a  
13 forfeiture of value, not just a forfeiture of  
14 title.

15 And I -- I want to highlight that  
16 distinction, as this Court noted in Bennett, if  
17 forfeiture can be a forfeiture merely of title,  
18 that still protects the surplus. And so there's  
19 a lot of examples that they cite that mention  
20 the word "forfeiture," but that tells you  
21 nothing about how it was actually implemented by  
22 the courts.

23 JUSTICE BARRETT: Did the Virginia  
24 state constitution have a Takings Clause at that  
25 time? Because, obviously, the -- you know, the

1 Bill of Rights didn't apply to Virginia then.  
2 So I'm just wondering, would those statutes have  
3 even been held to that standard?

4 MS. MARTIN: I'm not actually certain,  
5 Your Honor. I suspect it did. But,  
6 nevertheless, it's still a confiscation of  
7 something that's recognized as private property  
8 in -- in every other debt collection  
9 circumstance and that -- that there was a single  
10 exception that was actually narrower than what  
11 Hennepin County does. They only were able to  
12 take -- forfeit the land, essentially, if  
13 personal property was insufficient --

14 JUSTICE BARRETT: Well, sure.

15 MS. MARTIN: -- to pay the debt.

16 JUSTICE BARRETT: We wouldn't  
17 necessarily look to the Alien and Sedition Acts  
18 for the original meaning of the First Amendment.

19 MS. MARTIN: Yeah.

20 JUSTICE BARRETT: Let me ask you a  
21 question. Would you be satisfied if the statute  
22 was similar to the one in Nelson that permitted  
23 the surplus to be recovered?

24 MS. MARTIN: For purposes of this  
25 case, yes, Your Honor.

1 JUSTICE BARRETT: Why for purposes of  
2 this case? Are you reserving the possibility of  
3 challenging Nelson itself?

4 MS. MARTIN: I -- I personally don't  
5 like Nelson, but --

6 (Laughter.)

7 JUSTICE BARRETT: Okay. But -- but  
8 that's not the question. For -- for purposes of  
9 this case -- I'll accept your qualification --  
10 do you agree that under Nelson, if Minnesota had  
11 had the sort of conditional redemption built in  
12 that the New York statute did in Nelson, that  
13 the Fifth Amendment would be satisfied?

14 MS. MARTIN: I mean, I'm not going to  
15 go that far, but I will say that this case is  
16 distinguishable on that basis. And because  
17 there is no opportunity to claim the surplus in  
18 this case, unlike in Nelson, Nelson, even if you  
19 think it's binding, is -- it's completely  
20 distinguishable.

21 JUSTICE KAGAN: Why do you personally  
22 not like Nelson?

23 (Laughter.)

24 MS. MARTIN: Because it -- I think  
25 it's problematic. It suggests you have to bring

1 a takings claim before the taking has even  
2 occurred, and that would leave people -- it kind  
3 of flies in the face of this tradition that the  
4 best way of putting a person on notice from a  
5 taking is to actually take the property, and at  
6 that point, you can then go claim your just  
7 compensation or file your takings claim if they  
8 have not offered just compensation.

9 JUSTICE KAGAN: So do you think that  
10 there is any way to create a scheme even to sell  
11 the proper -- take the property and remit the  
12 surplus?

13 MS. MARTIN: Yes. As the amicus brief  
14 by Utah, joined by seven other states, explains,  
15 that most states do just that. They take the  
16 property subject to that traditional common law  
17 right, they sell the property, and then they  
18 have a claim of funds from which property owners  
19 may claim it after it's been sold.

20 JUSTICE KAGAN: What do you -- you  
21 noted that Minnesota has penalties here. What  
22 do you think the limits of penalties are?

23 MS. MARTIN: Before they become  
24 excessive?

25 JUSTICE KAGAN: Well, I'm just

1 thinking that you can call anything anything.  
2 What if a state just called this scheme a  
3 penalty scheme?

4 MS. MARTIN: Well, then I think our  
5 excessive fines claim would be the -- would  
6 obviously provide significant relief. Even if  
7 they were to try to, you know, enumerate the  
8 amount of money owed and it somehow swallowed up  
9 the value of the property, I think the Excessive  
10 Fines Clause applies.

11 But the Takings Clause applies because  
12 they -- they completely untethered the amount  
13 from any set statutory figure. Instead, they're  
14 tethering the amount owed to the value of the  
15 property, essentially trying to swallow  
16 everything up left over.

17 CHIEF JUSTICE ROBERTS: Well, what do  
18 you --

19 JUSTICE KAGAN: I'm not sure I  
20 understand that. I mean, suppose that there  
21 were a statute that said, you know, 50 percent,  
22 75 percent of the property, we're just going to  
23 take as a penalty.

24 MS. MARTIN: I think, if the  
25 government is essentially -- at some point, I

1 think it becomes a taking. That line is harder  
2 to draw than the line that you've got here,  
3 where we're not challenging the set penalties,  
4 interest, and fees in the \$15,000.

5 Instead, we're saying that the  
6 government can't just simply say that we get to  
7 take everything left over after that. It would  
8 be --

9 JUSTICE KAGAN: Well, I guess, you  
10 know, at -- at some point, I mean, suppose that  
11 this entire scheme were just rephrased as a  
12 penalty.

13 MS. MARTIN: If it's still just tied  
14 to the value of the property, I think you still  
15 have a very good takings claim there. And, of  
16 course, the excessive fines claim would also  
17 still apply.

18 JUSTICE GORSUCH: Counsel, back to  
19 Nelson for just a minute.

20 The -- the suggestion that you have to  
21 exhaust a -- a pre-deprivation process under  
22 state law in that footnote in Nelson, I  
23 understand that it wasn't briefed and it came  
24 late in -- in the day.

25 How does it fit with this Court's

1 subsequent decision in Knick, which seemed to  
2 suggest you don't have to exhaust state -- state  
3 law proceedings to bring a takings claim?

4 MS. MARTIN: I think it conflicts  
5 directly with Knick in that it suggests, in  
6 order to have a -- your takings claim is  
7 overcome if you fail to use a state court  
8 procedure, the foreclosure procedure, to state  
9 your claim, whereas Knick says that the moment a  
10 taking occurs, regardless of whether there's a  
11 state court procedure that might end up in  
12 compensation, you have a takings claim and you  
13 can go to federal court and bring your takings  
14 claim.

15 JUSTICE ALITO: In order -- in order  
16 for you to win, is it necessary for you to  
17 convince us that at the time of the adoption of  
18 the Constitution, a mortgager was regarded as  
19 having an equitable property interest in the  
20 surplus?

21 MS. MARTIN: No, Your Honor, it's not  
22 necessary for us to show that because today we  
23 all recognize that we have personal property  
24 and -- in our real estate, and that real estate  
25 is protected by the Takings Clause, a financial

1 interest connected to real estate is protected  
2 by the Takings Clause, as this Court said in  
3 Koontz, and so either way you cut it, we don't  
4 have to be able to prove the history. All we  
5 have to do is look at this Court's modern  
6 takings decisions.

7 JUSTICE ALITO: Well, don't you have  
8 to show that you have a -- you have a property  
9 -- you have -- you have to show you have a  
10 property interest that was taken.

11 And I assume you don't want to argue  
12 that a property interest is whatever a state now  
13 says is a property interest. So where do we  
14 look if we don't look to the understanding of  
15 property interests at the time of the adoption  
16 of the Constitution?

17 MS. MARTIN: I think this -- I think  
18 this Court has -- I mean, you can look at the  
19 history, but I think that this Court has  
20 acknowledged that some property interests exist,  
21 like in physical property, exist regardless of  
22 what state law says. This Court did not look to  
23 California law in *Horne* when it decided that  
24 raisins were private property.

25 And it -- it said in *James Daniel Good*

1 that no one could contest that real estate is  
2 private property. And the right we're talking  
3 about, the right to being paid for the excess  
4 value in your property, is sort of like the  
5 interest in Phillips, where -- where this --  
6 this Court noted that interest follows the  
7 principal like a shadow follows the body.

8 And this is the same sort of  
9 interconnected property interest.

10 CHIEF JUSTICE ROBERTS: What do you --

11 JUSTICE ALITO: Do you --

12 CHIEF JUSTICE ROBERTS: I'm sorry, go  
13 ahead.

14 JUSTICE ALITO: Just one -- one  
15 follow-up question on this. Do you have a  
16 response to Professor Kelly's amicus brief where  
17 he argues that it wasn't recognized historically  
18 that a mortgager had that property interest?

19 MS. MARTIN: I mean, I think it would  
20 ultimately be irrelevant even if you were  
21 correct. I think -- I think the Hall opinion is  
22 good. I think Justice Viviano's concurrence in  
23 *Rafaeli* also discusses the history of the  
24 mortgager's interest.

25 But, ultimately, it's irrelevant

1 because, in the tax collection context, it -- it  
2 goes all the way back to Magna Carta that the  
3 government could not take more than it was owed.

4           And while, you know, the county has  
5 pointed out that there were some feudal  
6 practices associated at the -- you know, at the  
7 time -- prior to the founding, there were  
8 feudal -- feudalism practices with the Statute  
9 of Gloucester and with quit-rent. That was not  
10 tax collection. That was the feudal practice of  
11 a lord who his tenants owed him fealty,  
12 services, or rent.

13           And this Court -- this country  
14 outright rejected such practices. So I think,  
15 when you look at the history of tax collection,  
16 it's very clear that there were limits on how  
17 much could be taken throughout our nation's  
18 history and then also dating all the way back to  
19 Magna Carta.

20           JUSTICE JACKSON: Counsel, I'm  
21 interested in the aspect of the state statute  
22 that affects a sale to the county, and I'm -- I  
23 would take it that you wouldn't think that your  
24 -- that Ms. Tyler was owed anything if she had  
25 actually sold the property to the county for the

1 amount of the tax debt? If they then went on  
2 and sold it for a higher price, she wouldn't  
3 receive anything as a result, right?

4 MS. MARTIN: I -- I think you're  
5 correct, yes --

6 JUSTICE JACKSON: So this --

7 MS. MARTIN: -- because that would be  
8 voluntary.

9 JUSTICE JACKSON: So is that the  
10 difference? I mean, in this statute, there is a  
11 part of it as I understand it -- and you can  
12 correct me -- in which the property is sold to  
13 the state by operation of law for an amount  
14 equal to the unpaid taxes.

15 So is it the difference -- and you're  
16 claiming that she's entitled to -- to the  
17 excess. So is the difference that in the first  
18 scenario we have a voluntary sale?

19 MS. MARTIN: Yeah, it's a fictional  
20 sale, essentially just a way of administratively  
21 transferring title. But the -- but what's  
22 required by the Takings Clause at minimum is  
23 that there is a sale that's arm's length  
24 transaction bid -- to the highest bidder. It  
25 can't be fraudulent, can't be collusive, can't

1 be this self-dealing sort of fictitious sale.

2 JUSTICE JACKSON: But you agree with  
3 the SG that the taking is happening at the time  
4 of the transfer of the absolute title?

5 MS. MARTIN: Yes. We just --

6 JUSTICE JACKSON: Not later, right?

7 MS. MARTIN: Right. We just focused  
8 in on the equity portion. It's sort of like --  
9 it's another way of looking at the same  
10 question, I think.

11 JUSTICE SOTOMAYOR: I'm sorry, it's  
12 not another way of looking at the same question.  
13 Your question presented said -- asked whether  
14 there was a taking of the surplus. The SG is  
15 formulating this differently. It's formulating  
16 it as a taking at the time of title. And that  
17 formulation has a huge impact.

18 MS. MARTIN: I --

19 JUSTICE SOTOMAYOR: If it's just a  
20 surplus, then -- then the auctioneer's price  
21 sets the surplus. If it's the SG's formulation,  
22 there's a whole lot of questions. What happens  
23 if there's a stock market crash the day after  
24 the taking and the value plummets? Is the state  
25 responsible for that decrease in price?

1                   These are big questions. And tell me  
2 why we should address it here. Why don't we  
3 just address the question you presented, which  
4 is the surplus question?

5                   MS. MARTIN: Sure, Your Honor. I  
6 think we phrased it as the value that exceeded  
7 the debt. But -- but, as far as the possibility  
8 of the -- the price changing after the --

9                   JUSTICE SOTOMAYOR: I have it whether  
10 taking and selling a home to satisfy a debt and  
11 keeping that surplus value as a windfall  
12 violates the Takings Clause.

13                   MS. MARTIN: Sure. So I -- what we  
14 were trying to get at is that there is this  
15 taking of the surplus value. If you were to  
16 hold that it was the surplus proceeds from the  
17 auction, I think Ms. Tyler would be more than  
18 satisfied with that.

19                   But the question I think you might be  
20 getting at is how can counties go forward with  
21 collecting taxes without putting themselves at  
22 risk for paying --

23                   JUSTICE SOTOMAYOR: That's the bottom  
24 line.

25                   MS. MARTIN: That's what you're

1 talking -- okay.

2 JUSTICE SOTOMAYOR: Okay? Here --  
3 here, you have a debtor who basically doesn't  
4 want to do anything. What's the county supposed  
5 to do to protect itself? Your answer is sell it  
6 at a regular auction.

7 MS. MARTIN: Yes.

8 JUSTICE SOTOMAYOR: But there are a  
9 lot of things that could affect that. Time will  
10 pass no matter what.

11 MS. MARTIN: Sure. Yeah. And I think  
12 that as long as they take it subject to that  
13 traditional interest -- the traditional  
14 requirement that they have a fair auction and  
15 they sell it without collusion or fraud, that  
16 satisfies the Takings Clause because they're not  
17 -- the government is not purporting to take the  
18 entire whole. They're only trying to take their  
19 share, turn -- convert the real estate into a  
20 pool of money so they can divide it up according  
21 to the liens in the property.

22 But, as far as takings that have  
23 already occurred, the way to traditionally look  
24 at that would be from the time of the taking.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Just one additional question. How do  
3 you deal with adverse possession? You know, the  
4 idea in state law -- and I think most states, if  
5 not all, have it -- that if somebody lives on  
6 your property for whatever number of years, 17  
7 or something, and you don't do anything about  
8 it, he gets to keep it under -- by the operation  
9 of state law. Isn't that a -- why isn't that a  
10 taking?

11 MS. MARTIN: Because, there, you have  
12 both a statute of limitations that basically  
13 just allows the dealing of stale claims between  
14 private parties. There's a time where it gets  
15 cut off where the property occupier can have  
16 some reassurance that their title is clear. And  
17 the other --

18 CHIEF JUSTICE ROBERTS: Well, I mean,  
19 he doesn't really have a title, right? I mean,  
20 he gets it at the end of the --

21 MS. MARTIN: Well, some states require  
22 color of title, but --

23 CHIEF JUSTICE ROBERTS: Okay.

24 MS. MARTIN: Yeah, but even if there  
25 wasn't, there's some reassurance that at some

1 point the property becomes theirs, but that's  
2 based on the idea at common law that the owner,  
3 seeing this open and obvious use of their  
4 property, has consented to it.

5 And, here, you wouldn't have that  
6 because the government took the property in July  
7 2015, and that's when the government took the  
8 right of possession as well.

9 CHIEF JUSTICE ROBERTS: Well, I mean,  
10 if it's a law, I think you can say that, you  
11 know, if you don't pay your taxes within three  
12 years or whatever it is, under state law, you've  
13 been deemed to consent to, what, escheating your  
14 property or something to -- to the state. I  
15 don't see that it's terribly different.

16 In each case, the property interest is  
17 defined by state law.

18 MS. MARTIN: Well, I think that with,  
19 for instance, adverse possession, if you were to  
20 try to carry the analogy over, it would be sort  
21 of like if, after the government took title in  
22 July 2015 and they moved somebody else in there,  
23 and then she had three years and still didn't  
24 bring a claim, they could cut it off with the  
25 statute of limitations.

1 CHIEF JUSTICE ROBERTS: Okay.

2 Justice Thomas?

3 Justice Alito?

4 JUSTICE ALITO: Does your theory apply  
5 to property other than real property? For  
6 example, I -- I believe that some cities impound  
7 vehicles that -- where the owner has unpaid tax  
8 -- unpaid tickets, and then, if the owner  
9 doesn't pay the amount that's due, the city will  
10 sell the car and keep the proceeds, put them  
11 into the city's general fund. Would that be  
12 unconstitutional in your view?

13 MS. MARTIN: Yes, Your Honor. And I  
14 think that the history of tax collection or debt  
15 collection from the government is pretty uniform  
16 on the question of personal property. In fact,  
17 Minnesota -- in Minnesota, Hennepin County, for  
18 example, if they're collecting personal property  
19 taxes, they're not allowed to take more than  
20 what's owed. And so I think, if you have a  
21 personal property situation, the same principle  
22 would carry over.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Sotomayor?

25 JUSTICE SOTOMAYOR: If we -- if we

1 were to rule in your favor on the Takings  
2 Clause, why would we reach the Excessive Fines  
3 Clause?

4 MS. MARTIN: Well, we presented it in  
5 our brief because it was dismissed on a motion  
6 to dismiss. But you could decline to answer it  
7 because the Takings Clause would fully remedy  
8 Ms. Tyler's harm.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: I'm going to go back  
11 to the question I asked you earlier, Ms. Martin,  
12 because I'm not quite sure I understood the  
13 answer. So suppose that there were a state that  
14 said we're going to sell a property when there's  
15 been some number of years of unpaid taxes, and  
16 we'll remit, you know, some of the surplus value  
17 to the owner but by no means all. This has  
18 been, you know, a burden on us, and we're going  
19 to keep 50 percent as a penalty.

20 How would we go about thinking about  
21 that constitutionally?

22 MS. MARTIN: I think that's a harder  
23 question to answer. The amount certainly above  
24 50 percent, I would presume, would be a taking.  
25 The amount below the 50 percent, it -- perhaps

1 it's also a taking, but it's a harder question.

2 I would certainly think --

3 JUSTICE KAGAN: Just the amount above  
4 whatever the state declared is a penalty so that  
5 if the state declared 55 percent as a penalty?

6 MS. MARTIN: Yeah, I think it's a  
7 problem if the govern -- if the government is  
8 tying the amount of the penalty to the value of  
9 the property that it wants to take. That would  
10 seem --

11 JUSTICE KAGAN: Well, then that's a  
12 problem for a 2 percent penalty.

13 MS. MARTIN: Well, there, the -- so  
14 the penalties here aren't tied -- aren't  
15 expressly tied to the value of the estate.  
16 They're tied to the debt owed.

17 The analogy you're giving is where  
18 they're tying it to the value of the thing  
19 that's indebted. And I -- that's why I think  
20 we're still in the takings territory and not  
21 just merely -- perhaps there's an excessive  
22 fines claim and a takings claim. Sorry, this is  
23 not as clear as I would like it to be, but I  
24 think it's an easier question when the  
25 government has --

1 JUSTICE KAGAN: I guess the reason I'm  
2 asking it is because it does, you know, seem to  
3 me just like -- when does this takings analysis  
4 come into effect?

5 MS. MARTIN: I think when the  
6 government has the \$15,000 accounted by statute  
7 and then they just simply purport to take  
8 everything left over after that.

9 JUSTICE KAGAN: I know everything.

10 MS. MARTIN: Yes.

11 JUSTICE KAGAN: But what I'm trying to  
12 say is, how about less than everything? How  
13 about 50 percent? How about 10 percent?

14 MS. MARTIN: I think it's probably  
15 still an issue if they're tying the value to the  
16 estate, but I think it gets harder, the  
17 line-drawing gets harder, if they're being  
18 clever the way that you're being clever. I  
19 mean, that's a clever idea.

20 (Laughter.)

21 JUSTICE KAGAN: It -- it sort of seems  
22 like a kind of obvious idea, but, okay.

23 MS. MARTIN: Nobody is doing it as far  
24 as I know.

25 JUSTICE KAGAN: Well, because

1 everybody who wants to do this is doing what  
2 Minnesota is doing.

3 MS. MARTIN: Yeah.

4 JUSTICE KAGAN: How about abandoned  
5 property? Does the state have a right to say at  
6 some point you haven't paid taxes for five  
7 years -- I believe Ms. Tyler was not living in  
8 the house either. You haven't paid taxes,  
9 you're not living there, we're going to consider  
10 it abandoned. So forget whether anybody else is  
11 using it. This isn't really an adverse  
12 possession case.

13 But, at some point, does the state  
14 have a right to say we consider this abandoned?

15 MS. MARTIN: I -- I would say  
16 Minnesota does not allow the abandonment of real  
17 estate, even for failure to pay property taxes.  
18 We cited the case Krueger in our reply brief.  
19 Even 30 years' failure to pay property taxes did  
20 not constitute abandonment of real estate --

21 JUSTICE KAGAN: Well, how about --

22 MS. MARTIN: -- under Minnesota law.

23 JUSTICE KAGAN: -- if some state  
24 wanted to just say, you know, we -- we have a  
25 rule, you don't pay taxes for five years, you're

1 not living there, we're going to consider the  
2 place abandoned?

3 MS. MARTIN: I think that would still  
4 be problematic, Your Honor, because there's a  
5 lot of reasons why people don't pay their  
6 property taxes and a lot of reasons why people  
7 move out. We've seen examples of people who are  
8 moved into nursing homes and all sorts of  
9 unfortunate circumstances.

10 And so we do not contest the  
11 government certainly -- that, certainly, the  
12 government can tack on penalties, interest, and  
13 fees and they can forcibly sell it and take  
14 their cut. But, when you just attempt to take  
15 everything left over after that, that's a  
16 taking.

17 JUSTICE KAGAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch?

20 Justice Kavanaugh?

21 Justice Barrett?

22 JUSTICE BARRETT: I want to go back to  
23 your answer to Justice Kagan because I was  
24 wondering the same thing. I mean, I think that  
25 in the county's brief, it blurs the line between

1 abandonment and forfeiture in -- in this  
2 situation.

3           So what is really the point -- and --  
4 and I guess this is kind of similar to what  
5 Justice Kagan was getting at. What is really  
6 the point of your winning if the county can do  
7 the same thing by saying: Yeah, we called it a  
8 forfeiture, but, you know what, it's really  
9 abandonment?

10           Would the analysis be different?  
11 Because you can't dispute that we do have a long  
12 tradition in the country of abandonment. I  
13 mean, counties, states, can take abandoned  
14 property that's not maintained, for example.

15           MS. MARTIN: Well, so the tradition of  
16 abandonment requires an intent to relinquish,  
17 which is actually an interesting factual  
18 question, and you -- to just suppose an intent  
19 because somebody isn't paying thousands of  
20 dollars, because they can add on all the other  
21 reasons why they might try to claim they think  
22 it's abandoned, but, ultimately, it's the  
23 failure to pay property taxes.

24           JUSTICE BARRETT: So you can't have  
25 construct -- constructive intent even if, you

1 know, she's not responded to multiple notices,  
2 even after a certain amount of time, I mean,  
3 because I presume there are other situations in  
4 which there's true abandonment, where intent has  
5 to be inferred from a failure to show up, a  
6 failure to reside, a failure to respond to  
7 notices?

8 MS. MARTIN: So the -- the way to deal  
9 with those types of abandoned properties is  
10 either through nuisance laws, which allows the  
11 government to mitigate the problem and charge  
12 the -- the cost to the -- the estate, or to  
13 simply use the power of eminent domain, take the  
14 property.

15 If it's truly derelict, then -- then,  
16 I mean, there may not be a lot of equity in the  
17 property, and if nobody shows up to claim the  
18 money, that could go through the unclaimed money  
19 statute.

20 JUSTICE BARRETT: So this might go  
21 back to Nelson and the New York statute. If  
22 they want to call it an abandonment, maybe they  
23 can call it an abandonment, they can sell it,  
24 they can hold the proceeds and give some period  
25 of time during which the owner can come and

1 redeem?

2 MS. MARTIN: Yes, I think that would  
3 be reasonable.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Jackson?

7 JUSTICE JACKSON: And just to be  
8 clear, with respect to this statute, it doesn't  
9 require any of those factors?

10 MS. MARTIN: That's exactly right.

11 JUSTICE JACKSON: It's just the not  
12 payment of taxes, the government -- the county  
13 can take these steps?

14 MS. MARTIN: That's right.

15 JUSTICE JACKSON: With respect to your  
16 excessive fines argument, what -- what is the  
17 best argument for characterizing this as at  
18 least partially punitive?

19 The others -- your friends on the  
20 other side say this is clearly remedial for a --  
21 a number of reasons. Obviously, the government  
22 has the ability to take taxes and, you know,  
23 abandon property and do all sorts of things.

24 So -- so why would this be best  
25 characterized as partially punitive?

1 MS. MARTIN: Well, the county below  
2 argued that this was at least intended partly to  
3 deter failure to pay property taxes. This Court  
4 has said repeatedly that deterrence is a marker  
5 of punishment. And so I think that is a very  
6 strong --

7 JUSTICE JACKSON: Haven't we also  
8 characterized deterrence in a civil or  
9 non-punitive way as well?

10 MS. MARTIN: Sure. So the question  
11 then would be is it -- is it essentially trying  
12 to deter conduct that is not allowed, that is --  
13 that causes a public harm versus a private harm.  
14 And so I -- I would point to the Court's opinion  
15 in Kokesh, which talks about the different --  
16 what makes something a penalty is -- is -- the  
17 question is, is it a public harm? And does it  
18 go beyond mere compensation?

19 JUSTICE JACKSON: And should we draw  
20 anything from the characterization of the other  
21 side as this sort of partially being Ms. Tyler's  
22 fault, that she could have sold it herself, for  
23 example, but she didn't, and so now we have to  
24 do it? Is there -- is there something punitive  
25 about that kind of approach to this?

1 MS. MARTIN: Well, that does sound a  
2 little punitive, and that would be something  
3 that I think, you know, her culpability would be  
4 something on -- on question on remand. That  
5 would be a question to answer on remand because  
6 the excessiveness question isn't before the  
7 Court. And, of course, none of that would be  
8 relevant to the takings analysis.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Ms. Ross.

13 ORAL ARGUMENT OF ERICA L. ROSS  
14 FOR THE UNITED STATES, AS AMICUS CURIAE,  
15 SUPPORTING NEITHER PARTY

16 MS. ROSS: Thank you, Mr. Chief  
17 Justice, and may it please the Court:

18 Taxes are not takings. As the parties  
19 agree, when a taxpayer fails to pay her full tax  
20 debt, the government may seize and sell property  
21 to recoup the money it is owed. But that power  
22 does not encompass the power to extinguish an  
23 owner's full rights in property that is worth  
24 more than the tax debt.

25 When the government obtains absolute

1 title to such property without any mechanism for  
2 the owner to recover excess value, it engages in  
3 a potentially compensable taking.

4 History and precedent strongly support  
5 that rule. In the decade after the founding,  
6 the federal government and nine states all --  
7 all limited the government to recovering the  
8 value of a tax debt.

9 And as this Court has held at least in  
10 the context of confiscatory laws, the government  
11 cannot define away a longstanding property  
12 interest to favor itself alone. The government  
13 thus agrees with Petitioner that she has stated  
14 a claim for a taking, though, as Justice  
15 Sotomayor noted, in the government's view, the  
16 relevant property interest is Petitioner's fee  
17 simple title, not any "equity in the property."

18 While the value of the property may  
19 affect the measure of just compensation, it is  
20 not itself the relevant property interest.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: So, with that said,  
23 what would you do with a case in which the  
24 government -- which it often does in -- in  
25 eminent domain cases -- simply kept the property

1 and did not sell it?

2 MS. ROSS: So I think, in all cases,  
3 and this, I think, is responsive to Justice  
4 Sotomayor's questions earlier as well, the  
5 question is, you know, what was this property  
6 worth at the time of the taking? And so we do  
7 think valuation here does have to happen with  
8 respect to when absolute title was taken in  
9 2015, whether there's a sale or not.

10 I think, when there is a tax sale,  
11 that can be very relevant evidence of the amount  
12 of compensation that's due because, even though  
13 that tax sale happens later and is a forced  
14 sale, this Court has been clear that just  
15 compensation has to be just to both the public  
16 and the property owner. And it would not be  
17 just to the public to ask that the state  
18 effectively provide some value that was not  
19 realized in the tax sale.

20 JUSTICE THOMAS: But how would that  
21 work here? You're talking about a condominium,  
22 and the -- from what I can tell, the only way  
23 you knew of this differential between the taxes  
24 owed and the value was because it was sold.

25 How would you determine the value of

1 it if you never sold it -- if the -- if the  
2 county never sold it?

3 MS. ROSS: So, Justice Thomas, I  
4 think, as my friend mentioned, you know, courts  
5 do this all the time. If the government  
6 condemns a property, it's not necessarily going  
7 to sell it, and so courts do have valuation  
8 mechanisms. I don't know specifically if they  
9 look to other sales of similar property. I  
10 would assume that's how they do it.

11 But I don't think this is a -- a  
12 problem that's unique in this context. And if I  
13 could just take a step back and explain why we  
14 think the difference between the interests here,  
15 as we define it and as my friend defines it, is  
16 important.

17 You know, Petitioner speaks about this  
18 as equity in property. I think, if there's a  
19 freestanding equity right, that could be  
20 problematic in some of the Court's other lines  
21 of cases.

22 So, most notably, in the regulatory  
23 takings context, this Court has long understood  
24 that the government may enact regulations that  
25 can affect the value of property, sort of

1 adjusting the burdens of economic life, as this  
2 Court has said it, and that that is not always  
3 or even, you know, often going to be a taking.

4 And so I think it's much more  
5 straightforward to think about this as she had  
6 absolute fee simple title. The state took all  
7 of that without recognizing that the property  
8 might be worth more than the tax debt, and so  
9 what's really at issue is, you know, cashing out  
10 that -- that property interest in the back end.

11 JUSTICE SOTOMAYOR: Ms. Ross, you're  
12 throwing a bomb into 240, 50 years of history  
13 with respect to delinquent taxes and sales only  
14 because, if you define it as the time the state  
15 takes title, then -- and valuation as of that  
16 date, no -- nothing's going to ever happen where  
17 a state's going to take that risk because  
18 properties have to be sold, the state's being  
19 forced into being the agent for the seller, and  
20 it's going to have to take all the risk and all  
21 of the responsibility for whatever happens to  
22 that property until it's sold.

23 Why would any state want to do that?  
24 And why are you forcing states into that?

25 MS. ROSS: So, respectfully --

1 JUSTICE SOTOMAYOR: Your adversary  
2 took a simple position. I'm entitled to a  
3 surplus. I think that's the question we should  
4 answer. The government's forcing us into a much  
5 more radical position.

6 MS. ROSS: So, respectfully, Justice  
7 Sotomayor, I don't think it is more radical.  
8 Again, I think, you know, we're trying to  
9 protect the Court's regulatory takings  
10 jurisprudence, among other things, but I think  
11 the analysis would really work in much the same  
12 way under our rule or Petitioner's rule in this  
13 set of cases.

14 JUSTICE SOTOMAYOR: Not at all.

15 MS. ROSS: Well, if I could explain  
16 why? I mean, again, I think the absolute title  
17 is the moment, but we completely accept that  
18 you're going to use or you can use the -- the  
19 later tax sale as a very good proxy and perhaps  
20 in, you know, almost all cases, if not all  
21 cases, actually the value of just compensation  
22 at that time.

23 JUSTICE SOTOMAYOR: Except the day  
24 that there's a stock crash.

25 MS. ROSS: So I think you could --

1 JUSTICE SOTOMAYOR: Say there's a  
2 stock market crash the day after the property is  
3 transferred.

4 MS. ROSS: I think you could  
5 conceptualize the taxpayer's failure to pay her  
6 taxes as agreeing to essentially the later tax  
7 sale as a measure of just compensation if you're  
8 concerned with that.

9 If I could just --

10 JUSTICE GORSUCH: Ms. Ross --

11 MS. ROSS: -- hit the history -- yes.

12 JUSTICE GORSUCH: -- well, before you  
13 do that, just to finish up this line of  
14 questioning, do we even need to decide this?  
15 The question before us, is there a taking here?  
16 Yes. Both of you agree on that. And then a big  
17 question becomes the matter of valuation, and do  
18 we have to decide that in this case?

19 MS. ROSS: You do not, Justice  
20 Gorsuch. I -- I -- you know, I'm simply trying  
21 to respond to the questions as they've been  
22 asked --

23 JUSTICE GORSUCH: Oh, of course.

24 MS. ROSS: -- and -- and, you know,  
25 this concern about equity versus surplus and why

1 we think it matters.

2           If I could briefly hit the history, I  
3 just want to answer Justice Barrett's question  
4 about Virginia. Virginia did not have a state  
5 just compensation requirement at the time. It  
6 did have a separate requirement that when the  
7 state affected property rights, it would do it  
8 through the -- the legislature. So there's some  
9 language about, you know, taking property that  
10 way. But there's not a separate just  
11 compensation requirement.

12           I think what's really significant is  
13 I'm not aware at least -- my friends can  
14 certainly tell me if I'm wrong -- of any state  
15 in the early period that was bound by a  
16 constitutional just compensation requirement and  
17 had a scheme like the one that's at issue here.

18           JUSTICE KAGAN: Your friend doesn't  
19 like Nelson and thinks it's inconsistent with  
20 Knick. What do you think?

21           MS. ROSS: So we're perfectly fine  
22 with Nelson, Justice Kagan. I think --

23           (Laughter.)

24           MS. ROSS: Both personally and as the  
25 government.

1 (Laughter.)

2 MS. ROSS: I think -- I think that --  
3 that Nelson very clearly kept this issue to one  
4 side, so if you look at page 110 of the decision  
5 in Nelson, where -- where the -- the relevant  
6 discussion, short discussion is, it says: But  
7 we do not have here a statute which absolutely  
8 precludes an owner from obtaining the surplus  
9 proceeds of a judicial sale.

10 And so I think the Court's  
11 constitutional holding in Nelson was very much  
12 carving this precise situation out.

13 In terms of the -- the relationship to  
14 Knick, I don't actually think there's any  
15 tension there. I think, you know, this is a  
16 very specific situation in which everybody  
17 agrees that the government can seize and sell  
18 the property. And so I think the -- the  
19 procedure that was at issue in Nelson is really  
20 just an accommodation for that odd set of facts.

21 And I don't think it's -- it's  
22 inconsistent with Knick because it's basically  
23 defining whether a taking has happened in the  
24 first place.

25 JUSTICE JACKSON: Isn't the

1 distinction between you and Petitioner the fact  
2 that because everybody agrees that the  
3 government can take, seize, and sell the  
4 property, your position is the taking has  
5 occurred when the government takes the entirety,  
6 absolute title, that at the moment of the  
7 seizure, the only thing the government is really  
8 entitled to is the tax amount and not full  
9 title, absolute title? Isn't that sort of the  
10 essence of your point?

11 MS. ROSS: I think that's correct,  
12 Justice Jackson, of course, you know, with the  
13 caveat that by the -- what they're entitled to  
14 is the tax debt, meaning including the penalties  
15 and the interest and all that.

16 JUSTICE JACKSON: Yes, that's what I  
17 mean.

18 MS. ROSS: But I take no one to  
19 disagree on that.

20 JUSTICE JACKSON: But they're not  
21 entitled to an absolute forfeiture of the  
22 entirety of the -- of the value of the house at  
23 the moment of the seizure?

24 MS. ROSS: That's correct, Justice  
25 Jackson. And this, I think, goes to some of the

1 earlier questions as well. You know, if the  
2 state had a system where it recognized that it's  
3 not entitled to the full value and so it  
4 therefore had a mechanism to cash out that value  
5 on the back end, there would be no taking. And  
6 so we wouldn't be thinking about this in terms  
7 of just compensation. It would just be a  
8 statutory question of, you know, have you gotten  
9 the amount that the statute said you would get,  
10 which presumably would be the taxes on that.

11 JUSTICE JACKSON: And so the taking  
12 takes place whether the government then goes on  
13 to sell it or not in your view?

14 MS. ROSS: Exactly. And I think that  
15 that's, you know, one problem with the way the  
16 court of appeals looked at this in this case,  
17 was it said, you know, you didn't have any right  
18 to the surplus at the later time because we --  
19 the state had defined away the surplus. But  
20 that also suggests, you know, that just by  
21 keeping it there would be no taking. And I  
22 think that can't be right.

23 JUSTICE BARRETT: Ms. Ross, given the  
24 difference between you and the Petitioner, how  
25 does the government recommend that we resolve

1 this case?

2 MS. ROSS: So, to quote one of my  
3 colleagues, the way that we said in our brief.

4 JUSTICE BARRETT: Yeah.

5 MS. ROSS: I think -- you know, I  
6 think that we -- we think that absolute title,  
7 the taking of absolute title without any  
8 mechanism for recovering the excess value is a  
9 taking. And I think, to Justice Gorsuch's  
10 point, that's probably enough for the day.

11 JUSTICE BARRETT: So just vacate and  
12 remand on that?

13 MS. ROSS: Yes. I mean, I think you  
14 would -- you would reverse the -- the decision  
15 insofar as it had dismissed the complaint.

16 JUSTICE BARRETT: We have a lot of  
17 debates about is it reverse or vacate and  
18 remand.

19 MS. ROSS: Sure.

20 JUSTICE BARRETT: But -- but you're  
21 saying, you know, it's not an affirmance, and  
22 there would be a possibility in your view of her  
23 amending her complaint if she didn't state the  
24 question properly? Is that what the government  
25 thinks she should do?

1 MS. ROSS: I guess. You know, I think  
2 that the -- I read the complaint to sort of be  
3 broad enough to include both theories, but I  
4 guess the district court could figure out  
5 whether that was necessary.

6 We do agree with Petitioner and I  
7 think Respondent on this point that the Court  
8 need not reach the Excessive Fines Clause if it  
9 decides the takings issue in Petitioner's favor.

10 JUSTICE BARRETT: Thank you.

11 CHIEF JUSTICE ROBERTS: Counsel --  
12 counsel, I was interested in your raising the  
13 regulatory taking question. So let's say you  
14 own property in a particular place, you know, on  
15 the lakeside or something, and it's worth a  
16 certain amount. And the government comes along  
17 and says, well, in the future, this property can  
18 only be used as a -- a turtle refuge because  
19 there's endangered turtles there. It reduces  
20 the value of the property by 90 percent.

21 And as the government, you would argue  
22 that's not a taking for a variety of reasons,  
23 and there's all sorts of things in our case law  
24 you could -- could look to.

25 Or let's say the government says,

1 well, we don't need all the property. We're  
2 just going to take, you know, 90 percent of it,  
3 and you get 10 percent. You're still left -- it  
4 reduces the value of the property by 90 percent.  
5 The same -- the same thing.

6 That one's a taking, right?

7 MS. ROSS: I think that's right, Mr.  
8 Chief Justice, and I think that just reflects  
9 this Court's precedents that, you know, you can  
10 do a lot of things around property, but sort of  
11 as the Court said in *Horne*, it's different when  
12 you come in and you physically take the  
13 property.

14 CHIEF JUSTICE ROBERTS: Well, it said  
15 it's different when it's raisins in *Horne*.

16 (Laughter.)

17 MS. ROSS: Well --

18 CHIEF JUSTICE ROBERTS: But the -- the  
19 -- but it seems to me that the distinction must  
20 be based to some extent on the idea that there  
21 is an irreducible core of what constitutes  
22 property as opposed to being regulated. You  
23 know, taking one square inch of that property is  
24 going to be a taking even and -- and regulation  
25 that reduces the value much more doesn't.

1                   Is that part of the way the government  
2 sees the case?

3                   MS. ROSS: I think that's right. I  
4 mean, I think that's what this Court's cases  
5 certainly have said. I think, you know, that's  
6 a reference to Loretto and sort of putting the  
7 antenna on, that itself is enough to be a  
8 taking. And I think, again, you know, this  
9 Court's decision in Horne strongly supports  
10 that, among other decisions.

11                  CHIEF JUSTICE ROBERTS: Well, is there  
12 some -- is there -- if there is an irreducible  
13 core to the property, where does that come from?

14                  MS. ROSS: So I think, you know, if  
15 you wanted to look for history -- look to  
16 history here, that's very strong, obviously, if  
17 we're talking about an irreducible core of sort  
18 of the physical property itself. Again, you  
19 know, most states didn't think it could -- they  
20 could extinguish all of your rights in the  
21 physical property. So I think history is  
22 certainly one place you could look there.

23                  I think you could also, as my friend  
24 was saying, you know, look at how the state  
25 today treats similar situations. I think

1 there's a real concern in this case of sort of  
2 the state having one rule for most situations  
3 and then a different rule for this one.

4 CHIEF JUSTICE ROBERTS: Could it be  
5 based to some extent in the Taking -- Takings  
6 Clause itself? The Constitution uses a term,  
7 "property." It must have some meaning, and the  
8 framers seem to think it was worth protecting.  
9 And I wonder if that is a concept that has  
10 carried over into state law --

11 MS. ROSS: I --

12 CHIEF JUSTICE ROBERTS: -- from the  
13 federal Constitution.

14 MS. ROSS: -- I think that well might  
15 be the case. I mean, again, I think, you know,  
16 for this case, it's really enough to say this is  
17 sort of the -- the quintessential type of  
18 property. We have a general rule that when the  
19 government comes in and physically takes your  
20 property, that is a taking.

21 And then, you know, there's obviously  
22 the accommodation for the tax clause and the --  
23 or, excuse me, the tax power. And the question  
24 is really just how those fit together. And so I  
25 think history here is a good guide for that.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Thomas?

3 Justice Alito?

4 JUSTICE ALITO: Can the government  
5 also keep its administrative expenses that it  
6 incurs as a result of having to go through the  
7 process?

8 MS. ROSS: Absolutely.

9 JUSTICE ALITO: Can it impose a  
10 penalty for failing to respond or for anything  
11 else that the property owner may do in  
12 connection with this proceeding?

13 MS. ROSS: I think it can, subject,  
14 obviously, to other constitutional limitations.  
15 I think this goes to Justice Kagan's questions  
16 earlier. You know, this Court's decision in  
17 Eastern Enterprises sort of -- it's really the  
18 -- the -- the controlling concurrence by Justice  
19 Kennedy and then the four dissenters, but sort  
20 of drew a line between when the government tries  
21 to take physical property or a specific sum of  
22 money, a specific pot of money, as in Webb's or  
23 the -- the IOLTA cases. On the one hand, we  
24 think of those as takings, and then, when it  
25 just assigns a penalty, we sort of think of

1 those differently.

2 JUSTICE ALITO: Under what  
3 circumstances can the -- can a state or the  
4 federal government, I guess, say we consider  
5 this property to have been abandoned and,  
6 therefore, we're going to keep the complete  
7 value?

8 MS. ROSS: So I think abandonment is  
9 far different. It's sort of solving for the  
10 problem of, has this person really relinquished  
11 all property interests, all intention to use the  
12 property? So, if you look at a case like  
13 Texaco, on which my friends rely heavily, there  
14 were a number of indicia of non-use of the  
15 property and it spanned over 20 years.

16 Here, by contrast, we just have, you  
17 know, five years of non-payment of taxes, and it  
18 would apply in exactly the same way if she lived  
19 in her condominium and was exercising every  
20 right in the bundle of sticks and just failing  
21 to pay property tax. So I think this is a far  
22 cry from a classic abandonment situation.

23 JUSTICE ALITO: Would abandonment be  
24 -- be limited to the situation where the state  
25 doesn't know where the person is?

1                   Suppose the state knows where the  
2                   property owner is and the property owner has not  
3                   allowed the -- the property to deteriorate and  
4                   become a health or safety hazard but just simply  
5                   continues to refuse to pay taxes or fail to pay  
6                   taxes. Is that an abandonment?

7                   MS. ROSS: So -- so I think --

8                   JUSTICE ALITO: Can that be considered  
9                   an abandonment and therefore take the situation  
10                  out of the Takings Clause?

11                  MS. ROSS: So, Justice Alito, you  
12                  know, I apologize, I don't have sort of a -- a  
13                  fine point at which it would become abandonment,  
14                  but I think it's helpful to see sort of how far  
15                  this is from abandonment.

16                  I do think states probably have some  
17                  flexibility in how they define abandonment, but,  
18                  you know, the fact that -- I -- I don't think  
19                  this would probably suffice, but even if it  
20                  could, as this Court said in *Horne*, you know,  
21                  this is an area in which the Constitution is  
22                  concerned with means as well as ends. And so I  
23                  think the fact that it might be able to  
24                  accomplish the end some other way doesn't remove  
25                  this from the takings power for the taxes.

1 JUSTICE ALITO: One last question and  
2 one that I -- I asked Petitioner. Would your  
3 theory apply to personal property as well as  
4 real property?

5 MS. ROSS: So I -- I apologize, I  
6 haven't thought deeply about the history or as  
7 deeply about the history with respect to  
8 personal property. I think there's pretty  
9 strong history on Petitioner's side with respect  
10 to that.

11 And, obviously, this Court's decision  
12 in *Horne* said, you know, people don't expect the  
13 government to come in and take your grapes, just  
14 as they don't expect it to come in and take your  
15 property. And so I think there would be a  
16 debate there.

17 But there'd be some points in the --  
18 the property owner's favor.

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Sotomayor?

22 Justice Kagan?

23 JUSTICE KAGAN: Could you say a few  
24 more words, Ms. Ross, about this penalty  
25 question? I mean, are there any penalties

1 because of the form of the penalty or because of  
2 the amount of the penalty one should view  
3 through a Takings Clause lens?

4 MS. ROSS: So I think, under this  
5 Court's precedent, if the penalty is itself  
6 the -- the property and at least we're not  
7 talking about, you know, sort of the historic  
8 classes of customs forfeitures and things like  
9 that that are sort of carved out for historic  
10 reasons, then you might think of it in a taking.

11 I think, when we're just talking  
12 about, you know, the government's assessing a  
13 number of dollars and it doesn't really care  
14 where that's paid from, that, I think, is not  
15 generally thought of as a taking.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch?

18 JUSTICE GORSUCH: Just real quick on  
19 the excessive fines question, which I understand  
20 you -- you -- you encourage us not to answer,  
21 but the district court on which the court of  
22 appeals basically relied said it wasn't a --  
23 a -- a fine or an excessive fine because the  
24 primary purpose was to compensate and that  
25 the -- the -- that Petitioner was given multiple

1 opportunities to pay the amount and -- and that  
2 it was partially a deterrent.

3 I don't see how that lines up under  
4 our case law as anything other than a fine,  
5 right? We've said it doesn't matter whether  
6 it's criminal versus civil. We've said if it's  
7 punitive in part, and deterrence we've indicated  
8 is often a hallmark of a penalty.

9 So, if we were to reach the excessive  
10 fines question, why wouldn't we just at least  
11 say that the district court's reasoning below is  
12 wrong?

13 MS. ROSS: So I think that if you were  
14 to reach it -- and, again, we -- we don't think  
15 it's necessary --

16 JUSTICE GORSUCH: I got you on that.

17 MS. ROSS: -- but, if you were to  
18 reach it, I think it's clearly not a punishment,  
19 even just taking Austin and Bajakajian on their  
20 terms, and that's for three primary reasons.

21 The first is there's no relationship  
22 to culpability whatsoever. This applies in  
23 exactly the same way no matter how or why  
24 someone fails to pay their taxes.

25 Second, the variability point here

1 strongly favors the idea that this isn't a  
2 penalty because, in a lot of cases or at least  
3 in some cases, this is actually going to be a  
4 net benefit to the taxpayer, and so it --

5 JUSTICE GORSUCH: And in some cases,  
6 it's going to be even worse for the taxpayer.

7 MS. ROSS: That's correct, Justice  
8 Gorsuch. But what the majority said in Austin  
9 in Footnote 14 and what Scalia said -- Justice  
10 Scalia said in the asterisked footnote in his  
11 opinion was that it has to be punitive --

12 JUSTICE GORSUCH: Well, that's not --

13 MS. ROSS: -- at least partially  
14 punitive in every case.

15 JUSTICE GORSUCH: The Court hasn't  
16 ever said that.

17 MS. ROSS: So I think Footnote 14  
18 of -- of the Court's opinion in Austin does  
19 suggest that in this context it should be at the  
20 statutory level in deciding whether it's a fine,  
21 and so you would have to look across all  
22 applications.

23 But the third reason I would give you  
24 is that even if you thought this wasn't purely  
25 remedial, I don't think it's punitive in any

1 meaningful sense. I think what's really going  
2 on here is partially that the state wants to,  
3 you know, pay -- not be left really holding the  
4 bag on these properties and also that it's just  
5 easier from an administrative convenience  
6 standpoint.

7 JUSTICE GORSUCH: But what about the  
8 fact, as you point out, that in every other  
9 circumstance, whether it's for assessing marital  
10 property, child support, or private mortgage  
11 lender foreclosing, everybody else has to abide  
12 by the usual rule that you only take what you're  
13 owed? It's just in this particular circumstance  
14 the state favors itself. Why isn't that some  
15 indication of a punitive purpose?

16 MS. ROSS: So because I don't think it  
17 shows that the state is looking to punish the  
18 individuals. Again, I think it shows that it's  
19 trying to help itself, and that may well be a  
20 reason why we -- we think it's a taking, but I  
21 don't think it pushes it over into punitiveness.

22 JUSTICE GORSUCH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh?

25 Justice Barrett?

1 JUSTICE BARRETT: No.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Jackson?

4 JUSTICE JACKSON: Can I just go back  
5 to Justice Gorsuch's point? Because I'm  
6 struggling with this notion of variability not  
7 being a penalty. You would think that if it was  
8 remedial and it was the kind of thing that some  
9 of my colleagues have talked about, where they  
10 take a percentage as a result of this  
11 circumstance or there's sort of a set standard,  
12 that that would be closer to remedial.

13 It feels very punitive in my view at  
14 least when you're talking about the, you know,  
15 massive differences that could occur just  
16 depending upon arbitrarily the value of a  
17 person's home.

18 MS. ROSS: So -- so, again, Justice  
19 Jackson, I think the reason it's not -- that  
20 aspect of it is not punitive is because, in some  
21 instances, it's going to benefit the taxpayer,  
22 the taxpayer who owes, you know, \$100,000 --

23 JUSTICE JACKSON: Well, in some  
24 instances --

25 MS. ROSS: -- in taxes.

1 JUSTICE JACKSON: -- in some  
2 instances, incarceration could benefit someone  
3 who's not -- who's homeless, for example. That  
4 doesn't make it not punitive. So, you know, I  
5 -- I'm not sure that that argument really  
6 actually carries the day on the characterization  
7 of this.

8 Let me ask you about the relationship  
9 to culpability as well. What -- what is your  
10 response to the county's in their brief  
11 suggestion that this really is kind of the fault  
12 of Ms. Tyler because, if she'd just kind of sold  
13 it on her own or she'd, you know, taken it into  
14 her own hands to do this, then they wouldn't  
15 have had to? Isn't that sort of a statement  
16 of -- at least in the nature of a culpability  
17 assessment?

18 MS. ROSS: I don't think so because I  
19 don't think they're saying, you know, she -- she  
20 did it through ill will or something that sort  
21 of we -- we more generally think of as -- as  
22 punitive or -- or even blaming of her.

23 You know, I think what's going on  
24 here, again, is basically that the -- the state  
25 wants to put these properties back into sort of

1 the revenue stream, it wants to not have to pay  
2 the person back because that's administratively  
3 complicated, things like that that I think, you  
4 know, again, may well push it into takings  
5 territory but that just don't have a ring of  
6 punitive in this sense.

7           You know, I think it's important to  
8 take a step back and this Court has only  
9 addressed the Excessive Fines Clause on a few  
10 occasions, and in those cases, they've generally  
11 either been criminal penalties or had a very  
12 close nexus to them. And, you know, we --

13           JUSTICE JACKSON: But you do agree  
14 with Justice Gorsuch --

15           MS. ROSS: -- perfectly accept that  
16 Austin --

17           JUSTICE JACKSON: -- you do agree with  
18 Justice Gorsuch's evaluation of the precedent in  
19 the sense that it -- it doesn't have to be  
20 criminal in order to trigger this provision,  
21 correct?

22           MS. ROSS: That's correct, Justice  
23 Jackson. My point is simply that this is such a  
24 far cry from the cases in which the Court has  
25 previously considered this clause that it --

1 it's just even more reason sort of not to reach  
2 out to decide the issue here.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Katyal.

7 ORAL ARGUMENT OF NEAL K. KATYAL

8 ON BEHALF OF THE RESPONDENTS

9 MR. KATYAL: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 This Court should affirm Judge  
12 Colloton's opinion for three reasons. First,  
13 Petitioner lacks standing. I'll outline two  
14 other points and then return to standing as it's  
15 jurisdictional.

16 Second, on the merits, the law here  
17 falls within a long tradition that stretches  
18 back before the republic, was present at the  
19 founding, and is confirmed by the very page of  
20 Henry Black's tax treatise that Petitioner block  
21 quotes.

22 This Court in *Texaco* made clear that  
23 a -- when a property right is extinguished due  
24 to an owner's failure to comply with reasonable  
25 conditions on ownership, there is no taking that

1 requires compensation. That's this case.

2           Petitioner failed to act after  
3 repeated notice for five years. Because owners  
4 can act to avert this result, this Court has not  
5 called such actions takings, as Nelson  
6 underscores.

7           And, third, Petitioner's theory would  
8 declare many state statutes today  
9 unconstitutional and create practical problems  
10 akin to what Justice Sotomayor referred to,  
11 including forcing governments to act as real  
12 estate agents and fiduciaries, and even forcing  
13 them to pay claims immediately at forfeiture,  
14 well before a property is sold.

15           The merits of this case are no doubt  
16 difficult, but I don't believe standing is, so I  
17 want to start there.

18           Petitioner -- the face of the  
19 complaint does not contain allegations that show  
20 standing. Petitioner's right to say we didn't  
21 make this argument before, we should have. But  
22 standing is jurisdictional. It can't be waived.  
23 And, here, it's missing.

24           Petitioner's theory of injury is she  
25 had a right to equity, which she defines as "her

1 financial interest in the property after  
2 deducting encumbering liens." But her complaint  
3 just says excess funds existed after the sale,  
4 not excess funds belonging to her. She never  
5 alleges she had equity, let alone a plausible  
6 claim to it.

7 And the lack of these allegations  
8 infects the entire valence of this case,  
9 creating a dangerous reality distortion field.  
10 Everything Petitioner claims about the law and  
11 what's in her briefs is about the harm of taking  
12 her equity, but the complaint just doesn't  
13 allege that.

14 JUSTICE THOMAS: I think I'll bypass  
15 the standing. The -- I think, at bottom, she's  
16 saying the county took her property, made a  
17 profit on it with the surplus equity, and it  
18 belongs to her.

19 But, at any rate, can you think of,  
20 Mr. Katyal, any instance in which a creditor can  
21 foreclose on property and -- or seize property  
22 and keep the excess profit or the excess amount  
23 over the debt that's actually owed?

24 MR. KATYAL: So, Justice Thomas, with  
25 respect to standing, just her complaint and her

1 petition disclaims the idea she's attacking the  
2 taking of the title or forfeiture. That's page  
3 3 of her petition. It's very clear.

4           So, as this case comes to the Court,  
5 unlike the three other cases that are pending  
6 before you which raise this issue, she --  
7 present the same question presented in two of  
8 them, those are ones which claim surplus equity.  
9 They say there's no other mortgage and the like.  
10 She's only attacking surplus equity here in --  
11 in her merits brief. That's just not the theory  
12 of the complaint whatsoever. So there's a  
13 complete mismatch between the two.

14           With respect to your question, which  
15 goes to Judge Kethledge's opinion, we agree  
16 that, you know, it's very different for private  
17 mortgages. The whole point that a state like  
18 Minnesota and, indeed, 19 other states are  
19 worried about is they don't want to be real  
20 estate agents of last resort. With a private  
21 mortgage, the bank opts in affirmatively to that  
22 and they say, you know, here are the conditions  
23 and the like.

24           With this situation, the government is  
25 stuck holding the bag at the end of the day.

1 And that's why you have a different tradition.  
2 It's a tradition that goes back to even before  
3 the republic, to the Statute of Gloucester in  
4 1278, as the Chief Justice was pointing out, the  
5 Virginia statute in 1790 --

6 JUSTICE GORSUCH: The Statute of  
7 Gloucester, 12 -- 1292, is that right, Mr.  
8 Katyal?

9 MR. KATYAL: I think 1272 if I recall.

10 JUSTICE GORSUCH: '72, all right.  
11 Well, you know, a funny thing happened after  
12 that. It was called the Magna Carta.

13 (Laughter.)

14 MR. KATYAL: Yeah.

15 JUSTICE GORSUCH: And, you know,  
16 there's one line in the reply brief that I  
17 thought summarized the point pretty well. Let's  
18 see here. I apologize, I don't have it right at  
19 hand. Yeah. "Tyler was not a vassal owing  
20 fealty to her lord but a modern-day fee simple  
21 owner of real property."

22 And the -- the Statute of Gloucester  
23 was about lands owned by the feudal lord and  
24 what happens when a vassal fails to provide  
25 enough wheat to his lord and can his lands,

1 which really belong to the lord, escheat to the  
2 lord. And I just don't understand what on earth  
3 any of that history has to do with this case.

4 MR. KATYAL: So, first of all, Justice  
5 Gorsuch, they cited the Magna Carta, which was  
6 in 1215. In response, we cited a later and more  
7 particular statute, the Statute of Gloucester,  
8 in 1278.

9 JUSTICE GORSUCH: I think Magna Carta  
10 was interpreted many, many times thereafter.  
11 And we have --

12 MR. KATYAL: Absolutely.

13 JUSTICE GORSUCH: -- the briefs before  
14 us. But you -- you want to -- how do -- just  
15 how does the rights of a -- of a feudal lord  
16 have anything to do with a fee simple case?

17 MR. KATYAL: So --

18 JUSTICE GORSUCH: I just am stuck on  
19 that.

20 MR. KATYAL: Yeah. So we're certainly  
21 not arguing that the king's powers are  
22 equivalent to the states' after the founding or  
23 that Ms. Tyler is a vassal or anything like  
24 that. We're simply --

25 JUSTICE GORSUCH: Good. I'm glad --

1 I'm glad to hear that. That's progress.

2 (Laughter.)

3 MR. KATYAL: Yeah. Yes, of course,  
4 Justice Gorsuch. We're saying, historically,  
5 the failure to meet conditions of property  
6 ownership, which that tradition of quit-rent,  
7 which goes all the way back to that statute, at  
8 the founding, that was the template. Look at  
9 St. George Tucker, which this Court isolated in  
10 the Dobbs case, as being the authoritative  
11 state -- source of -- of Blackstone.

12 What Tucker said both in his written  
13 opinions and in his treatise is this, and in the  
14 -- in the Kinney case versus Beverly in 1808, he  
15 said: Under the Virginia Constitution, all  
16 escheats, penalties, and forfeitures heretofore  
17 going to the king shall go to the Commonwealth.

18 And there's a long tradition of  
19 tracing that. Tucker says, you know, in his  
20 Blackstone Commentaries, this Virginia statute  
21 of 1790 is an example of complete forfeiture.  
22 It traces back to the founding. Many states  
23 used it in the 19th Century, from Maine in 1836  
24 to North Carolina in 1843.

25 The California Supreme Court, of

1 course, has a written opinion all about this and  
2 how it's not a taking because there are  
3 reasonable expectations when these statutes are  
4 created to say, look, you have complete  
5 forfeiture if you don't pay your taxes.

6 CHIEF JUSTICE ROBERTS: Just to  
7 interrupt quickly on -- on standing, I mean, a  
8 lot of people have property that's under water,  
9 I mean, that they -- it's heavily mortgaged, you  
10 know, that they're not going to make any profit  
11 of it.

12 But, you know, real estate values  
13 change. I mean, the fact that -- that she may  
14 have liens on her property that -- that are  
15 going to be difficult to pay off right now  
16 doesn't mean that any -- you know, the bank or  
17 anyone else can just walk in. It's not  
18 valueless just because she owes a lot of money  
19 on it.

20 MR. KATYAL: Mr. Chief Justice, if she  
21 had said that in her complaint and it wasn't  
22 just conclusory, which is what Iqbal and Twombly  
23 require, we wouldn't be making this argument.  
24 But the fact is, when you go through the  
25 complaint, there's not a word of that

1       whatsoever. And Iqbal and Twombly say you've  
2       got to at least rule out reasonable  
3       alternatives.

4                       Here, the reasonable alternative, the  
5       reason why this case looks almost too perfect,  
6       is because it's not telling you something really  
7       important in the complaint. She says, I owed  
8       \$15,000. She said the government sold it for  
9       \$40,000. This looks horrible.

10                      JUSTICE BARRETT: She doesn't have to  
11       negate every possible claim, though. All of  
12       this isn't in the record. I mean, if she owes  
13       these liens, I mean, it seems to me that's a  
14       counterargument that you can make, and you  
15       say -- you could say, in valuation, in fact,  
16       your property wasn't that -- you don't have any  
17       of that in the record.

18                      MR. KATYAL: Justice Barrett, our  
19       point is much simpler, which is she's got to  
20       make the allegation that she's got surplus  
21       equity. It's actually not in the complaint.

22                      JUSTICE BARRETT: But liberally  
23       construed. I mean, I think Justice Thomas is  
24       right, that's -- that's clearly what she's  
25       saying. And to the extent there's something

1 that would counter it down -- so you're saying  
2 she would actually have to say, I am  
3 unencumbered by any kind of mortgage or lien?

4 MR. KATYAL: I think that's certainly  
5 a way to do it. And if you -- this is the  
6 easiest thing in the world to allege. All she  
7 has to do is say, look, there's a dollar of  
8 surplus equity at stake. And if you want to  
9 look, look at the three complaints that are  
10 pending before you, two of which she's filed.

11 In Fair versus Continental, paragraph  
12 4 says the taxpayers "have no mortgage on the  
13 property and will be stripped of the equity in  
14 their home," which they list to be \$50,000. In  
15 the Meisner complaint in paragraph 37, they say  
16 there's no mortgage and then say -- they go  
17 through the property records to show that.

18 JUSTICE GORSUCH: Well, Mr. Katyal,  
19 sometimes people who take out mortgages are  
20 personally liable for the debt even after a -- a  
21 -- a mortgage sale for any excess owed, and  
22 that's possible here, right?

23 MR. KATYAL: Oh, it certainly could be  
24 possible. It's just not alleged that. She's  
25 the master of the complaint.

1 JUSTICE GORSUCH: Well, so she has to  
2 allege that there are mortgages that -- but that  
3 I -- I would be personally liable to them  
4 anyway.

5 MR. KATYAL: She's got to allege --

6 JUSTICE GORSUCH: Is that -- is that  
7 what you're suggesting?

8 MR. KATYAL: -- she's got to allege a  
9 Article III injury in fact. So, if the theory  
10 is that she owes some debt --

11 JUSTICE GORSUCH: I mean, you're --  
12 you're asking us to bring into the record that  
13 there are mortgages, okay, and take cognizance  
14 of that, even though we don't have that --

15 MR. KATYAL: We -- we --

16 JUSTICE GORSUCH: -- in -- in the  
17 pleading. Just let me finish.

18 And I would think then, if we're going  
19 to take that and do -- do our -- take judicial  
20 notice of that, we'd also take judicial notice  
21 of the fact that people often owe personal --  
22 are personally liable for those mortgages and  
23 that the money that went to the state here could  
24 have been used to discharge her personal debt.

25 And then where are we? It seems to me

1 like we're at summary judgment.

2 MR. KATYAL: So, no, Justice Gorsuch.  
3 So all we're saying is that she's got to allege  
4 in a non-conclusory way that there is some debt,  
5 that this is a recourse mortgage. She hasn't  
6 alleged even that. There's just nothing.

7 JUSTICE JACKSON: What about the fact  
8 that this is a class complaint as far as I can  
9 tell as well?

10 MR. KATYAL: Yeah. So I don't think  
11 --

12 JUSTICE JACKSON: So how do we account  
13 for that with respect to your theory of what has  
14 to be alleged?

15 MR. KATYAL: Doesn't -- doesn't itself  
16 provide standing. She's got to have a -- she  
17 has to isolate someone who has an Article III  
18 injury. And these other complaints do that very  
19 easily and for a really good reason. They say  
20 there are due process notice problems.

21 That's why people walk away from their  
22 equity. When we looked at this case and we  
23 asked why in the world would it be that Tyler  
24 walked away from her home, the reason we think  
25 is that there was no equity in the home, and

1 that's why she walked away. That's why this  
2 case looks a little bit too perfect.

3 And if you decide this case, as  
4 opposed to the three others that are pending  
5 before you, I think you get a distorted view of  
6 what's going on --

7 JUSTICE JACKSON: But even if there's  
8 no equity, I don't understand why that's still  
9 not an injury if she says that she's entitled to  
10 get the money back from the government.

11 MR. KATYAL: Well, she's got to  
12 explain a theory of how she would get the money  
13 back if it's already owed, for example, as  
14 Justice Gorsuch says, to someone else, the bank.

15 JUSTICE JACKSON: She'd get it back  
16 because the court would give it to her, and then  
17 she would do with -- with it as she would. I  
18 don't -- I guess I don't understand why the fact  
19 that she might owe someone else money, there's a  
20 lien on it, has anything to do with whether  
21 she's injured if she doesn't get it back from  
22 the government.

23 MR. KATYAL: Because, if -- if -- if  
24 she got the money back that way and, like, she  
25 could take the money and I suppose go to Aruba

1 or something like that, that isn't, I think,  
2 what could ever happen in the real world. If  
3 there is actually a lien, she's got -- those  
4 people would get paid first, the bank or  
5 something like that, which is Justice Gorsuch's  
6 point about the debt being owed.

7 She's just got to allege any Article  
8 III injury in fact, Justice Jackson, and she  
9 hasn't done that. She has --

10 JUSTICE KAGAN: When you said it  
11 distorts the case, how does it distort the case?

12 MR. KATYAL: Because, in the real  
13 world, people don't walk away, Justice Kagan,  
14 from meaningful equity in their homes. The only  
15 way they do that and what pumps up those numbers  
16 when they say this is happening in state after  
17 state is notice problems. It's due process  
18 problems where people don't learn about the  
19 situation. And so that's why those other  
20 complaints are due process --

21 JUSTICE JACKSON: What do you mean  
22 "walk away"? I don't understand. What do you  
23 mean --

24 MR. KATYAL: Well --

25 JUSTICE JACKSON: -- when you say

1 people don't walk away? Did she walk away in  
2 this situation?

3 MR. KATYAL: Oh, she -- she  
4 affirmatively did walk away, so we do think --

5 JUSTICE JACKSON: By doing what?

6 MR. KATYAL: -- it's just like  
7 abandonment. We -- well, first of all --

8 JUSTICE JACKSON: By not paying the  
9 taxes? That's -- that's your view?

10 MR. KATYAL: Not paying taxes after  
11 the notification and actually telling the county  
12 the following. She told the county -- and this  
13 is what, if we ever got to a remand or  
14 something, we would say -- but "Geraldine Tyler  
15 states she did not live at the property anymore  
16 and wants nothing to do with it."

17 So that's something we would introduce  
18 on remand if we were ever in a world of  
19 abandonment. That's what she told the county.  
20 And that's one of the other problems, we think,  
21 that goes to both merits and standing in this  
22 case, which is --

23 CHIEF JUSTICE ROBERTS: On --

24 MR. KATYAL: -- if you think about --

25 CHIEF JUSTICE ROBERTS: I was just

1 going to say, on -- on the merits, at -- at --  
2 at bottom, is your theory that the state can  
3 define property as it wishes?

4 MR. KATYAL: No. Our theory --

5 CHIEF JUSTICE ROBERTS: Well, what is  
6 -- what is the limiting principle?

7 MR. KATYAL: It's --

8 CHIEF JUSTICE ROBERTS: Could it --  
9 could it -- well, isn't that what it's doing  
10 here? It's saying whatever -- whatever you  
11 think you have, after three years of not paying  
12 your taxes, we have it. Your property interest  
13 is, you know, confined to that extent.

14 Now this doesn't mean it's -- I mean,  
15 our property interests are defined and confined  
16 by a lot of things, but I just want to know, if  
17 -- if there is something that the state can't  
18 touch, what is it and where does it come from?

19 MR. KATYAL: Yeah. So we think it  
20 comes and articulated in this Court's decision  
21 in Texaco at page 530 in which the Court said  
22 that a government can extinguish an owner's  
23 failure to comply with reasonable conditions on  
24 ownership.

25 In that circumstance, the Court said

1       there is no taking that requires compensation  
2       because the Court has never required the state  
3       to compensate the owner for the consequences of  
4       its own neglect.

5                   CHIEF JUSTICE ROBERTS:   What about  
6       perspective?   It said, okay, we're having, you  
7       know, a new regime in Minnesota, and everybody  
8       who buys property here should know that it is  
9       subject to whatever, escheatment or something  
10      to -- if the state needs it for a particular  
11      regulation, you get nothing.

12                   That is how we define property.   The  
13      Takings Clause depends upon you having a  
14      property interest.   We, the state, think it's  
15      defined by state law.   You no longer have that.

16                   MR. KATYAL:   Right.   So we think, in  
17      that hypothetical, if I understand it correctly,  
18      that would state a Takings Clause violation  
19      because it is not a traditional way of  
20      understanding property.   It's not reasonable.  
21      One way of understanding what is reasonable  
22      under Texaco is to ask whether it is  
23      traditional.

24                   And, here, the tradition of forfeiture  
25      of land starts, of course, with Statute of

1 Gloucester, Justice Gorsuch's favorite statute,  
2 but then it moves on beyond that to statute  
3 after statute at the founding, after the  
4 founding, and so you can trace it back.

5 In the same way, Mr. Chief Justice, is  
6 you could look at adverse possession and the  
7 Wilcox case from 1831 or the abandonment cases  
8 at the --

9 JUSTICE GORSUCH: So there's actually  
10 some common ground here, it seems to me, that  
11 you -- you're acknowledging it can't be pure  
12 positive law, state law that governs what is  
13 property, right?

14 MR. KATYAL: Correct.

15 JUSTICE GORSUCH: And -- and that we  
16 should look to tradition and history --

17 MR. KATYAL: Correct.

18 JUSTICE GORSUCH: -- for guidance?  
19 And it's just a matter of how we read that  
20 record that's the real question in dispute here?

21 MR. KATYAL: That is correct. We  
22 think that there is actually -- when you drill  
23 down, they do not have a founder, they do not  
24 have a treatise at the founding, they don't have  
25 a judicial opinion that says that this is a

1 Takings Clause violation or anything like that.

2 And you have state after state at this  
3 time, including the Bruen period, the founding,  
4 that had statutes like this, like Virginia and  
5 Kentucky, and --

6 CHIEF JUSTICE ROBERTS: I thought  
7 those were -- it was a minority of the states.

8 MR. KATYAL: It was a minority,  
9 absolutely. But I don't think that the Takings  
10 Clause should be read like, for example, the  
11 cruel and unusual punishment clause with the  
12 textual word "unusual" so that you kind of  
13 outlaw the outliers. This Court's never read  
14 the Takings Clause that way.

15 JUSTICE JACKSON: So, Mr. Katyal, can  
16 I ask you, because there's this point about the  
17 government being able to extinguish the property  
18 rights of the debtor, and you've said it a  
19 couple of times.

20 And it also came up on your friend on  
21 the other side's view of this, although she says  
22 what is happening is the government is taking  
23 the property and liquidating it, essentially,  
24 turning it into cash, and that really what it's  
25 entitled to is just the amount of the debt.

1 It's not that it's entitled to, as a result of  
2 the debt, extinguish completely the property  
3 interests or rights of the -- of the individual.

4 So what is your response to that?

5 Because I think there's a subtle distinction --

6 MR. KATYAL: Sure.

7 JUSTICE JACKSON: -- that's very  
8 important with respect to those two positions.

9 MR. KATYAL: So, Justice Jackson, two  
10 things. One, factually, the government here is  
11 not like -- this is no money-maker for the  
12 government at all. It loses money.

13 JUSTICE JACKSON: No, I understand  
14 that.

15 MR. KATYAL: Yeah. So --

16 JUSTICE JACKSON: My question is, when  
17 you say the government has traditionally been  
18 able to take property and she's not disputing  
19 that in a -- in a tax situation the government  
20 can take it, but what I think she's saying is  
21 you can take it, liquidate it --

22 MR. KATYAL: Correct.

23 JUSTICE JACKSON: -- and extract from  
24 it the amount to which you as the government are  
25 entitled, and you seem to be suggesting that you

1 can take it and extinguish all of the property  
2 interests that she has.

3 MR. KATYAL: And that is exactly what  
4 happened at the founding. St. George Tucker's  
5 treatise recognized that the Virginia statute  
6 does that. The 1837 Arkansas statute is so  
7 express, Justice Jackson, it says you can sell  
8 this for a surplus and use it to pay for schools  
9 --

10 JUSTICE KAGAN: Are there any limits  
11 to that?

12 MR. KATYAL: -- and pay for schools.

13 JUSTICE KAGAN: I mean, \$5,000 tax  
14 debt, \$5 million house, take the house, don't  
15 give back the rest?

16 MR. KATYAL: Well, I think this  
17 Court's decision in Nelson affirmed a scheme in  
18 which it was a \$65 water bill, Justice Kagan,  
19 and the house was sold for \$7,000, and this  
20 Court said that was absolutely permissible and  
21 would --

22 JUSTICE KAGAN: But Nelson had a very  
23 easy way for the property owner to get all the  
24 surplus value.

25 MR. KATYAL: Oh, au contraire. It's a

1 much, much harder way, Justice Kagan, in Nelson.  
2 In Nelson, it was a 20-day presale period that  
3 you had to file and ask for the surplus and this  
4 Court said you only might get it back. Here --

5 JUSTICE KAGAN: I mean, in Nelson,  
6 when the state sold the house, you had to file  
7 some paperwork and then you got all the money  
8 back. Here, when the state sells the house,  
9 there's nothing you can file to get your money  
10 back. The state says we'll keep it.

11 And my question is, are there any  
12 limits on that? Take a \$5,000 tax debt and a \$5  
13 million house, and the state says, thanks, we'll  
14 keep it.

15 MR. KATYAL: So, Justice Kagan, two  
16 things. One, on Nelson, I think every part of  
17 what you said I don't think is actually a  
18 correct description of either Nelson or  
19 Minnesota today.

20 So, in the Nelson statute, when -- you  
21 had 20 days to file pre-forfeiture. If you  
22 filed it on the 21st day, you were completely  
23 out of luck. You weren't guaranteed anything.  
24 You only might get something if you filed.

25 Here, you have five years from the

1 time of you haven't paid taxes to try and  
2 file -- to -- to redeem, and then even  
3 afterwards, after the government takes your  
4 house and gets complete title to it, you have at  
5 least six months and perhaps many years to buy  
6 the property back from the government.

7 You had none of those options  
8 available in Nelson. At page 105 --

9 JUSTICE GORSUCH: Let's -- let's just  
10 --

11 MR. KATYAL: -- they say --

12 JUSTICE GORSUCH: -- let's just answer  
13 Justice Kagan's question. I -- I'd like an  
14 answer to it too.

15 MR. KATYAL: Yeah.

16 JUSTICE GORSUCH: Assume if we have  
17 to, all right, that there is no mechanism for an  
18 opportunity to get the surplus value in this  
19 statute, and the government takes a million  
20 dollar property or however, I've forgotten the  
21 numbers, for a modest amount owed to the  
22 government, a \$5 amount. Taking, no taking?

23 MR. KATYAL: So two things, Your  
24 Honor. First is it's not a taking, but it very  
25 well would be a Due -- Due Process Clause

1 violation because there's usually a lack of  
2 notice, that if it's a \$5 thing, I would say --

3 JUSTICE GORSUCH: Well, put aside --  
4 put aside the notice. Taking or no taking?

5 MR. KATYAL: It's not a taking for  
6 exactly the reason this Court said in Nelson at  
7 page 110, "It is contended this is a harsh  
8 statute. The New York Court of Appeals spoke of  
9 the extreme hardships resulting from the  
10 application of the statute in this case, but it  
11 held, as we must, that relief from the hardship  
12 is the responsibility of the state legislature  
13 and not of the courts."

14 JUSTICE GORSUCH: So a \$5 --

15 MR. KATYAL: That's what you said.

16 JUSTICE GORSUCH: -- a \$5 property  
17 tax, a million dollar property, good to go?

18 MR. KATYAL: That was \$65 and 7,000.  
19 If you want to overrule Nelson, you know, then  
20 we'll be in different territory. But, if you  
21 start to think about overruling Nelson, I think  
22 you get into all the problems that Justice  
23 Sotomayor talked about, the policy concerns  
24 about a bomb basically going off.

25 And my friend on the other side's oral

1 argument illustrates precisely the problems that  
2 district courts will have in valuating these  
3 things. Her brief says at page 4, her reply  
4 brief, that it's the fair market value which is  
5 the measure of things and that the taking occurs  
6 at the moment title is transferred. If that's  
7 the case, where, here, she says it was \$54,500,  
8 that would mean governments are on the hook for  
9 \$14,500 in this case.

10 CHIEF JUSTICE ROBERTS: If -- if all  
11 that's true on the extent to which you're --  
12 you're willing to push the state's authority,  
13 what's the point of the Takings Clause?

14 I mean, that was something that was  
15 pretty important to the framers. Why did they  
16 put that in there if, in fact, the states -- and  
17 you say, in fact, you know, some of them had it.  
18 Virginia, Kentucky, were exercising  
19 extraordinary authority to take private  
20 property. The Constitution seemed to have a  
21 different idea in mind.

22 MR. KATYAL: Oh, we think there's a  
23 vital purpose of the Takings Clause, and it's  
24 really twofold. Number one, there's many  
25 circumstances like eminent domain in which an

1 individual can't avert the taking whatsoever.

2 You know, if the --

3 CHIEF JUSTICE ROBERTS: Well, but, I  
4 mean, the Constitution says without just  
5 compensation. I don't think the framers were  
6 ignorant of the notion of eminent domain, but  
7 they still wanted to protect private property if  
8 you don't pay for it.

9 MR. KATYAL: Oh, absolutely. My point  
10 is just that, you know, I think central to what  
11 the framers were thinking about were  
12 circumstances in which an owner can't avert the  
13 taking one way or the other. So, if the  
14 government's taking your house to build a road  
15 or something, just compensation, obviously.

16 Cases like Texaco and Nelson  
17 recognize, Mr. Chief Justice, that when someone  
18 can avert the situation by complying with the  
19 conditions of ownership, that's a very different  
20 circumstance, just like adverse possession or  
21 abandonment or the decision to tax --

22 JUSTICE GORSUCH: Well, eminent domain  
23 you can avert too. If they want to build a  
24 shopping mall on your -- on your farm, you can  
25 say, I'll build a shopping mall. They could

1 avert that.

2 MR. KATYAL: Yeah, but I think this  
3 Court's recognized that that is a bridge too  
4 far. And as long as it's a reasonable --

5 JUSTICE GORSUCH: That's a bridge too  
6 far?

7 MR. KATYAL: Yeah.

8 JUSTICE GORSUCH: But the \$7, \$5 for a  
9 million dollars is not a bridge too far?

10 (Laughter.)

11 MR. KATYAL: Well, it's -- the  
12 question, Justice Gorsuch, is whether it is a  
13 reasonable condition on property ownership. And  
14 we think the answer to that, which I think is  
15 consistent with your methodology, is to go back  
16 and look at the founding and ask yourself  
17 whether or not they would consider this a  
18 taking.

19 Is there affirmative support for that?  
20 It's to the contrary. You have states at the  
21 founding, you have Tucker, St. George Tucker,  
22 who this Court recognized as the leading  
23 authority, saying this is okay. You'd expect  
24 someone to have said the opposite at the  
25 founding if it weren't. But there is no person

1 --

2 JUSTICE JACKSON: Mr. Katyal, why --  
3 why are you suggesting that there would be,  
4 like, a real big practical problem if we ruled  
5 in the way that your friend on the other side  
6 wants us to? My understanding is that  
7 Minnesota's statute and the states at the  
8 founding that were doing this were in the  
9 minority. So most states allow for some sort of  
10 a surplus or have some sort of mechanism to give  
11 the money back to homeowners.

12 So what is the big practical problem  
13 that we would face?

14 MR. KATYAL: So, Justice Jackson,  
15 just, you know, no state actually does what  
16 they're seeking at least at reply brief page 4,  
17 which is the fair market value at the time of  
18 taking. So that's not one state.

19 Twenty states, I think they agree, do  
20 what Minnesota is doing here, so you'd  
21 jeopardize those. And, indeed, more than half  
22 the states, as the MLTA brief points out, don't  
23 automatically return the surplus.

24 JUSTICE JACKSON: Not automatically,  
25 but, I mean, they have some mechanism whereby a

1 person can get the money back.

2 MR. KATYAL: And -- but, again, it's  
3 very restricted in many of those states, and  
4 it's got to be done under a very, very fast  
5 timeframe, akin to my conversation with Justice  
6 Kagan before.

7 So there's actually a worry that if  
8 you pass a -- if you -- if you constitutionalize  
9 in this area -- and this is what the Minnesota  
10 brief says at page 6 -- you'll force states into  
11 shorter periods for statute of limitations and  
12 redemption periods, making world -- making  
13 things even harder for individual taxpayers.

14 JUSTICE KAGAN: If you had a \$10,000  
15 income tax bill due and the government came in  
16 and took the -- your \$100,000 bank account and  
17 didn't give you the \$90,000 back, taking?

18 MR. KATYAL: Takings. Yeah.

19 JUSTICE KAGAN: So what's the  
20 difference?

21 MR. KATYAL: There's no -- that's not  
22 a reasonable condition on property ownership,  
23 which is a different line of cases, a different  
24 suite of authorities, because, in that kind of  
25 circumstance, you know, tracing all the way back

1 to the founding, you have in rem liability to  
2 the government in that circumstance.

3 JUSTICE KAGAN: Is the difference  
4 historical only, or is there some functional  
5 difference?

6 MR. KATYAL: We think it's mostly  
7 historical. There might be a functional  
8 difference because it is in rem, so the  
9 government has the bitter and the sweet. It can  
10 only go after the property to the extent the  
11 property is worth anything. As the Chief  
12 Justice said, sometimes properties are under  
13 water. So one of the reasons that --

14 JUSTICE KAGAN: If -- if the mind  
15 rebels at the notion that the government can  
16 seize your \$100,000 bank account and not give  
17 you back the \$90,000 that you don't owe, if the  
18 mind rebels at that, you know, why should  
19 whether it's -- what was going on in 1200 or  
20 what was going on in 1776 change anything --

21 MR. KATYAL: Well, Justice --

22 JUSTICE KAGAN: -- about that?

23 MR. KATYAL: -- Justice Kagan, I'd say  
24 you'd have to be pretty darn sure that this was  
25 a constitutional violation and not just your

1 policy preferences at that point when you have  
2 precedent like Nelson, which is approving \$65  
3 and \$7,000, and you've said, you know, time and  
4 again --

5 JUSTICE KAGAN: Okay. We definitely  
6 have a different view of Nelson. My view of  
7 Nelson is you can get your money back by filing  
8 a form.

9 MR. KATYAL: And we can then -- if  
10 that's true, that's just as true for Minnesota,  
11 indeed, even truer, because it's much easier to  
12 get your money back under this statutory scheme  
13 than the "might" you get your money back, which  
14 was the language of Nelson, and you only had 20  
15 days to do it there. Here, you've got about six  
16 years to do it.

17 JUSTICE KAGAN: You had 20 days after  
18 the sale. You didn't have --

19 MR. KATYAL: No. Twenty days after  
20 the forfeiture, before the sale, Justice Kagan.

21 JUSTICE KAGAN: But you had all the  
22 time that you weren't paying your taxes, in the  
23 same way that you have all that time in this  
24 statute.

25 MR. KATYAL: And you --

1                   JUSTICE KAGAN: I guess what I'm  
2 asking is, like, what's -- what's the  
3 difference? Why should land be treated so much  
4 more favorably to -- that the state can just  
5 keep the whole when the state could never do  
6 that with cash?

7                   MR. KATYAL: It's -- it's not as much  
8 about land being different as there is a  
9 different historical tradition. And when you  
10 were asked under Texaco whether this is a  
11 reasonable condition on ownership, you go back  
12 and look at that.

13                   This Court has said time and again  
14 there's a real difference between what's good  
15 policy and what's outrageous -- Nelson, that  
16 language I read to you, is all about it -- and  
17 what is unconstitutional.

18                   There's been huge variation, as they  
19 acknowledge, in the states from the founding on.  
20 That variation really underscores that something  
21 beyond just constitutional restrictions are at  
22 stake. There are different policy objectives  
23 that different states have, going back to  
24 Justice Jackson's question.

25                   And for this Court to

1 constitutionalize it and to change the game is  
2 really going to force rigidity on the states and  
3 risk, as Justice Sotomayor was pointing out,  
4 really different valuation schemes in different  
5 district courts about fair market value or  
6 something else this Court --

7 JUSTICE BARRETT: Mr. Katyal --

8 CHIEF JUSTICE ROBERTS: Counsel --

9 JUSTICE BARRETT: -- what about  
10 Justice Alito's question about the car? So  
11 Justice Kagan's asking you, is the bank account  
12 different? What about the hypothetical of you  
13 owe, like, \$20 of parking tickets? Can the  
14 state just take your whole car?

15 MR. KATYAL: Again, I don't think that  
16 there's a -- that would be a reasonable  
17 condition on ownership because there is no  
18 tradition that goes back that could be looked  
19 to.

20 JUSTICE BARRETT: Well, there weren't  
21 cars then.

22 (Laughter.)

23 MR. KATYAL: Well, but buggies,  
24 whatever. You know --

25 JUSTICE BARRETT: Your buggy?

1                   MR. KATYAL: -- whatever. I mean, you  
2 know, there isn't something to look to. And I  
3 don't want to say that that's a complete  
4 straitjacket on governments. But I think, here,  
5 all you need to decide is you look at this  
6 statute in the other 19 states that have  
7 exactly -- you know, have very similar statutes  
8 and you ask is this reasonable --

9                   JUSTICE BARRETT: So property is just  
10 -- real property is sui generis?

11                   MR. KATYAL: Well, I think it's that  
12 the tradition of real property at least is what  
13 would decide this case. I don't want to say  
14 that it's just -- that it's actually something  
15 about the property or the in rem thing  
16 specifically. But I do think that that  
17 tradition is a very good guide here, and I think  
18 this Court should be equipped --

19                   JUSTICE KAVANAUGH: Why would we read  
20 --

21                   CHIEF JUSTICE ROBERTS: I think --

22                   JUSTICE KAVANAUGH: -- why would we  
23 read the Constitution to disfavor real property,  
24 though? That seems very counterintuitive.

25                   MR. KATYAL: I don't think it's

1 disfavoring or favoring. I think that the  
2 government did -- you know, governments have  
3 understood, Justice Kavanaugh, that land is kind  
4 of unique because it is the source on which  
5 wealth, particularly early wealth, was created,  
6 and so there are incentives to encourage  
7 productive use. That's what's the abandonment  
8 cases and the adverse possession cases are all  
9 about. So there actually is some tradition when  
10 it comes to land ownership.

11 Here, we think, to the extent you  
12 think it's like abandonment -- to the extent you  
13 think abandonment is okay, this is a classic  
14 case of abandonment. She even said she wanted  
15 to abandon this condo.

16 CHIEF JUSTICE ROBERTS: Counsel, I  
17 think you're right that there's a difference  
18 between the value that our history places upon  
19 money and property, but I think it's the exact  
20 opposite of what you're saying. I think our  
21 cases bear this out, where they talk about  
22 property, you know, land, being essential to the  
23 preservation of liberty and it's a bulwark  
24 against the dominance of the state.

25 Money, on the other hand, you know,

1 inflation, it's worthless, but land is still  
2 there. And to say that there's a greater degree  
3 of protection for money as opposed to property,  
4 I think, has it exactly backwards.

5 MR. KATYAL: Yeah, I don't know that  
6 I'm saying it's a greater protection or not.  
7 I'm just saying, for purposes of this case, all  
8 you have to do is look to, Mr. Chief Justice,  
9 the land cases, like Texaco. Page 525 of Texaco  
10 says, we are treating this property just like a  
11 "fee simple." And what it said is, if it's a  
12 reasonable condition on ownership, and there, if  
13 you just didn't register your claims, then you  
14 were out all of the money that you had spent and  
15 the land itself and all the improvements with  
16 respect to the mining in that.

17 CHIEF JUSTICE ROBERTS: Well, but, I  
18 mean, we've heard it a lot. The raisin case, I  
19 mean, there, they said there was no doubt you've  
20 got your raisins, and there's no doubt they  
21 could come along and say you owe us 10 percent  
22 of the value. Fine. But, as soon as they say  
23 we're taking 10 percent of your raisins, whole  
24 'nother game.

25 MR. KATYAL: A hundred percent right,

1 Mr. Chief Justice. In that case, you had a  
2 statute, the raisin thing, which isn't some  
3 reasonable traditional thing. It didn't harken  
4 back to some -- something that states had done  
5 or governments had done from the founding.

6 And, indeed, your opinion for the  
7 Court there quoted the Tucker treatise and said  
8 the whole point of the Takings Clause is to  
9 think about reasonable expectations of property.  
10 And we absolutely agree St. George Tucker said  
11 that the 1790 statute is a permissible example  
12 of government operating and it was completely  
13 taking all of the land.

14 CHIEF JUSTICE ROBERTS: Well, then why  
15 would they -- I'm into my other allocation of  
16 time here. Why would they say that they -- yes,  
17 you could have a tax on the raisins for whatever  
18 amount, but, no, you can't take them?

19 MR. KATYAL: Because I think the tax  
20 is something that is a reasonable condition,  
21 whereas taking them, it doesn't have the same  
22 historical tradition.

23 And so we're just saying here, you  
24 know, this is the test this Court has used from  
25 Texaco on, and we think it should apply here.

1 And that's what explains Nelson. And if states,  
2 as Justice Jackson points out, want to do things  
3 differently, they're, of course, free to do so.

4 We're not saying our rule's  
5 constitutionally compelled, but we don't think  
6 that the states have a constitutional  
7 straitjacket.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Thomas?

10 JUSTICE THOMAS: Mr. Katyal, you  
11 referred to the Virginia statute a couple of  
12 times -- a number of times. And do you have any  
13 examples of the application of that statute in a  
14 case where the taxes, the amount recovered, the  
15 amount of land was in excess of the taxes owed?

16 MR. KATYAL: So the Tucker treatise  
17 just says it does happen. I don't think we  
18 looked for a formal case in which it did. But I  
19 think the important point, Justice Thomas, is,  
20 if this were unconstitutional, if this were a  
21 violation of fundamental rights, you certainly  
22 would have expected this expert, Tucker, to have  
23 said so in his commentary.

24 The fact that he went out of his way  
25 to praise it do suggest to us that this was not

1 unconstitutional as the way the founders  
2 understood it.

3 JUSTICE THOMAS: But I could also  
4 think on the -- conclude on the other side that  
5 in a state where you had a number of individuals  
6 who were land-rich and money-strapped that you'd  
7 have examples of the -- an entire estate being  
8 forfeited for a modest tax --

9 MR. KATYAL: Yeah.

10 JUSTICE THOMAS: -- if you are right.

11 MR. KATYAL: Well, I -- I don't know.  
12 Very -- very few reported cases, of course, at  
13 this time across the country anyway, and,  
14 certainly, for, you know, land disputes, we do  
15 point out that it's not just Virginia and not  
16 just Kentucky in 1801. It's Maine in 1836;  
17 Arkansas, 1837, you know, and -- you know, and  
18 many other states that are brief isolates. So  
19 this was a common feature in the 19th Century.

20 JUSTICE THOMAS: Yeah, I'm only saying  
21 that if you -- the fact that you see nothing,  
22 you don't see -- you don't have an example also  
23 indicates that perhaps they simply liquidated  
24 what was necessary to cover the taxes.

25 MR. KATYAL: I -- I suppose. But I --

1 I think it might just reflect, Justice Thomas,  
2 the fact that nobody thought there was any  
3 problem with it, so there was litigation to had  
4 -- be had.

5 JUSTICE THOMAS: Well, I think  
6 Jefferson would. He was always money-strapped.

7 (Laughter.)

8 JUSTICE THOMAS: And he didn't exactly  
9 think fondly of big government, so --

10 MR. KATYAL: Well, again, there's -- I  
11 think it's telling that even Jefferson never  
12 said that the statute in Virginia posed any  
13 problems whatsoever.

14 JUSTICE THOMAS: That's perhaps  
15 because it was never applied in the way that you  
16 suggest.

17 MR. KATYAL: Well, again, I think the  
18 fact that it was written by -- you know, written  
19 about in the most important treatise,  
20 Blackstone's treatise of the time, with praise  
21 and there's no -- you know, nothing from  
22 Jefferson or Tucker or anyone else, I think, is  
23 indicia.

24 Again, I don't think it's our burden,  
25 Justice Thomas --

1 JUSTICE THOMAS: Yeah.

2 MR. KATYAL: -- to prove that there  
3 wasn't a constitutional violation. I think  
4 they've got to -- you know, they're seeking to  
5 topple not just this Court's decision in Nelson  
6 but 200 years of constitutional freedom for the  
7 states. I think they've got to affirmatively  
8 prove it up.

9 CHIEF JUSTICE ROBERTS: Justice Alito?

10 JUSTICE ALITO: Well, let's say that  
11 the state is able to get a fair valuation of the  
12 property and, in fact, a valuation of the  
13 property that if anything is overly generous to  
14 the state, and let's say that the state is also  
15 able to get compensation for all of its  
16 administrative expenses.

17 Then the question arises: Why should  
18 the state be allowed to keep more than that?  
19 And you argue that history supports that or,  
20 rather, there is no history supporting the idea  
21 that the state can't do that.

22 But do you have any other answer as to  
23 why the state should be allowed to keep anything  
24 more than I've just outlined?

25 MR. KATYAL: Sure. I think the

1 government in that circumstance is worried about  
2 balancing the rights of delinquent taxpayers  
3 against the rights of all other taxpayers.

4           And the -- they -- I think they've  
5 decided that in these 20 states that do it this  
6 way, that the best way to encourage the  
7 disposition of land in these circumstances and  
8 -- and -- and houses is to basically incentivize  
9 the owner to sue because, as this Court said in  
10 BFP, when the government sues -- and this is  
11 built into your hypothetical -- you get much  
12 less money than when individuals sue.

13           Forced sales, you know, have  
14 restricted auctions and very few people come.  
15 And so BFP says it's way below market. So the  
16 best way to maximize, these 20 states have  
17 decided, value is by saying, owners, you sue.

18           Now what's the way to get -- owners,  
19 you sell. What's the best way to get owners to  
20 sell? A harsher statute like this. To be sure,  
21 it's harsher because you know, if you don't sell  
22 it yourself, the government's going to sell it  
23 and not sell it for very very much. So that's,  
24 I think, what the amici briefs talks about,  
25 Justice Alito.

1 JUSTICE ALITO: That seems to be a  
2 dispute about how or a question about how the  
3 property is to be valued, but what I was saying  
4 is that if the valuation of the property is done  
5 in a way that is generous to the government, why  
6 should it get more than that?

7 MR. KATYAL: So, if you mean by  
8 "generous to the government" low amounts, I'm  
9 not sure if you meant by "generous to" -- do you  
10 mean lower than fair market value or higher?

11 JUSTICE ALITO: I mean that the  
12 government is made whole.

13 MR. KATYAL: Yeah. So, again, we  
14 think -- and it might be fighting the  
15 hypothetical, but all these states are saying we  
16 can't get the full value of the property through  
17 forced auctions. And your own decision in BFP  
18 recognizes exactly that.

19 And so that's the policy rationale.  
20 To maximize the amount at stake, that's the way  
21 to do it. And also governments fear -- and this  
22 is also in the amici briefs -- that if they're  
23 forced to be the realtor of last resort, even if  
24 they sell it at a high enough price, they could  
25 get sued for not selling it at a price that the

1 owner wants or not suing it fast enough and the  
2 like, they didn't get into the business of being  
3 real estate agents, but that's the position they  
4 will be in.

5 And the amici point out that, you  
6 know, this Court's decisions about chilling  
7 effects for government officers will be at play  
8 here. The moment they start selling, they'll  
9 expose themselves to lawsuits, so they just  
10 won't sell. And that'll be -- create all sorts  
11 of cash flow problems.

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Sotomayor?

15 Justice Kagan?

16 JUSTICE KAGAN: Why doesn't it --  
17 why -- why aren't the state's interests fully  
18 accommodated if they can just put, you know, a  
19 fairly meaningful penalty on it?

20 MR. KATYAL: Well, because, if they're  
21 still forced to sell in that circumstance --

22 JUSTICE KAGAN: Well, it's a penalty  
23 that's -- that -- that has the kind of effect  
24 that -- that you think this scheme has. In  
25 other words, the state won't have to be in the

1 position of a -- of a real estate agent because  
2 somebody will say: Oh, that's a pretty big  
3 penalty, I don't want to have to lose that.

4 MR. KATYAL: I think that states could  
5 do that. I think that states, you know, tracing  
6 all the way back to 1790 have understood that  
7 it's a -- that complete forfeiture is another  
8 way to deal with this and a way to highly  
9 incentivize people in ways that, you know, a  
10 penalty may not be able to do.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 Justice Jackson?

16 JUSTICE JACKSON: Suppose Ms. Tyler  
17 sold off the property to pay the tax debt and  
18 associated fees. Could the county come after  
19 her for the rest of the value of the property?

20 MR. KATYAL: If she sold it -- so  
21 we're back in 2000 -- you know, before title is  
22 transferred and she sells it?

23 JUSTICE JACKSON: Yes, yes.

24 MR. KATYAL: And --

25 JUSTICE JACKSON: She owns the

1 property. She has a tax debt. Instead of the  
2 state having anything to do with taking the  
3 property, she says, I'm going to pay off this  
4 \$5,000 or whatever by selling the property.

5 My question is, could the county say:  
6 When you sold off the property for \$40,000,  
7 we're entitled to the difference?

8 MR. KATYAL: I think, because it's an  
9 in rem, I think she probably couldn't do that,  
10 but the government might be able to impose a  
11 constructive trust in that circumstance at the  
12 time of the sale.

13 JUSTICE JACKSON: I think I'm not  
14 asking my question correctly, so forgive me.

15 My question is, if the tax debt was  
16 satisfied by her selling the condo --

17 MR. KATYAL: Oh.

18 JUSTICE JACKSON: -- and she gave the  
19 government \$5,000, could the government say, we  
20 want the full \$40,000 that was the purchase  
21 price of the condo?

22 MR. KATYAL: If the -- if I understand  
23 the hypothetical, the government -- she's not  
24 owed to the government 40,000.

25 JUSTICE JACKSON: Correct.

1           MR. KATYAL: She just owes the taxes  
2 and penalties.

3           JUSTICE JACKSON: Correct.

4           MR. KATYAL: And so, once the taxes  
5 and penalties are paid --

6           JUSTICE JACKSON: Yes.

7           MR. KATYAL: -- then I don't think  
8 that the government can, you know, take --

9           JUSTICE JACKSON: But why isn't the  
10 logic of your argument that the government  
11 could? I mean, that's the thing I'm struggling  
12 with because you seem to suggest that just  
13 because she owes this money, the government is  
14 entitled to extinguish her entire right in the  
15 property and any money that is incurred above  
16 the tax debt.

17           So I don't know why the government  
18 couldn't seek to get the money even if she sold  
19 the property to satisfy the tax debt.

20           MR. KATYAL: Because that would be --  
21 because I think the relevant thing is when title  
22 is transferred, and when title is transferred,  
23 the entire value is transferred to the  
24 government. Before that --

25           JUSTICE JACKSON: I understand. And

1 she's challenging the title transfer in this  
2 way. She's saying --

3 MR. KATYAL: She's actually not.

4 JUSTICE JACKSON: Well, she --

5 MR. KATYAL: That --

6 JUSTICE JACKSON: What I'm saying is  
7 she says you can take the title to liquidate it  
8 and take out the tax money, the rest of which  
9 redounds to me.

10 You say we can take the title in its  
11 entirety and not give -- and not liquidate it in  
12 the sense of giving it back to her. We can just  
13 sell it as though we owned the whole thing  
14 outright.

15 MR. KATYAL: And --

16 JUSTICE JACKSON: If that's true, I  
17 don't understand why she couldn't sell it  
18 herself, pay off the tax debt, and you then  
19 would, I guess, same -- have the same argument  
20 with respect to some sort of entitlement to the  
21 entire amount?

22 MR. KATYAL: I'm not sure we'd have  
23 the same argument because we wouldn't have the  
24 same tradition and reasonable condition on  
25 ownership. Our -- we're only defending what

1 Minnesota does here, which is to say, when title  
2 is fully transferred to the government, at that  
3 point, her property rights are extinguished,  
4 just like Texaco, and the government then has  
5 full access to the money.

6 We're not saying anything about before  
7 that moment of title transfer.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Rebuttal, Ms. Martin?

12 REBUTTAL ARGUMENT OF CHRISTINA M. MARTIN

13 ON BEHALF OF THE PETITIONER

14 MS. MARTIN: Justice Kagan asked  
15 earlier, what's the limit on the county's view?  
16 And the answer is there is none. Under the  
17 county's theory, you can have exactly what  
18 happened in Michigan when a county took an  
19 entire home that was worth at least \$25,000, at  
20 least that's what it fetched at an auction, over  
21 an \$8.41 tax delinquency. And you can have the  
22 situation in Nebraska, where an elderly widow in  
23 a nursing home lost her million-dollar farm over  
24 a relatively small debt. And I think the  
25 Constitution puts those limits.

1           The county suggests that due process  
2           can do the work of the Takings Clause. But it  
3           can't. It -- it is not just compensation. And  
4           this Court said in Jones versus Flowers that the  
5           failure to protect your property interests does  
6           not excuse the government of its constitutional  
7           obligations.

8           The Court also noted in Jones versus  
9           Flowers that it is an extraordinary power to  
10          take property and forcibly sell it to collect a  
11          tax debt. And, there, the statute at issue in  
12          that state actually protected the surplus  
13          proceeds. So how much more extraordinary when  
14          the government just simply gets to take  
15          everything left over after that?

16          The county claims state after state  
17          supports its view of history. But that's  
18          illusory. There were those two states. We  
19          responded in our reply brief that they failed to  
20          cite even a single example of where there was a  
21          confiscatory forfeiture. And, in fact, St.  
22          George Tucker himself refused to enforce such  
23          forfeiture multiple times, including in Nelson  
24          versus Barbour and in Kinney.

25          Under our theory, the taking in this

1 case happens at the exact same time as the  
2 Solicitor General's view because that's when the  
3 government extinguished Ms. Tyler's interest in  
4 being paid for her equity. That was July 2015.

5 And -- but that will not put states at  
6 risk. They'll still be able to collect taxes  
7 without running afoul of the Takings Clause.  
8 We'll -- I'll just point, again, to the Utah  
9 amicus brief. They were joined by seven other  
10 states. And they cite several examples of how  
11 states can collect taxes without violating the  
12 Takings Clause.

13 As for Texaco, Texaco is entirely  
14 distinguishable. That too was a self-executing  
15 statute of limitations that settled stale claims  
16 between two private parties. By contrast, the  
17 statute here is self-dealing, that takes from an  
18 individual and gives it to the government. It  
19 was also a minimal paperwork burden case, where  
20 all the property owner had to do was file a form  
21 to preserve their property interests.

22 If there are no further questions, we  
23 will just simply ask this Court to reverse and  
24 remand.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:46 a.m., the case  
3 was submitted.)

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