





1 APPEARANCES:

2 PHILIP L. ELLISON, ESQUIRE, Hemlock, Michigan; on  
3 behalf of the Petitioner.

4 FREDERICK LIU, Assistant to the Solicitor General,  
5 Department of Justice, Washington, D.C.; for the  
6 United States, as amicus curiae, supporting  
7 neither party.

8 MATTHEW T. NELSON, ESQUIRE, Grand Rapids, Michigan; on  
9 behalf of the Respondent.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 25-95, Pung versus Isabella County.

Mr. Ellison.

ORAL ARGUMENT OF PHILIP L. ELLISON

ON BEHALF OF THE PETITIONER

MR. ELLISON: Mr. Chief Justice, and may it please the Court:

The Fifth Amendment requires just compensation be measured by the value of what's taken. The Sixth Circuit's categorical rule reducing just compensation to surplus auction proceeds in all instances was wrong.

This Court has repeatedly confirmed that when the government takes property, the constitutional calculus begins with its fair market value. That is measured from the time of the take.

The error here is clear. The Pung home was worth \$194,400. The tax debt was roughly \$2200. Just compensation meant returning remaining equity. The lower courts erred when holding that the later auction price

1 of just \$76,000, less the debt, was  
2 categorically the only just compensation owed.

3 But this Court said it directly in  
4 Jacobs. An owner is owed just compensation,  
5 not inadequate compensation. Following Tyler,  
6 there are no windfalls to the government.

7 This case now asks the Court to  
8 confirm the other half, that the Constitution  
9 likewise forbids confiscatory losses when  
10 being -- when being imposed upon a former  
11 owner. Federal courts should consider all  
12 relevant market -- evidence of market value and  
13 determine whether just compensation has, in  
14 fact, been paid.

15 In addition to the Fifth Amendment,  
16 the Eighth Amendment's Excessive Fines Clause  
17 provides a backstop as well. Taking a  
18 six-figure home to punish over a small  
19 four-figure tax constitutes a fine and was  
20 sufficiently alleged to be grossly  
21 disproportionate to get past the initial  
22 pleading stage.

23 The judgment below should be reversed,  
24 and I welcome the Court's questions.

25 JUSTICE THOMAS: What do you do with

1 the fact that the English and American legal  
2 traditions seem to permit these sorts of  
3 foreclosures?

4 MR. ELLISON: So the -- the fact that  
5 the -- our history allows for these types of  
6 foreclosures is only one half of the equation.  
7 The other half of the equation historically is  
8 that protections have been built in, for  
9 example -- one of many is, for example,  
10 personalty has to be taken before real -- the  
11 real property, for example. This process that  
12 Isabella County undertook lacked that second  
13 half of that historical tradition.

14 Yes, surplus is the ultimate outcome  
15 if, in fact, the auction resulted in a fair  
16 market value. But, when it doesn't result in a  
17 fair market value, historically, courts have  
18 been allowed to challenge inequity, to set  
19 aside the foreclosure itself, or to otherwise  
20 award damages or compensation in those  
21 particular circumstances.

22 JUSTICE SOTOMAYOR: I'm sorry, where  
23 in your brief did you show -- where in your  
24 merits brief did you point to that history?

25 MR. ELLISON: That history --

1 JUSTICE SOTOMAYOR: I -- I know that  
2 there have been cases that talk about the  
3 fairness of an auction and that certain rules  
4 were set up to ensure fairness, that it had to  
5 be an open bidding system, et cetera. And  
6 those -- when those were set aside, there's a  
7 measure of compensation that's different than  
8 the proceeds.

9 But I think what Justice Thomas is  
10 saying, there is a long, long history of tax  
11 foreclosures, of bankruptcy foreclosures.  
12 We've even had a case on that, where the issue  
13 is whether the proceeds from that foreclosure  
14 have to be fair market value. And we've said  
15 no.

16 MR. ELLISON: So, respectfully,  
17 that -- the --- the Court -- the last word on  
18 this has been BFP, which was done specifically  
19 in a bankruptcy context of reasonably  
20 equivalent value. To answer --

21 JUSTICE SOTOMAYOR: No, I've asked you  
22 a different question. Show me cases --

23 MR. ELLISON: We --

24 JUSTICE SOTOMAYOR: -- that don't  
25 involve the unfairness of an auction where the

1 courts have given damages greater than the  
2 auction price.

3 MR. ELLISON: We would point to -- we  
4 would point you to Griffin and -- and  
5 Ballentyne on this matter that have suggested  
6 that when a --

7 JUSTICE SOTOMAYOR: Suggested. Give  
8 me a holding from a court in our 250-year  
9 history where we have said that the measure of  
10 damages on a tax foreclosure is fair market  
11 value, not the auction price.

12 MR. ELLISON: The -- there has not  
13 been that specific holding in this Court's  
14 history, but there has been the history of,  
15 like parallel circumstance foreclosures or  
16 mortgage foreclosures in other circumstances,  
17 where the typical market allows --

18 JUSTICE SOTOMAYOR: And Justice Scalia  
19 said the auction price, you couldn't make it  
20 the fair market value because this is not a  
21 fair market value sale. An auction is a  
22 different, forced sale, and so it will yield a  
23 different measure.

24 MR. ELLISON: The -- we would point  
25 this Court to Virginia Electric that says that

1 any depreciation in the value of the process  
2 itself has to be a burden to the government and  
3 it is their responsibility to suffer that loss.  
4 The time of the take is very important to  
5 establishing what the value of that property  
6 is.

7 CHIEF JUSTICE ROBERTS: What if it  
8 were --

9 JUSTICE JACKSON: Counsel --

10 CHIEF JUSTICE ROBERTS: -- a  
11 completely fair process, whatever -- however  
12 many weeks, months, you think notice has to be  
13 out there so everybody gets to it, easy to  
14 visit the -- all these things, and you still  
15 came out with a price that was below what, for  
16 example, the house would sell on the open  
17 market because many people don't want to go and  
18 get a -- you know, at a tax foreclosure system  
19 or whatever? In other words, if you're  
20 satisfied with the fairness of the process and  
21 it comes out with something below what you  
22 think is fair market value, is that just too  
23 bad?

24 MR. ELLISON: The answer is that the  
25 Fifth Amendment guarantees just compensation;

1 it doesn't guarantee the outcome of an auction.  
2 And I would point this Court to the Lawton  
3 decision that says that when a former property  
4 owner affirms the selling of the property,  
5 they're entitled to "at least" -- and that's, I  
6 think, a very important two words -- at least  
7 the surplus proceeds.

8 This case is distinguishable  
9 because --

10 CHIEF JUSTICE ROBERTS: Well, I know  
11 this case is distinguishable, but if -- I think  
12 the Solicitor General's position is that you  
13 look to the fairness of the process. And what  
14 would satisfy you with respect to the fairness?

15 I mean, the -- the -- just  
16 compensation is not out there in -- you know,  
17 if it's a period at which there's a great  
18 depression or whatever, it may not seem fair to  
19 you that you have to sell the house for a  
20 fraction of the value it was worth before, but  
21 what would they have to do to satisfy you that  
22 it was a fair process?

23 MR. ELLISON: In most instances, with  
24 well-developed, well-designed foreclosure  
25 systems, which we would point to, for example,

1 many of the examples in the National  
2 Association of Realtors' amicus brief, if those  
3 systems are designed to actually get the  
4 reasonable fair market value at the time,  
5 you're going to have very few cases in which  
6 this type of discrepancy, the delta between the  
7 actual known value of the property and the  
8 auction price, is fair.

9 CHIEF JUSTICE ROBERTS: Well, I guess  
10 that's what I'm trying to figure out. The --  
11 the known value of the property, there's not --  
12 we don't know what it is. One way to find out  
13 is have a fair sale in an open market.

14 So what's wrong with -- with that? I  
15 mean, I know you can object to saying, well,  
16 there wasn't enough whatever, there wasn't  
17 enough time or -- but what would it take for  
18 you to say that was a fair process, even if it  
19 comes out with a number that is unsatisfactory  
20 to you?

21 MR. ELLISON: The -- the out -- the --  
22 the -- the -- what we would seek is that an  
23 auction process is simply one piece of evidence  
24 that's overall -- in the overall scheme of  
25 possible evidence that competing parties

1 could -- could submit to the court to determine  
2 what is, in fact, the fair market value.

3 An auction -- in this case, for  
4 example, we say the auction price didn't result  
5 in the fair market value, and we offered  
6 contrary evidence. Courts of this country  
7 routinely and regularly figure out and decide  
8 what is a fair market value in all sorts of  
9 contexts, be it --

10 JUSTICE KAGAN: But, Mr. Ellison, I --  
11 I guess I thought from reading your briefs --  
12 and tell me if I'm wrong -- that you had agreed  
13 that, in general, foreclosure sales do not  
14 produce a fair market value price. In other  
15 words, just the fact that, even with a -- a  
16 very fair auction system, just the fact that a  
17 property is being offered for sale in those  
18 circumstances means that there's going to be a  
19 depressed price.

20 And I think that we -- this Court has  
21 recognized that in the past. And I suppose  
22 what -- I -- I think I'm -- I'm -- I'm looking  
23 for the same kind of answer that the -- the --  
24 that the Chief Justice is.

25 If the auction is fair and it

1       nonetheless produces a -- a depressed price,  
2       you know, a price that's lower than the price  
3       that you would have gotten two years earlier  
4       had there not been a foreclosure, are -- are --  
5       I mean, are you contesting that as an empirical  
6       matter? Are you saying that even if it's true  
7       as an empirical matter, you're still entitled  
8       to the free market value?

9               MR. ELLISON: I think what I'm -- what  
10       we're taking is a more nuanced half-step from  
11       that position. Our position is that we as a  
12       property owner should be able to challenge if,  
13       in fact, the auction price reached that fair  
14       market value.

15               Some auctions will reach fair market  
16       value as a matter of course. Some, like in  
17       this case instance, did not. And we should be  
18       able to present the evidence to say that the  
19       outcome, even if it's a fair auction, did not  
20       result in just -- in a fair market value, which  
21       in turn would not translate into just  
22       compensation for what was taken.

23               JUSTICE ALITO: Mr. Ellison --

24               JUSTICE BARRETT: Counsel --

25               JUSTICE ALITO: -- assuming for the

1 sake of argument that your client got notice of  
2 the foreclosure, were there not steps that your  
3 client could have taken to prevent landing  
4 in -- in the predicament where your client  
5 found himself?

6 MR. ELLISON: The --

7 JUSTICE ALITO: If they had 200 --  
8 \$190,000 equity in this house, could your  
9 client -- couldn't your client have gotten a  
10 loan using that as collateral, paid the taxes  
11 and there never would have been a sale?

12 MR. ELLISON: In -- in reality is that  
13 many times the -- the foreclosure process  
14 itself does prevent practically individuals  
15 from going out and being able to dispose of  
16 that property on the terms that they themselves  
17 would do because we've crossed over into the  
18 foreclosure process.

19 This mission -- this process that  
20 we're talking about today is a bit -- is a bit  
21 unique in that the fore -- the actual taking of  
22 the property starts before the foreclosure  
23 process, before actually taking title, and the  
24 moment -- and our position is is that the  
25 taking of the title itself is what starts that

1 process and that's the value that it should be  
2 on that particular day.

3 JUSTICE ALITO: Could you -- could you  
4 spell out for me step by step what you think  
5 the county was obligated to do? So they  
6 foreclose, all right. Step number 1, they  
7 foreclose. They -- and then what?

8 MR. ELLISON: At that point, there --  
9 there would be what's called a forfeiture,  
10 which is a unique aspect of Michigan law,  
11 there's a forfeiture. Then there's a  
12 foreclosure where they assume and take title,  
13 complete title to the property.

14 JUSTICE ALITO: Okay. So they have  
15 title to the property. And then they pay you  
16 the -- what you say is the fair market value of  
17 the property?

18 MR. ELLISON: At that point, the  
19 government has two paths in Michigan. One is  
20 they can go down and -- another property --  
21 another government can purchase that property  
22 for its fair market value, the actual known  
23 fair market value, or it goes to an auction  
24 process.

25 Our position is is that when it went

1 to the auction --

2 JUSTICE ALITO: Okay. So then they  
3 pay you the fair market value. Is that right?  
4 That's what you want?

5 MR. ELLISON: If it went to the  
6 government side, yes. If the government  
7 purchased it, correct.

8 JUSTICE ALITO: And then the county  
9 has an inventory of unoccupied houses and it  
10 has to sell those houses on the open market?

11 MR. ELLISON: It would sell them on --  
12 at an auction process, yes. Where we think  
13 that the Court or where we --

14 JUSTICE ALITO: On an auction process?

15 MR. ELLISON: They -- they decided to  
16 use an auction process. They're not required  
17 to use an auction process.

18 JUSTICE ALITO: Well, do you think  
19 this auction process produces the fair market  
20 value?

21 MR. ELLISON: This one does not. In  
22 all instances, no.

23 JUSTICE ALITO: Well, do you think an  
24 auction process generally produces the fair  
25 market value?

1 MR. ELLISON: I think it --

2 JUSTICE ALITO: Houses are not usually  
3 sold by auction.

4 MR. ELLISON: They can be -- I think  
5 it can reach auction value. Speaking from  
6 someone -- from my own anecdotal evidence of my  
7 work in Michigan, auctions can reach fair  
8 market value, but it didn't here.

9 JUSTICE ALITO: But what if it  
10 doesn't, okay? If they use the auction -- that  
11 if they use a -- a fair auction process, that's  
12 it, they're okay, even if it doesn't yield fair  
13 market value, what you say is fair market  
14 value?

15 MR. ELLISON: No, no. And that's  
16 where I was going to just lead to.

17 JUSTICE ALITO: No, okay.

18 MR. ELLISON: This is where the  
19 shortcoming is in Michigan's system, is in most  
20 typical foreclosure systems, there's a sales  
21 confirmation review process that's done by the  
22 court to confirm that -- it's usually called a  
23 confirmation sale. At that point -- for  
24 example, North Carolina is a good example of  
25 this.

1           You can go -- the former owner can go  
2 back and point out either the unfairness of the  
3 sale or the inadequacy of the price and say:  
4 Don't confirm this sale because it doesn't  
5 reach fair market value in these circumstances.

6           JUSTICE ALITO: Okay. And then what  
7 happens?

8           MR. ELLISON: At that point, the court  
9 reviews the competing evidence that's between  
10 the various parties.

11          JUSTICE ALITO: And the court -- the  
12 court decides what the fair market value is?

13          MR. ELLISON: That is correct.

14          JUSTICE ALITO: You get the fair  
15 market value?

16          MR. ELLISON: That is correct.

17          JUSTICE ALITO: And then the county  
18 has to try to sell the house?

19          MR. ELLISON: That's correct.

20          JUSTICE ALITO: And what if they --  
21 they try to sell it on the open market and  
22 they -- they can't get what was estimated to be  
23 the fair market value?

24          MR. ELLISON: Then the Fifth Amendment  
25 requires that they pay the -- the difference on

1 this being the just compensation that's owed.

2 JUSTICE ALITO: And all -- during all  
3 this time, they've got this inventory of  
4 unoccupied houses, they have to maintain them,  
5 they have to make sure they're not vandalized,  
6 they have to maintain insurance on these  
7 properties?

8 MR. ELLISON: By the government  
9 deciding to collect as a -- as a debt  
10 collection practice, deciding to use in rem  
11 civil forfeiture as a basis to collect on the  
12 debt rather than, for example, suing or going  
13 after personal property, going after bank  
14 accounts, that's the obligation that they  
15 assume in those response -- in that particular  
16 circumstance, yes.

17 JUSTICE BARRETT: Counsel, what's your  
18 best evidence that historically, the kind of  
19 procedure you're describing from North Carolina  
20 was used? Because it seems to me the  
21 historical evidence shows that you're entitled  
22 to the surplus of the proceeds from the  
23 auction.

24 MR. ELLISON: We -- the -- the  
25 examples are not as many as I would like them

1 to be, but the reality is we would look to  
2 Ballentyne and -- and Graffam as the two types  
3 of examples to show that when a sale doesn't  
4 reach the ultimate result or -- or a level of  
5 unfairness is included in that sales process,  
6 that there can be a challenge before the sale  
7 is, in fact, confirmed by the court.

8 JUSTICE BARRETT: Did you argue below  
9 that the process was in any way unfair?

10 MR. ELLISON: We didn't. We were  
11 precluded from that at the 12(b)(6) stage.

12 JUSTICE BARRETT: You mentioned to  
13 Justice Thomas that you think it's -- and --  
14 and -- and you kind of get at this in your  
15 reply brief -- that historically, the  
16 government had to go after personal property  
17 before going after real property.

18 MR. ELLISON: That is different.

19 JUSTICE BARRETT: Did you make that  
20 argument before the Sixth Circuit?

21 MR. ELLISON: Before the Sixth  
22 Circuit? No, because the ruling of the court  
23 below, both the trial court and the Sixth  
24 Circuit, is that surplus was categorically the  
25 only measure of damages.

1           JUSTICE BARRETT: Well, it seems to me  
2           that -- why would we get into that? It -- it  
3           seems to me pretty -- a dangerous road to go  
4           down for us to say that those things would be  
5           constitutionally required when they were  
6           neither pressed nor passed upon below.

7           MR. ELLISON: We would -- we would  
8           advocate that simply the rule that was  
9           developed by the Sixth Circuit below that said  
10          surplus is categorically fair market -- fair  
11          market value is, in fact, too narrow of a rule  
12          and that the Sixth Circuit can deal with these  
13          types of -- what sort of processes and  
14          procedures could be built into this to  
15          establish a fair process going forward.

16          JUSTICE GORSUCH: That --

17          JUSTICE JACKSON: Can I --

18          JUSTICE GORSUCH: -- that seems to  
19          square with what the Solicitor General suggests  
20          on page 26 of its brief, where, in disagreement  
21          with you, it suggests that auctions can  
22          sometimes be fine, but you have a right to  
23          challenge the procedures. It observes that  
24          that is not the basis on which the courts below  
25          proceeded.

1           I agree, looking at the Sixth Circuit  
2     in particular, they relied on BFP and this  
3     categorical rule and didn't get into this. And  
4     so the Solicitor General suggests we should  
5     vacate and remand to allow those arguments to  
6     proceed.

7           I don't see how we could affirm if --  
8     if those arguments were not passed -- passed  
9     upon below, and there might be an argument that  
10    personal property has to come first. I just  
11    want your thoughts on that.

12           MR. ELLISON: So we -- we share some  
13    overlap with the government's position in that  
14    reversal and remand should be appropriate in  
15    this because the narrow rule the Sixth Circuit  
16    adopted of categorical surplus proceeds always  
17    equals fair market value, one type of challenge  
18    could be a fairness challenge as to the sales  
19    process, but that's not the only challenge.

20           JUSTICE GORSUCH: Right. No, I  
21    understand you think there are more challenges  
22    available, but --

23           MR. ELLISON: Correct.

24           JUSTICE GORSUCH: -- the government  
25    agrees at least a fairness or procedural

1 challenge is available.

2 MR. ELLISON: Correct.

3 JUSTICE GORSUCH: But that wasn't  
4 considered by the Sixth Circuit.

5 MR. ELLISON: We would agree with that  
6 position, but we would take it one step further  
7 and say but the fairness of the auction is not  
8 the only consideration that --

9 JUSTICE KAGAN: If -- if you were  
10 given that kind of remand opportunity, and now  
11 I'm talking just about the fairness of the  
12 auction, so put aside whatever other thoughts  
13 you might have about things you would like to  
14 be entitled to, but just the fairness of the  
15 auction, would you have objections on that  
16 score?

17 MR. ELLISON: We would have objections  
18 on that score, but those were not developed on  
19 this record given the --

20 JUSTICE KAGAN: What -- what are those  
21 objections?

22 MR. ELLISON: For example, Michigan's  
23 system, for example, is -- at an auction, you  
24 have to -- the buyer of that process can't do  
25 an inspection of the property, can't go through

1 the property. You have to show up, for  
2 example, with cash on hand two hours after the  
3 sale price itself.

4 This needlessly depresses the market  
5 price because it increases risk in that market,  
6 which then depresses the price of the property  
7 itself.

8 JUSTICE KAGAN: And that's something  
9 that has not been developed, so we would just  
10 remand and let the courts below deal with that?

11 MR. ELLISON: Correct. And we think  
12 that both the sale process itself would be one  
13 theory that could be challenged. That's not  
14 our only theory that we would challenge. We  
15 think inadequacy of price, combined with many  
16 of these unfair factors, could then result in  
17 a --

18 JUSTICE GORSUCH: Would -- would you  
19 also make the argument about the personal  
20 property having to come first?

21 MR. ELLISON: We would challenge -- I  
22 mean, the other part to this would be the  
23 challenge would be is that Michigan's system --  
24 Michigan's very unique because it only took  
25 surplus proceeds responsibility. It didn't

1 take the back-end responsibility, the -- the  
2 Ballentyne-style responsibilities of being able  
3 to challenge within the system itself, which is  
4 why we're in federal court with 1983 as a  
5 supplement -- a supplemental-type action to fix  
6 that shortcoming.

7 JUSTICE JACKSON: Can I ask you  
8 about --

9 JUSTICE SOTOMAYOR: I'm sorry. You --  
10 you --

11 JUSTICE GORSUCH: Is that a yes? Is  
12 that -- is that a yes, that you would -- if I  
13 might just finish -- that you would -- before  
14 taking the property, one process that they need  
15 to consider is taking personal property first?

16 MR. ELLISON: The answer is yes.

17 JUSTICE GORSUCH: Okay.

18 MR. ELLISON: The answer is yes.

19 JUSTICE GORSUCH: All right. Thank  
20 you.

21 JUSTICE JACKSON: Can -- can -- can I  
22 just follow up on that? Because I'm wondering  
23 whether or not that kind of concern doesn't  
24 ring more in, like, a due process claim rather  
25 than just compensation because, to the extent

1 you're arguing about or your claim is that they  
2 needed to do other steps before they took the  
3 property, I didn't understand the -- the -- the  
4 Takings Clause to be concerned about  
5 pre-takings deprivation, that the Takings  
6 Clause was just about just compensation.

7 And so wouldn't -- wouldn't you be  
8 needing to bring kind of a due process-type  
9 claim if you're complaining about the personal  
10 property aspect of this?

11 MR. ELLISON: We -- we would know  
12 that due process comes awful close in the -- in  
13 the just compensation world, but the question  
14 that's being challenged here is does the result  
15 of this foreclosure process result in just  
16 compensation.

17 JUSTICE JACKSON: Yes. No, I know  
18 that, but I'm saying, to the extent, in the  
19 context of just compensation, we're now  
20 thinking just for the moment --

21 MR. ELLISON: Yeah.

22 JUSTICE JACKSON: -- about what  
23 happened before this taking, I wonder whether  
24 just compensation is the right analytical  
25 framework to evaluate that. It doesn't seem to

1 me to be -- and I know you're not making that  
2 argument --

3 MR. ELLISON: Right.

4 JUSTICE JACKSON: -- here, but I'm  
5 just sort of responding to the thought that if  
6 there is some sort of problem with what the  
7 government was supposed to do before the  
8 taking, we should not be thinking of that as a  
9 just compensation issue.

10 MR. ELLISON: It is possible that a  
11 just -- a due process aspect of this can --

12 JUSTICE JACKSON: All right. On  
13 the -- on the just compensation issue, I guess  
14 the thing that I'm really, really struggling  
15 with is the notion that just compensation is  
16 necessarily always tied to the fair market  
17 value. And you've said it many times, but I'm  
18 wondering if it doesn't also have to account  
19 for the circumstances under which this sale is  
20 taking place.

21 So we have your client, Mr. Pung, who  
22 had this house, but he also didn't pay his  
23 taxes. And kind of going with what Justice  
24 Alito was saying, piggybacking on it, I suppose  
25 there are things he could have done to cover

1 his tax bill. So the government is coming in  
2 at the beginning to foreclose on this house for  
3 the payment of his debt.

4 Given that circumstance, I guess I  
5 don't understand why your argument doesn't kind  
6 of turn the government into Mr. Pung's real  
7 estate agent with some sort of fiduciary duty  
8 to maximize the -- the value of this asset.

9 The government's only real interest in  
10 this is covering its tax liability. And if  
11 Mr. Pung wanted to get the maximum value of the  
12 house for -- to cover that debt, he could have  
13 sold it himself and gotten the fair market  
14 value on the day that you say, you know, the  
15 government came, I think, to -- to foreclose on  
16 it.

17 So having chosen not to do that,  
18 forcing the government to sell his house, I  
19 guess I'm worried about suggesting that he can  
20 come back after the fact and say, no, you  
21 didn't do enough to get the maximum price. All  
22 they have to do is just give them -- give him  
23 the excess of what they sell it for, and that  
24 should be the end of it, I think, conceptually.  
25 So tell me why I'm wrong about that.

1 MR. ELLISON: So I'm going to take a  
2 half step back and then a full step forward --

3 JUSTICE JACKSON: Okay.

4 MR. ELLISON: -- to say that what the  
5 Fifth Amendment requires to reach just  
6 compensation if you're going to trigger this  
7 process, because there's no obligation to do a  
8 tax foreclosure in the -- this is voluntary on  
9 the part of the government itself.

10 JUSTICE JACKSON: But only insofar as  
11 they're responding to his delinquency.

12 MR. ELLISON: I under --

13 JUSTICE JACKSON: So their -- their --  
14 his delinquency is the beginning. Like, you --  
15 you haven't really focused on that, but the  
16 first thing is, Mr. Pung, pay your taxes. And  
17 when he doesn't, the government has several  
18 options to try to figure out what to do.

19 One of them is, okay, you have this  
20 other property, whether it's real property or  
21 personal property. We are going to foreclose  
22 on it. If Mr. Pung says, please don't because  
23 my house is worth a hundred thousand dollars  
24 and if you put it into a tax sale, it's only  
25 going to get \$70,000, he can sell the house and

1 get the hundred thousand dollars and pay the  
2 tax bill. The government doesn't care about  
3 that.

4 MR. ELLISON: But if --

5 JUSTICE JACKSON: And why didn't he do  
6 that?

7 MR. ELLISON: But -- well, first of  
8 all, he didn't do that because he didn't owe  
9 the tax, which has been one of the underlying  
10 aspects of this, that --

11 JUSTICE JACKSON: Well, we have to  
12 assume that --

13 MR. ELLISON: But -- but --

14 JUSTICE JACKSON: -- for the purpose  
15 of this, right?

16 MR. ELLISON: But -- I would agree.  
17 But the point I guess I would come back to at  
18 the start of your question on this would be --  
19 is that in a tax foreclosure due -- or, excuse  
20 me, takings context, the obligation of the  
21 government under Cherokee Nation is to have  
22 reasonable, certain, and adequate provisions to  
23 reach just compensation.

24 JUSTICE JACKSON: Right. And the just  
25 compensation is the difference between what the

1 government sold his -- was forced to sell his  
2 house at on the tax sale and what it owed --  
3 what he owed in taxes. So they gave it back to  
4 him, right? They sold it for \$70,000 or  
5 whatever it was, gave it back to him, and I  
6 would think they're done.

7 You're saying they had an obligation  
8 to not sell it for the 70 or to reach into the  
9 public fisc and pay the difference between the  
10 70 and what it would have sold in a fair market  
11 scenario, and I don't understand where that  
12 comes from.

13 MR. ELLISON: Where it comes from is  
14 the obligation that if you're taking property,  
15 which is -- here, the property interest is not  
16 the auction proceeds.

17 JUSTICE JACKSON: Mm-hmm.

18 MR. ELLISON: The property interest  
19 here is the value of the equity that was taken.

20 JUSTICE JACKSON: One last time.  
21 They're not taking property like a person  
22 who -- like a government who wants to build a  
23 railroad. You know, the government wants to  
24 have a -- a sidewalk or a park. They're taking  
25 property because he didn't pay his taxes.

1           And so, to me, that context makes the  
2 just compensation analysis different.

3           MR. ELLISON: Respectfully, I would  
4 say that the --

5           JUSTICE JACKSON: You disagree?

6           MR. ELLISON: I disagree.

7           JUSTICE JACKSON: Okay.

8           MR. ELLISON: And I would -- I guess I  
9 would finish by saying that takings law doesn't  
10 turn on moral fault. And -- and the reality is  
11 is the -- the balance --

12           JUSTICE JACKSON: But I thought we  
13 were doing just compensation.

14           MR. ELLISON: Well, but --

15           JUSTICE JACKSON: There is equity in  
16 this, right?

17           MR. ELLISON: But the -- but the  
18 balance of the fairness was decided at the  
19 adoption of the Fifth Amendment. The tradeoffs  
20 between the government and the citizen was  
21 already weighed and -- and the obligation was  
22 put on the government by putting fair -- just  
23 compensation obligations on the government  
24 itself.

25           CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Justice Alito?

4 JUSTICE ALITO: Let me come back to  
5 the point that Justice Jackson was just making.  
6 Typically, if a property owner doesn't pay real  
7 estate taxes, the jurisdiction will send a  
8 notice and say you've got -- you didn't pay  
9 your taxes, and maybe they'll send several, and  
10 they'll -- they'll warn, you know, if you don't  
11 pay your taxes, we can foreclose on your  
12 property and sell it at a tax sale.

13 Now, before any of that occurs, I  
14 still don't understand why the taxpayer  
15 cannot -- a taxpayer who's in a situation like  
16 your client, and, again, assuming there was  
17 proper notice here, take steps to prevent a tax  
18 sale from taking place.

19 If you've got \$190,000 of equity in a  
20 house and you owe \$2,000 in taxes, can you not  
21 get a loan using your equity as collateral?

22 MR. ELLISON: It -- it is difficult to  
23 do that. There is off-ramps that -- that  
24 individuals can try to do. In fact, Mr. Pung  
25 tried to do that in this case at -- at numerous

1 parts with interactions with the tribunal, with  
2 the Tax Tribunal, and -- and things of that  
3 nature.

4 To answer your question is there are  
5 steps they can take, but if they cross that  
6 Rubicon, if the government takes that  
7 property --

8 JUSTICE ALITO: Yeah, but, before the  
9 government takes the property, there are steps  
10 that can be taken.

11 MR. ELLISON: But, if those steps  
12 aren't taken for whatever reason --

13 JUSTICE ALITO: Well -- well, if the  
14 taxpayer doesn't take them for whatever reason  
15 the taxpayer has, then perhaps one shouldn't  
16 feel so sorry for the taxpayer when the tax  
17 sale occurs.

18 There are a lot of outfits that will  
19 buy houses sight unseen for cash.

20 MR. ELLISON: I guess --

21 JUSTICE ALITO: Isn't that another  
22 option?

23 MR. ELLISON: I don't think that's  
24 another option because, you know, Mr. Pung  
25 didn't want to leave his home. The ability --

1 this is the home that he wanted his -- his  
2 nephew's son and his family to be able to have  
3 and retain. The idea that we'd vacate from the  
4 family home because of a tax that's being  
5 challenged in this aspect strikes me as not --  
6 as being kind of counterbalanced to the equity  
7 that we shouldn't be forced to sell something  
8 that we shouldn't necessarily --

9 JUSTICE ALITO: Well, on that, I mean,  
10 that's another argument about whether monetary  
11 compensation is always sufficient to constitute  
12 just compensation when there's an emotional  
13 attachment to a house, which is a serious  
14 thing, but that's not the issue here.

15 MR. ELLISON: Well, but the issue is  
16 here ultimately -- is that there is a piece of  
17 property that has been uncontested by the  
18 government to be worth, you know, approximately  
19 \$200,000. Once the government has decided that  
20 it's going to take more property than what the  
21 actual value of the debt actually is, that's  
22 what triggers the takings obligation. And if  
23 it's not a takings obligation, of course, we've  
24 also argued it's an excessive fine.

25 JUSTICE ALITO: What is the -- what

1 sorts of personal property do you think the  
2 government has to go after first before it goes  
3 after the -- the house?

4 MR. ELLISON: Well, in this case, with  
5 a tax debt of about 2200 bucks, it could have  
6 been the Peloton bike that was in the house.

7 JUSTICE ALITO: You think a Peloton  
8 bike today is worth \$2,000?

9 (Laughter.)

10 MR. ELLISON: Well --

11 JUSTICE ALITO: If you go on Facebook  
12 Marketplace and you try to sell a Peloton bike  
13 today for \$2,000, I don't think you're going to  
14 be very successful.

15 MR. ELLISON: Tradition --

16 JUSTICE ALITO: How are they going to  
17 know that he has a Peloton bike?

18 (Laughter.)

19 MR. ELLISON: Traditionally -- joking  
20 aside, traditionally, there are a lot -- there  
21 are a lot of different options. There's bank  
22 accounts, there's personal property, the  
23 vehicle, there's lots of other --

24 JUSTICE ALITO: All right. There are  
25 vehicles -- there are vehicles and bank

1 accounts. Maybe they can find out about that.  
2 Other personal property, how are they going to  
3 know what he has? I mean, do they have a right  
4 to go in the house and inspect everything --

5 MR. ELLISON: The govern --

6 JUSTICE ALITO: -- and see whether  
7 there's a, you know, a valuable gigantic TV  
8 that might be sold?

9 MR. ELLISON: When -- when the  
10 government is acting in a debt collector  
11 capacity, this was what -- and when I'm not  
12 paid a debt, that's the obligation I have when  
13 I'm collecting on a debt from someone that  
14 hasn't paid. The government is no different.

15 JUSTICE ALITO: If we start to -- to  
16 set out all sorts of rules for these tax sales  
17 to make them fair, how many years and how many  
18 cases do you think it's going to take to flesh  
19 out all of these details without any historical  
20 support for the procedures that you seem to  
21 think are required?

22 MR. ELLISON: We think that the --  
23 that the government has excellent models that  
24 are already in place that they could utilize.  
25 For example, Michigan's mortgage foreclosure

1 process is well established, over a hundred  
2 years.

3 It's already a known market. It's  
4 already a known process. They could adopt that  
5 on its own and -- and would have the back-end  
6 protections that are necessary so that fair  
7 market value is reached in all circumstances,  
8 whether it's an auction or a post-auction  
9 shortcoming.

10 JUSTICE ALITO: All right. Thank you.  
11 I appreciate it.

12 MR. ELLISON: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Sotomayor?

15 JUSTICE SOTOMAYOR: I -- I think your  
16 fallback position or your main position is just  
17 compensation under the Constitution requires  
18 fair market value?

19 MR. ELLISON: Correct.

20 JUSTICE SOTOMAYOR: If I disagree with  
21 that and I believe just compensation should be  
22 defined the way Justice Scalia did in BDP,  
23 which is what's reasonable under the  
24 circumstances, and I believe that a fair --  
25 that a valid auction is a reasonable

1 compensation, you lose on your main argument,  
2 correct?

3 MR. ELLISON: We would -- we would --  
4 if -- if you do not believe that fair market  
5 value is the standard, correct.

6 JUSTICE SOTOMAYOR: And so, if we  
7 believe that a valid auction -- and by valid,  
8 it has to be fair, it has to be permitted. I  
9 don't know about the personal property issue at  
10 all. I haven't looked into it. It hasn't been  
11 briefed, and it's a very bad place for us to  
12 make such a huge decision. That would be up to  
13 the court below, correct?

14 MR. ELLISON: Correct.

15 JUSTICE SOTOMAYOR: All right. Now,  
16 with respect to fairness, Justice Alito asked  
17 are there -- or said are we going to have to  
18 wait for every court to decide what's fair or  
19 is there a standard of fairness that we can  
20 look to. Not a particular Michigan, but  
21 provide me with a case that talks about what a  
22 fair auction for a tax fail -- a tax sale would  
23 be.

24 MR. ELLISON: We would point you to  
25 three cases, in fact. One would be Slater

1 versus Maxwell, which provides that tax  
2 foreclosures have to be provided for with  
3 entire fairness, and that's the -- the trigger  
4 word from there, that it has --

5 JUSTICE SOTOMAYOR: I'm not asking you  
6 for words. I'm asking you to point me to cases  
7 that set forth the parameters of what that  
8 fairness would look like.

9 MR. ELLISON: That's the high --  
10 that's -- Slater is the high water mark of tax  
11 foreclosure we would point to. As a practical  
12 multiple factor aspect, we would point to  
13 Ballentyne and Graffam, this Court's prior  
14 decisions, which we've -- we have briefed.

15 JUSTICE SOTOMAYOR: Okay. Thank you,  
16 counsel.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: Mr. Ellison, wouldn't  
19 your primary position effectively stop states  
20 from using foreclosure scale -- sales? Because  
21 I'm just thinking that if you accept the  
22 proposition -- I guess I am going to ask you to  
23 accept the foreclose -- the proposition that  
24 foreclosure sales usually depress prices so  
25 that they're lower than the fair market value.

1           If I'm -- if I have to give you the  
2 fair market value, you, the homeowner, aren't  
3 I -- am I not going to lose money if I'm the  
4 state on every -- on -- on every transaction  
5 like this? I mean, let's take a -- an example.

6           Suppose you don't have this mismatch  
7 that you have here between the very small debt  
8 and the -- suppose you have a hundred thousand  
9 dollar debt, right, and a foreclosure sale is  
10 going to get you \$110,000, and then the state  
11 takes the hundred thousand dollars that it's  
12 owed and it gives you the \$10,000 back, right?

13           MR. ELLISON: Okay.

14           JUSTICE KAGAN: But then, if you say:  
15 Well, no, the fair market value was really  
16 \$150,000, so I'm entitled to \$50,000 back,  
17 right?

18           MR. ELLISON: Right.

19           JUSTICE KAGAN: Well, that's just  
20 going to cut into what the state gets to take  
21 and it's going to mean that the state doesn't  
22 get the debt satisfied.

23           MR. ELLISON: So my response is that  
24 the Fifth Amendment requires just compensation.  
25 And -- and somewhat -- what seems to be baked

1 into some questions today has been whether this  
2 is best compensation, but assuming your  
3 hypothetical, where the --

4 JUSTICE KAGAN: Well, I'm just saying  
5 that the state is never going to get satisfied  
6 in the -- in the -- in that situation where a  
7 foreclosure sale will lead to less than the  
8 fair market value, so the state is going to  
9 say: Well, we can't use foreclosure sales  
10 anymore to satisfy debt obligations.

11 MR. ELLISON: I would agree they can't  
12 use this style of tax foreclosure sale. There  
13 are plenty of tax foreclosure sale systems in  
14 place that can reach just compensation or even  
15 the -- the best compensation in the foreclosure  
16 circumstances.

17 JUSTICE KAGAN: What you're saying is  
18 that there are plenty of foreclosure sale  
19 systems that can reach fair market value.

20 MR. ELLISON: Correct.

21 JUSTICE KAGAN: Yeah. And I -- I  
22 guess -- I -- I -- I guess I think how could  
23 that possibly be? I mean, if you're selling a  
24 house on foreclosure in an auction, you're just  
25 not going to get the fair market value as if

1 that house had never been foreclosed on and you  
2 were selling it in an open market.

3 MR. ELLISON: But acknowledging the --  
4 the -- the assumption you want me to make,  
5 which is the fact that the foreclosure itself  
6 can depress the price, it can't depress the  
7 price, I think, this far.

8 Now it could be a factor. It could be  
9 a piece of evidence. And we could offer  
10 contrary evidence to say, even in this  
11 foreclosure-type environment, the price that it  
12 was actually sold for was not good enough.

13 And this is our -- this is our  
14 Graffam/Ballentyne challenge that's there that  
15 says, in this circumstance, the particular  
16 system that the government's created in this  
17 particular type of auction sale unreasonably  
18 and unfairly depresses the price too far  
19 because we've got this counter-evidence,  
20 whether it's market appraisals, professional  
21 evidence, you know, information -- even the  
22 government's own assessments of those values  
23 are can say what you got at the auction is not  
24 enough in that circumstance --

25 JUSTICE KAGAN: Thank you.

1 MR. ELLISON: -- for that system.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Gorsuch?

4 JUSTICE GORSUCH: Is there something  
5 incongruous about the fact that when your  
6 property is taken by the government for --  
7 to -- to enhance it in a way that's going to  
8 increase its value radically, I take a house,  
9 I'm going to put a skyscraper on it, I'm going  
10 to rezone it, that the property owner doesn't  
11 get the upside?

12 MR. ELLISON: Correct.

13 JUSTICE GORSUCH: But, here, we're  
14 debating about how much of the downside they're  
15 going to get.

16 MR. ELLISON: Correct. And I would go  
17 as far as to say the government -- this Court  
18 has always said the government does get the  
19 upside. It's well established takings law.

20 The problem that I see here is is that  
21 even if this is not a takings -- if we -- if we  
22 take it out of the takings context and we put  
23 it in the excessive fines, what we have here is  
24 a government that says for a very small debt,  
25 we're going to take and destroy vast majorities

1 of the equity that's valued at the time that we  
2 took title to the property itself.

3 So, even if the takings part of this  
4 doesn't provide the answer, the excessive fines  
5 in particular circumstances, which where the  
6 delta is so high here, can provide alternate  
7 relief.

8 JUSTICE GORSUCH: And then I -- I -- I  
9 do want to understand just a little bit better  
10 this principal residence exemption, the --  
11 the -- that -- that led to this tax, this \$2200  
12 or whatever it is. You won in front of an ALJ  
13 who said that the family doesn't have to pay  
14 this.

15 MR. ELLISON: Correct.

16 JUSTICE GORSUCH: The county then went  
17 ahead and assessed it anyway and used that as  
18 the basis for this foreclosure.

19 MR. ELLISON: Correct. So --

20 JUSTICE GORSUCH: How did that happen?

21 MR. ELLISON: I don't think you have a  
22 long enough afternoon to explain the story of  
23 what happened here.

24 (Laughter.)

25 MR. ELLISON: But the very short

1 version of it is is that the PRE credit was  
2 determined by -- in Michigan, we have a Tax  
3 Tribunal that determines this.

4 JUSTICE GORSUCH: Yeah. No, I -- I've  
5 read -- I've read the briefs.

6 MR. ELLISON: Yeah, yeah.

7 JUSTICE GORSUCH: I got that. I'm  
8 just curious, why -- why would the county  
9 pursue a \$2200 debt that their own ALJ said  
10 wasn't owed to this extreme?

11 MR. ELLISON: We can't figure that  
12 answer out. We don't believe it's due. And  
13 the reality is -- is, by the time the tax  
14 assessor actually informed Mr. Pung that the  
15 price was actually -- that she had put the PRE  
16 credit -- had taken it way, denied it once  
17 again, the time -- the very limited 35-day  
18 window in which a Michigan taxpayer can  
19 activate the process of the tribunal, to go  
20 back again --

21 JUSTICE GORSUCH: After he's already  
22 won.

23 MR. ELLISON: Had already gone.

24 JUSTICE GORSUCH: Yeah.

25 MR. ELLISON: And so we're in a weird

1 circumstance here where the tax is legally  
2 technically owed but actually isn't owed in  
3 these circumstances. And it's -- it's a --  
4 it's a terrible position to be in for a  
5 homeowner who's trying to keep their home.

6 JUSTICE GORSUCH: Yeah, if you want to  
7 talk about what's just.

8 MR. ELLISON: I think it's an  
9 important -- we've been talking the equities on  
10 the government's side. I think the fact the  
11 tax isn't owed is a major equity on the  
12 govern -- or on the property owner's side in  
13 this circumstance.

14 JUSTICE GORSUCH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Kavanaugh?

17 JUSTICE KAVANAUGH: On the possibility  
18 of remand for consideration of fair process,  
19 the Solicitor General says, as part of that,  
20 the courts below could consider whether and to  
21 what extent Petitioner has preserved the issue.  
22 If he has, he will bear the -- bear the burden  
23 of showing that the sale was not conducted  
24 fairly.

25 Do you agree with that?

1           MR. ELLISON: We believe that's the  
2 first correct step that -- at least one theory  
3 that can be challenged, but it's not the only  
4 theory that could be challenged on a -- on a  
5 remand.

6           JUSTICE KAVANAUGH: What are the other  
7 theories?

8           MR. ELLISON: Well, the other theory  
9 is inadequacy of price, combined to this as  
10 well, so -- because you could have a sales  
11 auction or a sales auction that is entirely  
12 fair but still doesn't reach just compensation.

13          JUSTICE KAVANAUGH: But do you agree  
14 you would have to show that you preserved the  
15 issue and that you would bear the burden of  
16 showing that the sale was not conducted fairly?

17          MR. ELLISON: As someone who  
18 represents property owners, we always want to  
19 put the burden on the government whenever we  
20 can. This Court has not --

21          JUSTICE KAVANAUGH: That's why I'm  
22 asking the question. Do you --

23          MR. ELLISON: The Court has not spoken  
24 to that answer yet at least as I can see.

25          JUSTICE KAVANAUGH: Okay. So you

1 don't -- you don't necessarily agree, is  
2 what --

3 MR. ELLISON: We don't --

4 JUSTICE KAVANAUGH: That's fine.  
5 That's fine. I just wanted to clarify what you  
6 thought about that.

7 And then, secondly, Justice Sotomayor  
8 a few times has brought up Justice Scalia's  
9 opinion in BFP, and that does speak, as you  
10 know, very generally and broadly at the end  
11 about foreclosure redefines the market, and  
12 given that altered reality, the only legitimate  
13 evidence of the property's value at the time it  
14 is sold is the foreclosure sale price itself.

15 And I just want to hear your succinct  
16 response to BFP and how you distinguish not  
17 only the holding but the reasoning and  
18 rationale of BFP.

19 MR. ELLISON: Of course, the first  
20 answer, of course, is always to point to  
21 Footnote 3 in -- in BFP and say, in the -- in  
22 the Constitution --

23 JUSTICE KAVANAUGH: Which is a  
24 standard footnote, but -- that we use, but --  
25 but the question is the rationale and why it

1 wouldn't apply more -- more generally.

2 MR. ELLISON: Because, in the  
3 bankruptcy context -- well, two -- two answers  
4 to that question. One is, in the bankruptcy  
5 context, Congress has given separate authority  
6 to reallocate the burdens of debt between  
7 private debtor and creditor in those  
8 circumstances.

9 So this is an Article I, Section 8  
10 question. We're not here on Article I, Section  
11 8. We're here with the government with a  
12 takings-style claim. So we think that easily  
13 distinguishes in that aspect.

14 Importantly, BFP on the facts  
15 itself -- and I won't get into tremendous  
16 detail -- but the foreclosure occurred  
17 pre-bankruptcy. In California, at the time  
18 that that foreclosure occurred, they had a  
19 challenge process that they could have  
20 challenged the unfairness of the foreclosure  
21 before it went into the bankruptcy process.  
22 And the property owner didn't opt to utilize  
23 that process, presumably thinking that the  
24 price got fair. And, apparently, the  
25 bankruptcy attorney thought differently once

1 they got in there.

2 So, in addition to the -- just we're  
3 in different constitutional worlds. I think  
4 the facts that led up to the foreclosure and  
5 how the question was framed before this Court  
6 got there in two totally different paths and  
7 are not -- are not congruous.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Barrett?

11 JUSTICE BARRETT: So, counsel, I -- I  
12 want to echo what Justice Gorsuch said. I  
13 mean, it seems like there was some real  
14 unfairness to your client. I mean, frankly,  
15 reading the briefs, it sounds to me like this  
16 tax assessor was like Inspector Javert, but it  
17 was even worse because Jean Valjean hadn't  
18 stolen the bread. I mean, you didn't even --

19 (Laughter.)

20 JUSTICE BARRETT: -- you didn't even  
21 owe the tax, and it's this small tax and -- and  
22 the big -- you know, the big loss of the family  
23 home and -- and of the money. So it does seem  
24 that there's some unfairness there.

25 But I'm struggling to see how it fits

1 into the takings framework. Can you tell me of  
2 a case that we have that treats the foreclosure  
3 of a house as a taking? I mean, Tyler treats  
4 the pocketing of the surplus as a taking, but  
5 I'm not aware of a case -- I just don't know if  
6 it fits this framework. I'm not aware of a  
7 case of ours that says that when the government  
8 forecloses on the house, as opposed to when it  
9 pockets the money, it's -- it's taken the  
10 house.

11 MR. ELLISON: The best I can point  
12 this Court to is Tyler. And I think Tyler was  
13 specifically written with the words about value  
14 as opposed to surplus proceeds if we look at  
15 the -- many of the passages in Tyler itself.

16 What's important, I think, is that  
17 historically, under the common law, under debt  
18 collection schemes that are developed by  
19 states, there's always a back-end protection on  
20 the former property owner. There's a sales  
21 confirmation. There's a review process.  
22 There's a challenge. So we --

23 JUSTICE BARRETT: But none of that --  
24 none of that answers whether it's a taking.  
25 And -- okay, well, let me ask you this

1 question. You say that it should be fair  
2 market value. You also say the taking happens  
3 when the government forecloses on the property  
4 as opposed to when it sells the property at  
5 auction?

6 MR. ELLISON: In this circumstance,  
7 yes.

8 JUSTICE BARRETT: Which is the right  
9 date for gauging the fair market value?

10 MR. ELLISON: When they --

11 JUSTICE BARRETT: If there's a gap of  
12 a year?

13 MR. ELLISON: They -- when they take  
14 title. When they assume full and complete  
15 title, that is the taking because the govern --  
16 the person is dispossessed of the ownership of  
17 that property at that point.

18 JUSTICE BARRETT: So the -- the  
19 property falls in value, and that's the  
20 government's risk?

21 MR. ELLISON: It is, but it's also the  
22 government's benefit if it goes up in value, as  
23 Justice Gorsuch points out as well. It's --  
24 it's the time -- it's always -- this Court has  
25 always said we measure precisely at the time of

1 the take, is what the value of that property  
2 is.

3 JUSTICE BARRETT: Okay. So let's say  
4 I don't think Tyler settles the question  
5 whether the foreclosure is a taking, that I  
6 think Tyler leaves open and might treat just  
7 the pocketing of the surplus as the taking.

8 Why couldn't I view the foreclosure of  
9 the house as just an exercise of the taxing  
10 power and not a taking?

11 MR. ELLISON: Because the government  
12 is taking more property than necessary to  
13 fulfill the debt because, at that point,  
14 they're no longer a debt collector anymore.  
15 When they've taken that much property over the  
16 debt itself, they've become a confiscatory  
17 government now as opposed to a debt collector.

18 When -- when a -- if a client doesn't  
19 pay my bill, I don't get go to seize their  
20 whole entire house. I can only collect on the  
21 piece of the debt that I'm entitled to do so.  
22 The government has different powers. They can  
23 act as a super debt collector, and they're  
24 utilizing their takings power to be able to  
25 take more property than necessary.

1           And when you trigger that taking  
2 obligation, here -- again, what's taken is not  
3 the surplus; it's the equity that's in the home  
4 at the time of the taking -- that's what  
5 triggers the obligation to pay just  
6 compensation because the Fifth Amendment  
7 requires it.

8           CHIEF JUSTICE ROBERTS: Justice  
9 Jackson?

10           JUSTICE JACKSON: Can I just get  
11 clarity on the tax isn't owed scenario in this  
12 situation? I mean, ordinarily, in the tax  
13 system, if you have -- if you're contesting  
14 that you owe the taxes, you pay them and then  
15 you go through some sort of process to get  
16 refunded by the government.

17           So is that not the case here?

18           MR. ELLISON: This is a -- I have to  
19 acknowledge this is a unique case in that --

20           JUSTICE JACKSON: Okay.

21           MR. ELLISON: -- the tax isn't owed.  
22 This is the worst of all examples of  
23 government -- I think government run amok on --

24           JUSTICE JACKSON: But the government  
25 says it's owed. That's why they're foreclosing

1 on your house. So the dispute is, I guess,  
2 over whether it's owed. And the question is  
3 whether it can be collected before that dispute  
4 is resolved. And in other tax schemes, it can  
5 be, the --

6 MR. ELLISON: Correct.

7 JUSTICE JACKSON: Right.

8 MR. ELLISON: Correct.

9 JUSTICE JACKSON: So why can't it be  
10 here?

11 MR. ELLISON: Because Michigan has  
12 this very unique system, the PRE, as I was  
13 engaging --

14 JUSTICE JACKSON: Yeah.

15 MR. ELLISON: -- with Justice Gorsuch.  
16 The PRE has this very narrow 35-day appellate  
17 window that when the assessor says, I'm taking  
18 away the PRE credit, you have 35 days, even if  
19 you know it or don't know it --

20 JUSTICE JACKSON: Mm-hmm.

21 MR. ELLISON: -- if you don't trigger  
22 the Tax Tribunal's review in that, you're  
23 barred from challenging that tax from being --  
24 whether it's owed or not owed in that  
25 circumstance.

1 JUSTICE JACKSON: And you couldn't  
2 bring some sort of, under Michigan law, a  
3 collateral attack on the fairness of that  
4 process?

5 MR. ELLISON: That is correct. And I  
6 have --

7 JUSTICE JACKSON: That has not been --  
8 yeah.

9 MR. ELLISON: And I have certainly  
10 tried as part of the federal case here to bring  
11 that fact, detail in, but as the Sixth Circuit  
12 and the trial court both below said, is we  
13 don't consider any of the factors outside of  
14 surplus as categorically fair market value.  
15 And they went no further than that in any  
16 further analysis.

17 JUSTICE JACKSON: All right. One --  
18 one final question with respect to Justice  
19 Alito's type analysis.

20 I mean, I do understand the concept of  
21 we have a fairness problem because this is a  
22 really small debt and a lot of equity in the  
23 house. But, to the extent that the homeowner  
24 has notice that the government is intending to  
25 use this particular tool to recover its debt, I

1 wonder if the fairness questions that you are  
2 raising don't get resolved because the notice  
3 gives the homeowner a chance to prevent that  
4 terrible outcome.

5 It -- I hear you, if there's no  
6 notice, there's no opportunity, there's no  
7 chance for Mr. Pung to run in and pay the  
8 \$2,000 so the government doesn't steal his --  
9 steal, from his perspective, his family home.

10 But, when the government says clearly  
11 this is how we intend to solve the problem of  
12 you not paying your taxes, why isn't it  
13 incumbent as a matter of justice for the  
14 taxpayer, if they want to avoid the thing the  
15 government is threatening, to just pay the  
16 taxes in some other way?

17 MR. ELLISON: I -- I believe, if  
18 Mr. Pung knew he was going to be at the United  
19 States Supreme Court arguing about \$2200, he  
20 would have paid that many years ago, but the  
21 answer to your question is is that at the point  
22 when the government takes more property than  
23 necessary --

24 JUSTICE JACKSON: I'm before that  
25 point. I'm before the taking. I'm at the

1 government threatening --

2 MR. ELLISON: Threatening.

3 JUSTICE JACKSON: -- to take your  
4 house. And when they do that, the question is  
5 what comes next as a matter of fairness and  
6 traditional tax policy, et cetera.

7 And the reason why I keep getting hung  
8 up on your ultimate this is so unfair point is  
9 because I see a very clear opportunity for the  
10 taxpayer, who, by the way, is the original  
11 problem because he hasn't paid the tax, to  
12 solve the problem.

13 And when the government just follows  
14 through with what it said it was going to do be  
15 because it's owed this money in its view, I  
16 don't understand how the taxpayer gets to say  
17 it's unfair that the government didn't do all I  
18 think it should have done to get my house  
19 valued at the highest possible price.

20 And, in fact, if they put it in a tax  
21 auction, which is just standard, they've got to  
22 actually go and pay me the difference. That  
23 seems like real unfairness the other way to  
24 the, like, rest of the American people that we  
25 are paying you because you didn't pay your

1 taxes and the government had to foreclose on  
2 your house.

3 MR. ELLISON: The best answer I can  
4 give you is governments have a lot of tools in  
5 their tool chest to collect debts. They can  
6 use lawsuits. They can use, you know, the  
7 Peloton bike example I was using earlier. They  
8 have a lot of tools in their tool chest.

9 If they're going to utilize a process  
10 that captures way more property value than what  
11 the tax debt is, the Takings Clause does not  
12 have a moral fault. The Takings Clause has  
13 balanced those interests already and has put  
14 that burden on to the government.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 MR. ELLISON: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Liu.

20 ORAL ARGUMENT OF FREDERICK LIU  
21 FOR THE UNITED STATES, AS AMICUS CURIAE,  
22 SUPPORTING NEITHER PARTY

23 MR. LIU: Mr. Chief Justice, and may  
24 it please the Court:

25 In Tyler, this Court looked to history

1 and tradition to conclude that a taxpayer is  
2 entitled to just compensation when his home is  
3 sold for more than he owes. The same history  
4 establishes what compensation is just. As long  
5 as the sale is conducted fairly, just  
6 compensation is the surplus proceeds.

7           According to Petitioner, compensation  
8 should instead reflect a property's fair market  
9 value. But, as this Court recognized in BFP,  
10 foreclosed property is simply worth less.

11           Petitioner's approach would defy that  
12 reality and spell the end of tax sales in this  
13 country.

14           As for the Excessive Fines Clause,  
15 it's simply not implicated here. Any taking  
16 that's justly compensated for can't be a fine,  
17 can't be punishment, and can't be excessive.

18           I welcome the Court's questions.

19           JUSTICE THOMAS: Mr. Liu, you seem to  
20 put a lot of weight on fairness of the process.  
21 How do we determine that? Do we look at  
22 history and tradition? Do we look at, as  
23 Petitioner argues, at least as a part of this  
24 the end result, whether or not the price is a  
25 fair market value?

1                   The -- what should be our gauge for  
2                   that?

3                   MR. LIU: I do think we look to  
4                   history and tradition to determine what a fair  
5                   sale looks like. I would -- I think some  
6                   helpful guideposts are the Cooley treatise,  
7                   starting at page 334, that goes through the  
8                   historical practices of jurisdictions at the  
9                   time.

10                  I think the federal government's 1812  
11                  statute is also a helpful guidepost. And I  
12                  think, if you look at those guideposts, there  
13                  are basically three minimum ingredients of a  
14                  fair sale. One is public notice, notice that  
15                  contains the time and date of the sale, a  
16                  description of the property. The second is  
17                  that there must be a public auction. It can't  
18                  be a secret sale. It can't be a private sale.  
19                  And the third ingredient is that the auction  
20                  must be competitive. There must be an  
21                  opportunity for bidding and sale to the highest  
22                  bidder.

23                  And, of course, you can also look to  
24                  history and tradition to also figure out what  
25                  is the amount of the tax debt that can be

1 subtracted from the sale proceeds to yield  
2 the -- the surplus proceeds.

3 But do I think the inadequacy of the  
4 price bears on that? I'm not going to dispute  
5 that a truly grossly inadequate price should  
6 cause a court to look more closely at the  
7 procedures. But the fact that the -- the price  
8 is inadequate is not alone enough to justify  
9 setting aside the sale, and -- and -- and it  
10 never has been for -- for the centuries that  
11 tax sales have been conducted.

12 JUSTICE THOMAS: Has the taxing  
13 authority and power of government superseded  
14 that of the constitutional right to private  
15 property?

16 MR. LIU: No. I don't -- I mean, if  
17 I'm hearing the question correctly, no. The --  
18 the -- the government's authority to foreclose  
19 on property doesn't supersede any -- any  
20 private property rights.

21 I think the taking -- what the Taking  
22 Clause reflects is a really important guarantee  
23 of what happens when the government does take  
24 property, and it's the guarantee of just  
25 compensation. That's -- that's the balance the

1 founders struck.

2 JUSTICE THOMAS: Are there more  
3 protections in mortgage foreclosures, for  
4 example, than there are in tax foreclosures?

5 MR. LIU: There -- there may well be.  
6 You know, if you -- if you -- to contrast to  
7 contrast some of the cases my friend cited, he  
8 cited Graffam and Ballentyne, I mean, those --  
9 those were not tax sale cases. They did  
10 mention this concept of gross inadequacy of  
11 price.

12 If you look at the Court's on-point  
13 opinion on tax sales, which is Slater versus  
14 Maxwell, the Court rejects the notion that tax  
15 sales could be challenged based on a mere  
16 inadequacy of price. So --

17 JUSTICE THOMAS: That's not what  
18 I'm -- I'm not know talking about that.

19 MR. LIU: Okay.

20 JUSTICE THOMAS: The -- it seems as  
21 though, when we talk about such things as  
22 mortgage foreclosures, which we, of course,  
23 know are contractual, but there are all sorts  
24 of built-in protections --

25 MR. LIU: Right.

1 JUSTICE THOMAS: -- for the homeowner.  
2 Are there similar built-in protections for the  
3 taxpayer in tax foreclosures?

4 MR. LIU: I think there are, but I  
5 don't think they're constitutionalized by the  
6 Takings Clause. I think federal and state  
7 statutes have long proven perfectly capable of  
8 protecting the process and exempting certain  
9 property from levy in the tax sales context,  
10 and so they've provided the protections that  
11 may exist at the outset.

12 JUSTICE THOMAS: I think my point is  
13 rather that you're looking at a contract, a  
14 private contract when you're looking at  
15 mortgage and there are these built-in  
16 protections. You're looking at a  
17 constitutional right as -- with respect to  
18 private property as it relates to the  
19 government.

20 It seems as though that if you're  
21 looking at protections, they should be at least  
22 similar.

23 MR. LIU: Yes. And -- and if you -- I  
24 think it's a pretty good sign that the --  
25 the -- the tax sale procedures are

1 constitutional in that they provide -- the --  
2 the -- the tax sales that are conducted by  
3 governments look very much like the private  
4 mortgage foreclosure sales that banks and  
5 private lenders --

6 JUSTICE GORSUCH: Mr. Liu --

7 MR. LIU: -- conduct.

8 JUSTICE GORSUCH: -- you -- you -- you  
9 say that we should vacate and remand, correct?

10 MR. LIU: Correct.

11 JUSTICE GORSUCH: So we can't -- we  
12 can't affirm because none of these arguments  
13 about history were developed in the Sixth  
14 Circuit. They just went off on the idea of a  
15 foreclosure sale is automatically good enough.  
16 And -- and you don't support that view?

17 MR. LIU: Correct.

18 JUSTICE GORSUCH: Okay.

19 MR. LIU: We think the right way to go  
20 is vacate and remand for consideration of any  
21 arguments that have been preserved as to the  
22 process.

23 JUSTICE GORSUCH: And it really would  
24 be any arguments about what history and  
25 tradition might require in your view that we --

1 that they should consider, that are preserved?

2 MR. LIU: Exactly. So long as they're  
3 preserved --

4 JUSTICE GORSUCH: Yeah.

5 MR. LIU: -- all of those arguments  
6 can be considered.

7 JUSTICE GORSUCH: So -- so, for  
8 example, you know, Cooley also says, don't take  
9 more property than you need to, right? That's  
10 another rule that might be -- a court might  
11 want to look at?

12 MR. LIU: That is certainly fair game  
13 on remand.

14 JUSTICE GORSUCH: And they say, you  
15 know, if you get -- if you can take the Peloton  
16 rather than the whole house, you should take  
17 the Peloton. I mean --

18 MR. LIU: If it's preserved, that  
19 could be considered too.

20 JUSTICE GORSUCH: All right. All  
21 right. Thank you.

22 JUSTICE BARRETT: Do you have a  
23 position on whether those things are required?  
24 You're just saying if they're preserved they  
25 can be litigated below. Do you think they are

1 required?

2 MR. LIU: I don't think they're  
3 required by the Takings Clause. To take the  
4 personal property hypo, there's no need for  
5 such a rule that says the government needs to  
6 exhaust the personal property.

7 JUSTICE GORSUCH: Well, if you want to  
8 play with history, if you want to invoke  
9 history, you've got to -- you can't -- you  
10 can't cherry-pick it, Mr. Liu. And, you know,  
11 the history there is pretty clear that, you  
12 know, Cooley's -- Cooley's -- if you invoke  
13 Cooley, you -- you -- you've got to eat your  
14 Cooley, it seems to me.

15 (Laughter.)

16 MR. LIU: Yeah. So I -- I read Cooley  
17 differently. I -- I -- I know -- I know that  
18 that's --

19 JUSTICE GORSUCH: Okay. All right.  
20 That's fair. But you -- you would accept that  
21 you have to deal with the whole of the history,  
22 you don't get to cherry-pick here?

23 MR. LIU: Oh, of course. And -- and  
24 that passage from Cooley is a rule about  
25 divisible property. What it says is, when

1 property is divisible --

2 JUSTICE GORSUCH: Sure.

3 MR. LIU: -- that the government  
4 shouldn't take more of the parts than it needs  
5 to. Now, here, the property was indivisible  
6 and everyone agrees that it was necessary to  
7 take the whole property. You couldn't take  
8 just the backyard or just the front yard, and  
9 so that rule is simply inapplicable.

10 JUSTICE KAGAN: Well, how about,  
11 Mr. Liu, that -- a rule that would say there's  
12 the house, but there was also a car, and the  
13 car could have satisfied the \$2,000 debt.

14 MR. LIU: We don't think the Takings  
15 Clause constitutionalizes that rule. We think  
16 the Takings Clause doesn't address the  
17 antecedent question of what property can be  
18 taken for public use. Gather -- rather, it  
19 addresses the -- the -- the subsequent question  
20 of, if you take property for public use, what  
21 is the just compensation.

22 But I -- I just want to address the  
23 merits of this personal property exhaustion  
24 rule. There's no need for such a rule because,  
25 if the taxpayer wants to sell his Peloton bike

1 to satisfy his tax debt, he is free to do so  
2 any day of the week. In fact, our foreclosing  
3 on it would make it more difficult for him to  
4 sell it.

5 So, if, indeed, Mr. Pung thinks the  
6 way to satisfy my tax debt is to sell my  
7 Peloton bike, there's no need for a rule that  
8 forces him to do that. And --

9 CHIEF JUSTICE ROBERTS: Well, what if  
10 the only thing he has to sell is his house?

11 MR. LIU: If the only thing that he  
12 has to sell is --

13 CHIEF JUSTICE ROBERTS: Because he --  
14 he doesn't have to do that, does he?

15 MR. LIU: Well, he -- he -- he can  
16 sell his house and he's free to do so to -- to  
17 pay the price. If it's a situation where  
18 there's a financial hardship or it's --

19 CHIEF JUSTICE ROBERTS: If it -- well,  
20 what do you mean if there's a financial  
21 hardship?

22 MR. LIU: Well, in Michigan --

23 CHIEF JUSTICE ROBERTS: It's usually  
24 not a defense to paying your taxes.

25 MR. LIU: No, but in Michigan and --

1 and -- and in many other jurisdictions,  
2 taxpayers who truly are unable to afford their  
3 taxes are given installment plans, offers in  
4 compromise. They're -- they're -- they're  
5 given --

6 CHIEF JUSTICE ROBERTS: What if the --

7 MR. LIU: -- opportunities to --

8 CHIEF JUSTICE ROBERTS: Oh, sorry, go  
9 ahead.

10 MR. LIU: Well, they're just given  
11 opportunities to -- to find a way to pay their  
12 taxes. And -- and one of -- one of them is,  
13 indeed, to ask the -- in the case of the IRS,  
14 to discharge the house from the federal lien so  
15 that the taxpayer can sell it. And what  
16 happens at closing in that open market sale --

17 CHIEF JUSTICE ROBERTS: Well --

18 MR. LIU: -- is they simply cut a  
19 check to the IRS.

20 CHIEF JUSTICE ROBERTS: Well, what if  
21 the validity of the tax assessment is still  
22 under challenge?

23 MR. LIU: So, if -- if it's still  
24 under challenge, under the IRS rules, we cannot  
25 levy on the house, so that challenge can go

1 forward.

2 I think what's unusual about this case  
3 is that instead of paying the tax and then  
4 challenging it, Mr. Pung just -- just wanted to  
5 litigate all the way through without paying the  
6 tax at all.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: There are some  
11 suggestions in the many briefs that have been  
12 filed in this case, although not in  
13 Petitioner's brief, about specific things that  
14 could be done to make the process fairer. For  
15 example, one of the briefs points to statutes  
16 that have been enacted in Oregon, Maine, and  
17 Massachusetts, and they say that under those  
18 statutes, the -- the jurisdiction that is  
19 attempting to collect the taxes must first list  
20 the property for sale at market value via real  
21 estate brokers or real estate agents, and then,  
22 if the realtor listing is unable to proceed,  
23 then a public auction is allowed where the  
24 minimum strike price at auction is two-thirds  
25 of the fair market value, et cetera, et cetera.

1           So some of those things seem like  
2 possibly good reforms that would make the  
3 process fairer, but what concerns me is getting  
4 into the determination of which -- the details  
5 of this scheme that are minimally necessary to  
6 comply with the Takings Clause.

7           MR. LIU: We -- we share that concern  
8 as well, Justice Alito, and that's why, at the  
9 outset, in response to Justice Thomas's  
10 questions, I provided a few things that we  
11 think provide the constitutional floor.

12           But, above that floor, I think states  
13 have leeway to adopt other procedures that --  
14 that, in their view, may or may not close the  
15 gap between the for sale price and the fair  
16 market value. But it -- it -- it's up to them  
17 to adopt those.

18           CHIEF JUSTICE ROBERTS: Justice  
19 Sotomayor?

20           JUSTICE SOTOMAYOR: That's the  
21 problem, Mr. Liu, because you get into a  
22 situation like this one that Justice Barrett  
23 very eloquently described as feeling like  
24 fundamentally unfair. They're fighting over a  
25 \$2400 tax debt that at least two courts said

1 wasn't owed, and yet they plowed ahead and got  
2 a -- a price half the amount of the value of  
3 the property that was flipped for the value of  
4 the property.

5 At some point, doesn't the  
6 Constitution have something to say under the  
7 rubric of what a just compensation is? I mean,  
8 is it just to give the state that much leeway?

9 MR. LIU: I think --

10 JUSTICE SOTOMAYOR: Shouldn't the  
11 minimum require a little bit more?

12 MR. LIU: I don't think the Takings  
13 Clause speaks to those issues. I mean, to the  
14 extent the --

15 JUSTICE SOTOMAYOR: So what would?

16 MR. LIU: Well, I think these sorts of  
17 issues about when a foreclosure is appropriate  
18 have typically been the province of federal and  
19 state statutes, and those statutes have proven  
20 perfectly competent in addressing those  
21 issues --

22 JUSTICE SOTOMAYOR: Not here.

23 MR. LIU: -- for centuries.

24 JUSTICE SOTOMAYOR: Not here. That's  
25 the claim. Not --

1           MR. LIU: Well, I think the -- what  
2           the facts of this -- this case show is that  
3           Mr. Pung was given notice of the delinquency.  
4           I mean, he face-to-face was told by the  
5           township assessor that he owed the tax.

6           JUSTICE SOTOMAYOR: And he went to tax  
7           court, and the tax court said no, you don't.

8           MR. LIU: That --

9           JUSTICE SOTOMAYOR: And he presented  
10          the government with that notice, and the  
11          government said bye.

12          MR. LIU: Right. And -- and I think  
13          this is a -- an unusual feature of this case,  
14          that while Mr. Pung did appeal the denial of  
15          the principal residence exception as to certain  
16          years, he didn't appeal that denial as to the  
17          year at issue here.

18          I don't know what explains that  
19          choice, but it is what --

20          JUSTICE SOTOMAYOR: All right.

21          MR. LIU: -- creates this case.

22          JUSTICE SOTOMAYOR: I have one final  
23          question. Given the three minimums of  
24          fairness, are you saying those are the only  
25          ones, or are you leaving open the door that

1 there are potentially others?

2 MR. LIU: We are leaving open the door  
3 that there are others. I think, as -- as has  
4 been mentioned this morning, this is not an  
5 issue that has been the focus of the briefing.  
6 So one of the reasons we think a remand is  
7 appropriate is for any preserved issues like  
8 this to be addressed.

9 The reason why I say it's not an  
10 exhaustive list is because, while there are  
11 certain procedures that you can point to that  
12 will provide fair procedures, there's any  
13 number of things a state could put on top that  
14 would actually make those -- you know, undercut  
15 those same procedures.

16 So I -- I don't think it's -- it's --  
17 it's as simple as going through and saying  
18 there's X, Y, and Z. I think you need a  
19 catch-all that's something like: And the state  
20 can't do anything else to kind of undercut  
21 all -- all the procedures on that list.

22 JUSTICE SOTOMAYOR: So --

23 CHIEF JUSTICE ROBERTS: Justice -- oh.

24 JUSTICE SOTOMAYOR: -- the other side  
25 is saying you can't do anything that undercuts

1 fair market value. That -- that's how they  
2 would answer that question. And so how should  
3 we answer it if not that way?

4 MR. LIU: Right. And -- and I -- I --  
5 I don't think the mere fact that a -- a  
6 procedure is or is not going to have an effect  
7 on fair market value can be enough to decide  
8 whether it's okay or not.

9 JUSTICE SOTOMAYOR: But should it be a  
10 factor?

11 MR. LIU: Whether -- whether the --  
12 the procedure undercuts fair market value?

13 JUSTICE SOTOMAYOR: In some --

14 MR. LIU: Yeah.

15 JUSTICE SOTOMAYOR: -- not rational  
16 way, right? I don't know what else.

17 MR. LIU: I think -- I think the  
18 guide -- I think the guide has to be history  
19 and tradition. I -- I -- I think that provides  
20 the most principled way to decide which  
21 procedures are required and which are not.

22 JUSTICE SOTOMAYOR: All right. Thank  
23 you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: Just as an empirical

1 matter, Mr. Liu, do you think that Justice  
2 Scalia was right when he said the thing that  
3 Justice Kavanaugh read, that foreclosure sales  
4 just produce not as much money as the fair  
5 market value would?

6 MR. LIU: Yes. We think it's just a  
7 bad -- a matter of basic economics. It's been  
8 proven true through histories -- centuries of  
9 experience with tax foreclosure sales. And  
10 Petitioner indeed acknowledges on page 20 of  
11 his brief that forced sales inherently lead to  
12 lower prices.

13 JUSTICE KAGAN: So what would it mean  
14 if we said that the measure was fair market  
15 value with respect to foreclosure sales?

16 MR. LIU: It would spell the end of  
17 tax sales in America. Every tax sale  
18 is necessarily going to yield less than fair  
19 market value.

20 If the government is nevertheless  
21 required to reimburse the taxpayer -- taxpayer  
22 as if the sale yielded fair market value, then  
23 every tax sale is going to end up costing the  
24 government money, and it won't be long before  
25 governments simply stop conducting tax sales

1 altogether.

2           And at the end of the day, who does  
3 this hurt? It hurts other taxpayers who are  
4 actually paying their taxes because the  
5 shortfall has to come from real taxpayers.

6           JUSTICE KAGAN: Thank you.

7           CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch?

9           JUSTICE GORSUCH: In -- in that  
10 analysis, I'm sure there are a lot of careful  
11 economic work done that probably quantifies the  
12 delta between fair market value and -- and what  
13 a good auction price after foreclosure looks  
14 like.

15           Would that be relevant consideration  
16 in this process that would happen on remand,  
17 the evidence about what, in fact, a good  
18 process tends to yield?

19           MR. LIU: I think that sort of  
20 analysis can be an indicator.

21           JUSTICE GORSUCH: Right.

22           MR. LIU: It can be a reason to look  
23 more closely at the process. After all, I  
24 think the historical guarantees of notice and  
25 publicity and -- and competition are there to

1 make sure -- when you don't have those, what  
2 happens is that the price goes down. So,  
3 conversely, if you see a very, very, very low  
4 price --

5 JUSTICE GORSUCH: Like, here --

6 MR. LIU: -- you might wonder about  
7 the -- about the proceeding.

8 JUSTICE GORSUCH: -- we have,  
9 basically, a third of the market value was  
10 realized. Would that be good reason for a  
11 judge to be pretty skeptical that the  
12 procedures were -- were fair?

13 MR. LIU: I think pretty skeptical is  
14 too strong. I think it is reason to look at  
15 the procedures and to scrutinize them.

16 JUSTICE GORSUCH: I suspect it's a  
17 great deal lower. I don't know. I haven't  
18 done -- looked, and maybe you have and you can  
19 tell me, but I suspect one-third or  
20 approximately is a good deal lower than a fair  
21 process tends to yield compared to fair market  
22 value.

23 MR. LIU: It's hard to generalize  
24 because, in response to Justice Alito's  
25 question, I -- I do think it's true that states

1 have some leeway in the types of procedures  
2 they adopt, so there's going to be state  
3 variation.

4 JUSTICE GORSUCH: Sure. A lot of  
5 people may just let the whole thing go to seed,  
6 not take care of it, not keep it up, and -- and  
7 realize as little as possible, not -- not  
8 notify anybody about it.

9 MR. LIU: Yeah.

10 JUSTICE GORSUCH: Others might  
11 actually care --

12 MR. LIU: Yeah.

13 JUSTICE GORSUCH: -- you know, and --  
14 and take care.

15 MR. LIU: I -- I can -- I can tell you  
16 the IRS estimates a forced sale like this to  
17 result in 60 percent --

18 JUSTICE GORSUCH: Sixty percent.

19 MR. LIU: -- of what the -- what the  
20 "fair market value" --

21 JUSTICE GORSUCH: Thank you. It was  
22 very helpful.

23 MR. LIU: -- whatever those be.

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: Do you think our  
3 opinion in this case should talk about the  
4 procedures at all or any of this?

5 MR. LIU: No. I think it's enough for  
6 this Court in this case to simply articulate  
7 the correct principle, which is, as long as the  
8 sale is fairly conducted, the surplus proceeds  
9 represent just compensation.

10 And fleshing out what a -- a fair sale  
11 looks like can be left for remand or for  
12 another case if the issue isn't preserved in  
13 this one.

14 JUSTICE KAVANAUGH: So we shouldn't  
15 even say the guideposts that you mentioned in  
16 response to Justice Thomas?

17 MR. LIU: We're -- we're -- we're not  
18 urging you to do so. We -- we -- we  
19 acknowledge that the precise guideposts have  
20 not been the subject of adversarial briefing.  
21 It's not that I don't believe that they are the  
22 correct guideposts, but there just hasn't  
23 been --

24 JUSTICE KAVANAUGH: We could make a  
25 mistake, as your point --

1           MR. LIU: There -- yeah. There just  
2 hasn't been the airing of -- of what those  
3 procedures are that I think would -- would  
4 warrant this Court getting that granular  
5 about -- about what the Constitution requires.

6           JUSTICE KAVANAUGH: Thank you.

7           JUSTICE BARRETT: Mr. Liu, I just want  
8 to ask you about the right analytical framework  
9 as we think about the opinion. This is an  
10 unusual case, and as I was kind of going back  
11 and forth with your friend, we don't have a  
12 case saying that the Takings Clause applies in  
13 this context.

14           And I don't think Tyler quite does say  
15 that the foreclosure itself is the taking.  
16 You've briefed it as if it is a Takings Clause  
17 issue as opposed to an exercise of the taxing  
18 power. Why did you make that choice and,  
19 conceptually, when does the taking happen?

20           THE WITNESS: So we don't think every  
21 foreclosure is necessarily a taking. We think  
22 it's going to depend on whether there is excess  
23 value in the equity of the home that exceeds  
24 the tax debt.

25           But, as to when the taking occurs, if

1     there is excess value above the tax debt, we do  
2     think the taking occurs at the time the house  
3     is foreclosed upon, not at the time of sale,  
4     which could be a different time period.

5             JUSTICE BARRETT:   But you might not  
6     know if there's extra value in the house  
7     because, if the government is saying so long as  
8     the sale is fairly -- I mean, here, there was a  
9     huge difference --

10            MR. LIU:   Right.

11            JUSTICE BARRETT:   -- between the debt  
12     and the value of the house.  Let's say it's a  
13     lot closer.  Let's say the debt was, you know,  
14     \$90,000 and you don't know how much the house  
15     is going to get at auction, so then did you  
16     take the house at foreclosure?

17            MR. LIU:   It's true, I -- I -- without  
18     doing the sort of sale analysis, you might not  
19     know.  But that's also true even to a larger  
20     extent under Petitioner's test because their  
21     test is hypothesizing a fair market sale and  
22     then reasoning from that that there is excess  
23     value.

24            All I'm saying is what you would  
25     hypothesize at that moment is just a different

1 kind of sale. You would hypothesize a  
2 distressed -- a distressed property sale and  
3 if -- if your hypothesis is that that would  
4 result in more than the tax debt, then I -- I  
5 think you have a good indication that there is  
6 a taking at that moment.

7 Now, of course, the -- the actual sale  
8 that happens is going to confirm exactly what  
9 the surplus proceeds are, but I don't -- I  
10 don't think there's any real analytical problem  
11 in thinking that the taking occurs at the time  
12 of foreclosure. But I should also add that  
13 timing is going to be dependent on the laws of  
14 the jurisdiction.

15 So here in Michigan, the judgment of  
16 foreclosure --

17 JUSTICE BARRETT: There was a gap.

18 MR. LIU: -- there was a gap, and then  
19 the sale happened. Under the federal scheme,  
20 the taxpayer's right of redemption goes beyond  
21 the sale. The -- the taxpayer has until 180  
22 days after the sale to say that he wants to  
23 redeem the property and take it back.

24 We would say, under the federal  
25 scheme, there's no transfer of title and,

1 therefore, no taking until that right of  
2 redemption expires.

3 And that -- that's traditionally how,  
4 I think, courts have understood the property  
5 rights here. The transfer of title is --  
6 coincides with the expiration of the right of  
7 redemption.

8 JUSTICE BARRETT: So the right of  
9 redemption is where you -- the expiration of  
10 the right of redemption, it's not quite -- I  
11 mean, let's see. I'm not an expert in  
12 foreclosure by any stretch, so I don't know how  
13 all these steps work.

14 But, if I'm understanding you  
15 correctly, it's not really at the moment of  
16 foreclosure because the right of redemption  
17 might expire at a time later than that.

18 MR. LIU: Exactly, exactly. And --  
19 and, technically, under Michigan law, I think  
20 there's still -- you have until the following  
21 March 31st or 21 days after a contested  
22 foreclosure.

23 JUSTICE BARRETT: So you're not really  
24 pegging it to when the government exerts  
25 control over the property. You're pegging it

1 to when the property owner has lost any ability  
2 himself to control the property?

3 MR. LIU: Correct. Correct.

4 JUSTICE BARRETT: Okay. Well, then  
5 that would be different. When we started  
6 talking and I said foreclosure --

7 MR. LIU: Ah, okay.

8 JUSTICE BARRETT: -- you -- you are  
9 saying analytically I should be thinking of  
10 this differently?

11 MR. LIU: You're -- you're right.

12 JUSTICE BARRETT: Okay.

13 MR. LIU: I was -- I was using  
14 foreclosure as a -- as a sort of shorthand for  
15 the transfer of title, but you're right. As a  
16 technical matter, the judgment of foreclosure  
17 doesn't necessarily coincide with that transfer  
18 of title, but I think it's the transfer of  
19 title --

20 JUSTICE BARRETT: Transfer of title  
21 that matters.

22 MR. LIU: -- that -- that is key.

23 JUSTICE BARRETT: Okay.

24 MR. LIU: And -- and that may vary  
25 depending on the jurisdiction.

1 JUSTICE BARRETT: Okay. That's  
2 helpful. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Jackson?

5 JUSTICE JACKSON: Really quickly, do  
6 you -- do you have any reaction to the thought  
7 that all of the fairness questions that are  
8 coming up in this case could actually be taken  
9 care of in the due process realm?

10 So what I mean is that we have this  
11 form -- the fairness questions about whether  
12 the government should have taken personal  
13 property -- Michigan government, personal  
14 property before the house. That's one set of  
15 issues.

16 Whether the Michigan government  
17 conducted a fair auction, you all are  
18 accounting for that in the context of the just  
19 compensation evaluation, but I suppose you  
20 could say just compensation is the amount that  
21 is generated at auction minus the tax bill,  
22 which is what we're calling the excess  
23 proceeds.

24 To the extent that your argument is  
25 that they didn't do enough with respect to the

1 auction, what you're really complaining about  
2 is what Michigan law says about the process.  
3 And -- and we have a whole set of cases and  
4 ways to evaluate whether, as a constitutional  
5 matter, the government is giving you adequate  
6 process.

7           So it takes care, I think, of, like,  
8 some of the concerns about, well, how do we do  
9 this in figuring out whether it's fair enough.  
10 We -- we have a rubric when we look at federal  
11 and state laws and they're giving process to  
12 people in a context, we say, as a  
13 constitutional matter, is this procedure  
14 comporting with due process?

15           So -- so what is your reaction to  
16 treating it like that, in which case we would  
17 affirm because the Sixth Circuit is doing the  
18 takings part of this, just compensation equals  
19 excess proceeds, and leave open the idea that  
20 there could be another lawsuit by this very  
21 plaintiff claiming a due process problem?

22           MR. LIU: I don't think we have any  
23 real objection to putting the fairness of the  
24 sale under the heading of procedural due  
25 process.

1 JUSTICE JACKSON: Yes.

2 MR. LIU: I think what matters most to  
3 us is -- is getting the contours of that rule  
4 right, and I think whether it's viewed as  
5 procedural due process or a function of the  
6 just compensation clause, it's still going to  
7 look at the same legal materials. It's still  
8 going to look to the -- the nation's history  
9 and tradition.

10 JUSTICE JACKSON: Sure, absolutely.  
11 But it just helps that we already have a way of  
12 thinking about whether state laws are giving  
13 people adequate process. It seems like, you  
14 know, to -- to kind of import that here seems  
15 to be difficult, and that's what a lot of  
16 people are reacting to.

17 MR. LIU: Well, I guess all I would  
18 say is there's, I think, a common-sense  
19 intuition that if a sale is rigged or there's  
20 collusion in the sale, that what results from  
21 that sale isn't really just compensation.

22 JUSTICE JACKSON: Sure. But the --  
23 the state law is doing that. And we can  
24 evaluate whether the state law's process is  
25 generating artificially unfair depressed

1 auction prices under the rubric of are they  
2 giving you adequate process.

3 MR. LIU: That's right. And the --  
4 and the -- the -- the thing -- the only thing I  
5 would really push back on, though, is the idea  
6 that some of these other rules --

7 JUSTICE JACKSON: Mm-hmm.

8 MR. LIU: -- about the -- the  
9 government's authority to foreclose and what it  
10 can foreclose on, I don't think there's a home  
11 for those rules under the rubric of, I think it  
12 would have to be substantive due process.

13 JUSTICE JACKSON: Fine. Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Mr. Nelson.

17 ORAL ARGUMENT OF MATTHEW T. NELSON

18 ON BEHALF OF THE RESPONDENT

19 MR. NELSON: Mr. Chief Justice, and  
20 may it please the Court:

21 The Petitioner's Takings Clause  
22 question here has morphed from just whether  
23 fair market value is the only measure of just  
24 compensation into questions regarding whether  
25 the Takings Clause requires the government to

1 execute against certain property before others  
2 when collecting a debt and whether the Takings  
3 Clause dictates the procedures for government  
4 auctions of foreclosed property. Only the  
5 first of these questions was actually preserved  
6 and addressed below and challenged in the  
7 district court.

8           The Sixth Circuit here correctly  
9 applied historic practice, this Court's  
10 precedents, and economic reality to determine  
11 that surplus proceeds less -- from an auction  
12 sale, less the tax debt that's owed establishes  
13 just compensation. Property sold under a  
14 compelled -- on -- in a compelled market, under  
15 compelled market conditions, is worth what the  
16 market pays for it under those conditions, and  
17 not what the property would be worth in an  
18 idealized private sale.

19           By contrast, Petitioner's fair market  
20 value theory has no foothold in historic  
21 practice, this Court's precedents, or economic  
22 reality. Even though the government has been  
23 selling properties at auction and returning the  
24 overplus for centuries, not a single case has  
25 ever suggested that the surplus proceeds are

1 equal to the property's fair market value less  
2 the debt.

3           Moreover, the property -- the  
4 Petitioner's fair market value approach assumes  
5 market conditions that simply don't exist after  
6 a foreclosure because the property owner's  
7 decisions not to pay the tax, not to sell the  
8 property, not to obtain a statutory deferral,  
9 and not to exercise the right of redemption.

10           The Takings Clause does not require  
11 compensation to the owner for owner-created  
12 reductions to the property value. That would  
13 be unjust to the government and to the public.

14           I welcome the Court's questions.

15           JUSTICE THOMAS: What was the assessed  
16 value on which the tax was imposed?

17           MR. NELSON: The assessed value here  
18 was approximately \$194,000.

19           JUSTICE THOMAS: Can Petitioner use  
20 that as a basis for its disagreement with the  
21 foreclosed sale value?

22           MR. NELSON: Justice Thomas, we do not  
23 believe so because the -- if the measure of the  
24 property's value is at the time of the taking,  
25 it's either -- if the taking is the surplus

1 proceeds, then the amount of the surplus  
2 proceeds is what's taken. If the property  
3 value is the equitable interest in the property  
4 at the time that the right of redemption  
5 expired, the property was no longer worth the  
6 -- the assessed value under the market -- under  
7 market conditions because the property was in  
8 foreclosure and the right of redemption had not  
9 been exercised, such that the value of the  
10 equitable interest in the property had  
11 diminished to a forced-sale value, which we  
12 believe is the teaching from BFP.

13 JUSTICE THOMAS: So it -- the value  
14 decreased approximately \$120,000 in that short  
15 period?

16 MR. NELSON: We believe that the  
17 property -- yes, the property decreased in  
18 value by -- by a very significant amount  
19 between the time of the assessment and the time  
20 of the foreclosure -- or, excuse me, the -- the  
21 expiration of the right of redemption because  
22 of the non-payment of the tax.

23 No reasonable buyer out in the market  
24 would acquire the property at the moment of  
25 foreclosure -- of the -- of the taking here for

1 the \$194,000 because --

2 JUSTICE GORSUCH: Except for someone  
3 did shortly after the auction buy the property  
4 for the prior \$194,000. Doesn't that give rise  
5 to some reason to be concerned about the  
6 procedures that your client used?

7 MR. NELSON: No, Your Honor. The --  
8 the procedures here have been the historic  
9 process that have been used since the beginning  
10 of the republic. But with regard to the  
11 particular \$195,000 subsequent sale price, what  
12 we have is right now a discussion of the  
13 assessed value of the property on the open  
14 market and a later sale of the property more  
15 than a year after the property was purchased  
16 from auction, also on the open market, and not  
17 a -- a sale within the confines of a forced  
18 sale with regard to the property.

19 At the time of the foreclosure, there  
20 was no longer an open market for the property.  
21 We could not -- there was not an unlimited time  
22 to purchase the property, and there was not the  
23 opportunity for there just to be a willing -- a  
24 willing seller.

25 JUSTICE GORSUCH: I am curious, just

1 -- I know this is a bit of a side show,  
2 unfortunately, I apologize, but I am curious  
3 about how come the assessor charged that tax  
4 again and disregarded the ALJ's, at least, oral  
5 indications that -- that it was not owed, and  
6 how come nobody over the many years between  
7 there and here said, hey, wait a minute, what  
8 are we doing over \$2,000 tax bill?

9 MR. NELSON: So, Justice Gorsuch,  
10 there are -- there are a couple of wrinkles  
11 that occurred in this proper process. Number  
12 one, the decision with regard to the personal  
13 residence exemption was made by the township  
14 assessor, not the county. So the township  
15 assessor disallows the personal residence  
16 exemption. The property tax remains unpaid.  
17 The property tax is delinquent. So the  
18 property gets turned over to the county  
19 treasurer for the collection of the tax. But  
20 --

21 JUSTICE GORSUCH: I understand that  
22 there are a lot of bureaucracies involved and  
23 that the right hand is not always talking to  
24 the left hand. I appreciate that. We've all  
25 been -- we've all encountered that phenomenon.

1 (Laughter.)

2 JUSTICE GORSUCH: But what is curious  
3 to me is we're sitting in the Supreme Court of  
4 the United States many years -- no one, I mean,  
5 at some point the right hand recognizes, Ah,  
6 there's a left hand over here, and at some  
7 point, a lawyer gets involved and advises the  
8 left hand to the right hand. And I'm not  
9 criticizing anyone. Don't get me wrong.

10 I'm just curious how a \$2,000  
11 erroneously applied, it seems, \$2,000 tax bill  
12 led to -- to taking someone's home, a sale for  
13 a third of what it's worth, and -- and then  
14 very promptly the whole value is -- is secured  
15 again by the person who collected it out of  
16 bankruptcy -- out -- out of the foreclosure.  
17 It's a striking set of facts. How did it  
18 happen?

19 MR. NELSON: So the -- the township  
20 assessor, I don't know what the township  
21 assessor's reasoning was. It may well be --  
22 there's two requirements with regard to the --  
23 the principal residence exemption. There must  
24 both be -- the person who's entitled to it must  
25 both be the owner of the property and be using

1 the property as their principal residence.  
2 There may have been a question with regard to  
3 whether it was being used as a principal  
4 residence at the time. That is not in the  
5 record.

6 With regard to after the property is  
7 turned over now to the county, who is the --  
8 the Respondent here, when it's turned over to  
9 the county, the county has no authority to say  
10 now this tax should not have been paid unless  
11 what happens is --

12 JUSTICE GORSUCH: Oh, goodness.

13 MR. NELSON: Well, unless --

14 JUSTICE GORSUCH: Really? Nobody can  
15 say, hey, there was a mistake?

16 MR. NELSON: Well, the --

17 JUSTICE GORSUCH: I have to -- I have  
18 to foreclose on someone's home for a tax bill  
19 now know is false but I --I -- you know, I --  
20 I'm forced to do it?

21 MR. NELSON: So, Your Honor, the  
22 Petitioner here had the opportunity to come to  
23 the show-cause hearing or the foreclosure  
24 hearing in -- the show-cause hearing with the  
25 treasurer or the foreclosure hearing with the

1 court and say this tax was never properly  
2 assessed.

3 At that time, there is an opportunity  
4 to -- to say the tax is not properly assessed,  
5 we're going to go ahead and reverse this --  
6 this whole process, and we're in the clear.  
7 But that didn't happen.

8 JUSTICE BARRETT: Is this always how  
9 the county does it? I mean, if the tax bill  
10 were 100 bucks, you would still take a house?

11 MR. NELSON: The -- typically, there  
12 -- there's -- if the property tax bill is \$100,  
13 that means the assessed value of the property  
14 is -- is very small. So, yes, there are  
15 instances where there are very small assessed  
16 value -- or very small tax bills with  
17 properties that also have lower assessed  
18 values.

19 JUSTICE SOTOMAYOR: I find it strange  
20 here that every other tax year was paid. Don't  
21 you think by the time of the sale, that the  
22 county would have said, wait a minute, every  
23 other tax bill has been paid; something went  
24 awry here?

25 MR. NELSON: I think there -- they

1 were well aware of what went awry, that there  
2 was something that had gone awry in -- in the  
3 situation. And this particular issue that had  
4 gone awry is the tax bill that had been -- that  
5 had not been challenged, had not been paid,  
6 even --

7 JUSTICE SOTOMAYOR: Had been  
8 challenged -- well, I do have a question.  
9 Mr. Liu's answer raised it in my mind.

10 It's one thing to say that an auction  
11 price reflects the just compensation when it's  
12 close to or at the time of the taking. But  
13 once you separate out the point of just  
14 compensation, which is when you've taken it,  
15 which you seem to agree, is the time you took  
16 title and let's assume Mr. Liu's answer and no  
17 redemption -- and redemption rights have  
18 expired, what permits you to hold on to that  
19 property until it secures the lowest value?

20 Meaning, I can assume that just  
21 compensation is just as an auction price if the  
22 auction is close to the taking. But if it's  
23 not, how do I make that leap?

24 MR. NELSON: So, two responses to your  
25 question, Justice Sotomayor. First, with

1 regard to the -- the timing here, the timing  
2 here was somewhat unusual because the actual  
3 foreclosure was challenged and so there was a  
4 multi-year -- there was multi-year litigation  
5 all the way through the Michigan Supreme Court  
6 with regard to the underlying foreclosure.

7 So the foreclosure was --

8 JUSTICE SOTOMAYOR: I would put that  
9 the foreclosure, the taking is when that  
10 finishes, okay?

11 MR. NELSON: So -- so when the  
12 foreclosure judgment was reinstated, there was  
13 a period of time for redemption and there was  
14 not enough time to notice the property for the  
15 next regularly scheduled auction for these  
16 properties.

17 So the county -- the counties hold two  
18 auctions for these properties. One in July,  
19 one in July or August and then one typically in  
20 September or October.

21 That is the normal process.

22 JUSTICE SOTOMAYOR: Do you know what  
23 the historical practice was on this issue? Was  
24 the historical practice more that what happens  
25 in federal lien law or is this a new creation

1 by states that they foreclose -- keep the  
2 property as long as they want and sell it when  
3 they want to?

4 MR. NELSON: No, Your Honor. I don't  
5 believe there's any -- any -- anything that  
6 I've seen with regard to specifically how long  
7 after the -- the foreclosure occurs that the  
8 auction sale must happen. But this is --

9 JUSTICE SOTOMAYOR: That's one of the  
10 things that hasn't been briefed, but it is --  
11 an important question in my own mind. All  
12 right. Thank you.

13 JUSTICE BARRETT: Well, Mr. Liu seemed  
14 to suggest that -- and -- and maybe I  
15 misunderstood him -- but that if the taking  
16 occurred when the right of redemption expired,  
17 that that would be the relevant moment for  
18 valuing the property, because that's how the  
19 Fifth Amendment works.

20 And, you know, as applied to the  
21 states too, that when the property is taken,  
22 that's when we value it. So kind of picking up  
23 on what Justice Sotomayor is saying, I had  
24 understood Mr. Liu's answer to be consistent  
25 because he was saying well, we -- you would

1 kind of make that judgment about what it would  
2 get at auction at the time the right of  
3 redemption expired.

4 But I understood you to be telling  
5 Justice Sotomayor something different, which is  
6 don't worry about that date, we still treat it  
7 as being worth whatever the auction yielded,  
8 even if it's a year later.

9 MR. NELSON: Justice Barrett, no --  
10 no. The -- I'm sorry if I -- I created some  
11 confusion. If the -- if the -- if the taking  
12 is at the time the right of redemption expires  
13 and that's not true as a matter of Michigan  
14 law, so I want to come back to that, but with  
15 regard to -- if that's what the taking is,  
16 then, yes, the valuation is as of that date.

17 And the auction is as, in BFP -- as  
18 BFP suggested, the best evidence of that, if  
19 there is a significant delay, that might be  
20 something that -- that would call into question  
21 whether the -- whether the valuation -- whether  
22 the surplus proceeds are generated, are the  
23 accurate reflection.

24 Here there's a -- a reason for the  
25 delay, but with going back to some of the

1 questions you were asking earlier of brother  
2 counsel, under Michigan law, the Rafaeli  
3 decision, the taking is -- is deemed not to  
4 have occurred until the surplus proceeds are  
5 generated. And so as you were indicating  
6 earlier there's an exercise --

7 JUSTICE BARRETT: Well doesn't that --  
8 don't we have to just say that? I mean, when a  
9 taking happens is a question of federal law.

10 MR. NELSON: The -- when a taking  
11 happens is a matter of federal law. The  
12 definition of the property interest is  
13 typically a question of state law and as long  
14 as they're not defining a way of preexisting  
15 property interest, state law -- my reading  
16 reading of this Court's jurisprudence is that  
17 state law would then govern.

18 Here the Michigan Supreme Court has  
19 said it is the withholding -- it is the right  
20 to the overplus when the overplus is generated  
21 that is the -- that is the relevant time to  
22 assess the taking.

23 JUSTICE GORSUCH: So I see it as an  
24 argument about measure but I don't see how  
25 that's an argument about what the taking is for

1 purposes of federal law.

2 MR. NELSON: So --

3 JUSTICE GORSUCH: I would have thought  
4 that when I lose all the bundle of sticks in my  
5 property, and the state takes them, that's a  
6 taking for the -- for -- for the purposes of  
7 the U.S. Constitution.

8 Whatever Michigan might say.

9 MR. NELSON: And that is consistent  
10 with the Sixth Circuit's decision in Hall.  
11 There it would be the equitable interest in the  
12 property as distressed by the fact that the  
13 property is in -- in foreclosure and there's --  
14 right of redemption has not been exercised.

15 JUSTICE GORSUCH: Once -- once title  
16 has passed --

17 MR. NELSON: Sure.

18 JUSTICE GORSUCH: I mean, would you  
19 agree once title passes to the -- to the  
20 county, to the state, that that is the -- the  
21 date of the taking for purposes of the federal  
22 Constitution?

23 MR. NELSON: Because I'm betwixt and  
24 between the state law and the federal law, we  
25 don't take a position as which of the specific

1 which -- but the result of them we believe the  
2 same.

3 JUSTICE GORSUCH: I understand that  
4 you think all roads lead to Rome and we win. I  
5 got -- I appreciate that.

6 (Laughter.)

7 JUSTICE GORSUCH: I appreciate that.  
8 But -- but for our purposes, if we're  
9 considering a remand, that's another issue that  
10 I guess you don't have a position on so would  
11 have to be explored?

12 MR. NELSON: Well, the Sixth Circuit  
13 has operated under the -- operated under the  
14 view after Hall that the interest that's being  
15 taken is the equitable interest in the  
16 property, the value -- the -- the value -- the  
17 distressed value of the property less the -- of  
18 the unpaid taxes.

19 JUSTICE GORSUCH: And that might be  
20 wrong though is what we're exploring here. It  
21 might be that the taking is the taking of the  
22 house in the foreclosure.

23 MR. NELSON: Well, this Court --

24 JUSTICE GORSUCH: When fee simple  
25 passes from taxpayer to sovereign.

1           MR. NELSON: So no, Your Honor. We  
2 disagree with that. Because the payment of the  
3 tax itself is not a taking. So if the value of  
4 the property at the time --

5           JUSTICE GORSUCH: Well, I understand  
6 that. But you're -- you're -- you're resisting  
7 -- or I thought you weren't taking a position.  
8 And I guess I'm wondering which it is. But  
9 isn't there at least a colorable argument that  
10 a taking occurs when you take title to my  
11 house?

12           MR. NELSON: Yes, Your Honor, there's  
13 a colorable argument that --

14           JUSTICE GORSUCH: All right. Thank  
15 you. Then we don't need to go further I don't  
16 think.

17           JUSTICE JACKSON: But -- but can I  
18 just ask you, that -- to follow up on that.  
19 Isn't the relevance of determining whether a  
20 taking has occurred just to get us to the point  
21 of determining what is owed to the taxpayer?

22           In other words, it's not like a free  
23 floating question of -- you -- you don't  
24 dispute that a taking happened here in the  
25 sense that, right?

1           MR. NELSON: No. After Tyler I -- I  
2 would -- it would be foolish for me to contest  
3 that.

4           JUSTICE JACKSON: Okay. So you don't  
5 dispute that there's a taking. So to me  
6 it's -- it's not so much when that taking  
7 occurred, except insofar as we think that when  
8 it occurred relates to when it should have been  
9 valued or what its value is.

10           So the bottom line of all of it is  
11 what is actually the value of the taking that  
12 occurred? And so, I mean, I suppose you could  
13 say we reach all the way back to the point at  
14 which, you know, they first noticed him that he  
15 was -- had his house foreclosed or when the  
16 title passed or all of those pieces.

17           But there's also the argument, which  
18 is what the Sixth Circuit determined, that it  
19 is at the point in which the government sells  
20 the property, recovers its tax amount, and  
21 gives the person back the excess.

22           MR. NELSON: The -- the --

23           JUSTICE JACKSON: Not so much the  
24 taking but that that's -- that's the value of  
25 what has occurred as a result of the taking.

1 That is the just compensation that is owed to  
2 the person in light of this taking that  
3 everybody agrees happened.

4 MR. NELSON: Yes, Your Honor, we  
5 agree.

6 JUSTICE KAGAN: Mr. Nelson, did you  
7 have a back half of your answer to Justice  
8 Gorsuch's question? He asked whether there was  
9 a taking when the foreclosure occurred. And  
10 you said there is a colorable argument.

11 Is there a but to that?

12 MR. NELSON: There's a colorable  
13 argument that -- so the -- the question was,  
14 I -- I -- I believe, there's a colorable  
15 argument that there's a -- that there's a  
16 taking when title passes. The -- the but I  
17 would add is the question is title passes --  
18 what portion of the bundle of sticks is  
19 actually being taken?

20 Because if the property is worth, for  
21 example, the same as or less than the tax  
22 that's owed, and the property is foreclosed  
23 upon, the -- the property is received in  
24 payment of the tax. And there is no taking at  
25 all.

1           So the interest that's being taken if  
2     at the time of the -- the right of redemption  
3     expires would be the equitable interest. And I  
4     don't believe that there's actually a  
5     difference between the Respondents and the  
6     Petitioner on that point. It's not the entire  
7     home.

8           JUSTICE KAGAN: And when you said the  
9     taking, whatever it is, occurs at the -- when  
10    the title passes, which is I think the same  
11    thing that Mr. Liu said, that might be  
12    different than what the foreclosure occurs; is  
13    that correct?

14          MR. NELSON: The title will not fully  
15    pass until the right of redemption expires. So  
16    the -- the right of redemption here expired 21  
17    days after the foreclosure judgment was  
18    reinstated. Typically that occurs under  
19    Michigan law on March 31st of -- of each tax  
20    year. Thank you.

21          With regard to some of the -- some of  
22    the discussion with regard to the -- the  
23    issues, there was a question with regard to  
24    safety valves that Mr. Liu indicated for the  
25    purposes -- for the Court's purposes, I would

1 point the Court to Section, Michigan compiled  
2 laws Section 211.78h, 78k, and 78q for the  
3 purposes of identifying how Michigan law, like  
4 the law of most states, provides for ways for  
5 property owners to avoid foreclosure, where  
6 they -- where they are unable to pay or there  
7 are issues with regard to disability that would  
8 prevent them from paying.

9 With regard to the -- the question of  
10 -- there was a statement with regard to the  
11 federal government about what the IRS  
12 anticipates receiving from a forced sale. The  
13 IRS typically only forecloses on properties  
14 that they believe will sell. The states, when  
15 they are foreclosing on properties where there  
16 is no -- where the taxes -- where taxes are  
17 delinquent, there is no such selective process.  
18 They simply foreclose on all of those  
19 properties. Some of them are un-buildable  
20 lots. Some of them are -- suffer from  
21 environmental contamination. Some of them are  
22 blighted. And they -- they do not have an  
23 anticipation of sale.

24 So, typically, we would anticipate  
25 that the sale of -- that -- that auction sales

1 of tax-foreclosed properties would be at a  
2 lower rate than IRS foreclosures.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas?

6 JUSTICE THOMAS: When you say that --  
7 when you said earlier that your process is  
8 similar to historic process, what do you mean  
9 by that?

10 MR. NELSON: I mean that historically  
11 the states have used the foreclosure process,  
12 followed by an auction, to recover unpaid --  
13 unpaid and delinquent property taxes. Some of  
14 those -- and there are a variety of  
15 intermediate processes that court -- that  
16 states have adopted that are in the historic  
17 record. We do believe that the Cooley treatise  
18 sets forth a fairly wide range of what those  
19 practices are.

20 But the overall foreclosure auction  
21 sale and return of the surplus proceeds process  
22 that this Court identified in Tyler is  
23 consistent with what Michigan is now doing and  
24 the effect of what has happened in this case.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: You said that the  
3 foreclosure judgment expired on March 31st,  
4 2018. They -- the auction took place a year  
5 and a half -- year and a quarter later, July  
6 16th, 2019?

7 MR. NELSON: So the -- the foreclosure  
8 judgment was reinstated on June 12th, 2018.  
9 The right of redemption expired on July 3 of  
10 2018. And because there was not an opportunity  
11 to notice -- to get the property into the  
12 notice package with regard to the next auction,  
13 the county --

14 JUSTICE SOTOMAYOR: It went the year.

15 MR. NELSON: -- waited a year, yes.

16 JUSTICE SOTOMAYOR: So how do I deal  
17 with the fiction that the auction price could  
18 be just compensation for a taking that occurred  
19 a year earlier?

20 MR. NELSON: Had --

21 JUSTICE SOTOMAYOR: I mean, the market  
22 could have crashed. Anything could have  
23 happened.

24 How do I deal with that fiction?

25 MR. NELSON: So, inevitably, there's

1 going to be some lag between a foreclosure and  
2 an auction. And just as --

3 JUSTICE SOTOMAYOR: No, not  
4 inevitably. The federal government and -- I  
5 don't know what the historical practice was. I  
6 suspect it was that title passed when the  
7 auction or redemption was after -- I mean,  
8 there were a lot of things at the founding, I  
9 don't know what they are, to avoid that.

10 MR. NELSON: There are -- there are  
11 ways to avoid it. If there is a specific  
12 concern with regard to events that occurred  
13 between the time of the -- of the taking and  
14 the auction, those would be a basis for  
15 challenging whether just -- whether the auction  
16 reflects or establishes just compensation.

17 Those challenges were not raised here.  
18 There was no challenge to the adequacy of the  
19 surplus proceeds based on the time between when  
20 the foreclosure judgment was reinstated and the  
21 right of redemption expired and when the  
22 auction occurred here.

23 JUSTICE SOTOMAYOR: Okay. Thank you,  
24 counsel.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 Justice Barrett, anything further?

3 JUSTICE BARRETT: No further

4 questions.

5 CHIEF JUSTICE ROBERTS: Justice

6 Jackson?

7 Thank you, counsel.

8 MR. NELSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Rebuttal,

10 Mr. Ellison?

11 REBUTTAL ARGUMENT OF PHILIP L. ELLISON

12 ON BEHALF OF THE PETITIONER

13 MR. ELLISON: We welcome our brother's

14 concession here that there has been a taking in

15 this case that was contrary to their position,

16 of course, in the trial court below. We

17 welcome that concession, and we think it

18 narrows the scope of this case because now

19 we're only talking about valuation at this

20 point.

21 I would point this Court to Virginia

22 Electric and Kirby Forest that says that when

23 there is -- when there is a process that is

24 being undertaken for taking, the depreciation

25 of the value caused by the taking itself or, in

1 Kirby Forest, the prospective taking that's  
2 about to occur, that obligation, that loss is  
3 borne by the government, not by the former  
4 property owner. And I would point this Court  
5 to those cases.

6 I would also have to disagree with my  
7 brother counsel that -- that there was no --  
8 that there was a redemption right below. There  
9 was an attempt to redeem, and it was denied. I  
10 think that's somewhat a side issue on this  
11 part, but the reality is -- is that the  
12 government was not going to give back this  
13 property despite all the efforts of the Pung  
14 family.

15 And it's been a frustrating -- I've  
16 been the trial attorney since the very  
17 beginning on this. It has been a frustrating,  
18 awful case to try to tell someone they're going  
19 to lose their family home and there's nothing  
20 you can do to get the government to stop them  
21 from doing that. So I know that's kind of  
22 beyond the scope today slightly as to the issue  
23 of the taking valuation that we've narrowed  
24 this case down to, but the Pung family is here  
25 today and they are devastated by the loss of

1 this family home. And what they want is -- is  
2 the justice that hopefully the Just  
3 Compensation Clause should provide for us in  
4 these circumstances.

5 I would -- I would finally just like  
6 to finally just say is -- is that the arguments  
7 of brother counsel was surplus proceeds is the  
8 end all, be all. And I think we -- at least I  
9 take from the questions today that that can't  
10 possibly be the rule in these circumstances.

11 But what he's not engaging on -- and I  
12 believe, Justice Gorsuch, you talked -- you've  
13 referenced it with Mr. Liu -- is -- is you got  
14 to take the bitter with the sweet. If you're  
15 going to take the benefits of tax foreclosure  
16 and you're going to take more property than  
17 necessary, you got to also take the historical  
18 practices of the limitations on there, and if  
19 you're going to act in -- in furtherance or  
20 beyond those historical limitations, whether  
21 it's taking the Peloton bike or limiting  
22 yourself or -- or all the limits that are  
23 traditionally there for normal debt collection  
24 practices, you also have to take all of those  
25 as well historically, to benefit from that.

1           And if you're not going to take those,  
2           you're no longer a debt collector; you're now a  
3           confiscatory government, and you're responsible  
4           under the Takings Clause.

5           Thank you very much.

6           CHIEF JUSTICE ROBERTS: Thank you,  
7           counsel.

8           The case is submitted.

9           (Whereupon, at 11:57 a.m., the case  
10          was submitted.)

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