

**SUPREME COURT  
OF THE UNITED STATES**

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL PUNG, PERSONAL )  
REPRESENTATIVE OF THE ESTATE OF )  
TIMOTHY SCOTT PUNG, )  
                                Petitioner, )  
                                v. ) No. 25-95  
ISABELLA COUNTY, MICHIGAN, )  
                                Respondent. )  
- - - - -

Pages: 1 through 118  
Place: Washington, D.C.  
Date: February 25, 2026

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15           The above-entitled matter came on for  
16   oral argument before the Supreme Court of the  
17   United States at 10:12 a.m.

1 APPEARANCES:

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3 behalf of the Petitioner.

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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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1 P R O C E E D I N G S

2 (10:12 a.m.)

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

6 Mr. Ellison.

7 ORAL ARGUMENT OF PHILIP L. ELLISON

8 ON BEHALF OF THE PETITIONER

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

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

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

21 The error here is clear. The Pung  
22 home was worth \$194,400. The tax debt was  
23 roughly \$2200. Just compensation meant  
24 returning remaining equity. The lower courts  
25 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, for example, is  
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 your --

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 this  
4 Court -- we would point you to Griffin and --  
5 and Ballentyne on this matter that have  
6 suggested 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 BARRETT: 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?

20 In other words, if you're satisfied  
21 with the fairness of the process and it comes  
22 out with something below what you think is fair  
23 market value, is that just too 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       are -- I mean, are you contesting that as an  
6       empirical matter? Are you saying that even if  
7       it's true as an empirical matter, you're still  
8       entitled 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 instance, did not. And we should be able  
18       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 --  
11 that -- if they use a -- a fair auction  
12 process, that's it, they're okay, even if it  
13 doesn't yield fair market value, what you say  
14 is fair market 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  
20 most typical foreclosure systems, there's a --  
21 a sales confirmation, a review process that's  
22 done by the court to confirm that -- it's  
23 usually called a confirmation sale. At that  
24 point -- for example, North Carolina is a good  
25 example of 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 the  
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. But I  
11   just 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 -- that you would --  
14 before taking the property, one process that  
15 they need to consider is taking personal  
16 property first?

17 MR. ELLISON: The answer is yes.

18 JUSTICE GORSUCH: Okay.

19 MR. ELLISON: The answer is yes.

20 JUSTICE GORSUCH: All right. Thank  
21 you.

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

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

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

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

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

22            MR. ELLISON: Yeah.

23            JUSTICE JACKSON: -- about what  
24    happened before this taking, I wonder whether  
25    just compensation is the right analytical

1 framework to evaluate that. It doesn't seem to  
2 me to be -- and I know you're not making that  
3 argument --

4 MR. ELLISON: Right.

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

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

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

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

1     there are things he could have done to cover  
2     his tax bill. So the government is coming in  
3     at the beginning to foreclose on this house for  
4     the payment of his debt.

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

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

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

1 So tell me why I'm wrong about that.

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

4 JUSTICE JACKSON: Okay.

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

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

13 MR. ELLISON: I under --

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

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

1 going to get \$70,000, he can sell the house and  
2 get the hundred thousand dollars and pay the  
3 tax bill. The government doesn't care about  
4 that.

5 MR. ELLISON: But if --

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

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

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

14 MR. ELLISON: But -- but --

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

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

25 JUSTICE JACKSON: Right. And the just

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

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

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

18           JUSTICE JACKSON: Mm-hmm.

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

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



1 property because he didn't pay his taxes.

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

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

6 JUSTICE JACKSON: You disagree?

7 MR. ELLISON: I disagree.

8 JUSTICE JACKSON: Okay.

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

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

15 MR. ELLISON: Well, but --

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas, anything further?  
4 Justice Alito?

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

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

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

23 MR. ELLISON: It -- it is difficult to  
24 do that. There is off-ramps that -- that  
25 individuals can try to do. In fact, Mr. Pung

1     tried to do that in this case at -- at numerous  
2     parts with interactions with the tribunal, with  
3     the Tax Tribunal, and -- and things of that  
4     nature.

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

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

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

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

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

21            MR. ELLISON: I guess --

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

24            MR. ELLISON: I don't think that's  
25    another option because, you know, Mr. Pung

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

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

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

1 JUSTICE ALITO: What is the -- what  
2 sorts of personal property do you think the  
3 government has to go after first before it goes  
4 after the -- the house?

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

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

10 (Laughter.)

11 MR. ELLISON: Well --

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

16 MR. ELLISON: Tradition --

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

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. It's already a known market. It's  
3 already a known process.

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

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

11 MR. ELLISON: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor?

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

18 MR. ELLISON: Correct.

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

1 correct?

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

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

13 MR. ELLISON: Correct.

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

23 MR. ELLISON: We would point you to  
24 three cases, in fact. One would be Slater  
25 versus Maxwell, which provides that tax



1       foreclosures have to be provided for with  
2       entire fairness, and that's the -- the trigger  
3       word from there, that they have --

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

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

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

16              CHIEF JUSTICE ROBERTS: Justice Kagan?

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

25              If I'm -- if I have to give you the

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

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

12 MR. ELLISON: Okay.

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

17 MR. ELLISON: Right.

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

22 MR. ELLISON: So my response is that  
23 the Fifth Amendment requires just compensation.  
24 And -- and somewhat -- what seems to be baked  
25 into some questions today has been whether this

1 is best compensation, but assuming your  
2 hypothetical, where the --

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

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

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

19 MR. ELLISON: Correct.

20 JUSTICE KAGAN: Yeah. And I -- I  
21 guess -- I -- I -- I guess I think how could  
22 that possibly be? I mean, if you're selling a  
23 house on foreclosure in an auction, you're just  
24 not going to get the fair market value as if  
25 that house had never been foreclosed on and you

1       were selling it in an open market.

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

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

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

24              JUSTICE KAGAN: Thank you.

25              MR. ELLISON: -- for that system.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Gorsuch?

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

11 MR. ELLISON: Correct.

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

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

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

1 time that we took title to the property itself.

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

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

14 MR. ELLISON: Correct.

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

18 MR. ELLISON: Correct. So --

19 JUSTICE GORSUCH: How did that happen?

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

23 (Laughter.)

24 MR. ELLISON: But the very short  
25 version of it is is that the PRE credit was

1 determined by -- in Michigan, we have a Tax  
2 Tribunal that determines this.

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

5 MR. ELLISON: Yeah, yeah.

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

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

19 JUSTICE GORSUCH: After he's already  
20 won.

21 MR. ELLISON: Had already gone.

22 JUSTICE GORSUCH: Yeah.

23 MR. ELLISON: And so we're in a weird  
24 circumstance here where the tax is legally  
25 technically owed but actually isn't owed in

1     these circumstances. And it's -- it's a --  
2     it's a terrible position to be in for a  
3     homeowner who's trying to keep their home.

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

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

12            JUSTICE GORSUCH: Thank you.

13            CHIEF JUSTICE ROBERTS: Justice  
14    Kavanaugh?

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

22            Do you agree with that?

23            MR. ELLISON: We believe that's the  
24    first correct step that -- at least one theory  
25    that can be challenged, but it's not the only



1 theory that could be challenged on a -- on a  
2 remand.

3 JUSTICE KAVANAUGH: What are the other  
4 theories?

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

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

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

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

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

22 JUSTICE KAVANAUGH: Okay. So you  
23 don't -- you don't necessarily agree, is  
24 what --

25 MR. ELLISON: We don't --

1 JUSTICE KAVANAUGH: That's fine.

2 That's fine. I just wanted to clarify what you  
3 thought about that.

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

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

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

20 JUSTICE KAVANAUGH: Which is a  
21 standard footnote, but -- that we use, but --  
22 but the question is the rationale and why it  
23 wouldn't apply more -- more generally.

24 MR. ELLISON: Because, in the  
25 bankruptcy context -- well, two -- two answers

1 to that question. One is, in the bankruptcy  
2 context, Congress has given separate authority  
3 to reallocate the burdens of debt between  
4 private debtor and creditor in those  
5 circumstances.

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

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

24 So, in addition to the -- just we're  
25 in different constitutional worlds, I think the

1 facts that led up to the foreclosure and how  
2 the question was framed before this Court got  
3 there in two totally different paths and are  
4 not -- are not congruous.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett?

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

16 (Laughter.)

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

22 But I'm struggling to see how it fits  
23 into the takings framework. Can you tell me of  
24 a case that we have that treats the foreclosure  
25 of a house as a taking? I mean, Tyler treats

1 the pocketing of the surplus as a taking, but  
2 I'm not aware of a case -- I just don't know if  
3 it fits this framework. I'm not aware of a  
4 case of ours that says that when the government  
5 forecloses on the house, as opposed to when it  
6 pockets the money, it's -- it's taken the  
7 house.

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

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

20 JUSTICE BARRETT: But none of that --  
21 none of that answers whether it's a taking.  
22 And -- okay, well, let me ask you this  
23 question. You say that it should be fair  
24 market value. You also say the taking happens  
25 when the government forecloses on the property

1 as opposed to when it sells the property at  
2 auction?

3 MR. ELLISON: In this circumstance,  
4 yes.

5 JUSTICE BARRETT: Which is the right  
6 date for gauging the fair market value --

7 MR. ELLISON: When they --

8 JUSTICE BARRETT: -- if there's a gap  
9 of a year?

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

15 JUSTICE BARRETT: So the -- the  
16 property falls in value, and that's the  
17 government's risk?

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

25 JUSTICE BARRETT: Okay. So let's say

1 I don't think Tyler settles the question  
2 whether the foreclosure is a taking, that I  
3 think Tyler leaves open and might treat just  
4 the pocketing of the surplus as the taking.

5 Why couldn't I view the foreclosure of  
6 the house as just an exercise of the taxing  
7 power and not a taking?

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

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

23 And when you trigger that taking  
24 obligation, here -- again, what's taken is not  
25 the surplus; it's the equity that's in the home

1 at the time of the taking -- that's what  
2 triggers the obligation to pay just  
3 compensation because the Fifth Amendment  
4 requires it.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Jackson?

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

14 So is that not the case here?

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

17 JUSTICE JACKSON: Okay.

18 MR. ELLISON: -- the tax isn't owed.  
19 This is the worst of all examples of  
20 government -- I think government run amok on --

21 JUSTICE JACKSON: But the government  
22 says it's owed. That's why they're foreclosing  
23 on your house. So the dispute is, I guess,  
24 over whether it's owed. And the question is  
25 whether it can be collected before that dispute



1 is resolved. And in other tax schemes, it can  
2 be, the --

3 MR. ELLISON: Correct.

4 JUSTICE JACKSON: Right.

5 MR. ELLISON: Correct.

6 JUSTICE JACKSON: So why can't it be  
7 here?

8 MR. ELLISON: Because Michigan has  
9 this very unique system, the PRE, as I was  
10 engaging --

11 JUSTICE JACKSON: Yeah.

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

17 JUSTICE JACKSON: Mm-hmm.

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

23 JUSTICE JACKSON: And you couldn't  
24 bring some sort of, under Michigan law, a  
25 collateral attack on the fairness of that

1 process?

2 MR. ELLISON: That is correct. And I  
3 have --

4 JUSTICE JACKSON: That has not been --  
5 yeah.

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

14 JUSTICE JACKSON: All right. One --  
15 one final question with respect to Justice  
16 Alito's type analysis.

17 I mean, I do understand the concept of  
18 we have a fairness problem because this is a  
19 really small debt and a lot of equity in the  
20 house. But, to the extent that the homeowner  
21 has notice that the government is intending to  
22 use this particular tool to recover its debt, I  
23 wonder if the fairness questions that you are  
24 raising don't get resolved because the notice  
25 gives the homeowner a chance to prevent that

1       terrible outcome.

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

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

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

21              JUSTICE JACKSON: I'm before that  
22      point. I'm before the taking. I'm at the  
23      government threatening --

24              MR. ELLISON: Threatening.

25              JUSTICE JACKSON: -- to take your

1 house. And when they do that, the question is  
2 what comes next as a matter of fairness and  
3 traditional tax policy, et cetera.

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

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

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

25 MR. ELLISON: The best answer I can

1 give you is governments have a lot of tools in  
2 their tool chest to collect debts. They can  
3 use lawsuits. They can use, you know, the  
4 Peloton bike example I was using earlier. They  
5 have a lot of tools in their tool chest.

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

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 MR. ELLISON: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Liu.

17 ORAL ARGUMENT OF FREDERICK LIU  
18 FOR THE UNITED STATES, AS AMICUS CURIAE,  
19 SUPPORTING NEITHER PARTY

20 MR. LIU: Mr. Chief Justice, and may  
21 it please the Court:

22 In Tyler, this Court looked to history  
23 and tradition to conclude that a taxpayer is  
24 entitled to just compensation when his home is  
25 sold for more than he owes. The same history

1 establishes what compensation is just. As long  
2 as the sale is conducted fairly, just  
3 compensation is the surplus proceeds.

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

8 Petitioner's approach would defy that  
9 reality and spell the end of tax sales in this  
10 country.

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

15 I welcome the Court's questions.

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

23 The -- what should be our gauge for  
24 that?

25 MR. LIU: I do think we look to

1 history and tradition to determine what a fair  
2 sale looks like. I would -- I think some  
3 helpful guideposts are the Cooley treatise,  
4 starting at page 334, that goes through the  
5 historical practices of jurisdictions at the  
6 time.

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

20 And, of course, you can also look to  
21 history and tradition to also figure out what  
22 is the amount of the tax debt that can be  
23 subtracted from the sale proceeds to yield  
24 the sur -- the surplus proceeds.

25 But do I think the inadequacy of the

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

9 JUSTICE THOMAS: Has the taxing  
10 authority and power of the government  
11 superseded that of the constitutional right to  
12 private property?

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

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

24 JUSTICE THOMAS: Are there more  
25 protections in mortgage foreclosures, for



1 example, than there are in tax foreclosures?

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

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

13 JUSTICE THOMAS: That's not what  
14 I'm -- I'm not talking about that.

15 MR. LIU: Okay.

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

21 MR. LIU: Right.

22 JUSTICE THOMAS: -- for the homeowner.  
23 Are there similar built-in protections for the  
24 taxpayer in tax foreclosures?

25 MR. LIU: I think there are, but I

1 don't think they're constitutionalized by the  
2 Takings Clause. I think federal and state  
3 statutes have long proven perfectly capable of  
4 protecting the process and exempting certain  
5 property from levy in the tax sale context, and  
6 so they've provided the protections that may  
7 exist outside.

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

16 It seems as though that if you're  
17 looking at protections, they should be at least  
18 similar.

19 MR. LIU: Yes. And -- and if you -- I  
20 think it's a pretty good sign that the --  
21 the -- the tax sale procedures are  
22 constitutional in that they provide -- the --  
23 the -- the tax sales that are conducted by  
24 governments look very much like the private  
25 mortgage foreclosure sales that banks and

1 private lenders --

2 JUSTICE GORSUCH: Mr. Liu --

3 MR. LIU: -- conduct.

4 JUSTICE GORSUCH: -- you -- you -- you  
5 say that we should vacate and remand, correct?

6 MR. LIU: Correct.

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

13 MR. LIU: Correct.

14 JUSTICE GORSUCH: Okay.

15 MR. LIU: We think the right way to go  
16 is vacate and remand for consideration of any  
17 arguments that have been preserved as to the  
18 process.

19 JUSTICE GORSUCH: And it really would  
20 be any arguments about what history and  
21 tradition might require in your view that we --  
22 that they should consider, that are preserved?

23 MR. LIU: Exactly. So long as they're  
24 preserved --

25 JUSTICE GORSUCH: Yeah.

1                   MR. LIU: -- all of those arguments  
2     can be considered.

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

8                   MR. LIU: That is certainly fair game  
9     on remand.

10                  JUSTICE GORSUCH: And they say, you  
11     know, if you get -- if you can take the Peloton  
12     rather than the whole house, you should take  
13     the Peloton. I mean --

14                  MR. LIU: If it's preserved, that  
15     could be considered too.

16                  JUSTICE GORSUCH: All right. All  
17     right. Thank you.

18                  JUSTICE BARRETT: Do you have a  
19     position on whether those things are required?  
20     You're just saying, if they're preserved, they  
21     can be litigated below. Do you think they are  
22     required?

23                  MR. LIU: I don't think they're  
24     required by the Takings Clause. To take the  
25     personal property hypo, there's no need for

1     such a rule that says the government needs to  
2     exhaust the personal property.

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

11            (Laughter.)

12            MR. LIU: Yeah. So I -- I read Cooley  
13    differently. I -- I -- I know -- I know that  
14    that's --

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

19            MR. LIU: Oh, of course. And -- and  
20    that passage from Cooley is a rule about  
21    divisible property. What it says is, when  
22    property is divisible --

23            JUSTICE GORSUCH: Sure.

24            MR. LIU: -- that the government  
25    shouldn't take more of the parts than it needs

1 to. Now, here, the property was indivisible  
2 and everyone agrees that it was necessary to  
3 take the whole property. You couldn't take  
4 just the backyard or just the front yard, and  
5 so that rule is simply inapplicable.

6 JUSTICE KAGAN: Well, how about,  
7 Mr. Liu, that -- a rule that would say there's  
8 the house, but there was also a car, and the  
9 car could have satisfied the \$2,000 debt?

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

18 But I -- I just want to address the  
19 merits of this personal property exhaustion  
20 rule. There's no need for such a rule because,  
21 if the taxpayer wants to sell his Peloton bike  
22 to satisfy his tax debt, he is free to do so  
23 any day of the week. In fact, our foreclosing  
24 on it would make it more difficult for him to  
25 sell it.

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

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

7                   MR. LIU: If the only thing that he  
8     has to sell --

9                   CHIEF JUSTICE ROBERTS: Does he -- he  
10    doesn't have to do that, does he?

11                  MR. LIU: Well, he -- he -- he can  
12    sell his house and he's free to do so to -- to  
13    pay the price. If it's a situation where  
14    there's a financial hardship or it's --

15                  CHIEF JUSTICE ROBERTS: If -- well,  
16    what do you mean if there's a financial  
17    hardship?

18                  MR. LIU: Well, in Michigan --

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

21                  MR. LIU: No, but in Michigan and --  
22    and -- and in many other jurisdictions,  
23    taxpayers who truly are unable to afford their  
24    taxes are given installment plans, offers in  
25    compromise. They're -- they're -- they're

1 given --

2 CHIEF JUSTICE ROBERTS: What if the --

3 MR. LIU: -- opportunities to --

4 CHIEF JUSTICE ROBERTS: Oh, sorry, go  
5 ahead.

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

13 CHIEF JUSTICE ROBERTS: Well --

14 MR. LIU: -- is they simply cut a  
15 check to the IRS.

16 CHIEF JUSTICE ROBERTS: Well, what if  
17 the validity of the tax assessment is still  
18 under challenge?

19 MR. LIU: So, if -- if it's still  
20 under challenge, under the IRS rules, we cannot  
21 levy on the house, so that challenge can go  
22 forward.

23 I think what's unusual about this case  
24 is that instead of paying the tax and then  
25 challenging it, Mr. Pung just -- just wanted to



1 litigate all the way through without paying the  
2 tax at all.

3 CHIEF JUSTICE ROBERTS: Thank you.

4 Justice Thomas?

5 Justice Alito?

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

22 So some of those things seem like  
23 possibly good reforms that would make the  
24 process fairer, but what concerns me is getting  
25 into the determination of which -- the details

1 of this scheme that are minimally necessary to  
2 comply with the Takings Clause.

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

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

14 CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor?

16 JUSTICE SOTOMAYOR: That's the  
17 problem, Mr. Liu, because you get into a  
18 situation like this one that Justice Barrett  
19 very eloquently described as feeling like  
20 fundamentally unfair. They're fighting over a  
21 \$2400 tax debt that at least two courts said  
22 wasn't owed, and yet they plowed ahead and got  
23 a -- a price half the amount of the value of  
24 the property that was flipped for the value of  
25 the property.

1           At some point, doesn't the  
2   Constitution have something to say under the  
3   rubric of what a just compensation is? I mean,  
4   is it just to give the state that much leeway?

5           MR. LIU: I think the --

6           JUSTICE SOTOMAYOR: Shouldn't the  
7   minimum require a little bit more?

8           MR. LIU: I don't think the Takings  
9   Clause speaks to those issues. I mean, to the  
10   extent the --

11          JUSTICE SOTOMAYOR: So what would?

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

18          JUSTICE SOTOMAYOR: Not here.

19          MR. LIU: -- for centuries.

20          JUSTICE SOTOMAYOR: Not here. That's  
21   the claim. Not --

22          MR. LIU: Well, I think the -- what  
23   the facts of this -- this case show is that  
24   Mr. Pung was given notice of the delinquency.  
25   I mean, he face-to-face was told by the

1 township assessor that he owed the tax.

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

4 MR. LIU: That --

5 JUSTICE SOTOMAYOR: And he presented  
6 the government with that notice, and the  
7 government said bye.

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

14 I don't know what explains that  
15 choice, but it is what --

16 JUSTICE SOTOMAYOR: All right.

17 MR. LIU: -- creates this case.

18 JUSTICE SOTOMAYOR: I have one final  
19 question. Given the three minimums of  
20 fairness, are you saying those are the only  
21 ones, or are you leaving open the door that  
22 there are potentially others?

23 MR. LIU: We are leaving open the door  
24 that there are others. I think, as -- as has  
25 been mentioned this morning, this is not an

1 issue that has been the focus of the briefing.  
2 So one of the reasons we think a remand is  
3 appropriate is for any preserved issues like  
4 this to be addressed.

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

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

18 JUSTICE SOTOMAYOR: So --

19 CHIEF JUSTICE ROBERTS: Justice -- oh.

20 JUSTICE SOTOMAYOR: -- the other side  
21 is saying you can't do anything that undercuts  
22 fair market value. That -- that's how they  
23 would answer that question. And so how should  
24 we answer it if not that way?

25 MR. LIU: Right. And -- and I -- I --

1 I don't think the mere fact that a -- a  
2 procedure is or is not going to have an effect  
3 on fair market value can be enough to decide  
4 whether it's okay or not.

5 JUSTICE SOTOMAYOR: But should it be a  
6 factor?

7 MR. LIU: Whether -- whether the --  
8 the procedure undercuts fair market value?

9 JUSTICE SOTOMAYOR: In some --

10 MR. LIU: Yeah.

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

13 MR. LIU: I think -- I think the  
14 guide -- I think the guide has to be history  
15 and tradition. I -- I -- I think that provides  
16 the most principled way to decide which  
17 procedures are required and which are not.

18 JUSTICE SOTOMAYOR: All right. Thank  
19 you.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: Just as an empirical  
22 matter, Mr. Liu, do you think that Justice  
23 Scalia was right when he said the thing that  
24 Justice Kavanaugh read, that foreclosure sales  
25 just produce not as much money as the fair

1 market value would?

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

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

12 MR. LIU: It would spell the end of  
13 tax sales in America. Every tax sale  
14 is necessarily going to yield less than fair  
15 market value.

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

23 And at the end of the day, who does  
24 this hurt? It hurts other taxpayers who are  
25 actually paying their taxes because the

1       shortfall has to come from real taxpayers.

2                   JUSTICE KAGAN: Thank you.

3                   CHIEF JUSTICE ROBERTS: Justice  
4       Gorsuch?

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

11                  Would that be relevant consideration  
12      in this process that would happen on remand,  
13      the evidence about what, in fact, a good  
14      process tends to yield?

15                  MR. LIU: I think that sort of  
16      analysis can be an indicator.

17                  JUSTICE GORSUCH: Right.

18                  MR. LIU: It can be a reason to look  
19      more closely at the process. After all, I  
20      think the historical guarantees of notice and  
21      publicity and -- and competition are there to  
22      make sure -- when you don't have those, what  
23      happens is that the price goes down. So,  
24      conversely, if you see a very, very, very low  
25      price --



1 JUSTICE GORSUCH: Like, here --

2 MR. LIU: -- you might wonder about  
3 the -- about the proceeding.

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

9 MR. LIU: I think pretty skeptical is  
10 too strong. I think it is reason to look at  
11 the procedures and to scrutinize them.

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

19 MR. LIU: It's hard to generalize  
20 because I -- I -- in response to Justice  
21 Alito's question, I -- I do think it's true  
22 that states have some leeway in the types of  
23 procedures they adopt, so there's going to be  
24 state variation.

25 JUSTICE GORSUCH: Sure. A lot of

1 people may just let the whole thing go to seed,  
2 not take care of it, not keep it up, and -- and  
3 realize as little as possible, not -- not  
4 notify anybody about it.

5 MR. LIU: Yeah.

6 JUSTICE GORSUCH: Others might  
7 actually care --

8 MR. LIU: Yeah.

9 JUSTICE GORSUCH: -- you know, and --  
10 and take care.

11 MR. LIU: I -- I can -- I can tell you  
12 the IRS estimates a forced sale like this to  
13 result in 60 percent --

14 JUSTICE GORSUCH: Sixty percent.

15 MR. LIU: -- of what the -- what the  
16 "fair market value" --

17 JUSTICE GORSUCH: Thank you. It was  
18 very helpful.

19 MR. LIU: -- whatever those be.

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Kavanaugh?

23 JUSTICE KAVANAUGH: Do you think our  
24 opinion in this case should talk about the  
25 procedures at all or any of this?

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

6           And fleshing out what a -- a fair sale  
7     looks like can be left for remand or for  
8     another case if the issue isn't preserved in  
9     this one.

10          JUSTICE KAVANAUGH: So we shouldn't  
11     even say the guideposts that you mentioned in  
12     response to Justice Thomas?

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

20          JUSTICE KAVANAUGH: We could make a  
21     mistake, as your point --

22          MR. LIU: There -- yeah. There just  
23     hasn't been the airing of -- of what those  
24     procedures are that I think would -- would  
25     warrant this Court getting that granular

1       about -- about what the Constitution requires.

2               JUSTICE KAVANAUGH: Thank you.

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

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

16              MR. LIU: So we don't think every  
17      foreclosure is necessarily a taking. We think  
18      it's going to depend on whether there is excess  
19      value in the equity of the home that exceeds  
20      the tax debt.

21              But, as to when the taking occurs, if  
22      there is excess value above the tax debt, we do  
23      think the taking occurs at the time the house  
24      is foreclosed upon, not at the time of sale,  
25      which could be a different time period.

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

6 MR. LIU: Right.

7 JUSTICE BARRETT: -- between the debt  
8 and the value of the house. Let's say it's a  
9 lot closer. Let's say the debt was, you know,  
10 \$90,000 and you don't know how much the house  
11 is going to get at auction. So then did you  
12 take the house at foreclosure?

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

20 All I'm saying is what you would  
21 hypothesize at that moment is just a different  
22 kind of sale. You would hypothesize a  
23 distressed -- a distressed property sale, and  
24 if -- if your hypothesis is that that would  
25 result in more than the tax debt, then I -- I

1 think you have a good indication that there is  
2 a taking at that moment.

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

11 So here in Michigan, the judgment of  
12 foreclosure --

13 JUSTICE BARRETT: There was a gap.

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

20 We would say, under the federal  
21 scheme, there's no transfer of title and,  
22 therefore, no taking until that right of  
23 redemption expires.

24 And that -- that's traditionally how,  
25 I think, courts have understood the property

1 rights here. The transfer of title is --  
2 coincides with the expiration of the right of  
3 redemption.

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

10 But, if I'm understanding you  
11 correctly, it's not really at the moment of  
12 foreclosure because the right of redemption  
13 might expire at a time later than that.

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

19 JUSTICE BARRETT: So you're not really  
20 pegging it to when the government exerts  
21 control over the property. You're pegging it  
22 to when the property owner has lost any ability  
23 himself to control the property?

24 MR. LIU: Correct. Correct.

25 JUSTICE BARRETT: Okay. Well, then

1       that would be different. When we started  
2       talking and I said foreclosure --

3               MR. LIU: Ah, okay.

4               JUSTICE BARRETT: -- you -- you are  
5       saying, analytically, I should be thinking of  
6       this differently?

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

8               JUSTICE BARRETT: Okay.

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

16              JUSTICE BARRETT: Transfer of title  
17      that matters.

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

19              JUSTICE BARRETT: Okay.

20              MR. LIU: And -- and that may vary  
21      depending on the jurisdiction.

22              JUSTICE BARRETT: Okay. That's  
23      helpful. Thank you.

24              CHIEF JUSTICE ROBERTS: Justice  
25      Jackson?



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

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

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

20 To the extent that your argument is  
21 that they didn't do enough with respect to the  
22 auction, what you're really complaining about  
23 is what Michigan law says about the process.  
24 And -- and we have a whole set of cases and  
25 ways to evaluate whether, as a constitutional

1 matter, the government is giving you adequate  
2 process.

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

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

18           MR. LIU: I don't think we have any  
19 real objection to putting the fairness of the  
20 sale under the heading of procedural due  
21 process.

22           JUSTICE JACKSON: Yes.

23           MR. LIU: I think what matters most to  
24 us is -- is getting the contours of that rule  
25 right, and I think whether it's viewed as

1 procedural due process or a function of the  
2 just compensation clause, it's still going to  
3 look at the same legal materials. It's still  
4 going to look to the -- the nation's history  
5 and tradition.

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

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

18 JUSTICE JACKSON: Sure. But the --  
19 the state law is doing that. And we can  
20 evaluate whether the state law's process is  
21 generating artificially unfair depressed  
22 auction prices under the rubric of are they  
23 giving you adequate process.

24 MR. LIU: That's right. And the --  
25 and the -- the -- the thing -- the only thing I

1 would really push back on, though, is the idea  
2 that some of these other rules --

3 JUSTICE JACKSON: Mm-hmm.

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

9 JUSTICE JACKSON: Fine. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Mr. Nelson.

13 ORAL ARGUMENT OF MATTHEW T. NELSON

14 ON BEHALF OF THE RESPONDENT

15 MR. NELSON: Mr. Chief Justice, and  
16 may it please the Court:

17 The Petitioner's Takings Clause  
18 question here has morphed from just whether  
19 fair market value is the only measure of just  
20 compensation into questions regarding whether  
21 the Takings Clause requires the government to  
22 execute against certain property before others  
23 when collecting a debt and whether the Takings  
24 Clause dictates the procedures for government  
25 auctions of foreclosed property. Only the

1 first of these questions was actually preserved  
2 and addressed below and challenged in the  
3 district court.

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

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

24           Moreover, the prop -- the Petitioner's  
25 fair market value approach assumes market

1 conditions that simply don't exist after a  
2 foreclosure because of the property owner's  
3 decisions not to pay the tax, not to sell the  
4 property, not to obtain a statutory deferral,  
5 and not to exercise the right of redemption.

6 The Takings Clause does not require  
7 compensation to the owner for owner-created  
8 reductions to the property value. That would  
9 be unjust to the government and to the public.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: What was the assessed  
12 value on which the tax was imposed?

13 MR. NELSON: The assessed value here  
14 was approximately \$194,000.

15 JUSTICE THOMAS: Can Petitioner use  
16 that as a basis for its disagreement with the  
17 foreclosed sale value?

18 MR. NELSON: Justice Thomas, we do not  
19 believe so because the -- if the measure of the  
20 property's value is at the time of the taking,  
21 it's either -- if the taking is the surplus  
22 proceeds, then the amount of the surplus  
23 proceeds is what's taken. If the property  
24 value is the equitable interest in the property  
25 at the time that the right of redemption

1 expired, the property was no longer worth  
2 the -- the assessed value under the market --  
3 under market conditions because the property  
4 was in foreclosure and the right of redemption  
5 had not been exercised such that the value of  
6 the equitable interest in the property had  
7 diminished to a forced-sale value, which we  
8 believe is the teaching from BFP.

9 JUSTICE THOMAS: So it -- the value  
10 decreased approximately \$120,000 in that short  
11 period?

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

19 No reasonable buyer out in the market  
20 would acquire the property at the moment of  
21 foreclosure -- of the -- of the taking here for  
22 the \$194,000 because --

23 JUSTICE GORSUCH: Except for someone  
24 did shortly after the auction buy the property  
25 for the prior \$194,000. Doesn't that give rise

1 to some reason to be concerned about the  
2 procedures that your client used?

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

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

21 JUSTICE GORSUCH: I am curious just --  
22 I know this is a bit of a side show, for which  
23 I apologize, but I am curious about how come  
24 the assessor charged that tax again and  
25 disregarded the ALJ's at least oral indications



1     that -- that it was not owed, and how come  
2     nobody over the many years between there and  
3     here said, hey, wait a minute, what are we  
4     doing over a \$2,000 tax bill?

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

16            JUSTICE GORSUCH:  I understand that  
17    there are a lot of bureaucracies involved and  
18    that the right hand's not always talking to the  
19    left hand.  I appreciate that.  We've all  
20    been -- we've all encountered that phenomenon.

21            (Laughter.)

22            JUSTICE GORSUCH:  But what is curious  
23    to me is we're sitting in the Supreme Court of  
24    the United States many years -- no one -- I  
25    mean, at some point, the right hand recognizes,

1     ah, there's a left hand over here, and at some  
2     point, a lawyer gets involved and advises the  
3     left hand of the right hand. And I'm not  
4     criticizing anyone. Don't get me wrong.

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

14            MR. NELSON: So the -- the township  
15    assessor, I don't know what the township  
16    assessor's reasoning was. It may well be --  
17    there's two requirements with regard to the --  
18    the principal residence exemption. There must  
19    both be -- the person who's entitled to it must  
20    both be the owner of the property and be using  
21    the property as their principal residence.  
22    There may have been a question with regard to  
23    whether it was being used as a principal  
24    residence at the time. That is not in the  
25    record.

1           With regard to after the property is  
2     turned over now to the county, who is the --  
3     the -- the Respondent here, when it's turned  
4     over to the county, the county has no authority  
5     to say now this tax should not have been paid  
6     unless what happens is --

7           JUSTICE GORSUCH: Oh, goodness.

8           MR. NELSON: -- the -- well, unless --

9           JUSTICE GORSUCH: Really? I mean,  
10    nobody can say, hey, there was a mistake?

11          MR. NELSON: Well, the opportunity --

12          JUSTICE GORSUCH: I have to -- I have  
13    to foreclose on someone's home for a tax bill I  
14    now know is false, but I -- I -- I -- you know,  
15    I -- I'm forced to do it?

16          MR. NELSON: So, Your -- Your Honor,  
17    the Petitioner here had the opportunity to come  
18    to the show-cause hearing or the foreclosure  
19    hearing in -- the show-cause hearing with the  
20    treasurer or the foreclosure hearing with the  
21    court and say this tax was never properly  
22    assessed.

23          At that time, there is an opportunity  
24    to -- to say the tax is not properly assessed,  
25    we're going to go ahead and reverse this --

1     this whole process, and we're in the clear.

2     But that didn't happen.

3             JUSTICE BARRETT: Is this always how  
4     the county does it? I mean, if the tax bill  
5     were a hundred bucks, you would still take a  
6     house?

7             MR. NELSON: The -- typically,  
8     there -- there's -- if the property tax bill is  
9     a hundred dollars, that means the assessed  
10    value of the property is very -- is very small.  
11    So, yes, there are instances where there are  
12    very small assessed value -- or very small tax  
13    bills with properties that also have lower  
14    assessed values.

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

21            MR. NELSON: I think there -- they  
22    were well aware of what went awry, that there  
23    was something that had gone awry in -- in the  
24    situation, and the particular issue that had  
25    gone awry is the tax bill that had been -- that

1 had not been challenged, had not been paid,  
2 even though the others --

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

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

16 Meaning I can assume that just  
17 compensation is just as an auction price if the  
18 auction is close to the taking. But, if it's  
19 not, how do I make that leap?

20 MR. NELSON: So two responses to your  
21 question, Justice Sotomayor. First, with  
22 regard to the -- the timing here, the timing  
23 here was somewhat unusual because the actual  
24 foreclosure was challenged and so there was a  
25 multi-year -- there was multi-year litigation

1 all the way through the Michigan Supreme Court  
2 with regard to the underlying foreclosure.

3 So the foreclosure was --

4 JUSTICE SOTOMAYOR: I will put that  
5 the foreclosure, the taking is when that  
6 finishes, okay?

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

13 So the county -- the counties hold two  
14 auctions for these properties, one in July --  
15 one in July or August and then one typically in  
16 September or October.

17 That is the normal process.

18 JUSTICE SOTOMAYOR: Do you know what  
19 the historical practice was on this issue? Was  
20 the historical practice more that what happens  
21 in federal lien law, or is this a new creation  
22 by states that they foreclose, keep the  
23 property as long as they want, and sell it when  
24 they want to?

25 MR. NELSON: No, Your Honor. I don't

1 believe there's any -- any -- anything that  
2 I've seen with regard to specifically how long  
3 after the -- the foreclosure occurs that the  
4 auction sale must happen. But this is --

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

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

16 And, you know, as applied to the  
17 states too, that when the property is taken,  
18 that's when we value it. So kind of picking up  
19 on what Justice Sotomayor is saying, I had  
20 understood Mr. Liu's answer to be consistent  
21 because he was saying, well, we -- we -- you  
22 would kind of make that judgment about what it  
23 would get at auction at the time the right of  
24 redemption expired.

25 But I understood you to be telling

1 Justice Sotomayor something different, which is  
2 don't worry about that date, we still treat it  
3 as being worth whatever the auction yielded,  
4 even if it's a year later.

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

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

21 Here, there's a -- a reason for the  
22 delay, but with going back to some of the  
23 questions you were asking earlier of brother  
24 counsel, under Michigan law, under the Rafaeli  
25 decision, the taking is -- is deemed not to



1 have occurred until the surplus proceeds are  
2 generated. And so, as you were indicating  
3 earlier, there's an exercise --

4 JUSTICE BARRETT: Well, doesn't --  
5 don't we get to just say that? I mean, when a  
6 taking happens is a question of federal law.

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

15 Here, the Michigan Supreme Court has  
16 said it is the withholding -- it is the right  
17 to the overplus when the overplus is generated  
18 that is the -- that is the relevant time to  
19 assess the taking.

20 JUSTICE GORSUCH: See, I can see that  
21 as an argument about measure, but I don't see  
22 how that's an argument about what the taking is  
23 for purposes of federal law.

24 MR. NELSON: So --

25 JUSTICE GORSUCH: I would have thought

1     that when I lose all the bundle of sticks in my  
2     property and the state takes them, that's a  
3     taking for the -- for -- for the purposes of  
4     the U.S. Constitution, whatever Michigan might  
5     say.

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

12            JUSTICE GORSUCH: Once -- once title  
13    has passed -- I mean, would you agree --

14            MR. NELSON: Sure.

15            JUSTICE GORSUCH: -- that once title  
16    passes to the -- to the county, to the state,  
17    that that is the -- the date of the taking for  
18    purposes of the federal Constitution?

19            MR. NELSON: Because I'm betwixt and  
20    between the state law and the federal law, we  
21    don't take a position as to --

22            JUSTICE GORSUCH: You don't?

23            MR. NELSON: -- which of the specific,  
24    which -- but the result of them we believe is  
25    the same.

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

4 (Laughter.)

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

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

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

21 MR. NELSON: Well, this Court --

22 JUSTICE GORSUCH: -- when fee simple  
23 passes from taxpayer to sovereign.

24 MR. NELSON: So no, Your Honor. We  
25 disagree with that because the payment of the

1 tax itself is not a taking. So, if the value  
2 of the property at the time --

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

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

12 JUSTICE GORSUCH: All right. Thank --  
13 thank you.

14 MR. NELSON: Yeah.

15 JUSTICE GORSUCH: Then we don't need  
16 to go further, I don't 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  
23 free-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 be -- it would be foolish for me to  
3 contest 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 at 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 you  
10 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 -- that there's a taking  
16 when title passes. The -- the but I would add  
17 is the question is title passes -- what portion  
18 of the bundle of sticks is actually being  
19 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 Respondent and the  
6     Petitioner on that point. It's not the entire  
7     home.

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

20          With --

21          JUSTICE KAGAN: Thank you.

22          MR. NELSON: Thank you.

23          With regard to some of the -- some of  
24    the discussion with regard to the -- the  
25    issues, there was a question with regard to

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

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



1           So, typically, we would anticipate  
2   that the sale of -- that -- that auction sales  
3   of tax-foreclosed properties would be at a  
4   lower rate than IRS foreclosures.

5           CHIEF JUSTICE ROBERTS: Thank you,  
6   counsel.

7           Justice Thomas?

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

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

22          But the overall foreclosure, auction  
23   sale, and return of the surplus proceeds  
24   process that this Court identified in Tyler is  
25   consistent with what Michigan is now doing and

1 the effect of what has happened in this case.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 Justice Sotomayor?

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

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

16 JUSTICE SOTOMAYOR: It went a year.

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

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

22 MR. NELSON: Had --

23 JUSTICE SOTOMAYOR: I mean, the market  
24 could have crashed. Anything could have  
25 happened. How do I deal with that fiction?

1           MR. NELSON: So, inevitably, there's  
2 going to be some lag between a foreclosure and  
3 an auction, and just as --

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 Justice Gorsuch?

3 Justice Kavanaugh?

4 Justice Barrett, anything further?

5 JUSTICE BARRETT: No.

6 CHIEF JUSTICE ROBERTS: Justice

7 Jackson?

8 Thank you, counsel.

9 MR. NELSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Rebuttal,

11 Mr. Ellison?

12 REBUTTAL ARGUMENT OF PHILIP L. ELLISON

13 ON BEHALF OF THE PETITIONER

14 MR. ELLISON: We welcome our brother's

15 concession here that there has been a taking in

16 this case. That was contrary to their

17 position, of course, in the trial court below.

18 We welcome that concession, and we think it

19 narrows the scope of this case because now

20 we're only talking about valuation at this

21 point.

22 I would point this Court to Virginia

23 Electric and Kirby Forest that says that when

24 there is a -- when there is a process that is

25 under -- being undertaken for takings, the

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

7 I would also have to disagree with my  
8 brother counsel that -- that there was no --  
9 that there was a redemption right below. There  
10 was an attempt to redeem, and it was denied. I  
11 think that's somewhat a side issue on this  
12 part, but the reality is is that the government  
13 was not going to give back this property  
14 despite all the efforts of the Pung 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 evaluation 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 the  
2     justice that, hopefully, the Just Compensation  
3     Clause should provide for us in these  
4     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  
12    I -- I believe, Justice Gorsuch, you talked --  
13    you -- you referenced it with Mr. Liu -- is --  
14    is you got to take the bitter with the sweet.  
15    If you're going to take the benefits of tax  
16    foreclosure and you're going to take more  
17    property than necessary, you've got to also  
18    take the historical practices of the  
19    limitations on there, and if you're going to  
20    act in -- in furtherance or beyond those  
21    historical limitations, whether it's taking the  
22    Peloton bike or limiting yourself or -- or all  
23    the limits that are traditionally there for  
24    normal debt collection practices, you also have  
25    to take all of those as well historically to

1 benefit from that.

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

6 Thank you very much.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 The case is submitted.

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

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## Official - Subject to Final Review

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## Official - Subject to Final Review

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## Official - Subject to Final Review

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## Official - Subject to Final Review

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