No. 25-95

IN THE

Supreme Court of the United States

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

Petitioner,

v.

ISABELLA COUNTY, MICHIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE MACKINAC CENTER LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When the government takes and sells the real property held by the taxpayer to settle a tax debt, does due process require the government to obtain fair market value so as to not deprive the taxpayer of his equity or penalize the taxpayer?

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INTEREST OF *AMICUS CURIAE*[1]

The Mackinac Center for Public Policy is a Michigan-based, non-partisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

The Mackinac Center Legal Foundation, a subdivision of the Mackinac Center for Public Policy, has litigated matters similar to this one in Michigan.

SUMMARY OF THE ARGUMENT

It has long been true that the states' statutory laws are one source for determining the parameters of property rights. However, as this Court held in *Tyler v Hennepin*, 598 U.S. 631 (2023), deprivation of property rights by a state under the Fifth Amendment are subject to due process rights under the Fourteenth Amendment. Regarding foreclosures, due process requires that equity that exceeds the tax debt following foreclosure be returned to the former owner of the property. This matter before the Court seeks to define the conditions determining the amount of this equity to return.

In matters of foreclosure, state and local governments have been claiming for themselves the status of 'super creditor' that has exceeded historic rights in the name

1. No counsel for a party authored the brief in whole or in part, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

of efficient debt collection by the public bodies. Despite longstanding requirements that governments have the same or similar duties as private creditors, lienholders, and bailiffs, state and local governments have been holding themselves free from the same responsibilities owed to a debtor by private parties. Such a tilting of the scales is not necessary and violates the property rights of those whose real property has been foreclosed.

ARGUMENT

A. Brief summary of historical foreclosure and tax debt collection.

The history of state tax collection described in *Tyler v Hennepin* is instructive. That states have the power to collect such tax debts is obvious, "The power to distrain personal property for the payment of taxes is almost as old as the common law. Cooley, Taxation, 302." *Springer v. United States*, 102 U.S. 586, 593 (1880). "[T]he First Congress, which proposed the adoption of the Bill of Rights, also provided that certain taxes could be 'levied by distress and sale of goods of the person or persons refusing or neglecting to pay.' Act of Mar. 3, 1791, c. 15, s 23, 1 Stat. 204." *G.M. Leasing Corp. v. United States*, 338 U.S. 338, 354 (1977).

But even at the time of the Magna Carta, there were constraints.

> The principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as Runnymede in 1215, where King John swore in Magna Carta that when his sheriff or bailiff came to collect

> any debts owed him from a dead man, they could remove property "until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased."

Tyler, 568 US at 639, citing W. McKechnie, Magna Carta, A Commentary on the Great Charter of King John, ch. 26, p. 322 (rev. 2d ed. 1914)

The rights of the debtor described above "became rooted in English law" and "This principle made its way across the Atlantic." *Tyler*, 598 US at 639-640. This particular right to constrain the amount of the debt collected to the amount of debt that was owed continued and was the "consensus" at the time of the ratification of the Fourteenth Amendment. *Id* at 641.

Over this lengthy initial period, such tax collection had been an act against the taxpayer—*in personam*, rather than against the real property. This was evident in Michigan. "[I]n the early years of this state, it was commonly understood that the delinquent taxpayer, not the foreclosing entity, continued to own the land at the time of the tax-foreclosure sale and would have been entitled to any surplus, which no more followed title to the land than the former owner's other personal property." *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 565-466 (2020), citing *People ex rel. Seaman v. Hammond*, 1 Doug. 276 (Mich. 1844).

This changed following the introduction of a national income tax during the Civil War. Actions to collect debt wherein the real property was considered the party—*in rem* actions—were coming into use to collect tax debts.

Originally, *in rem* actions were used primarily in admiralty actions and because special problems were posed by intercepting ships for piracy and enforcement of the various Navigation Acts.

> There have traditionally been three classes of *in rem* suits: those involving "things guilty," "things hostile," and "things indebted." Suits against things guilty arise when some act is done by or with them in contravention of law. Things are hostile when they are owned or controlled by an enemy in war. Things become indebted when they are made responsible for the payment of a sum of money pursuant to contract or usage. Examples of the three classes are routinely found in maritime law. A vessel that is used to smuggle goods into the country becomes "guilty," and liable to seizure by customs officers. Enemy ships or cargo taken in war are hostile property, subject to condemnation in a prize proceeding. A vessel that receives supplies or necessaries in a foreign port is said to become indebted to the supplier for the amounts delivered.

Harrington, *Rethinking In Rem*, 12 Yale L. and Pol'y Rev. 281, 285 (1994).

"Proceeding *in rem* in those cases was often justified by necessity, because the party responsible for the crime was frequently located overseas and thus beyond the personal jurisdiction of United States courts." *Leonard v. Texas*, 580 U.S. 1178, 137 S.Ct. 847, 849 (2017), (Statement of Justice THOMAS respecting the denial of certiorari).

While the unique challenges posed by piracy and anti-smuggling necessity made such an unusual contrivance necessary on the high seas, they had not been generally applied to real property and taxpayer debts. However, with the imposition of the Civil War wartime taxes and increased interstate mobility, *in rem* proceedings for tax debts were beneficial and cost effective to the states. The matter came before this Court in *Springer v United States*, 102 U.S. 586 (1880). Springer was accessed a wartime income tax in 1865. *Springer*, 102 U.S. at 593. For nonpayment, his property was seized via an action against the property to collect the income tax due. The question before this Court was whether such a tax was an unconstitutional direct tax where, although being an income tax debt, it was levied against his property.

The *Springer* court decided the government's right to seize the whole property for payment of taxes in the way that it did was legitimate and cited the government's pressing need. "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer is entitled to the delays of litigation is unreason." *Springer*, 102 U.S. at 594. While *Springer* did not tie this directly to the context of the war that was going on at the time of the tax imposition, that context has been referenced by subsequent opinions. "[S]ince the Civil War we have upheld statutes allowing for the civil forfeiture of real property." *United States v. Daniel Good Real Property*, 510 U.S. 43, 82 (1993) (J. Thomas concurring in part and dissenting in part). And, in the context of other forms of *in rem* civil forfeiture, it has been noticed that what was created as a wartime exigency has become the permanent justification, even though the government's need for revenue was a

constant. Such government revenue needs (urgent or not) ought not govern due process:

> [I]t is twice puzzling for the majority to explain cases such as *Springer v. United States*, 102 U.S. 586 (1881), and *Dobbins's Distillery*, [96 U.S. 395 (1878)], as depending on the Federal Government's urgent need for revenue in the 19th century. First, it is somewhat odd that the Court suggests that the Government's financial concerns might justifiably control the due process analysis, and second, it is difficult to believe that the prompt collection of funds was more essential to the Government a century ago than it is today.

Daniel Good, 510 U.S. at 83 (cleaned up).

Most states have some form of statutory *in rem* foreclosure and there are differing forms as well as multiple *quasi in rem* forms. This Court has used the term "*in rem*" as a convenient shorthand for all of the various forms, and Amicus Curiae will follow that standard here[2].

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2. See *Hanson v. Denckla*, 357 U.S. 235, 246, n. 12 (1958): "A judgment in personam imposes a personal liability or obligation on one person in favor of another. A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. Restatement, Judgments, 5—9. For convenience of terminology this opinion will use 'in rem' in lieu of 'in rem and quasi in rem.'"

In addition to statutory law, other sources of law contribute to what constitutes protected property rights and what is protected by due process. Statutory law is just one source of many. "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Rafaeli*, 505 Mich. at 455. The common law is foremost among these other sources, both inherited from England and developed here. Similarly, treatise writers such as Blackstone and Justice Thomas M. Cooley are treated with respect in explaining the origins and scope of our property rights and laws:

> Like the founders of our nation, Michigan has historically held property rights in the highest regard. Former Michigan Supreme Court Justice Thomas M. Cooley, one of our nation's preeminent jurists and learned scholars, wrote that the "right to private property is a sacred right; ... it was the old fundamental law, springing from the original frame and constitution of the realm."
>
> [P]roperty ... is recognized as such by the law, and nothing else is or can be. Property and law are born and must die together. Before the laws, there was no property; take away the laws, all property ceases.
>
> Drawing on Sir William Blackstone, Justice Cooley further recognized that the Magna Carta "guaranteed" the protection of private property against government overreach. Just as the Magna Carta guaranteed property

> owners due process of law, so too did the sacred text limit the King's ability to take his subject's property, real or personal…
>
> ***
>
> "This state's common law is adopted from England, and to identify such law this Court may consider original English cases and authorities." Our review of English common law supports the notion that an owner of real or personal property has a right to any surplus proceeds that remain after property is sold to satisfy a tax debt. Just as the Magna Carta protected property owners from uncompensated takings, it also recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess. In fact, although the "mode of collecting the land tax in England was by distress," it was a well-recognized principle that any excess property sold to satisfy a tax debt would be paid back to the owner. Further, Blackstone explained that in the context of bailments, whenever the government seized property for delinquent taxes, it did so subject to "an implied contract in law" to either return the property if the tax debt was paid or "to render back the overplus" if the property was sold to satisfy the delinquent taxes.

Rafaeli, 505 Mich at 454-455 (cleaned up and internal citations and footnotes omitted).

So entwined are our real property laws with equitable considerations, that the very term "equity," as applied to real estate, comes from the courts of equity:

> The history of equity in real estate is particularly illuminating because this property right formed in response to foreclosure practices that raised concerns like those in the present case. Until mortgages came into widespread use, creditors generally obtained a "gage of land" as security in the debtor's land, but the creditor could not recover possession of the land from the debtor. That defect, from the creditor's perspective, likely led to the creation of the predominant form of common-law mortgage, in which the mortgagor conveyed the land, usually in fee simple, to the mortgagee on the condition subsequent that it would be reconveyed to the mortgagor when the debt was repaid at the appointed time.
>
> The harshness of this procedure was evident to many at the time and is similar to harshness involved in the present case, namely that it automatically led to the full loss of the mortgagor's interest in the property no matter how much debt was owed—no surplus was owed or paid to the mortgagor. Equity courts addressed these concerns—in part because the transaction functioned as an extension of a security interest in the property rather than a true transfer of the fee—by creating the "equity of redemption," under which the

> mortgagor could redeem the property by paying off the debt after defaulting. The "equity of redemption" was considered—including by this Court—a property right and came to represent the homeowner's interest in the property, known as "equity."

Rafaeli, 505 Mich. at 476-478 (Viviano, J., concurring, internal footnotes and citations omitted).

With that in mind, the following will discuss Michigan's property rights as they pertain the other forms of liens and foreclosure in the state and show that the state has given itself greater statutory rights to foreclose and dispose of property than are given to other creditors who can obtain liens.

B. Michigan's foreclosure law for taxes and government debts

As with most other states[3], Michigan's current tax foreclosure procedures are a form of *in rem* actions:

As Michigan's Supreme Court noted in *Thompson v. Auditor General*, 261 Mich. 624, 652 (1933):

> Such foreclosure is a proceeding in rem, against the land itself,—and it is the holding of the courts of this country that valid notice which must describe with reasonable certainty the

3. Most states have adopted some form of *in rem* procedure following the 1935 Model Real Property Tax Collection Law. See, for example, Frank Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 766 (2000).

> lands to be sold, must be given before sale, and that any statute which provides for the sale of lands for delinquent taxes which fails to provide for description of the particular lands to be sold is repugnant to the Constitution, because it may deprive the owner of his property without due process of law.

Smith v. Cliffs on the Bay Condominium Ass'n., 245 Mich. App. 73, 75 (2001)

At the heart of this matter, Michigan's General Property Tax Act, Mich. Comp. Laws §§ 211.1 *et seq.*, allows the "foreclosing governmental unit[4]," to foreclose the property and sell it at below market value. The governmental foreclosing unit may establish an opening minimum bid that only covers the amount of the tax debt and costs. Mich. Comp. Laws § 211.78m(5). It may then sell the property at auction for either the minimum bid "or its fair market value." Mich. Comp. Laws § 78m(1).

The Michigan General Property Tax Act does not gives the courts any equitable jurisdiction over the tax foreclosure sale, with the exception where "the court determines that the owner of the property subject to foreclosure is a minor heir, is incompetent, is without means of support, or is undergoing substantial hardship, the court may withhold that property from foreclosure for 1 year or may enter an order extending the redemption period as the court determines to be equitable." Mich. Comp. Laws § 211.78k(4).

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4. Mich. Comp. Laws § 211.78(8)(a) defines "foreclosing governmental unit" as either a county treasurer or the state.

The courts do not have any equitable authority over the price obtained in a tax foreclosure—a power that, as we shall see, the courts have when private parties conduct foreclosures.

C. Michigan's foreclosure laws for non-state creditors.

i. Foreclosure on mortgage notes.

When non-governmental parties foreclose on a mortgage and force the sale of a property, they must sell at the true value or market price of the property. If not sold for the market value, that shall be a defense to any claims of deficiency. Michigan statutes determine that:

> It shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or ***that the amount bid was substantially less than its true value,*** and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him.

Mich. Comp. Laws § 600.3280 (emphasis added).

It has long been held that failure to obtain fair market value is grounds for the courts to exercise their equitable power on behalf of the party that had owned the foreclosed property:

> 'The foreclosure of a mortgage is equitable in its nature though based on legal rights, and it is the province of the court of equity to see to it that a party invoking its aid shall have dealt fairly before relief is given. A court of equity has the right to so control the proceedings as to produce a just result and to protect the rights of all parties.' Wiltsie on Mortgage Foreclosure (4th Ed.) § 38.

Michigan Trust Co. v. Cody, 264 Mich. 258, 262 (1933).

The *Cody* court upheld the trial court where it had found:

> 'The court finds as a matter of fact that the mortgaged property at the time of the sale in question was fairly worth a sum largely in excess of the amount bid for the same by the plaintiff, which was the only bid made at the sale in question … and that under these and the other conditions under which the sale was held, to allow the plaintiff to acquire the property on a bid far below the real value of the same, and which would result in a very large deficiency against the mortgagors, produces a result which shocks the conscience of the court and brings the case within the rule in equity that the sale be not confirmed.'

Cody, 264 Mich. at 264.

Similarly, Michigan's courts have looked to the law of other jurisdictions and held:

> In proceedings of this character, the fair market value of the premises sold is a question of fact, *Stone v. Haskell*, 212 Mass. 283, 98 N.E. 1032; 3 Jones on Mortgages, 8th Ed., § 1583, and the burden of proving that a higher price should have been obtained upon the sale of the property was upon defendant. *Vahey v. Bigelow*, 208 Mass. 89, 94 N.E. 249; *Stone v. Haskell*, 212 Mass. 283, 98 N.E. 1032; 3 Jones on Mortgages, 8th Ed., § 1583.

Stewart v. Eaton, 287 Mich. 466, 485 (1939).

More recently, in a case where the bank foreclosed on the property on a mortgage, and sold it at below fair market value and then went after the previous owner for a deficiency, it was again held that the below-market sale price was a defense to collection of the deficiency:

> Since the bank chose not to attempt to bid in the property at the fair market value on the date of the sheriff's sale and since the trial court found that the property was worth the entire amount of the indebtedness at the time of the sheriff's sale, no deficiency existed. The absence of a deficiency removed defendant bank's claim against the additional pledge collateral and, therefore, the money it received from the plaintiffs when they redeemed this collateral was wrongfully obtained and the judgment of the trial court was correct.

Chabut v. Chabut, 66 Mich. App. 440, 455 (1976). Further, in *Kansas City Life Ins. Co. v. Durant*, 99 Mich. App. 754 (1980), the court looked to expert testimony to

determine the market value and whether the sale price was reasonable:

> The court referred to the expert testimony offered by both parties as to the market value of the property and held that, based upon that evidence, the bid-in price was reasonable. The fact that the court recognized that foreclosure sales do not generally result in the seller obtaining the highest possible price for the property does not negate the fact that its decision was based on the testimony of experts concerning the market value of the properties. A finding that the offer was "reasonable" clearly indicates that the amount of the bid was not substantially less than the true value of the property, which is all that the statute requires.

Kansas City Life Ins. Co., 99 Mich. at 762.

ii. Foreclosure on construction liens.

Similarly, Michigan allows for the attachment of construction liens by contractors and mechanics who work on real property, and authorizes subsequent judicial foreclosure. Mich. Comp. Laws § 570.1101 *et seq.*, Construction Lien Act, Act 497 of 1980. This Act determines that "An action to enforce a construction lien through foreclosure is ***equitable in nature***." Mich. Comp. Laws § 570.1118(1) (emphasis added).

As was shown regarding mortgage foreclosure, ensuring a fair market price is obtained is an inherent part of the equitable requirements.

iii. Foreclosure of alimony and support liens.

Michigan allows for the attachment of liens on real property for nonpayment of spousal or child support after a divorce where such support is included in the judgment of divorce. Mich. Comp. Laws § 552.27. "Order the sale of the property against which the lien is adjudged in the same manner and upon the same notice as in suits for the foreclosure of mortgage liens." Mich. Comp. Laws § 552.27(a).

Once again, foreclosure of mortgage liens requires the sale to obtain a fair market price. Therefore foreclosure of support liens would also require this to be done "in the same manner." *Id.*

iv. Foreclosure of condominium association liens.

Michigan allows for the attachment of liens upon subject units for non-payment of home owner association dues. Mich. Comp. Laws § 559.208(1). As with construction liens and spousal support liens, foreclosure of these liens is conducted in the same manner as mortgage foreclosures, and therefore requires a fair price be obtained. "A foreclosure shall be in the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement or judicial action…" Mich. Comp. Laws § 559.208(2).

v. Non-foreclosure of judgment liens.

Michigan allows for judgment liens to attach to real property. Mich. Comp. Laws § 600.2803. However, Michigan does not allow foreclosure by the lienholder

on the real property to which a judgment lien attaches. Rather, the lienholder must wait until a conveyance or refinancing of the subject real property. Mich. Comp. Laws § 600.2819.

And an attachment to real property is only allowed if the debtor lacks sufficient personal property:

> In Michigan, direct attachment of a debtor's real estate is disfavored. … A judgment, by itself, does not create a lien against a debtor's property. Under the scheme provided [by statute], the creditor must first obtain a judgment for the amount owed, then execute that judgment against the debtor's property. A creditor may execute against real property owned by a debtor only after attempting to execute against the debtor's personalty and determining that the personal property is insufficient to meet the judgment amount.

George v. Sandor M. Gelman, P.C., 201 Mich. App. 474, 477 (1993).

vi. Non-foreclosure of attorneys' liens.

Michigan recognizes two types of court-created non-statutory rights of attorneys' to a lien to secure payment for their services. A "general, retaining, or possessory lien" to hold money or documents already in the attorney's possession, and a "special, particular, or charging lien…an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit." *George*, 201 Mich. App. at 476.

These liens are not codified by statute, but are a common law right recognized by the courts in Michigan. *Id.* "No Michigan authority, however, permits an attorneys' charging lien to attach to real property." *George*, 201 Mich. App. at 477. "Common law established in other states does not permit an attorneys' charging lien to attach to the client's real property 'even where the attorney's services result in a judgment establishing title or possession for the client.'" *George*, 201 Mich. App. at 477-478 (internal citations omitted).

> 'The lien exists as part of the court's inherent power to oversee the relationship of attorneys, as officers of the court, with their client. It does provide a means of securing the legitimate interest of the attorney in payment for his services and expenses on behalf of the client, but it is subject to the control of the court for the protection of the client and third parties as well…'

Kysor Industrial Corporation v. D.M. Liquidating Co., 11 Mich App 438, 445 (1968).

These liens cannot attach to real property—and therefore cannot be foreclosed—and are subject to oversight by the court.

D. Conclusion

When acting as a creditor, governmental units have been giving to themselves greater powers than those given to their private counterparts. Here, in Michigan, for instance, the government's foreclosure on a tax lien

exempts it from the equitable considerations found in other lien foreclosures. A private party creditor must attempt to obtain a fair market price when foreclosing on real property. Creditors holding judgment liens cannot foreclose at all and must instead patiently wait for a conveyance or refinancing of the property. Attorneys' liens cannot attach to real property.

The reasons offered for granting the government special privileges have included wartime necessity and pleadings of other special needs of the government. "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest." *Ark. Game and Fish Comm'n v. United States*, 568 U.S. 23, 36 (2012), citing *United States v. Causby*, 328 U.S. 256, 275 (1946) (Black, J., dissenting). Academics have offered rationales such as "The tax collector's right to the surplus value is an integral part of the tax collection process and, indeed, an integral part of real property tax."[5] That the government needs an extra incentive "powerful incentive for the debtor to pay the tax. … [T]he right to obtain the surplus by foreclosure creates an incentive for mortgagees to monitor and pay the tax if he does not."[6]

But the balance ought not be tilted so far in favor of the government. The Takings Clause would be rendered meaningless if governments could so easily dictate the terms of sale in favor of depriving the former property

5. Marie Reilly, *The Case for the Tax Collector*, 18 J. Bankr. L. & Prac. 6 Art. 2.

6. *Id.*

owner of their equity. The due process of the citizen should not be swept easily aside by claims of the government's need for procedures that favor the government more than those allowed to private creditors who have a similar lien claims on real property. Insufficient auction procedures cannot dictate the worth of citizens' property rights. As in *Tyler*, 598 U.S. at 638, longstanding rights found under common law must be taken into account as a source of property rights. Similarly, the Court needs to look at different sources of state law as well. *Id.* And in doing so it ought to look at the state law applicable to private parties. In doing so, it will find that the state here is trying to give itself creditors' rights above and beyond that of other creditors, and abrogate its common law and equitable duties at the same time. State and local governments, like private parties, should be held to an equitable duty to sell foreclosed property at a fair market price.

Respectfully submitted,

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