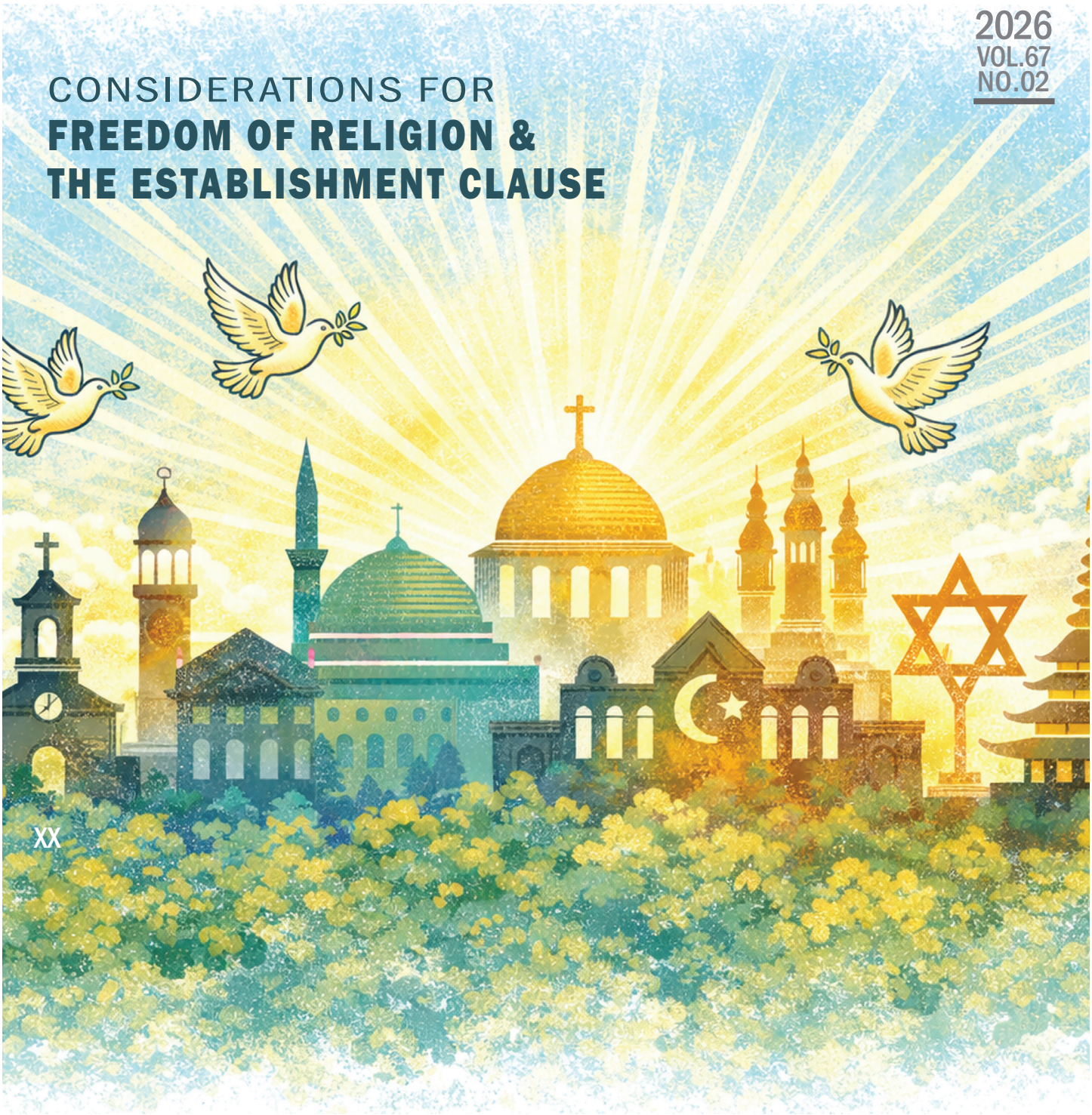
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CONSIDERATIONS FOR FREEDOM OF RELIGION & THE ESTABLISHMENT CLAUSE



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Introduction

The Ever-Evolving Takings Clause: The authors of the Constitution presciently foresaw that as the new nation progressed, the federal government would require resources held by private citizens.

In the Bill of Rights, they added language that accommodated governmental interests while protecting those of the people: the Fifth Amendment's provision that "nor shall private property be taken for public use, without just compensation." That clause, including its extension to the States via the Fourteenth Amendment, has spawned a vast array of takings claims, from the basic—seeking recompense for physical appropriation of land—to more nuanced arguments that regulations improperly limit the use, enjoyment, or economic opportunity of real estate and other types of property.

The Supreme Court has been central to Takings Clause interpretation, providing touchstones to guide resolution of federal, state, and local disputes. Many of these have accommodated the government: shortly after the Civil War, the Court confirmed the fundamental right to take private property for public use;[1] a century ago, it upheld the validity of local zoning ordinances as a constitutional exercise of police powers;[2] and in 1978 it affirmed a local government's right to substitute transferable development rights in lieu of granting a building permit, providing a flexible calculus for evaluating takings, including factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.[3]

But on the other side of the ledger, the Court has increasingly held in favor of property owners. Moving beyond early claimants whose real estate was clearly physically impacted, whether by low-level overhead flights,[4] uncontrolled flooding,[5] or cable tv wiring,[6] the Court five years ago held that a state law allowing even intermittent entry onto private land was also a prohibited *per se* physical taking.[7] Other holdings reveal a growing will to redress regulatory overreach, including the Court's *Nollan/Dolan/Koontz*[8] trilogy finding Takings Clause liability where governmental regulation did not bear an "essential nexus" and "rough proportionality" to the public good being protected. That principle recently reappeared in *Sheetz v. El Dorado County*[9] where a unanimous Supreme Court ruled for the property owner, holding that impact-based permitting fees, whether legislatively derived or administrative, must meet "rough proportionality." And four days after *Sheetz*, in *Devillier v. Texas*[10] the Court further expanded the reach of the Takings Clause, finding that inverse condemnation claims brought against a state under state law could also include Takings Clause claims, and intimating that even if state law did not specifically support such a claim, direct recourse to federal court could nevertheless be available.

A Precursor

The Court's Property Tax Scrutiny in Tyler.

Against that recent trajectory, a present-day Supreme Court grant of takings-based certiorari may rightly cause concern for governmental defendants. That focus is heightened in the case of property taxes, where a 2023 antecedent required realignment of state tax law to conform with the Takings Clause. *Tyler v. Hennepin County*[11] was a challenge to Minnesota's statutory property foreclosure scheme. There, Geraldine Tyler, an elderly County resident, had ceased paying property taxes on her condominium, failing to respond to overdue notices and not pursuing any of the multiple avenues afforded her to redeem her property or to protect her equity interest. After three years of default, Minnesota law provided that title to the condominium vested in the state and the accrued taxes and penalties were extinguished.[12] The County then sold the property at public auction, obtaining $40,000-significantly more than the $2,500 in taxes and $12,500 in penalties which were owed.

The County retained the full sales price pursuant to State law, which provided that the proceeds were to be applied first, to any expenses incurred for municipal improvements and environmental cleanup that increased the value of the property; second, to outstanding special assessments, third, a discretionary amount designated by the County to help fund forest development or county parks and recreational areas; and finally, 40 percent of the remainder to the County, 40 percent to the school district, and 20 percent to the town or city, as applicable.[13] Tyler sued, arguing that retention of the surplus violated the Takings Clause and amounted to an unlawful fine under the Eighth Amendment's Excessive Fines Clause.

The District Court dismissed the suit for failure to state a claim, noting that although Minnesota common law had once recognized an owner's interest in surplus equity in the tax-foreclosure context, that right had been abrogated by the state's statutory forfeiture scheme.[14] The Eighth Circuit affirmed, holding that "[w]here State law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking."[15] The Circuit Court also rejected Tyler's claim under the Excessive Fines Clause, adopting the holding below that the forfeiture was not a fine because it was intended to remedy the State's tax losses rather than punishing delinquent property owners.[16]

The Supreme Court reversed, in a unanimous opinion authored by Chief Justice Roberts, which implicitly accepted the legitimacy of the tax sale process and the deduction of collection costs in addition to outstanding taxes and interest, but questioned the retention of excess value:

> Here there was money remaining after Tyler's home was seized and sold by the County to satisfy her past due taxes, along with the costs of collecting them. The question is whether that remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State.[17]

To answer that query, said Roberts, the Court draws on "existing rules or understandings" about property rights. While State law could figure into that calculus, it could not be the only source: "Otherwise, a State could "sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate."[18] Thus, Roberts looked to "traditional property law principles," historical practices, and Supreme Court precedent to delineate the relevant analytical framework. He found an enduring principle, from the Magna Carta through *Blackstone's Commentaries*, that while the Crown had the power to seize property to satisfy a debt, any remaining surplus had to be returned to the original owner.[19] The same precept migrated to the colonies, where the new national government and ten states adopted laws limiting the retention of sales proceeds to the amount of the taxpayer debt, a policy that would become law in the majority of states today, where surplus must be returned to the taxpayer.[20]

Minnesota's scheme was not only out of step with the majority but also internally inconsistent, because in virtually every other context, such as where a private creditor sells the property, Minnesota law entitled the owner to any surplus.[21] In contrast, Justice Roberts observed, "The State now makes an exception only for itself, and only for taxes on real property.")[22] That inconsistency suggested an attempt by the Minnesota legislature to avoid paying compensation for its taking of property.[23] The Court unanimously held that Minnesota's retention of the surplus proceeds from the sale of Tyler's residence violated the Takings Clause, a decision requiring numerous jurisdictions to rewrite their property tax codes.

Given Tyler's acceptance of takings relief, the Court did not decide her excessive-fines claim.[24] But in an analysis that may have later resilience, Justice Gorsuch's concurrence saw Minnesota's tax-forfeiture scheme as punitive and would have found it in violation of the Excessive Fines Clause: "It matters not whether the scheme has a remedial purpose, even a predominantly remedial purpose. So long as the law 'cannot fairly be said solely to serve a remedial purpose,' the Excessive Fines Clause applies."[25]

Enter Pung

Beyond the Property Tax Surplus Issue

The *Tyler* decision was barely two years old when, in October 2025, the Court granted certiorari in another property tax case with potentially far greater implications for local government: *Pung v. Isabella County* sprang from a dispute about survivors' entitlement to a property



In granting certiorari, the Supreme Court will now consider a property tax issue more consequential than the discussion of surplus in Tyler: whether the government, when taking title to property due to unpaid property taxes, is liable to the defaulting owner for the property's fair market value.

tax exemption, in this case Michigan's Principal Residence Exemption (PRE), which provides that a property owner may claim an exemption from local school district taxes if the owner occupies the property as his or her principal residence.[26] In 1994, Timothy Pung had been granted a PRE exemption for his property in Union Township, Isabella County, Michigan. He died in 2004 and was survived by his wife and two children, who occupied the home as their primary residence (his wife died in 2008, but one of his children continued to reside there).

In 2010, the Union Township tax assessor retroactively denied the PRE for the Pung property for tax years 2007, 2008, and 2009, given that no one was listed on the deed after Pung's death and that no subsequent affidavits had been filed for a new PRE for the property. The tax assessor continued to deny the PRE for 2010 and 2011. Although Pung's son ultimately successfully appealed the PRE denials through 2011, the property's 2012 PRE was revoked because no new affidavit had been filed for that year. While the parties dispute whether Pung received written notice of the revocation of the 2012 PRE, they agree that he received verbal notice of the revocation when he paid his tax bill in February 2013. Pung challenged his 2012 tax assessment and refused to pay the resulting deficit, leading to an unpaid tax bill of $2,241.93. The County Treasurer initiated foreclosure proceedings in June 2014; when Pung failed to appear, the court entered judgment in favor of the County. While Pung moved to set aside the foreclosure, arguing he didn't hear about it until already finalized, the Michigan Court of Appeals ultimately ruled in favor of the County and upheld the foreclosure. The County, now record owner of the property, sold it at a public auction for $76,008. The District Court awarded Pung the surplus remaining after deducting the tax debt, which yielded slightly less than $74,000, but it deferred consideration of Pung's argument that compensation for the County's taking should have been far greater, based on the property's fair market value when title transferred to the County.[27]

On appeal, Pung resumed his fair market value argument, pointing to the fact that the auction purchaser rapidly resold his home for $195,000—a price slightly higher than the County's tax assessment for the property. He asserted that the County's failure to remit the fair market balance-based proceeds to him, nearly $120,000, violated the Takings Clause. The Sixth Circuit disagreed, affirming the court below and holding that a plaintiff whose property is foreclosed and sold at public auction for failure to pay taxes is entitled only to the auction price surplus after deducting taxes and expenses, not to reimbursement based on the property's fair market value.[28] The Circuit also rejected Pung's Eighth Amendment Excessive Fines claim, holding that the Michigan law does not punish property owners for failing to pay their taxes, but rather "its aim is to encourage the timely payment of property taxes."[29]

In granting certiorari, the Supreme Court will now consider a property tax issue more consequential than the discussion of surplus in *Tyler*: whether the government, when taking title to property due to unpaid property taxes, is liable to the defaulting owner for the property's fair market value. The questions presented are:

> (1) Whether taking and selling a home to satisfy a debt to the government, and clause of the Fifth Amendment when the compensation is based on the artificially depressed auction sale price rather than the property's fair market value; and
> (2) whether the forfeiture of real property worth far more than needed to satisfy a tax debt but sold for a fraction of its real value constitutes an excessive fine under the Eighth Amendment, particularly when the debt was never actually owed.

At stake in *Pung* are billions of dollars in property taxes collected annually by localities through tax lien and forfeiture sales. A holding that taxing authorities are responsible for the fair market value of properties sold in default scenarios would likely curtail tax sales and have a devastating impact on local government budgets, an argument made by IMLA and its associates in the Local Government Legal Center (LGLC): the National League of Cities, the National Association of Counties, the Government Finance Officers Association, and the International City/County Management Association. Our LGLC brief cited the many issues that would arise under a



Beyond valuation, the Justices seemed more concerned about an issue not specifically within the Question Presented: the fairness of the process that led to Mr. Pung's property being sold for roughly one-third of its eventual value.

fair market value system, including the risks assumed by the government to maintain the property prior to sale and the perverse incentives created for nonpayment of property taxes, where defaulting property owners would receive a windfall, burdening other taxpayers disproportionately. A primary contribution of the LGLC brief was IMLA's survey of property tax forfeiture systems across the nation, many of which include lengthy redemption periods, extensive notice of public sale, and other mechanisms to ensure fairness in the process.[30] The brief also highlighted the inherent disconnect between fair market valuation and amounts actually obtained at auction: in the latter, purchasers often have no chance to inspect the property, title insurance may not be available, and the sale is on an as-is basis, without warranty—limitations that naturally result in lower valuations, a proposition advanced mor than 30 years ago by Justice Scalia.[31] Additionally, the value that the Pung auction purchaser subsequently obtained would likely not be garnered without upgrades, refurbishment, staging, marketing by a licensed real estate agent, and other elements normally associated with commercial sale.

Implicit in the LGLC brief was the point that Michigan's system, which is analogized in only a minority of jurisdictions, cannot be viewed as defining the wide diversity of state and local property tax mechanisms nationwide. LGLC argued that, however the Court might analyze the Michigan property forfeiture and sale scheme, a one-size-fits-all solution forced on each state, city, and county across America was not appropriate--a judicial fiat imposing fair market value as the baseline for Takings Clause claims in every property tax default scenario would be catastrophic for local governments, no doubt leading to even further litigation about value. And mindful of Justice Gorsuch's Excessive Fines stance in *Tyler*, LGLC reiterated that a forfeiture process which merely delivers unpaid taxes to the government is not punitive; holding otherwise would provide defaulting property owners another rationale for circumventing their tax responsibilities. LGLC's baseline mission was to emphasize to the Court the overwhelming importance of property tax revenues to communities across the nation, which often provide more than half of a locality's budget. Without those funds, the entire spectrum of services upon which constituents rely, whether law enforcement, EMT, education, parks, and more, would be severely jeopardized.

Pung v. Isabella County was heard on February 25, days before this issue of Municipal Lawyer went to print. At oral argument, a majority of the Court appeared skeptical of the proposition that "just compensation" in a tax foreclosure derives from a property's fair market value rather than the surplus after public auction. The colloquy included repeated references to Justice Scalia's opinion in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) which held that lower valuations are an inevitable and constitutionally acceptable incident of non-market sale scenarios. Justice Alito raised the prospect that if FMV applies, governments would be required to stockpile, insure, and maintain homes awaiting FMV sale. And along that theme, Justice Jackson pointed out that valuation in an eminent domain context was far different from a taking instigated by the taxpayer's inaction, in the latter, if FMV was not obtained at sale, the government would then become liable for the deficit—not only foregoing the unpaid taxes but taking from the public fisc to compensate the defaulting taxpayer.

Beyond valuation, the Justices seemed more concerned about an issue not specifically within the Question Presented: the fairness of the process that led to Mr. Pung's property being sold for roughly one-third of its eventual value. Justice Gorsuch expressed concern about a bureaucratic structure that did not afford more latitude to the plaintiff. Justice Barrett inquired whether the same foreclosure sale process would befall a taxpayer owing only $100. And as Justice Jackson framed it, this was more a case about Due Process than Takings, requiring greater attention to the fairness afforded the taxpayer to avoid foreclosure. On that score, Justice Kagan doubted that a procedure allowing for a long delay (more than a year) between foreclosure and public sale could reasonably be considered fair.

Notwithstanding those fairness concerns, the Court seemed disinclined to adopt the petitioner's just compensation arguments. While any prediction is risky, after roughly ninety minutes of oral argument it appears unlikely that *Pung* will result in a nationwide Fair Market Value benchmark for property tax foreclosures. The Court will rule before its current Term ends in early July. ML

NOTES:

[1]Kohl v. United States, 91 U.S. 367, 371 (1875). Upholding as "essential to its independent existence and perpetuity" the authority of the United States to condemn land for use as a customs house and post office building, and affirming that same right in the States: "No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership." *Id.*

[2]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Refuting a takings claim based on a finding that zoning scheme bore "substantial relation to the public health, safety, morals, or general welfare."

[3]Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[4]United States v. Causby, 328 U.S. 256 (1946). While invalidating the common law doctrine ("*ad coelum*") that landowners' rights extend indefinitely into the airspace above the subject property, the Court ruled that low elevation flights, below the public airspace, worked a compensable Taking.

[5]Arkansas Fish and Game Comm'n v. United States, 568 U.S. 23 (2012). Reversing the Federal Circuit, the Court held that six consecutive years of Army Corps of Engineers-caused flooding, destroying more than 18 million board feet of hardwood timber was a compensable Taking.

[6]Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) Construed a New York state law requiring property owners to permit installation and maintenance of cable television wires on their premises. Jean Loretto, owner of a five-story apartment building on Manhattan's West Side, successfully argued that mandated installation of a ½-inch diameter cable and two 1½-cubic foot boxes on her roof was a Taking.

[7]Cedar Point Nursery v. Hassid, 141 S.Ct. 143 (2021).

[8]Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).

[9]*Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024).

[10]*Devillier v. Texas*, 601 U.S. 285 (2024).

[11]*Tyler v. Hennepin Cnty.*, 505 F.Supp. 3d 879 (D. Minn. 2020).

[12]MINN. STAT. §§ 281.17(a), .18.

[13]*Tyler*, 505 F. Supp. 3d at 894.

[14]*Id.*

[15]Tyler v. Hennepin Cnty., 26 F. 4th 789, 793 (8th Cir. 2022).

[16]*Id.* at 794 (citing *Tyler* 505 F. Supp. 3d, at 895–899).

[17]Tyler v. Hennepin Cnty, 143 S. Ct. 1369, 1375 (2023).

[18]*Id.* (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998)).

[19]*Id.* at 1376.

[20]*Id.* at 1378.

[21]*Id.* (quoting MINN. STAT. §§ 550.08, .20 (2022)).

[22]*Id.*

[23]*Id.* at 1376.

[24]*Id.* at 1381.

[25]*Id.*

[26]MICH. COMP. LAWS § 211.7cc(1).

[27]Pung v. Cnty. of Isabella, 632 F.Supp. 3d 743, 745 (E.D. Mich. Sep. 29, 2022) (citing Pung v. Cnty. of Isabella, no. 18-01334 (W.D. Mich. Sep. 29, 2020) "[T]here remains a potential dispute over whether the Fifth and Fourteenth Amendments require an accounting for not only the excess proceeds, but also for the full fair market value of the property, which could be a higher amount. The Court is not resolving that issue at this time. The parties may litigate the issue in the context of determining the proper amount of damages on these claims."

[28]Pung v. Kopke, Nos. 22-1919/1939 (6th Cir. Jan. 28, 2025) 2025 WL 31822 (en banc rehearing denied, Feb. 26, 2025).

[29]*Id.* The court also rejected Pung's other claims alleging Due Process and Equal Protection violations).

[30]Pung v. Isabella Cnty, No. 25-95 Amicus Br. of Local Government Legal Center, at Appx A. Fairness was also at the heart of the amicus brief of the United States in support of neither party, which argued that "[I]f the sale is conducted fairly, the taxpayer's just compensation is the surplus proceeds—that is, the total proceeds from the sale minus the tax debt (including interest, fees, and expenses)." At 10.

[31]BFP v. Resolution Tr. Corp., 511 U.S. 531, 548-549 (1994).

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