

SUPREME COURT OF THE UNITED STATES

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GERALDINE TYLER,)

Petitioner,)

v.) No. 22-166

HENNEPIN COUNTY, MINNESOTA, ET AL.,)

Respondents.)

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3 GERALDINE TYLER,)
4 Petitioner,)
5 v.) No. 22-166
6 HENNEPIN COUNTY, MINNESOTA, ET AL.,)
7 Respondents.)
8 - - - - -
9
10 Washington, D.C.
11 Wednesday, April 26, 2023
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.
16
17 APPEARANCES:
18 CHRISTINA M. MARTIN, ESQUIRE, Palm Beach Gardens,
19 Florida; on behalf of the Petitioner.
20 ERICA L. ROSS, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; for the
22 United States, as amicus curiae, supporting
23 neither party.
24 NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf
25 of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

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

Ms. Martin.

ORAL ARGUMENT OF CHRISTINA M. MARTIN

ON BEHALF OF THE PETITIONER

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

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

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

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

9 The county apparently does not dispute
10 that Ms. Tyler had a property interest in her
11 former home or in its value. Instead, it
12 asserts that the government may redefine private
13 property by statute.

14 The consequence of that would be an
15 unlimited power to define away private property
16 and to confiscate it to pay debts, no matter how
17 valuable the property or how small the debt.

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

1 of failing to timely pay her property taxes.

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

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

10 I welcome the Court's questions.

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

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

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

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

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

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

3 MS. MARTIN: In this part --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. MARTIN: Sure.

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

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

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

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

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

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

14 JUSTICE BARRETT: Well, sure.

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

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

19 MS. MARTIN: Yeah.

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

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

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

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

6 (Laughter.)

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

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

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

23 (Laughter.)

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

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

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

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

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

23 MS. MARTIN: Before they become
24 excessive?

25 JUSTICE KAGAN: Well, I'm just

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

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

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

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

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

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

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

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

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

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

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

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

25 How does it fit with this Court's

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

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

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

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

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

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

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: What do you --

11 JUSTICE ALITO: Do you --

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

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

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

25 But, ultimately, it's irrelevant

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

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

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

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

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

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

6 JUSTICE JACKSON: So the --

7 MS. MARTIN: Because that would be
8 voluntary.

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

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

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

1 be this self-dealing sort of fictitious sale.

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

5 MS. MARTIN: Yes. We just --

6 JUSTICE JACKSON: Not later, right?

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

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

18 MS. MARTIN: I --

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

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

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

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

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

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

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

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

1 talking -- okay.

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

7 MS. MARTIN: Yes.

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Okay.

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

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Okay.

2 Justice Thomas?

3 Justice Alito?

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

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: If we -- if we

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

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

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

2 I would certainly think --

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

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

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

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

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

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

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

9 JUSTICE KAGAN: I know everything.

10 MS. MARTIN: Yes.

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

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

20 (Laughter.)

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

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

25 JUSTICE KAGAN: Well, because

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

3 MS. MARTIN: Yeah.

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

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

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

21 JUSTICE KAGAN: Well, how about --

22 MS. MARTIN: -- under Minnesota law.

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

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

3 MS. MARTIN: I think that would still
4 be problematic, Your Honor, because there's a
5 lot of reasons why people don't pay their
6 property taxes and a lot of reasons why people
7 move out.

8 We've seen examples of people who are
9 moved into nursing homes and all sorts of
10 unfortunate circumstances. And so we do not
11 contest the government certainly -- that
12 certainly the government can tack on penalties,
13 interest, and fees and they can forcibly sell it
14 and take their cut.

15 But when you just attempt to take
16 everything left over after that, that's a
17 taking.

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 Justice Kavanaugh?

22 Justice Barrett?

23 JUSTICE BARRETT: I want to go back to
24 your answer to Justice Kagan because I was
25 wondering the same thing. I mean, I think that

1 in the county's brief, it blurs the line between
2 abandonment and forfeiture in -- in this
3 situation.

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

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

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

25 JUSTICE BARRETT: So you can't have

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

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

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

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

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

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

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

9 MS. MARTIN: That's exactly right.

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

13 MS. MARTIN: That's right.

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

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

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

25 MS. MARTIN: Well, the county below

1 argued that this was at least intended partly to
2 deter failure to pay property taxes. This Court
3 has said repeatedly that deterrence is a marker
4 of punishment.

5 And so I think that is a very strong
6 --

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

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

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

25 Is there -- is there something

1 punitive about that kind of approach to this?

2 MS. MARTIN: Well, that does sound a
3 little punitive. And that would be something
4 that I think, you know, her culpability would be
5 something on -- on question on remand. That
6 would be a question to answer on remand because
7 the excessiveness question isn't before the
8 Court.

9 And, of course, none of that would be
10 relevant to the takings analysis.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Ms. Ross?

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

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

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

1 more than the tax debt.

2 When the government obtains absolute
3 title to such property without any mechanism for
4 the owner to recover excess value, it engages in
5 a potentially compensable taking.

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

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

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

23 I welcome the Court's questions.

24 JUSTICE THOMAS: So with that said,
25 what would you do with a case in which the

1 government -- which it often does in -- in
2 eminent domain cases -- simply kept the property
3 and did not sell it?

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

12 I think when there is a tax sale, that
13 can be very relevant evidence of the amount of
14 compensation that's due because even though that
15 tax sale happens later and is a forced sale,
16 this Court has been clear that just compensation
17 has to be just to both the public and the
18 property owner.

19 And it would not be just to the public
20 to ask that the state effectively provide some
21 value that was not realized in the tax sale.

22 JUSTICE THOMAS: But how would that
23 work here? You're talking about a condominium,
24 and the -- from what I can tell, the only way
25 you knew of this differential between the taxes

1 owed and the value was because it was sold.

2 How would you determine the value of
3 it if you never sold it, if the -- if the county
4 never sold it?

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

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

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

24 So most notably in the regulatory
25 takings context, this Court has long understood

1 that the government may enact regulations that
2 can affect the value of property, sort of
3 adjusting the burdens of economic life as this
4 Court has said it, and that that is not always
5 or even, you know, often going to be a taking.

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

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

25 Why would any state want to do that

1 and why are you forcing states into that?

2 MS. ROSS: So, respectively --

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

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

16 JUSTICE SOTOMAYOR: Not at all.

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

25 JUSTICE SOTOMAYOR: Except the day

1 that there's a stock crash.

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

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

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

11 JUSTICE GORSUCH: Ms. Ross --

12 MS. ROSS: If I could just hit the
13 history -- yes.

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

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

25 JUSTICE GORSUCH: Oh, of course.

1 MS. ROSS: -- and -- and, you know,
2 this concern about equity versus surplus and why
3 we think it matters.

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

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

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

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

25 (Laughter.)

1 MS. ROSS: Both personally and as the
2 government.

3 (Laughter.)

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

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

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

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

1 first place.

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

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

18 JUSTICE JACKSON: Yes, that's what I
19 mean.

20 MS. ROSS: But I take no one to
21 disagree on that.

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

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

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

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

25 JUSTICE BARRETT: Ms. Ross, given the

1 difference between you and the Petitioner, how
2 does the government recommend that we resolve
3 this case?

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

6 JUSTICE BARRETT: Yeah.

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

13 JUSTICE BARRETT: So just vacate and
14 remand on that?

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

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

21 MS. ROSS: Sure.

22 JUSTICE BARRETT: But -- but you're
23 saying, you know, it's not an affirmance, and
24 there would be a possibility in your view of her
25 amending her complaint if she didn't state the

1 question properly? Is that what the government
2 thinks she should do?

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

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

12 JUSTICE BARRETT: Thank you.

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

23 And as the government, you would argue
24 that's not a taking for a variety of reasons,
25 and there's all sorts of things in our case law

1 you could -- could look to.

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

8 That one's a taking, right?

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

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

18 (Laughter.)

19 MS. ROSS: Well --

20 CHIEF JUSTICE ROBERTS: But the -- the
21 -- but it seems to me that the distinction must
22 be based to some extent on the idea that there
23 is an irreducible core of what constitutes
24 property as opposed to being regulated. You
25 know, taking one square inch of that property is

1 going to be a taking even and -- and regulation
2 that reduces the value much more doesn't.

3 Is that part of the way the government
4 sees the case?

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

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

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

25 I think you could also, as my friend

1 was saying, you know, look at how the state
2 today treats similar situations. I think
3 there's a real concern in this case of sort of
4 the state having one rule for most situations
5 and then a different rule for this one.

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

13 MS. ROSS: I --

14 CHIEF JUSTICE ROBERTS: -- from the
15 federal Constitution.

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

23 And then, you know, there's obviously
24 the accommodation for the tax clause and the --
25 or, excuse me, the tax power. And the question

1 is really just how those fit together. And so I
2 think history here is a good guide for that.

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas?

5 Justice Alito?

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

10 MS. ROSS: Absolutely.

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

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

1 think of those as takings, and then, when it
2 just assigns a penalty, we sort of think of
3 those differently.

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

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

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

25 JUSTICE ALITO: Would abandonment

1 be -- be limited to the situation where the
2 state doesn't know where the person is?

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

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

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

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

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

1 accomplish the end some other way doesn't remove
2 this from the takings power for the taxes.

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

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

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

19 But there'd be some points in the --
20 the property owner's favor.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 Justice Kagan?

25 JUSTICE KAGAN: Could you say a few

1 more words, Ms. Ross, about this penalty
2 question? I mean, are there any penalties
3 because of the form of the penalty or because of
4 the amount of the penalty one should view
5 through a Takings Clause lens?

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

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

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

1 primary purpose was to compensate and that
2 the -- the -- that Petitioner was given multiple
3 opportunities to pay the amount and -- and that
4 it was partially a deterrent.

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

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

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

18 JUSTICE GORSUCH: I got you on that.

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

23 The first is there's no relationship
24 to culpability whatsoever. This applies in
25 exactly the same way no matter how or why

1 someone fails to pay their taxes.

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

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

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

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

15 MS. ROSS: -- at least partially
16 punitive in every case.

17 JUSTICE GORSUCH: The Court hasn't
18 ever said that.

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

25 But the third reason I would give you

1 is that even if you thought this wasn't purely
2 remedial, I don't think it's punitive in any
3 meaningful sense. I think what's really going
4 on here is partially that the state wants to,
5 you know, pay -- not be left really holding the
6 bag on these properties and also that it's just
7 easier from an administrative convenience
8 standpoint.

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

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

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 Justice Barrett?

3 JUSTICE BARRETT: No.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

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

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

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

25 JUSTICE JACKSON: Well, in some

1 instances --

2 MS. ROSS: -- in taxes.

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

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

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

25 You know, I think what's going on

1 here, again, is basically that the -- the state
2 wants to put these properties back into sort of
3 the revenue stream. It wants to not have to pay
4 the person back because that's administratively
5 complicated. Things like that that I think, you
6 know, again, may well push it into takings
7 territory but that just don't have a ring of
8 punitive in this sense.

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

15 JUSTICE JACKSON: But you do agree
16 with Justice Gorsuch --

17 MS. ROSS: -- perfectly accept that
18 Austin --

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

24 MS. ROSS: That's correct, Justice
25 Jackson. My point is simply that this is such a

1 far cry from the cases in which the Court has
2 previously considered this clause that it --
3 it's just even more reason sort of not to reach
4 out to decide the issue here.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Katyal?

9 ORAL ARGUMENT OF NEAL K. KATYAL
10 ON BEHALF OF THE RESPONDENTS

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

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

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

24 This Court in *Texaco* made clear that
25 a -- when a property right is extinguished due

1 to an owner's failure to comply with reasonable
2 conditions on ownership, there is no taking that
3 requires compensation. That's this case.

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

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

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

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

1 Petitioner's theory of injury is she
2 had a right to equity, which she defines as "her
3 financial interest in the property after
4 deducting encumbering liens." But her complaint
5 just says excess funds existed after the sale,
6 not excess funds belonging to her. She never
7 alleges she had equity, let alone a plausible
8 claim to it.

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

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

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

1 MR. KATYAL: So, Justice Thomas, with
2 respect to standing, just her complaint and her
3 petition disclaims the idea she's attacking the
4 taking of the title or forfeiture. That's page
5 3 of her petition. It's very clear.

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

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

1 With this situation, the government is
2 stuck holding the bag at the end of the day.
3 And that's why you have a different tradition.
4 It's a tradition that goes back to even before
5 the republic, to the Statute of Gloucester in
6 1278, as the Chief Justice was pointing out, the
7 Virginia statute in 1790 --

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

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

12 JUSTICE GORSUCH: '72, all right.

13 Well, you know, a funny thing happened after
14 that. It was called the Magna Carta.

15 (Laughter.)

16 MR. KATYAL: Yeah.

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

24 And the -- the Statute of Gloucester
25 was about lands owned by the feudal lord and

1 what happens when a vassal fails to provide
2 enough wheat to his lord and can his lands,
3 which really belong to the lord, escheat to the
4 lord. And I just don't understand what on earth
5 any of that history has to do with this case.

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

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

14 MR. KATYAL: Absolutely.

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

19 MR. KATYAL: So --

20 JUSTICE GORSUCH: I just am stuck on
21 that.

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

1 that. We're simply --

2 JUSTICE GORSUCH: Good. I'm glad --
3 I'm glad to hear that. That's progress.

4 (Laughter.)

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

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

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

1 to North Carolina in 1843.

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

8 CHIEF JUSTICE ROBERTS: Just to
9 interrupt quickly on -- on standing, I mean, a
10 lot of people have property that's under water.
11 I mean, that they -- it's heavily mortgaged, you
12 know, that they're not going to make any profit
13 of it. But, you know, real estate values
14 change. I mean, the fact that -- that she may
15 have liens on her property that -- that are
16 going to be difficult to pay off right now
17 doesn't mean that any -- you know, the bank or
18 anyone else could just walk in. It's not
19 valueless just because she owes a lot of money
20 on it.

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

1 complaint, there's not a word of that
2 whatsoever. And Iqbal and Twombly say you've
3 got to at least rule out reasonable
4 alternatives.

5 Here, the reasonable alternative, the
6 reason why this case looks almost too perfect,
7 is because it's not telling you something really
8 important in the complaint. She says, I owed
9 \$15,000. She said the government sold it for
10 \$40,000. This looks horrible.

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

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

23 JUSTICE BARRETT: But liberally
24 construed. I mean, I think Justice Thomas is
25 right, that's -- that's clearly what she's

1 saying. And to the extent there's something
2 that would counter it down -- so you're saying
3 she would actually have to say, I am
4 unencumbered by any kind of mortgage or lien?

5 MR. KATYAL: I think that's certainly
6 a way to do it. And if you -- this is the
7 easiest thing in the world to allege. All she
8 has to do is say, look, there's a dollar of
9 surplus equity at stake. And if you want to
10 look, look at the three complaints that are
11 pending before you, two of which she's filed.
12 In Fair versus Continental, paragraph 4 says the
13 taxpayers "have no mortgage on the property and
14 will be stripped of the equity in their home,"
15 which they list to be \$50,000. And the Meisner
16 complaint in paragraph 37, they say there's no
17 mortgage and then say -- they go through the
18 property records to show that.

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

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

1 the master of the complaint.

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

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

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

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

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

16 MR. KATYAL: We -- we --

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

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

1 And then where are we? It seems to me
2 like we're at summary judgment.

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

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

11 MR. KATYAL: Yeah. So I don't think
12 --

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

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

22 That's why people walk away from their
23 equity. When we looked at this case and we
24 asked why in the world would it be that Tyler
25 walked away from her home, the reason we think

1 is that there was no equity in the home, and
2 that's why she walked away. That's why this
3 case looks a little bit too perfect.

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

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

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

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

24 MR. KATYAL: Because, if -- if -- if
25 she got the money back that way and, like, she

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

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

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

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

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

25 MR. KATYAL: Well --

1 JUSTICE JACKSON: -- when you say
2 people don't walk away? Did she walk away in
3 this situation?

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

6 JUSTICE JACKSON: By doing what?

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

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

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

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

24 CHIEF JUSTICE ROBERTS: On --

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

1 CHIEF JUSTICE ROBERTS: I was just
2 going to say, on -- on the merits, at -- at --
3 at bottom, is your theory that the state can
4 define property as it wishes?

5 MR. KATYAL: No. Our theory --

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

8 MR. KATYAL: It's --

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

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

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

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

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

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

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

25 And, here, the tradition of forfeiture

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

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

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

15 MR. KATYAL: Correct.

16 JUSTICE GORSUCH: And -- and that we
17 should look to tradition and history for
18 guidance?

19 MR. KATYAL: Correct.

20 JUSTICE GORSUCH: And it's just a
21 matter of how we read that record that's the
22 real question in dispute here?

23 MR. KATYAL: That is correct. We
24 think that there is actually -- when you drill
25 down, they do not have a founder, they do not

1 have a treatise at the founding, they don't have
2 a judicial opinion that says that this is a
3 Takings Clause violation or anything like that.

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

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

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

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

22 And it also came up on your friend on
23 the other side's view of this, although she says
24 what is happening is the government is taking
25 the property and liquidating it, essentially,

1 turning it into cash, and that really what it's
2 entitled to is just the amount of the debt.
3 It's not that it's entitled to, as a result of
4 the debt, extinguish completely the property
5 interests or rights of the -- of the individual.

6 So what is your response to that?

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

8 MR. KATYAL: Sure.

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

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

15 JUSTICE JACKSON: No, I understand
16 that. My question is, when you say the
17 government has traditionally been able to take
18 property and she's not disputing that in a -- in
19 a tax situation the government can take it, but
20 what I think she's saying is you can take it,
21 liquidate it --

22 MR. KATYAL: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Here, you have five years from the

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

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

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

11 MR. KATYAL: -- they say --

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

15 MR. KATYAL: Yeah.

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

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

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

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

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

14 JUSTICE GORSUCH: So a \$5 --

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

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

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

25 And my friend on the other side's oral

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

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

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

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

1 individual can't avert the taking whatsoever.

2 You know, if the --

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

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

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

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

1 avert that.

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

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

7 MR. KATYAL: Yeah.

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

10 (Laughter.)

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

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

1 --

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

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

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

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

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

1 person can get the money back.

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

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

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

18 MR. KATYAL: Takings. Yeah.

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

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

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

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

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

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

21 MR. KATYAL: Well, Justice --

22 JUSTICE KAGAN: -- about that?

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

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

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

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

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

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

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

25 MR. KATYAL: And you --

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

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

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

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

25 And for this Court to

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

7 JUSTICE BARRETT: Mr. Katyal --

8 CHIEF JUSTICE ROBERTS: Counsel --

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

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

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

22 (Laughter.)

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

25 JUSTICE BARRETT: Your buggy?

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

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

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

19 JUSTICE KAVANAUGH: Why would we read
20 --

21 CHIEF JUSTICE ROBERTS: I think --

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

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

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

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

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

25 Money, on the other hand, you know,

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

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

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

25 MR. KATYAL: A hundred percent right,

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

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

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

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

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

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

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

8 CHIEF JUSTICE ROBERTS: Justice
9 Thomas?

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

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

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

1 unconstitutional as the way the founders
2 understood it.

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

9 MR. KATYAL: Yeah.

10 JUSTICE THOMAS: -- if you are right.

11 MR. KATYAL: Well, I -- I don't know.

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

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

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

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

8 (Laughter.)

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

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

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

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

25 Again, I don't think it's our burden

1 --

2 JUSTICE THOMAS: Yeah.

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

10 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

1 MR. KATYAL: Sure. I think the
2 government in that circumstance is worried about
3 balancing the rights of delinquent taxpayers
4 against the rights of all other taxpayers.

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

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

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

1 about, Justice Alito.

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

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

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

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

20 And so that's the policy rationale to
21 maximize the amount at stake. That's the way to
22 do it. And also governments fear -- and this is
23 also in the amici briefs -- that if they're
24 forced to be the realtor of last resort, even if
25 they sell it at a high enough price, they could

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

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

12 And that'll be -- create all sorts of
13 cash flow problems.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 Justice Kagan?

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

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

24 JUSTICE KAGAN: Well, it's a penalty
25 that's -- that -- that has the kind of effect

1 that -- that you think this scheme has. In
2 other words, the state won't have to be in the
3 position of a -- of a real estate agent, because
4 somebody will say: Oh, that's a pretty big
5 penalty, I don't want to have to lose that?

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

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 Justice Kavanaugh?

16 Justice Barrett?

17 Justice Jackson?

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

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

25 JUSTICE JACKSON: Yes, yes. She owns

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

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

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

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

15 My question is, if the tax debt was
16 satisfied by her selling the condo, and she gave
17 the government \$5,000, could the government say
18 we want the full \$40,000 that was the purchase
19 price of the condo?

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

23 JUSTICE JACKSON: Correct.

24 MR. KATYAL: She just owes the taxes
25 and penalties.

1 JUSTICE JACKSON: Correct.

2 MR. KATYAL: And so once the taxes and
3 penalties are paid --

4 JUSTICE JACKSON: Yes.

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

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

15 So I don't know why the government
16 couldn't seek to get the money even if she sold
17 the property to satisfy the tax debt?

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

23 JUSTICE JACKSON: I understand. And
24 she's challenging the title transfer in this
25 way. She's saying --

1 MR. KATYAL: She's actually not.

2 JUSTICE JACKSON: Well, she -- what
3 I'm saying is, she says you can take the title
4 to liquidate it and take out the tax money, the
5 rest of which rebounds to me.

6 You say we can take the title in its
7 entirety, and not give -- and not liquidate it
8 in the sense of giving it back to her. We can
9 just sell it as though we owned the whole thing
10 outright.

11 MR. KATYAL: And --

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

18 MR. KATYAL: I'm not sure we'd have
19 the same argument because we wouldn't have the
20 same tradition and reasonable condition on
21 ownership. Our -- we're only defending what
22 Minnesota does here, which is to say, when title
23 is fully transferred to the government, at that
24 point her property rights are extinguished, just
25 like Texaco, and the government then has full

1 access to the money.

2 We're not saying anything about before
3 that moment of title transfer.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Rebuttal, Ms. Martin?

8 REBUTTAL ARGUMENT OF CHRISTINA M. MARTIN
9 ON BEHALF OF THE PETITIONER

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

22 The county suggests that due process
23 can do the work of the Takings Clause, but it
24 can't. It -- it is not just compensation. And
25 this Court said, in Jones versus Flowers, that

1 the failure to protect your property interests
2 does not excuse the government of its
3 constitutional obligations.

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

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

21 Under our theory, the taking in this
22 case happens at the exact same time as the
23 Solicitor General's view because that's when the
24 government extinguished Ms. Tyler's interest in
25 being paid for her equity. That was July 2015.

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

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

19 If there are no further questions, we
20 will just simply ask this Court to reverse and
21 remand.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 The case is submitted.

25

1 (Whereupon, at 11:48 a.m., the case
2 was submitted.)
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