

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

GERALDINE TYLER,)
)
 Petitioner,)
)
 v.) No. 22-166
)
HENNEPIN COUNTY, MINNESOTA, ET AL.,)
)
 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. The consequence of that
14 would be an unlimited power to define away
15 private property and to confiscate it to pay
16 debts, no matter how valuable the property or
17 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 -- if there was no
13 surplus 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 this -- this
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 the -- a debt collector may not take more
23 than 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 you -- Minnesota has a
15 law sort of going forward and they say from now
16 on, in Minnesota, if you get property, you have
17 to know that we, the state, are going to take it
18 if you don't pay taxes for three years? And
19 people go in with that expectation. The market
20 value is discounted because of that.

21 If -- 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 -- 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, that
5 had a similar procedure as -- as Minnesota here
6 today, you know, way back when, I guess before
7 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 -- that case --
11 would you have a takings claim if somebody acted
12 -- if the state took your property consistent
13 with a provision in law that had been in effect
14 from 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 the western bounds of it hadn't yet been
24 defined, and different --

25 MS. MARTIN: Sure.

1 CHIEF JUSTICE ROBERTS: -- different
2 states had different rules, and -- and they
3 chose to have a rule that had an exception to
4 what today we might think of as common
5 definition of 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 the -- that there was a
10 single exception that was actually narrower than
11 what Hennepin County does. They only were able
12 to 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 -- 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 --
3 it kind of flies in the face of this tradition
4 that the best way of putting a person on notice
5 from a taking is to actually take the property,
6 and -- and at that point, you can then go claim
7 your just compensation or file your takings
8 claim if they have not offered just
9 compensation.

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

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

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

24 MS. MARTIN: Before they become
25 excessive?

1 JUSTICE KAGAN: Well, I'm just
2 thinking that you can call anything anything.
3 What if a state just called this scheme a
4 penalty scheme?

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

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

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

23 MS. MARTIN: I think, if the
24 government is essentially -- at some point, I
25 think it becomes a taking. The -- that line is

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

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

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

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

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

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

24 How does it fit with this Court's
25 subsequent decision in Knick, which seemed to

1 suggest you don't have to exhaust state -- state
2 law proceedings to bring a takings claim?

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

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

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

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

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

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

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

24 And it -- it said in *James Daniel Good*
25 that no one could contest that real estate is

1 private property. And the right we're talking
2 about, the right to being paid for the excess
3 value in your property, is sort of like the
4 interest in Phillips, where -- where this --
5 this Court noted that interest follows the
6 principal like a shadow follows the body.

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

9 CHIEF JUSTICE ROBERTS: What do you --

10 JUSTICE ALITO: Do you --

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

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

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

24 But, ultimately, it's irrelevant
25 because, in the tax collection context, it's --

1 it goes all the way back to Magna Carta that the
2 government could not take more than it was owed.

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

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

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

1 went on and sold it for a higher price, she
2 wouldn't receive anything as a result, right?

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

5 JUSTICE JACKSON: So this --

6 MS. MARTIN: -- because that would be
7 voluntary.

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

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

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

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

4 MS. MARTIN: Yes. We just --

5 JUSTICE JACKSON: Not later, not at --

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

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

17 MS. MARTIN: I --

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

25 These are big questions. And tell me

1 why we should address it here. Why don't we
2 just address the question you presented, which
3 is the surplus question?

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

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

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

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

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

24 MS. MARTIN: That's what you're try --
25 okay.

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

6 MS. MARTIN: Yes.

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Okay.

23 MS. MARTIN: Yeah, but even if there
24 wasn't, there's some reassurance that at some
25 point the property becomes theirs, but that's

1 based on the idea at common law that the owner,
2 seeing this open and obvious use of their
3 property, has consented to it.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Okay.

1 Justice Thomas?

2 Justice Alito?

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

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: If we -- if we
25 were to rule in your favor on the Takings

1 Clause, why would we reach the Excessive Fines
2 Clause?

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

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

1 I would certainly think --

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

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

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

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

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

25 JUSTICE KAGAN: I -- I guess the

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

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

8 JUSTICE KAGAN: I -- I know
9 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 -- I mean,
19 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 if --

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. We've seen examples of people who are
8 moved into nursing homes and all sorts of
9 unfortunate circumstances.

10 And so we do not contest the
11 government certainly -- that, certainly, the
12 government can tack on penalties, interest, and
13 fees and they can forcibly sell it and take
14 their cut. But, when you just attempt to take
15 everything left over after that, that's a
16 taking.

17 JUSTICE KAGAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 Justice Kavanaugh?

21 Justice Barrett?

22 JUSTICE BARRETT: I want to go back to
23 your answer to Justice Kagan because I was
24 wondering the same thing. I mean, I think that
25 in the county's brief, it blurs the line between

1 abandonment and forfeiture in -- in this
2 situation.

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

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

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

24 JUSTICE BARRETT: So you can't have
25 construct -- constructive intent even if, you

1 know, she's not responded to multiple notices,
2 even after a certain amount of time, I mean,
3 because I presume there are other situations in
4 which there's true abandonment, where intent has
5 to be inferred from a failure to show up, a
6 failure to reside, a failure to respond to
7 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
22 they want to call it an abandonment, maybe they
23 can call it an abandonment, they can sell it,
24 they can hold the proceeds and give some period
25 of time during which the owner can come and

1 redeem?

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

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

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

10 MS. MARTIN: That's exactly right.

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

14 MS. MARTIN: That's right.

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

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

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

1 MS. MARTIN: Well, the county below
2 argued that this was at least intended partly to
3 deter failure to pay property taxes. This Court
4 has said repeatedly that deterrence is a marker
5 of punishment. And so I think that is a very
6 strong --

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
24 do it? Is there -- is there something punitive
25 about that kind of approach to this?

1 MS. MARTIN: Well, that does sound a
2 little punitive, and that would be something
3 that I think, you know, her culpability would be
4 something on -- on question on remand. That
5 would be a question to answer on remand because
6 the excessiveness question isn't before the
7 Court. And, of course, none of that would be
8 relevant to the takings analysis.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Ms. Ross.

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

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

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

25 When the government obtains absolute

1 title to such property without any mechanism for
2 the owner to recover excess value, it engages in
3 a potentially compensable taking.

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

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

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

21 I welcome the Court's questions.

22 JUSTICE THOMAS: So, with that said,
23 what would you do with a case in which the
24 government -- which it often does in -- in
25 eminent domain cases -- simply kept the property

1 and did not sell it?

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

10 I think, when there is a tax sale,
11 that can be very relevant evidence of the amount
12 of compensation that's due because, even though
13 that tax sale happens later and is a forced
14 sale, this Court has been clear that just
15 compensation has to be just to both the public
16 and the property owner. And it would not be
17 just to the public to ask that the state
18 effectively provide some value that was not
19 realized in the tax sale.

20 JUSTICE THOMAS: But how would that
21 work here? You're talking about a condominium,
22 and the -- from what I can tell, the only way
23 you knew of this differential between the taxes
24 owed and the value was because it was sold.

25 How would you determine the value of

1 it if you never sold it -- if this -- if the
2 county never sold it?

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

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

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

22 So, most notably, in the regulatory
23 takings context, this Court has long understood
24 that the government may enact regulations that
25 can affect the value of property, sort of

1 adjusting the burdens of economic life, as this
2 Court has said it, and that that is not always
3 or even, you know, often going to be a taking.

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

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

23 Why would any state want to do that?
24 And why are you forcing states into that?

25 MS. ROSS: So, respectfully --

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

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

14 JUSTICE SOTOMAYOR: Not at all.

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

23 JUSTICE SOTOMAYOR: Except the day
24 that there's a stock crash.

25 MS. ROSS: I'm -- so -- so I think you

1 could --

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

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

10 If I could just --

11 JUSTICE GORSUCH: Ms. Ross --

12 MS. ROSS: -- hit the history -- yes.

13 JUSTICE GORSUCH: -- well, just before
14 you do that, just to finish up this line of
15 questioning, it -- do we even need to decide
16 this? The question before us, is there a taking
17 here? Yes. Both of you agree on that. And
18 then -- big question becomes the matter of
19 valuation, and do we have to decide that in this
20 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 --
3 and why 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 would do it
10 through the -- the legislature. So there's some
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's -- 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 -- isn't that sort
12 of the 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 --

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 tax surplus.

13 JUSTICE JACKSON: And so the taking
14 takes place whether the government then goes on
15 to say it -- 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've
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 -- to quote one of
5 my colleagues, the way that we said in our
6 brief.

7 JUSTICE BARRETT: Yeah.

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

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

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

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

22 MS. ROSS: Sure.

23 JUSTICE BARRETT: But -- but you're
24 saying, you know, it's not an affirmance, and
25 there would be an impossibility in your view of

1 her amending her complaint if she didn't state
2 the question properly? Is that what the
3 government thinks she should do?

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

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

13 JUSTICE BARRETT: Thank you.

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

24 And I know -- as the government, you
25 would argue that's not a taking for a variety of

1 reasons, and there's all sorts of things in our
2 case law you could -- could look to.

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

9 That one's a taking, right?

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

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

19 (Laughter.)

20 MS. ROSS: Well --

21 CHIEF JUSTICE ROBERTS: But the -- the
22 -- but it seems to me that that -- the
23 distinction must be based to some extent on the
24 idea that there is an irreducible core of what
25 constitutes property as opposed to being

1 regulated. You know, taking one square inch of
2 that property is going to be a taking even and
3 -- and regulation that reduces the value much
4 more doesn't.

5 Is that part of the way the government
6 sees the case?

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

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

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

1 physical property. So I think history is
2 certainly one place you could look there.

3 I think you could also, as my friend
4 was saying, you know, look at how the state
5 today treats similar situations. I think
6 there's a real concern in this case of sort of
7 the state having one rule for most situations
8 and -- and then a different rule for this one.

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

16 MS. ROSS: I --

17 CHIEF JUSTICE ROBERTS: -- from the
18 federal Constitution.

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

1 And then, you know, there's obviously
2 the accommodation for the tax clause and the --
3 or, excuse me, the tax power. And the question
4 is really just how those fit together. And --
5 and so I think history here is a good guide for
6 that.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas?

9 Justice Alito?

10 JUSTICE ALITO: Can the government
11 also keep its administrative expenses that it
12 incurs as a result of having to go through the
13 process?

14 MS. ROSS: Absolutely.

15 JUSTICE ALITO: Can it impose a
16 penalty for failing to respond or for anything
17 else that the property owner may do in
18 connection with this proceeding?

19 MS. ROSS: I think it can, subject,
20 obviously, to other constitutional limitations.
21 I think this goes to Justice Kagan's questions
22 earlier. You know, this Court's decision in
23 Eastern Enterprises sort of -- it's really the
24 -- the -- the controlling concurrence by Justice
25 Kennedy and then the four dissenters, but sort

1 of drew a line between when the government tries
2 to take physical property or a specific sum of
3 money, a specific pot of money, as in Webb's or
4 the -- the IOLTA cases. On the one hand, we
5 think of those as takings, and then, when it
6 just assigns a penalty, we sort of think of
7 those differently.

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

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

22 Here, by contrast, we just have, you
23 know, five years of non-payment of taxes, and it
24 would apply in exactly the same way if she lived
25 in her condominium and was exercising every

1 right in the bundle of sticks and just failing
2 to pay property tax. So I think this is a far
3 cry from a classic abandonment situation.

4 JUSTICE ALITO: Well, would
5 abandonment be less -- be limited to the
6 situation where the state doesn't know where the
7 person is?

8 Suppose the state knows where the
9 property owner is and the property owner has not
10 allowed the -- the property to deteriorate and
11 become a health or safety hazard but just simply
12 continues to refuse to pay taxes or fail to pay
13 taxes. Is that an abandonment?

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

15 JUSTICE ALITO: Can that be considered
16 an abandonment and therefore take the situation
17 out of the Takings Clause?

18 MS. ROSS: So, Justice Alito, you
19 know, I apologize, I don't have sort of a -- a
20 fine point at which it would become abandonment,
21 but I think it's helpful to see sort of how far
22 this is from abandonment.

23 I do think states probably have some
24 flexibility in how they define abandonment, but,
25 you know, the fact that -- I -- I don't think

1 this would probably suffice, but even if it
2 could, as this Court said in *Horne*, you know,
3 this is an area in which the Constitution is
4 concerned with means as well as ends. And so I
5 think the fact that it might be able to
6 accomplish the end some other way doesn't remove
7 this from the takings power for the --

8 JUSTICE ALITO: One last question and
9 one that I -- I asked Petitioner. Would your
10 theory apply to personal property as well as
11 real property?

12 MS. ROSS: So I -- I apologize, I
13 haven't thought deeply about the history or as
14 deeply about the history with respect to
15 personal property. I think there's pretty
16 strong history on Petitioner's side with respect
17 to that.

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

24 But there'd be some points in the --
25 the property owner's favor.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 Justice Kagan?

5 JUSTICE KAGAN: Could you say a few
6 more words, Ms. Ross, about this penalty
7 question? I mean, are there any penalties
8 because of the form of the penalty or because of
9 the amount of the penalty one should view
10 through a Takings Clause lens?

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

18 I think, when we're just talking
19 about, you know, the government's assessing a
20 number of dollars and it doesn't really care
21 where that's paid from, that, I think, is not
22 generally thought of as a taking.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: Just real quick on

1 the excessive fines question, which I understand
2 you -- you -- you encourage us not to answer,
3 but the district court on which the court of
4 appeals basically relied said it wasn't a --
5 a -- a fine or an excessive fine because the
6 primary purpose was to compensate and that
7 the -- the -- that Petitioner was given multiple
8 opportunities to pay the amount and -- and that
9 it was partially a deterrent.

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

16 So, what -- if we were to reach the
17 excessive fines question, why wouldn't we just
18 at least say that the district court's reasoning
19 below is wrong?

20 MS. ROSS: So I think the -- if you
21 were to reach it -- and, again, we -- we don't
22 think it's necessary --

23 JUSTICE GORSUCH: I got you on that.

24 MS. ROSS: -- but, if you were to
25 reach it, I think it's clearly not a punishment,

1 even just taking Austin and Bajakajian on -- on
2 their terms, and that's for three primary
3 reasons.

4 The first is there's no relationship
5 to culpability whatsoever. This applies in
6 exactly the same way no matter how or why
7 someone fails to pay their taxes.

8 Second, the variability point here
9 strongly favors the idea that this isn't a
10 penalty because, in a lot of cases or at least
11 in some cases, this is actually going to be a
12 net benefit to the taxpayer, and so it's --

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

15 MS. ROSS: That's correct, Justice
16 Gorsuch. But what the majority said in Austin
17 in Footnote 14 and what Scalia said -- Justice
18 Scalia said in the asterisked footnote in his
19 opinion was that it has to be punitive --

20 JUSTICE GORSUCH: Well, that's not the
21 --

22 MS. ROSS: -- at least partially
23 punitive in every case.

24 JUSTICE GORSUCH: The Court hasn't
25 ever said that.

1 MS. ROSS: So I think Footnote 14
2 of the -- of the Court's opinion in Austin does
3 suggest that in this context it should be at the
4 statutory level in deciding whether it's a fine,
5 and so you would have to look across all
6 applications.

7 But the third reason I would give you
8 is that even if you thought this wasn't purely
9 remedial, I don't think it's punitive in any
10 meaningful sense. I think what's really going
11 on here is partially that the state wants to,
12 you know, pay -- not -- not be left really
13 holding the bag on these properties and also
14 that it's just easier from an administrative
15 convenience standpoint.

16 JUSTICE GORSUCH: But, well, what
17 about the fact, as you point out, that in every
18 other circumstance, whether it's for assessing
19 marital property, child support, or private
20 mortgage lender foreclosing, everybody else has
21 to abide by the usual rule that you only take
22 what you're owed? It's just in this particular
23 circumstance the state favors itself. Why --
24 why isn't that some in -- in -- indication of a
25 punitive purpose?

1 MS. ROSS: So because I don't think it
2 shows that the state is looking to punish the
3 individuals. Again, I think it shows that it's
4 trying to help itself, and that may well be a
5 reason why we -- we think it's a taking, but I
6 don't think it pushes it over into punitiveness.

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 Justice Barrett?

11 JUSTICE BARRETT: No.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Can I just go back
15 to Justice Gorsuch's point? Because I'm
16 struggling with this notion of variability not
17 being a penalty. You would think that if it was
18 remedial and it was the kind of thing that some
19 of my colleagues have talked about, where they
20 take a percentage as a result of this
21 circumstance or there's sort of a set standard,
22 that that would be closer to remedial.

23 It feels very punitive in my view at
24 least when you're talking about the, you know,
25 massive differences that could occur just

1 depending upon arbitrarily the value of a
2 person's home.

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

8 JUSTICE JACKSON: Well, in some
9 instances --

10 MS. ROSS: -- in taxes.

11 JUSTICE JACKSON: -- in some
12 instances, incarceration could benefit someone
13 who's not -- who's homeless, for example. That
14 doesn't make it not punitive. So, I -- you
15 know, I'm -- I'm not sure that that argument
16 really actually carries the day on the
17 characterization of this.

18 Let me ask you about the relationship
19 to culpability as well. What -- what is your
20 response to the county's in their brief
21 suggestion that this really is kind of the fault
22 of Ms. Tyler because, if she'd just kind of sold
23 it on her own or she'd, you know, taken it into
24 her own hands to do this, then they wouldn't
25 have had to? Isn't that sort of a statement

1 of -- of -- at least in the nature of a
2 culpability assessment?

3 MS. ROSS: I don't think so because I
4 don't think they're saying, you know, she -- she
5 did it through ill will or something that sort
6 of we -- we more generally think of as -- as
7 punitive or -- or even blaming of her.

8 You know, I think what's going on
9 here, again, is basically that the -- the state
10 wants to put these properties back into sort of
11 the revenue stream, it wants to not have to pay
12 the person back because that's administratively
13 complicated, things like that that I think, you
14 know, again, may well push it into takings
15 territory but that just don't have a ring of
16 punitive in this sense.

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

23 JUSTICE JACKSON: But you do agree
24 with Justice Gorsuch --

25 MS. ROSS: -- perfectly accept that

1 Austin --

2 JUSTICE JACKSON: -- you do agree with
3 Justice Gorsuch's evaluation of the precedent in
4 the sense that we -- it -- it doesn't have to be
5 criminal in order to trigger this provision,
6 correct?

7 MS. ROSS: That's correct, Justice
8 Jackson. My point is simply that this is such a
9 far cry from the cases in which the Court has
10 previously considered this clause that it --
11 it's just even more reason sort of not to reach
12 out to decide the issue here.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Katyal.

17 ORAL ARGUMENT OF NEAL K. KATYAL
18 ON BEHALF OF THE RESPONDENTS

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

21 This Court should affirm Judge
22 Colloton's opinion for three reasons. First,
23 Petitioner lacks standing. I'll outline two
24 other points and then return to standing as it's
25 jurisdictional.

1 Second, on the merits, the law here
2 falls within a long tradition that stretches
3 back before the republic, was present at the
4 founding, and is confirmed by the very page of
5 Henry Black's tax treatise that Petitioner block
6 quotes.

7 This Court in *Texaco* made clear that
8 a -- when a property right is extinguished due
9 to an owner's failure to comply with reasonable
10 conditions on ownership, there is no taking that
11 requires compensation. That's this case.

12 Petitioner failed to act after
13 repeated notice for five years. Because owners
14 can act to avert this result, this Court has not
15 called such actions takings, as Nelson
16 underscores.

17 And, third, Petitioner's theory would
18 declare many state statutes today
19 unconstitutional and create practical problems
20 akin to what Justice Sotomayor referred to,
21 including forcing governments to act as real
22 estate agents and fiduciaries, and even forcing
23 them to pay claims immediately at forfeiture,
24 well before a property is sold.

25 The merits of this case are no doubt

1 difficult, but I don't believe standing is, so I
2 want to start there.

3 Petitioner -- the face of the
4 complaint does not contain allegations that show
5 standing. Petitioner's right to say we didn't
6 make this argument before, we should have. But
7 standing is jurisdictional. It can't be waived.
8 And, here, it's missing.

9 Petitioner's theory of injury is she
10 had a right to equity, which she defines as
11 "[her] financial interest in the property after
12 deducting encumbering liens." But her complaint
13 just says excess funds existed after the sale,
14 not excess funds belonging to her. She never
15 alleges she had equity, let alone a plausible
16 claim to it.

17 And the lack of these allegations
18 infects the entire valence of this case,
19 creating a dangerous reality distortion field.
20 Everything Petitioner claims about the law and
21 what's in her briefs is about the harm of taking
22 her equity, but the complaint just doesn't
23 allege that.

24 JUSTICE THOMAS: I think I'll bypass
25 the standing. The -- I think, at bottom, she's

1 saying you -- the county took her property, made
2 a profit on it with the surplus equity, and it
3 belongs to her.

4 But, at any rate, can you think of,
5 Mr. Katyal, any instance in which a creditor can
6 foreclose on property and -- or seize property
7 and keep the excess profit or the excess amount
8 over the -- the debt that's actually owed?

9 MR. KATYAL: So, Justice Thomas, with
10 respect to standing, just her complaint and her
11 petition disclaims the idea she's attacking the
12 taking of the title or forfeiture. That's page
13 3 of her petition. It's very clear.

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

24 With respect to your question, which
25 goes to Judge Kethledge's opinion, we agree

1 that, you know, it's very different for private
2 mortgages. The whole point that a state like
3 Minnesota and, indeed, 19 other states are
4 worried about is they don't want to be real
5 estate agents of last resort. With a private
6 mortgage, the bank opts in affirmatively to that
7 and they say, you know, here are the conditions
8 and the like.

9 With this situation, the government is
10 stuck holding the bag at the end of the day.
11 And that's why you have a different tradition.
12 It's a tradition that goes back to even before
13 the republic, to the Statute of Gloucester in
14 1278, as the Chief Justice was pointing out, the
15 Virginia statute in 1790 --

16 JUSTICE GORSUCH: The Statute of
17 Gloucester, 12 -- 1292, is that right, Mr.
18 Katyal?

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

20 JUSTICE GORSUCH: '72, all right.

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

23 (Laughter.)

24 MR. KATYAL: Yeah.

25 JUSTICE GORSUCH: And, you know,

1 there's one line in the reply brief that I
2 thought summarized the point pretty well. Let's
3 see here. I apologize, I don't have it right at
4 hand. Yeah. "Tyler was not a vassal owing
5 fealty to her lord but a modern-day fee simple
6 owner of real property."

7 And the -- the Statute of Gloucester
8 was about lands owned by the feudal lord and
9 what happens when a vassal fails to provide
10 enough wheat to his lord and can his lands,
11 which really belong to the lord, escheat to the
12 lord. And I just don't understand what on earth
13 any of that history has to do with this case.

14 MR. KATYAL: So, first of all, Justice
15 Gorsuch, they cited the Magna Carta, which was
16 in 1215. In response, we cited a later and more
17 particular statute, the Statute of Gloucester,
18 in 1278.

19 JUSTICE GORSUCH: I think Magna Carta
20 was interpreted many, many times thereafter.
21 And we have it --

22 MR. KATYAL: Absolutely.

23 JUSTICE GORSUCH: -- in the -- the
24 briefs before us. But you -- you want to -- how
25 do -- it -- just how does the rights of a -- of

1 a feudal lord have anything to do with a fee
2 simple case?

3 MR. KATYAL: So --

4 JUSTICE GORSUCH: I just am stuck on
5 that.

6 MR. KATYAL: Yeah. So we're certainly
7 not arguing that the king's powers are
8 equivalent to the states' after the founding or
9 that Ms. Tyler is a vassal or anything like
10 that. We're simply --

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

13 (Laughter.)

14 MR. KATYAL: Yeah. Yes, of course,
15 Justice Gorsuch. We're saying, historically,
16 the failure to meet conditions of property
17 ownership, which that tradition of quit-rent,
18 which goes all the way back to that statute, at
19 the founding, that was the template. Look at
20 St. George Tucker, which this Court isolated in
21 the Dobbs case, as being the authoritative
22 state -- source -- source of Black -- of
23 Blackstone.

24 What Tucker said both in his written
25 opinions and in his treatise is this, and in the

1 -- in the Kinney case versus Beverly in 1808, he
2 said: Under the Virginia Constitution, all
3 escheats, penalties, and forfeitures heretofore
4 going to the king shall go to the Commonwealth.

5 And there's a long tradition of
6 tracing that. Tucker says, you know, in his
7 Blackstone Commentaries, this Virginia statute
8 of 1790 is an example of complete forfeiture.
9 It traces back to the founding. Many states
10 used it in the 19th Century, from Maine in 1836
11 to North Carolina in 1843.

12 The California Supreme Court, of
13 course, has a written opinion all about this and
14 how it's not a takings because there are
15 reasonable expectations when these statutes are
16 created to say, look, you have complete
17 forfeiture if you don't pay your taxes.

18 CHIEF JUSTICE ROBERTS: Just to
19 interrupt quickly on -- on standing, I mean, a
20 lot of people have property that's under water,
21 I mean, that they -- it's heavily mortgaged, you
22 know, that they're not going to make any profit
23 of it.

24 But, you know, real estate values
25 change. I mean, the fact that -- that she may

1 have liens on her property that -- that are
2 going to be difficult to pay off right now
3 doesn't mean that -- that any -- you know, the
4 bank or anyone else can just walk in. It's not
5 valueless just because she owes a lot of money
6 on it.

7 MR. KATYAL: Mr. Chief Justice, if she
8 had said that in her complaint and it wasn't
9 just conclusory, which is what Iqbal and Twombly
10 require, we wouldn't be making this argument.
11 But the fact is, when you go through the
12 complaint, there's not a word of that
13 whatsoever. And Iqbal and Twombly say you've
14 got to at least rule out reasonable
15 alternatives.

16 Here, the reasonable alternative, the
17 reason why this case looks almost too perfect,
18 is because it's not telling you something really
19 important in the complaint. She says, I owed
20 \$15,000. She said the government sold it for
21 \$40,000. This looks horrible.

22 JUSTICE BARRETT: She doesn't have to
23 negate every possible claim, though. All of
24 this isn't in the record. I mean, if she owes
25 these liens, I mean, it seems to me that's a

1 counterargument that you can make, and you
2 say -- you could say, in valuation, in fact,
3 your property wasn't that -- that -- you don't
4 have any of that in the record.

5 MR. KATYAL: Justice Barrett, our
6 point is much simpler, which is she's got to
7 make the allegation that she's got surplus
8 equity. It's actually not in the complaint.

9 JUSTICE BARRETT: But liberally
10 construed. I mean, I think Justice Thomas is
11 right, that's -- that's clearly what she's
12 saying. And to the extent there's something
13 that would counter it down -- so you're saying
14 she would actually have to say, I am
15 unencumbered by any kind of mortgage or lien?

16 MR. KATYAL: I think that's certainly
17 a way to do it. And if you want -- this is the
18 easiest thing in the world to allege. All she
19 has to do is say, look, there's a dollar of
20 surplus equity at stake. And if you want to
21 look, look at the three complaints that are
22 pending before you, two of which she's filed.

23 In Fair versus Continental, paragraph
24 4 says the taxpayers "have no mortgage on the
25 property and will be stripped of the equity in

1 their home," which they list to be \$50,000. In
2 the Meisner complaint in paragraph 37, they say
3 there's no mortgage and then say -- they go
4 through the property records to show that.

5 JUSTICE GORSUCH: Well, Mr. Katyal,
6 sometimes people who take out mortgages are
7 personally liable for the debt even after a -- a
8 -- a -- a -- a -- a mortgage sale for any excess
9 owed, and that's possible here, right?

10 MR. KATYAL: Oh, it certainly could be
11 possible. It's just not alleged that. She's
12 the master of the complaint.

13 JUSTICE GORSUCH: Well, so she has to
14 allege that there are mortgages that -- but that
15 I'm -- I would be personally liable to them
16 anyway.

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

18 JUSTICE GORSUCH: Is that -- is that
19 what you -- you're suggesting?

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

23 JUSTICE GORSUCH: I mean, I -- you --
24 you're -- you're asking us to bring into the
25 record that there are mortgages, okay, and take

1 cognizance of that, even though that we don't
2 have that --

3 MR. KATYAL: We -- we --

4 JUSTICE GORSUCH: -- in -- in the
5 pleading. Just let me finish.

6 And I would think then, if we're going
7 to take that and -- and -- and -- do our -- take
8 judicial notice of that, we'd also take judicial
9 notice of the fact that people often owe
10 personal -- are personally liable for those
11 mortgages and that the money that went to the
12 state here could have been used to discharge her
13 personal debt.

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

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

21 JUSTICE JACKSON: What about the fact
22 that this is a class complaint as far as I can
23 tell as well?

24 MR. KATYAL: Yeah. So I don't think
25 --

1 JUSTICE JACKSON: So how -- how --how
2 do we account for that with respect to your
3 theory of what has to be alleged?

4 MR. KATYAL: Doesn't -- doesn't itself
5 provide standing. She's got to have a per --
6 she has to isolate someone who has an Article
7 III injury. And these other complaints do that
8 very easily and for a really good reason. They
9 say there are due process notice problems.

10 That's why people walk away from their
11 equity. When we looked at this case and we
12 asked why in the world would it be that Tyler
13 walked away from her home, the reason we think
14 is that there was no equity in the home, and
15 that's why she walked away. That's why this
16 case looks a little bit too perfect.

17 And if you decide this case, as
18 opposed to the three others that are pending
19 before you, I think you get a distorted view of
20 what's going on --

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

25 MR. KATYAL: Well, she's got to

1 explain a theory of how she would get the money
2 back if it's already owed, for example, as
3 Justice Gorsuch says, to someone else, the bank.

4 JUSTICE JACKSON: She'd get it back
5 because the court would give it to her, and then
6 she would do with -- with it as she would. I
7 don't -- I don't -- I guess I don't understand
8 why the fact that she might owe someone else
9 money, there's a lien on it, has anything to do
10 with whether she's injured if she doesn't get it
11 back from the government.

12 MR. KATYAL: Because, if -- if -- if
13 she got the money back that way and, like, she
14 could take the money and I suppose go to Aruba
15 or something like that, that isn't, I think,
16 what could ever happen in the real world. If
17 there is actually a lien, she's got -- the --
18 those people would get paid first, the bank or
19 something like that, which is Justice Gorsuch's
20 point about the debt being owed.

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

24 JUSTICE KAGAN: When you said it
25 distorts the case, how does it distort the case?

1 MR. KATYAL: Be -- because, in the
2 real world, people don't walk away, Justice
3 Kagan, from meaningful equity in their homes.
4 The only way they do that and what pumps up
5 those numbers when they say this is happening in
6 state after state is notice problems. It's due
7 process problems where people don't learn about
8 the situation. And so that's why those other
9 complaints are due process --

10 JUSTICE JACKSON: What do you mean
11 "walk away"? I don't understand. What do you
12 mean --

13 MR. KATYAL: Well --

14 JUSTICE JACKSON: -- when you say
15 people don't walk away? Did she walk away in
16 this situation?

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

19 JUSTICE JACKSON: By doing what?

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

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

24 MR. KATYAL: Not paying taxes after
25 the notification and actually telling the county

1 the following. She told the county -- and this
2 is what, if we ever got to a remand or
3 something, we would say -- but "Geraldine Tyler
4 states she did not live at the property anymore
5 and wants nothing to do with it."

6 So that's something we would introduce
7 on remand if we were ever in a world of
8 abandonment. That's what she told the county.
9 And that's one of the other problems, we think,
10 that goes to both merits and standing in this
11 case, which is --

12 CHIEF JUSTICE ROBERTS: On --

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

14 CHIEF JUSTICE ROBERTS: I was just
15 going to say, on -- on the merits, it -- at --
16 at bottom, is your theory that the state can
17 define property as it wishes?

18 MR. KATYAL: No. Our theory --

19 CHIEF JUSTICE ROBERTS: Well, what is
20 -- what is the limiting principle?

21 MR. KATYAL: It's --

22 CHIEF JUSTICE ROBERTS: Could it --
23 could it's -- well, isn't that what it's doing
24 here? It's saying whatever -- whatever you
25 think you have, after three years of not paying

1 your taxes, we have it. Your property interest
2 is, you know, confined to that extent.

3 Now this doesn't mean it's -- I mean,
4 our property interests are defined by -- and
5 confined by a lot of things, but I just want to
6 know, if -- if there is something that the state
7 can't touch, what is it and where does it come
8 from?

9 MR. KATYAL: Yeah. So we think it
10 comes and articulated in this Court's decision
11 in Texaco at page 530 in which the Court said
12 that a government can extinguish an owner's
13 failure to comply with reasonable conditions on
14 ownership.

15 In that circumstance, the Court said
16 there is no taking that requires compensation
17 because the Court has never required the state
18 to compensate the owner for the consequences of
19 its own neglect.

20 CHIEF JUSTICE ROBERTS: What about
21 perspective? It said, okay, we're having, you
22 know, a new regime in Minnesota, and everybody
23 who buys property here should know that it is
24 subject to whatever, escheatment or something
25 to -- if the state needs it for a particular

1 regulation, you get nothing.

2 That is how we define property. The
3 Takings Clause depends upon you having a
4 property interest. We, the state, think it's
5 defined by state law. You no longer have that.

6 MR. KATYAL: Right. So we think, in
7 that hypothetical, if I understand it correctly,
8 that would state a Takings Clause violation
9 because it is not a traditional way of
10 understanding property. It's not reasonable.
11 One way of understanding what is reasonable
12 under Texaco is to ask whether it is
13 traditional.

14 And, here, the tradition of forfeiture
15 of land starts, of course, with Statute of
16 Gloucester, Justice Gorsuch's favorite statute,
17 but then it moves on beyond that to statute
18 after statute at the founding, after the
19 founding, and so you can trace it back.

20 In the same way, Mr. Chief Justice, is
21 you could look at adverse possession and the
22 Wilcox case from 1831 or the abandonment cases
23 at the --

24 JUSTICE GORSUCH: So there's actually
25 some common ground here, it seems to me, that

1 you -- you're acknowledging it can't be pure
2 positive law, state law that governs what is
3 property, right?

4 MR. KATYAL: Correct.

5 JUSTICE GORSUCH: And -- and that we
6 should look to tradition and history --

7 MR. KATYAL: Correct.

8 JUSTICE GORSUCH: -- for guidance?
9 And it's just a matter of how we read that
10 record that's the real question in dispute here?

11 MR. KATYAL: That is correct. We
12 think that there is actually -- when you drill
13 down, they do not have a founder, they do not
14 have a treatise at the founding, they don't have
15 a judicial opinion that says that this is a
16 Takings Clause violation or anything like that.

17 And you have state after state at this
18 time, including the Bruen period, the founding,
19 that had statutes like this, like Virginia and
20 Kentucky, and --

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

23 MR. KATYAL: It was a minority,
24 absolutely. But I don't think that the Takings
25 Clause should be read like, for example, the

1 cruel and unusual punishment clause with the
2 textual word "unusual" so that you kind of
3 outlaw the outliers. This Court's never read
4 the Takings Clause that way.

5 JUSTICE JACKSON: But, Mr. Katyal, can
6 I ask you, because there's this point about the
7 government being able to extinguish the property
8 rights of the debtor, and you've said it a
9 couple of times.

10 And it also came up on your friend on
11 the other side's view of this, although she says
12 what is happening is the government is taking
13 the property and liquidating it, essentially,
14 turning it into cash, and that really what it's
15 entitled to is just the amount of the debt.
16 It's not that it's entitled to, as a result of
17 the debt, extinguish completely the property
18 interests or rights of the -- of the individual.

19 So what is your response to that?
20 Because I think there's a subtle distinction --

21 MR. KATYAL: Sure.

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

24 MR. KATYAL: So, Justice Jackson, two
25 things. One, factually, the government here is

1 not like -- this is no money-maker for the
2 government at all. It loses money.

3 JUSTICE JACKSON: No, I understand
4 that.

5 MR. KATYAL: Yeah. So --

6 JUSTICE JACKSON: My question is, when
7 you say the government has traditionally been
8 able to take property and she's not disputing
9 that in a -- in a tax situation the government
10 can take it, but what I think she's saying is
11 you can take it, liquidate it --

12 MR. KATYAL: Correct.

13 JUSTICE JACKSON: -- and extract from
14 it the amount to which you as the government are
15 entitled, and you seem to be suggesting that you
16 can take it and extinguish all of the property
17 interests that she has.

18 MR. KATYAL: And that is exactly what
19 happened at the founding. St. George Tucker's
20 treatise recognized that the Virginia statute
21 does that. The 1837 Arkansas statute is so
22 express, Justice Jackson, it says you can sell
23 this for a surplus and use it to pay for schools
24 --

25 JUSTICE KAGAN: Are there any limits

1 to that?

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

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

6 MR. KATYAL: Well, I think this
7 Court's decision in Nelson affirmed a scheme in
8 which it was a \$65 water bill, Justice Kagan,
9 and the house was sold for \$7,000, and this
10 Court said that was absolutely permissible and
11 would --

12 JUSTICE KAGAN: But Nelson had a very
13 easy way for the property owner to get all the
14 surplus value.

15 MR. KATYAL: Oh, au contraire. It's a
16 much, much harder way, Justice Kagan, in Nelson.
17 In Nelson, it was a 20-day presale period that
18 you had to file and say -- ask for the surplus
19 and this Court said you only might get it back.
20 Here --

21 JUSTICE KAGAN: I mean, in Nelson,
22 when the state sold the house, you had to file
23 some paperwork and then you got all the money
24 back. Here, when the state sells the house,
25 there's nothing you can file to get your money

1 back. The state says we'll keep it.

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

6 MR. KATYAL: So, Justice Kagan, two
7 things. One, on Nelson, I think every part of
8 what you said I don't think is actually a
9 correct description of either Nelson or
10 Minnesota today.

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

16 Here, you have five years from the
17 time of you haven't paid taxes to try and
18 file -- to -- to -- to redeem, and then even
19 afterwards, after the government takes your
20 house and gets complete title to it, you have at
21 least six months and perhaps many years to buy
22 the property back from the government.

23 You had none of those options
24 available in Nelson. At page 105 --

25 JUSTICE GORSUCH: Let's -- let's just

1 --

2 MR. KATYAL: -- they say --

3 JUSTICE GORSUCH: -- let's just answer
4 Justice Kagan's question. I'm -- I -- I'd like
5 an answer to it too.

6 MR. KATYAL: Yeah.

7 JUSTICE GORSUCH: Assume if we have
8 to, all right, that there is no mechanism for an
9 opportunity to get the surplus value in this
10 statute, and the government takes a million
11 dollar property or how -- however, I've
12 forgotten the numbers, for a -- a modest amount
13 owed to the government, a \$5 amount. Taking, no
14 taking?

15 MR. KATYAL: So two things, Your
16 Honor. First is it's not a takings, but it very
17 well be a Due -- Due Process Clause violation
18 because there's usually a lack of notice, that
19 if it's a \$5 thing, I would say --

20 JUSTICE GORSUCH: Well, put aside --
21 put aside the notice. Put -- I -- I -- taking
22 or no taking?

23 MR. KATYAL: It's not a taking for
24 exactly the reason this Court said in Nelson at
25 page 110, "It is contended this is a harsh

1 statute. The New York Court of Appeals spoke of
2 the extreme hardships resulting from the
3 application of the statute in this case, but it
4 held, as we must, that relief from the hardship
5 is the responsibility of the state legislature
6 and not of the courts."

7 JUSTICE GORSUCH: So a \$5 --

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

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

11 MR. KATYAL: That -- that was \$65 and
12 7,000. If you want to overrule Nelson, you
13 know, then we'll be in different territory.
14 But, if you start to think about overruling
15 Nelson, I think you get into all the problems
16 that Justice Sotomayor talked about, the policy
17 concerns about a bomb basically going off.

18 And my friend on the other side's oral
19 argument illustrates precisely the problems that
20 district courts will have in valuating these
21 things. Her brief says at page 4, her reply
22 brief, that it's the fair market value which is
23 the measure of things and that the taking occurs
24 at the moment title is transferred. If that's
25 the case, where, here, she says it was \$54,500,

1 that would mean governments are on the hook for
2 \$14,500 in this case.

3 CHIEF JUSTICE ROBERTS: If -- if all
4 that's true on the extent to which you're --
5 you're willing to push the state's authority,
6 what's the point of the Takings Clause?

7 I mean, that was something that was
8 pretty important to the framers. Why did they
9 put that in there if, in fact, the states -- and
10 you say, in fact, you know, some of them had it.
11 Virginia, Kentucky, were exercising
12 extraordinary authority to take private
13 property. The Constitution seemed to have a
14 different idea in mind.

15 MR. KATYAL: Oh, we think there's a
16 vital purpose of the Takings Clause, and it's
17 really twofold. Number one, there's many
18 circumstances like eminent domain in which an
19 individual can't avert the taking whatsoever.
20 You know, if the --

21 CHIEF JUSTICE ROBERTS: Well, but, I
22 mean, the Constitution says without just
23 compensation. I don't think the framers were
24 ignorant of the notion of eminent domain, but
25 they still wanted to protect private property if

1 you don't pay for it.

2 MR. KATYAL: Oh, absolutely. My point
3 is just that, you know, I think central to what
4 the framers were thinking about were
5 circumstances in which an owner can't avert the
6 taking one way or the other. So, if the
7 government's taking your house to build a road
8 or something, just compensation, obviously.

9 Cases like Texaco and Nelson
10 recognize, Mr. Chief Justice, that when someone
11 can avert the situation by complying with the
12 conditions of ownership, that's a very different
13 circumstance, just like adverse possession or
14 abandonment or the decision to tax --

15 JUSTICE GORSUCH: Well, eminent domain
16 you can avert too. If they want to build a
17 shopping mall on your -- on your farm, you just
18 say, I'll build a shopping mall. But they could
19 avert that.

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

23 JUSTICE GORSUCH: That's a bridge too
24 far?

25 MR. KATYAL: Yeah.

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

3 (Laughter.)

4 MR. KATYAL: Well, it's -- it -- the
5 question, Justice Gorsuch, is whether it is a
6 reasonable condition on property ownership. And
7 we think the answer to that, which I think is
8 consistent with your methodology, is to go back
9 and look at the founding and ask yourself
10 whether or not they would consider this a
11 taking.

12 Is there affirmative support for that?
13 It's to the contrary. You have states at the
14 founding, you have Tucker, St. George Tucker,
15 who this Court recognized as the leading
16 authority, saying this is okay. You'd expect
17 someone to have said the opposite at the
18 founding if it weren't. But there is no person
19 --

20 JUSTICE JACKSON: Mr. Katyal, why --
21 why are you suggesting that there would be,
22 like, a real big practical problem if we ruled
23 in the way that your friend on the other side
24 wants us to? My understanding is that
25 Minnesota's statute and the states at the

1 founding that were doing this were in the
2 minority. So most states allow for some sort of
3 a surplus or have some sort of mechanism to give
4 the money back to homeowners.

5 So what is the big practical problem
6 that we would face?

7 MR. KATYAL: So, Justice Jackson,
8 just, you know, no state actually does what
9 they're seeking at least at reply brief page 4,
10 which is the fair market value at the time of
11 taking. So that's not one state.

12 Twenty states, I think they agree, do
13 what Minnesota is doing here, so you'd
14 jeopardize those. And, indeed, more than half
15 the states, as the MLTA brief points out, don't
16 automatically return the surplus.

17 JUSTICE JACKSON: Not automatically,
18 but, I mean, they have some mechanism whereby a
19 person can get the money back.

20 MR. KATYAL: And -- but, again, it's
21 very restricted in many of those states, and
22 it's got to be done under a very, very fast
23 timeframe, akin to my conversation with Justice
24 Kagan before.

25 So there's actually a worry that if

1 you pass a -- if you -- if you constitutionalize
2 in this area -- and this is what the Minnesota
3 brief says at page 6 -- you'll force states into
4 shorter periods for statute of limitations and
5 redemption periods, making world -- making
6 things even harder for individual taxpayers.

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

11 MR. KATYAL: Takings. Yeah.

12 JUSTICE KAGAN: So what's the
13 difference?

14 MR. KATYAL: There's no -- that's not
15 a reasonable condition on property ownership,
16 which is a different line of cases, a different
17 suite of authorities, because, in that kind of
18 circumstance, you know, tracing all the way back
19 to the founding, you have in rem liability to
20 the government in that circumstance.

21 JUSTICE KAGAN: Is -- is the
22 difference historical only, or is there some
23 functional difference?

24 MR. KATYAL: We think it's mostly
25 historical. There might be a functional

1 difference because it is in rem, so the
2 government has the bitter and the sweet. It can
3 only go after the property to the extent the
4 property is worth anything. As the Chief
5 Justice said, sometimes properties are under
6 water. So one of the reasons that --

7 JUSTICE KAGAN: If -- if the mind
8 rebels at the notion that the government can
9 seize your \$100,000 bank account and not give
10 you back the \$90,000 that you don't owe, if the
11 mind rebels at that, you know, why should
12 whether it's -- what was going on in 1200 or
13 what was going on in 1776 change anything --

14 MR. KATYAL: Well -- well, Justice --

15 JUSTICE KAGAN: -- about that?

16 MR. KATYAL: -- Justice Kagan, I'd say
17 you'd have to be pretty darn sure that this was
18 a constitutional violation and not just your
19 policy preferences at that point when you have
20 precedent like Nelson, which is approving \$65
21 and \$7,000, and you've said, you know, time and
22 again --

23 JUSTICE KAGAN: Okay. We definitely
24 have a different view of Nelson. My view of
25 Nelson is you can get your money back by filing

1 a form.

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

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

12 MR. KATYAL: No. Twenty days after
13 the forfeiture, before the sale, Justice Kagan.

14 JUSTICE KAGAN: But you had all the
15 time that you weren't paying your taxes, in the
16 same way that you have all that time in this
17 statute.

18 MR. KATYAL: And -- and -- you --

19 JUSTICE KAGAN: I -- I -- I guess what
20 I'm asking is, like, what's -- what's the
21 difference? Why should land be treated so much
22 more favorably to the -- that the state can just
23 keep the whole when the state could never do
24 that with cash?

25 MR. KATYAL: It's -- it's not as much

1 about land being different as there is a
2 different historical tradition. And when you
3 were asked under Texaco whether this is a
4 reasonable condition on ownership, you go back
5 and look at that.

6 This Court has said time and again
7 there's a real difference between what's good
8 policy and what's outrageous -- Nelson, that
9 language I read to you, is all about it -- and
10 what is unconstitutional.

11 There's been huge variation, as they
12 acknowledge, in the states from the founding on.
13 That variation really underscores that something
14 beyond just constitutional restrictions are at
15 stake. There are different policy objectives
16 that different states have, going back to
17 Justice Jackson's question.

18 And for this Court to
19 constitutionalize it and to change the game is
20 really going to force rigidity on the states and
21 risk, as Justice Sotomayor was pointing out,
22 really different valuation schemes in different
23 district courts about fair market value or
24 something else this Court --

25 JUSTICE BARRETT: Mr. Katyal --

1 CHIEF JUSTICE ROBERTS: Counsel --

2 JUSTICE BARRETT: -- what about
3 Justice Alito's question about the car? So
4 Justice Kagan's asking you, is the bank account
5 different? What about the hypothetical of you
6 owe, like, \$20 of parking tickets? Can the
7 state just take your whole car?

8 MR. KATYAL: Again, I don't think that
9 there's a -- that would be a reasonable
10 condition on ownership because there is no
11 tradition that goes back that could be looked
12 to.

13 JUSTICE BARRETT: Well, there weren't
14 cars at the time.

15 (Laughter.)

16 MR. KATYAL: Well, but buggies,
17 whatever. You know --

18 JUSTICE BARRETT: Your buggy?

19 MR. KATYAL: -- what -- whatever. I
20 mean, you know, there isn't something to look
21 to. And I don't want to say that that's a
22 complete straitjacket on governments. But I
23 think, here, all you need to decide is you look
24 at this statute and the other 19 states that
25 have exactly -- you know, have very similar

1 statutes and you ask is this reasonable --

2 JUSTICE BARRETT: So property is just
3 -- real property is sui generis?

4 MR. KATYAL: Well, I think it's that
5 the tradition of real property at least is what
6 would decide this case. I don't want to say
7 that it's just -- that it's actually something
8 about the property or the in rem thing
9 specifically. But I do think that that
10 tradition is a very good guide here, and I think
11 this Court should be equipped --

12 JUSTICE KAVANAUGH: Why would we read
13 --

14 CHIEF JUSTICE ROBERTS: I think it --

15 JUSTICE KAVANAUGH: -- why would we
16 read the Constitution to disfavor real property,
17 though? That seems very counterintuitive.

18 MR. KATYAL: I don't think it's
19 disfavoring or favoring. I think that the
20 government did -- you know, governments have
21 understood, Justice Kavanaugh, that land is kind
22 of unique because it is the source on which
23 wealth, particularly early wealth, was created,
24 and so there are incentives to encourage
25 productive use. That's what the abandonment

1 cases and the adverse possession cases are all
2 about. So there actually is some tradition when
3 it comes to land ownership.

4 Here, we think, to the extent you
5 think it's like aban -- to the extent you think
6 abandonment is okay, this is a classic case of
7 abandonment. She even said she wanted to
8 abandon this condo.

9 CHIEF JUSTICE ROBERTS: Counsel, I
10 think you're right that there's a difference
11 between the value that our history places upon
12 money and property, but I think it's the exact
13 opposite of what you're saying. I -- I think
14 our cases bear this out, where they talk about
15 property, you know, land, being essential to the
16 preservation of liberty and it's a bulwark
17 against the dominance of the state.

18 Money, on the other hand, you know,
19 inflation, it's worthless, but land is still
20 there. And to say that there's a greater degree
21 of protection for money as opposed to property,
22 I think, has it exactly backwards.

23 MR. KATYAL: Yeah, I don't know that
24 I'm saying it's a greater protection or not.
25 I'm just saying, for purposes of this case, all

1 you have to do is look to, Mr. Chief Justice,
2 the land cases, like Texaco. Page 525 of Texaco
3 says, we are treating this property just like a
4 "fee simple." And what it said is, if it's a
5 reasonable condition on ownership, and there, if
6 you just didn't register your claims, then you
7 were out all of the money that you had spent and
8 the land itself and all the improvements with
9 respect to the mining in that.

10 CHIEF JUSTICE ROBERTS: Well, but, I
11 mean, we've heard it a lot. The raisin case, I
12 mean, there, they said there was no doubt you've
13 got your raisins, and there's no doubt they
14 could come along and say you owe us 10 percent
15 of the value. Fine. But, as soon as they say
16 we're taking 10 percent of your raisins, whole
17 'nother game.

18 MR. KATYAL: Hundred percent right,
19 Mr. Chief Justice. In that case, you had a
20 statute, the raisin thing, which isn't some
21 reasonable traditional thing. It didn't harken
22 back to some -- something that states had done
23 or governments had done from the founding.

24 And, indeed, your opinion for the
25 Court there quoted the Tucker treatise and said

1 the whole point of the Takings Clause is to
2 think about reasonable expectations of property.
3 And we absolutely agree St. George Tucker said
4 in -- that the 1790 statute is a permissible
5 example of government operating and it was
6 completely taking all of the land.

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

12 MR. KATYAL: Because I think the tax
13 is something that is a reasonable condition,
14 whereas taking them, it doesn't have the same
15 historical tradition.

16 And so we're just saying here, you
17 know, this is the test this Court has used from
18 Texaco on, and we think it should apply here.
19 And that's what explains Nelson. And if states,
20 as Justice Jackson points out, want to do things
21 differently, they're, of course, free to do so.

22 We're not saying our rule's
23 constitutionally compelled, but we don't think
24 that the states have a constitutional
25 straitjacket.

1 CHIEF JUSTICE ROBERTS: Justice
2 Thomas?

3 JUSTICE THOMAS: Mr. Katyal, you
4 referred to the Virginia statute a couple of
5 times -- a number of times. And do you have any
6 examples of the application of that statute in a
7 case where the taxes, the amount recovered, the
8 amount of land was in excess of the taxes owed?

9 MR. KATYAL: So the Tucker treatise
10 just says it does happen. I don't think we've
11 looked for a formal case in which it did. But I
12 think the important point, Justice Thomas, is,
13 if this were unconstitutional, if this were a
14 violation of fundamental rights, you certainly
15 would have expected this expert, Tucker, to have
16 said so in his commentary.

17 The fact that he went out of his way
18 to praise it do suggest to us that this was not
19 unconstitutional as the way the founders
20 understood it.

21 JUSTICE THOMAS: But I could also
22 think on the -- conclude on the other side that
23 in a state where you had a number of individuals
24 who were land-rich and money-strapped that you
25 would have examples of the -- an entire estate

1 being forfeited for a modest tax --

2 MR. KATYAL: Yeah.

3 JUSTICE THOMAS: -- if you are right.

4 MR. KATYAL: Well, I -- I don't know.
5 Very -- very few reported cases, of course, at
6 this time across the country anyway, and,
7 certainly, for, you know, land disputes, we do
8 point out that it's not just Virginia and not
9 just Kentucky in 1801. It's Maine 1836;
10 Arkansas, 1837, you know, and -- you know, and
11 many other states that our brief isolates. So
12 this was a common feature in the 19th Century.

13 JUSTICE THOMAS: Yeah, I'm only saying
14 that if you -- the fact that you see nothing,
15 you don't see -- you don't have an example also
16 indicates that perhaps they did -- simply
17 liquidated what was necessary to cover the
18 taxes.

19 MR. KATYAL: I -- I suppose. But I --
20 I think it might just reflect, Justice Thomas,
21 the fact that nobody thought there was any
22 problem with this, so there was no litigation to
23 had -- be had.

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

1 (Laughter.)

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

4 MR. KATYAL: Well, again, I -- there's
5 -- I think it's telling that even Jefferson
6 never said that -- that the statute in Virginia
7 posed any problems whatsoever.

8 JUSTICE THOMAS: That's perhaps
9 because it was never applied in the way that you
10 suggest.

11 MR. KATYAL: Well, again, I think the
12 fact that it was written by -- you know, written
13 about in the most important treatise,
14 Blackstone's treatise of the time, with praise
15 and there's no -- you know, nothing from
16 Jefferson or Tucker or anyone else, I think, is
17 indicia.

18 Again, I don't think it's our burden,
19 Justice Thomas --

20 JUSTICE THOMAS: Yeah.

21 MR. KATYAL: -- to prove that there
22 wasn't a constitutional violation. I think
23 they've got to -- you know, they're seeking to
24 topple not just this Court's decision in Nelson
25 but 200 years of constitutional freedom for the

1 states. I think they've got to affirmatively
2 prove it up.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: Well, let's say that
5 the state is able to get a fair valuation of the
6 property and, in fact, a valuation of the
7 property that if anything is overly generous to
8 the state, and let's say that the state is also
9 able to get compensation for all of its
10 administrative expenses.

11 Then the question arises: Why should
12 the state be allowed to keep more than that?
13 And you argue that history supports that or,
14 rather, there is no history supporting the idea
15 that the state can't do that.

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

19 MR. KATYAL: Sure. I think the
20 government in that circumstance is worried about
21 balancing the rights of delinquent taxpayers
22 against the rights of all other taxpayers.

23 And the -- they -- I think they've
24 decided that in these 20 states that do it this
25 way, that the best way to encourage the -- the

1 disposition of land in these circumstances and
2 -- and -- and houses is to basically incentivize
3 the owner to sue because, as this Court said in
4 BFP, when the government sues -- and this is
5 built into your hypothetical -- you get much
6 less money than when individuals sue.

7 Forced sales, you know, have
8 restricted auctions and very few people come.
9 And so BFP says it's way below market. So the
10 best way to maximize, these 20 states have
11 decided, value is by saying, owners, you sue.

12 Now what's the way to get -- owners,
13 you sell. What's the best way to get owners to
14 sell? A harsher statute like this. To be sure,
15 it's harsher because you know, if you don't sell
16 it yourself, the government's going to sell it
17 and not sell it for very much. So that's, I
18 think, what the amici briefs talk about, Justice
19 Alito.

20 JUSTICE ALITO: Well, that seems to be
21 a -- a dispute about how or a question about how
22 the property is to be valued, but what I was
23 saying is that if the valuation of the property
24 is done in a way that is generous to the
25 government, why should it get more than that?

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

5 JUSTICE ALITO: I mean that the
6 government is made whole.

7 MR. KATYAL: Yeah. So, again, we
8 think -- and it might be fighting the
9 hypothetical, but all these states are saying we
10 can't get the full value of the property through
11 forced auctions. And your own decision in BFP
12 recognizes exactly that.

13 And so that's the policy rationale.
14 To maximize the amount at stake, that's the way
15 to do it. And also governments fear -- and this
16 is also in the amici briefs -- that if they're
17 forced to be the realtor of last resort, even if
18 they sell it at a high enough price, they could
19 get sued for not selling it at a price that the
20 owner wants or not suing it fast enough and the
21 like, they didn't get into the business of being
22 real estate agents, but that's the position they
23 will be in.

24 And the amici point out that, you
25 know, this Court's decisions about chilling

1 effects for government officers will be at play
2 here. The moment they start selling, they'll
3 expose themselves to lawsuits, so they just
4 won't sell. And that'll be -- create all sorts
5 of cash flow problems.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 Justice Kagan?

10 JUSTICE KAGAN: Why doesn't it --
11 why -- why aren't the state's interests fully
12 accommodated if they can just put, you know, a
13 fairly meaningful penalty on it?

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

16 JUSTICE KAGAN: Well, it's a penalty
17 that's -- that -- that has the kind of effect
18 that -- that you think this scheme has.

19 MR. KATYAL: Yeah, it --

20 JUSTICE KAGAN: In other words, the
21 state won't have to be in the position of a --
22 of a real estate agent because somebody will
23 say: Oh, that's a pretty big penalty, I don't
24 want to have to lose that.

25 MR. KATYAL: I think that states could

1 do that. I think that states, you know, tracing
2 all the way back to 1790 have understood that
3 it's a -- that complete forfeiture is another
4 way to deal with this and a way to highly
5 incentivize people in ways that, you know, a
6 penalty may not be able to do.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 Justice Kavanaugh?

10 Justice Barrett?

11 Justice Jackson?

12 JUSTICE JACKSON: Suppose Ms. Tyler
13 sold off the property to pay the tax debt and
14 associated fees. Could the county come after
15 her for the rest of the value of the property?

16 MR. KATYAL: If she sold it -- so
17 we're back in two thou -- you know, before title
18 is transferred and she sells it?

19 JUSTICE JACKSON: Yes, yes.

20 MR. KATYAL: And --

21 JUSTICE JACKSON: She owns the
22 property. She has a tax debt. Instead of the
23 state having anything to do with taking the
24 property, she says, I'm going to pay off this
25 \$5,000 or whatever by selling the property.

1 My question is, could the county say:
2 When you sold off the property for \$40,000,
3 we're entitled to the difference?

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

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

11 My question is, if the tax debt was
12 satisfied by her selling the condo --

13 MR. KATYAL: Oh.

14 JUSTICE JACKSON: -- and she gave the
15 government \$5,000, could the government say, we
16 want the full \$40,000 that was the purchase
17 price of the condo?

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

21 JUSTICE JACKSON: Correct.

22 MR. KATYAL: She just owes the taxes
23 and penalties.

24 JUSTICE JACKSON: Correct.

25 MR. KATYAL: And so, once the taxes

1 and penalties are paid --

2 JUSTICE JACKSON: Yes.

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

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

13 So I don't know why the government
14 couldn't seek to get the money even if she sold
15 the property to satisfy the tax debt.

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

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

24 MR. KATYAL: She's actually not.

25 JUSTICE JACKSON: Well, she --

1 MR. KATYAL: That --

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

6 You say we can take the title in its
7 entirety and not give -- and not liquidate it in
8 the sense of giving it back to her. We can just
9 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,
25 just like Texaco, and the government then has

1 full 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 the

1 failure to protect your property interests does
2 not excuse the government of its constitutional
3 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, St.
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
3 taxes without running afoul of the Takings
4 Clause. We'll -- I'll just point, again, to the
5 Utah amicus brief. They were joined by seven
6 other states. And they cite several examples of
7 how states can collect taxes without violating
8 the Takings Clause.

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

24 (Whereupon, at 11:46 a.m., the case
25 was submitted.)

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