

IN THE SUPREME COURT OF OHIO

State of Ohio,	*	Case No.: 2020-0859
	*	
Plaintiff-Appellee,	*	Appeal from Ninth District
	*	Case No. 12-CA-0032-M
vs.	*	
	*	
James O'Malley,	*	
	*	
Defendant-Appellant.	*	

**BRIEF OF *AMICUS CURIAE* ACLU OF OHIO FOUNDATION, INC.
IN SUPPORT OF APPELLANT JAMES O'MALLEY'S
FIRST ASSIGNMENT OF ERROR**

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STATEMENT OF *AMICUS* INTERESTS

The American Civil Liberties Union of Ohio Foundation, Inc. (ACLU) is the Ohio affiliate of the American Civil Liberties Union, one of the oldest and largest organizations in the nation dedicated to the preservation and defense of the Bill of Rights. With more than 1.5 million members across the country, and with approximately 200,000 members, supporters and activists in Ohio, the ACLU appears routinely in state and federal courts, both as amicus and as direct counsel, without bias or political partisanship, to hold the government accountable to the public and to protect the rights of individuals. The ACLU has an interest in the rights of all Ohioans to be free from abuses under the 8th Amendment, in the rights of low-income people and other disadvantaged Ohioans to be treated fairly under the law, and in seeking an end to predatory criminal fines including asset forfeiture.

INTRODUCTION

An indigent person being made to forfeit his car to the government is not the same as an affluent person being made to do so. Defendant James O'Malley's truck, a gift from his grandparents valued at \$31,000, was his only asset; now that the state has seized it, he is without employment, without a mode of transportation to gain employment, and without even something to sell to support himself. Meanwhile, the government may either keep the truck for itself, or sell it to fund its own operations. In his First Assignment of Error, Mr. O'Malley asks this Court to find that his truck was taken unconstitutionally, and in so finding, to hold that sentencing courts must consider a defendant's financial circumstances in evaluating a forfeiture under the Excessive Fines Clause of the 8th Amendment. *Amicus* submits this brief in support of that proposition.

In this case, the Court will for the first time in more than twenty years consider what criteria lower courts must use to consider whether a forfeiture is unconstitutionally excessive. It is time

for an update. In 1998, in *United States v. Bajakajian*, the U.S. Supreme Court ruled that the Excessive Fines Clause “limits the government’s power to extract payments, whether in cash or in kind, as punishment for some offense,” and required an evaluation of “the proportionality” of a fine related to the offense. *United States v. Bajakajian*, 524 U.S. 321, 328 and 336, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). Last year, the Court in *Timbs v. Indiana* further emphasized the Clause’s historic function as a “constant shield” against state abuse of fines “to raise revenue, harass [] political foes, and indefinitely detain those unable to pay.” *Timbs v. Indiana*, 139 S. Ct. 682, 689, 203 L.Ed.2d 11 (2019) (citations omitted). And in the meantime, state courts in at least Indiana, Colorado, Montana, Pennsylvania, and Tennessee have developed uniform rules requiring examination of individual ability to pay when evaluating a fine or forfeiture under the Clause. In Ohio, the appellate districts have no universal rule, and most do not require an analysis of hardship to the defendant. *Amicus* urges this Court to annunciate a uniform proportionality test for excessive fines similar to the one recently developed in Indiana. A constitutional test must require courts, when sentencing Ohioans to forfeit their money or their property, to consider the financial impact such a penalty will have given each person’s circumstances.

STATEMENT OF FACTS AND OF THE CASE

Amici adopt the Statement of Facts set out by Defendant-Appellant James O’Malley.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW I

PROPOSITION OF LAW I:

“In Light of U.S. Supreme Court Precedent, this Court Should Revise its Excessive Fines Clause Analysis and Consider Financial Hardship.”

This Court has long recognized that “forfeitures are not favored in the law or in equity.” *State v. Baumholtz*, 50 Ohio St.3d 198, 202, 553 N.E.2d 635 (1990). Many years before *Timbs v. Indiana*, Ohio concluded that sentences of excessive forfeitures violate both the 8th Amendment’s Excessive Fines Clause and Article I, Section 9 of the Ohio Constitution. *State v. Hill*, 70 Ohio St. 3d 25, 635 N.E.2d 1248, syllabus (1994).¹ When this Court ruled in *Hill* that sentencing courts must apply a proportionality test to determine whether a forfeiture is unconstitutionally excessive, it explicitly declined to create a bright-line factor test. *Id.* at n4. At that time, the Court held that specific guidelines “should be developed in [the] normal course—by trial courts and courts of appeals.” *Id.* It has been 26 years since *Hill*, and Ohio’s trial and appellate courts have developed a range of factors to consider in an excessive fines proportionality examination. But no consensus has emerged, and importantly, neither has any rule requiring examination of the hardship a forfeiture might impose on a defendant. *E.g. State v. Luong*, 2012-Ohio-4519, 977 N.E.2d 1075, ¶ 44 (12th Dist.) (directing trial court to conduct proportionality review under Excessive Fines Clause but declining to provide specific factors to review); *Rice v. Logan Cty. Bd. Of Commrs.*, 114 Ohio App.3d 198, 203, 682 N.E.2d 1106 (1996) (same); *State v. Adams*, 11th Dist. Ashtabula No. 2012-A-0025, 2013-Ohio-1603, ¶¶67-68

¹ This Court has also found generally that “the Ohio Constitution, Article I, Section 9, provides protection independent of the protection provided by the Eighth Amendment.” *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶¶59, 78. The Ohio Constitution’s parallel clause can apply with more protection than even the U.S. Constitution. *See Arnold v. Cleveland*, 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993).

(when courts conduct a proportionality review, “many factors have been applied;” courts must “necessarily accommodate the facts of the case and weigh the seriousness of the offense...against the severity of the criminal sanction”); *State v. Friend*, 5th Dist. Licking No. 18-ca-41, 2019-Ohio-343, ¶¶19-20 (noting lack of guidance on what a proportionality test should consider; citing multiple factors trial courts must evaluate, but not financial hardship); *State v. Ziepfel*, 107 Ohio App. 3d 646, 652, 669 N.E.2d 299, (1995) (proportionality “must be assessed on a case-by-case basis;” not listing hardship as a relevant factor); *State v. Kish*, 9th Dist. Lorain No. 02ca008146, 2003-Ohio-2426 ¶¶53-54, *citing State v. Harold*, 109 Ohio App. 3d 87, 671 N.E.2d 1078 (1996) (requiring “compar[ison] of forfeiture’s “harshness” to the defendant’s culpability, gravity of the offense, property’s relationship to the offense, and harm to the community; suggesting additional non-mandatory factors including defendant’s financial circumstances); *In re Forfeiture of Property of Anderson-Melton*, 2d Dist. Montgomery No. 18357, 2000 WL 1720443 at *2 (articulating “primary factors” for a proportionality test that do include “hardship to the defendant.”) In light of recent guidance from the U.S. Supreme Court and Ohio’s sister state courts, this Court should create a uniform rule for evaluating a fine’s proportionality that requires consideration of the defendant’s financial circumstances.

I. The Excessive Fines Clause Contemplates an Analysis of the Hardship to Defendants.

When the U.S. Supreme Court ruled in *Bajakajian* that courts must conduct a proportionality test during an Excessive Fines Clause analysis, it left undecided whether a person’s “wealth or income [is] relevant.” *Bajakajian* at 340 n.15. In 2019, the *Timbs* Court relied on foundational historical sources to trace the Clause’s “venerable lineage,” unanimously holding it was incorporated against the states. 139 S. Ct. at 687; *see Browning-Ferris Indus. of Vt. v. Kelco Disposal*, 492 U.S. 257, 264, 109 S.Ct. 2909, 106 L.Ed.2d 219, n.4 (1989) (in

determining the Clause’s scope, courts “look to the origins of the Clause and the purpose which directed its framers.”) Taken together, *Timbs* and the history it relies on show that courts must consider the impact of a forfeiture on a defendant’s financial circumstances when conducting a proportionality review under the Clause.

The Eighth Amendment’s historical underpinnings always required *both* that “economic sanctions ‘be proportioned to the wrong’” committed and *also* that they “not be so large as to deprive [an offender] of his livelihood.” *Timbs*, 139 S. Ct. at 687-88 (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)). The *Timbs* Court reviewed the Magna Carta and English Bill of Rights as the Clause’s predecessors, or “lineage.” *Id.* The Court quoted from the Magna Carta, a “free-man shall not be amerced for a small fault but after the manner of the fault; and for a great fault after the greatness thereof, **saving him his contentment.**” *Id.* at 687 (emphasis added). Under the Magna Carta’s protections, “in no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him.” William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 287 (2d ed. 1914). These historical sources affirm that preserving a defendant’s financial security was always a co-equal purpose of the Clause with ensuring that a fine be proportional to the harm done. *See also United States v. Levesque*, 546 F.3d 78, 83-84 (1st Cir. 2008) (“[T]he notion that a forfeiture should not be so great as to deprive a wrongdoer of [their] livelihood is deeply rooted in the history of the Eighth Amendment.”)

Under its original meaning, the Excessive Fines Clause prevented fines, fees, or forfeitures that were excessive specifically in light of a defendant’s financial situation. In this way, the Clause originally:

“encod[ed] two complementary, but distinct, constitutional principles: (1) a proportionality principle, linking the penalty to the offense, and (2) an additional limiting principle linking the penalty imposed to the alleged offender’s economic status and circumstances. We might call this second principle the Eighth Amendment’s ‘economic survival’ (or perhaps ‘livelihood-protection’) norm.”

Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 836 (2013). In the text on which the Clause is based, saving a person’s “contentment” meant “to leave him sufficient for the sustenance of himself and those dependent on him.” *Id.* at 855 (quoting McKechnie at 287). Preserving a person’s basic economic security was always critical, and “[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements.” *Timbs*, 139 S. Ct. at 693 (quoting *Pleas of the Crown for the County of Gloucester* xxxiv (F. Maitland ed. 1884)). In his 1769 *Commentaries*, William Blackstone emphasized how important an individual hardship consideration was to the Magna Carta’s prohibition on excessive fines, writing that financial penalties should be levied “according to the particular circumstances of the offence and offender” and that “no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear.” 4 William Blackstone, *Commentaries* 372 (1769).

Despite the Magna Carta’s protections, government abuse of fines and fees persisted, and so later iterations of the Clause sought to limit them. “The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay.” *Timbs*, 139 S. Ct. at 688 (citing The Grand Remonstrance ¶¶ 17, 34 (1641), in *The Constitutional Documents of the Puritan Revolution 1625-1660*, at 210, 212 (S. Gardiner, 3d Ed. Rev. 1906)). Resisting these abuses, British citizens overthrew James II in the Glorious Revolution and drafted the 1689 English Bill of Rights. That document guaranteed individual rights and reasserted the Magna Carta’s protections against

excessive fines. *Id.* The English Bill of Rights became the closest ancestor to the Virginia Declaration of Rights, whose protections evolved into the United States Constitution. *See* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 Wm. & Mary Bill of Rts. J. 989, 1049 (2019). (“[W]hen George Mason... drafted the Virginia Declaration of Rights...he relied upon the English Bill of Rights,” “Thus...Virginia’s Declaration...reads: That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”)

The Eighth Amendment descends directly from this provision; in fact the First Congress “adopted [it] almost verbatim,” *Timbs*, 139 S. Ct. at 688, “as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts . . . [when] [e]normous fines and amercements were . . . sometimes imposed.” *Id.* at 696 (Thomas, J., concurring) (quoting Joseph Story, *Commentaries on the Constitution of the United States* § 1896, at 750-51 (1833)); *see also* *Levesque*, 546 F.3d at 84 (“[R]uinous monetary punishments are exactly the sort that motivated the 1689 Bill of Rights and, consequently, the Excessive Fines Clause.”) This history’s application to forfeitures in particular is just as deeply rooted; as one scholar writes, the “forfeiture practices [that] angered colonists...were among the key grievances that triggered the American revolution.” Alex Haller, *Legislative Reform or Legalized Theft?: Why Civil Asset Forfeiture Must Be Outlawed in Ohio*, 67 Clev. St. L. Rev. 295, 302-03 (2019). Just as the United States Constitution codified the protection against excessive fines as a core right from the beginning, Ohio did the same. *See* Ohio Constitution of 1802, Art. VIII, Section 13 (“excessive fines shall not be imposed;”) *see also* Ohio Constitution of 1851, Art. I, Section 9. In this case,

this Court has an opportunity to put Ohio’s jurisprudence into conformity with the Clause’s historic purpose.

II. Consideration of Individual Hardship is Also Necessary to Protect Individual Rights and Prevent Abuses of Power

The Eighth Amendment’s historic requirement that individual hardship be considered in an excessive fines analysis functioned not just to protect individuals, but to prevent abuses of state power. In early American history, “[n]otwithstanding the States’ apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued.” *Timbs*, 139 S. Ct. at 688 (discussing Black Codes that imposed “draconian fines” for crimes like vagrancy “and other dubious offenses” after the Civil War). Asset forfeiture especially has “led to egregious and well-chronicled abuses” now that it has become “widespread and highly profitable.” *Leonard v. Texas*, 137 S. Ct. 847, 848, 197 L.Ed.2d 474 (2017) (Thomas, J., statement respecting the denial of certiorari.) “Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.” *Timbs*, 139 S. Ct. at 689 (quoting Brief for American Civil Liberties Union et al. as Amici Curiae at 7).

Ohio’s localities are no less susceptible to the kind of financial abuse the Clause guards against than similar jurisdictions nationwide. For example, Ohio’s 2012-13 state budget “cut the local government fund in half,” and beginning in “2017, counties, municipalities and townships [were] working with \$1.176 billion less than in 2010” each year. W. Patton, Policy Matters Ohio, *State Cuts Sting Ohio Localities* (Dec. 2016) available at <https://www.policymattersohio.org/research-policy/quality-ohio/revenue-budget/state-cuts-sting-ohio-localities>; see also Doug Caruso, *State cuts to local governments result in local cuts and higher taxes*, Columbus Dispatch (Nov. 2, 2018) available at

<https://www.dispatch.com/news/20181103/state-cuts-to-local-governments-result-in-local-cuts-and-higher-taxes> (discussing continuing distress over cuts). The City of Medina, where Mr. O'Malley was prosecuted, lost over \$1.1 million in revenue over this time period as a result. Patton, *State Cuts Sting* at Table 2. But “[w]hether courts contribute to a city’s bottom line or generate sufficient cash flow for its own operations should not be even a secondary thought considering the role of the judiciary in our system of government.” Chief Justice Maureen O'Connor, Letter Regarding Fine, Fee, and Bail Practices (Jan. 29, 2018) *available at* <https://www.supremecourt.ohio.gov/SCO/justices/oconnor/finesFeesBailLetter.pdf>. As research has demonstrated repeatedly in Ohio, government use of criminal fines, fees, or forfeitures to supplement revenue or fund operating costs begets the abuse of power. *E.g.*, S.D. Thakkilapati, ACLU of Ohio, *Off the Record: Profiteering and Misconduct in Ohio’s Mayor’s Courts* (April 2019), *available at* https://www.acluohio.org/wpcontent/uploads/2019/05/Report_OffTheRecordProfiteeringAndMisconductInOhiosMayorsCourts_FINAL_2019-0520.pdf. Despite the Ohio General Assembly’s 2017 forfeiture reforms, cash and proceeds from forfeited property continue to be used to subsidize local budgets, incentivizing the taking of property. *See* Haller, *Legislative Reform or Legalized Theft?* at 304, 312.² While statewide reporting requirements for forfeiture were eliminated in 2012, a study conducted prior found Ohio jurisdictions together obtained an annual average of \$8,575,933 in value from forfeitures. Dick Carpenter et al, *Policing for Profit: the*

² The cited article discusses government retention of forfeiture proceeds generally, R.C. 2981.12(b). But the perverse incentive is similar under Ohio’s vehicle forfeiture laws relevant to Mr. O’Malley, R.C. 4511.18 & 4503.234. Under the framework discussed here, the agency conducting a vehicle forfeiture may simply keep the car, or may sell it with a portion of the proceeds retained by the same type of fund described in 2981.13.

Abuse of Civil Asset Forfeiture Institute for Justice 5 (2d ed. Nov. 2015) at 116, available at <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>.

III. Ohio Should Join the Weight of Other States that Consider Individual Circumstances In their Excessive Fines Analyses

Ohio’s proportionality test under *Hill* does not, and never has, demanded the individual hardship consideration that the Excessive Fines Clause contemplates. Although some lower courts have permitted consideration of this factor, none has expressly required it, and many have ignored it altogether. In light of *Timbs* and the above historical precedent and policy rationales it explains, other state courts have already begun to update their analyses.

The Indiana Supreme Court, on remand in *Timbs*, has held that an evaluation of individual hardship is a necessary element of a proportionality test. That state now looks to “the owner’s economic means—relative to the property’s value.” *State v. Timbs*, 134 N.E.3d 12, 36 (Ind. 2019). One of the factors Indiana courts must now consider in determining whether a fine or forfeiture is “grossly disproportional” is the “effect[] the forfeiture will have on the claimant.” *Id.* at 36. In making this requirement, the Indiana Supreme Court emphasized that “the historical roots of the Excessive Fines Clause reveal concern for the economic effects a fine would have on the punished individual” and that failing to consider economic hardship relative to the forfeiture value “would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally.” *Id.* at 36-37.

Colorado’s Supreme Court, similarly, found *Timbs*’s discussion of “historical predecessors” convincing and concluded these roots were “persuasive evidence that a fine that is more than a person can pay may be ‘excessive.’” *Colo. Dep’t of Lab. & Emp. v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019). As a result Colorado held that “ability to pay is an

appropriate element of the Excessive Fines Clause [proportionality] analysis” because a “fine that would bankrupt a person or put a company out of business would be a substantially more onerous fine than one that did not.” *Id.* at 101-02. Similarly, in *State v. Yang*, Montana’s highest court found after *Timbs* that sentencing judges must consider “the financial resources of the offender, and the nature of the burden that payment of the fine will impose.” *State v. Yang*, 452 P.3d 897, 904 (Mont. 2019).

Additional state high courts, even prior to the *Timbs* ruling, have held similarly in recent years. *See, e.g., Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 192 (Pa. 2017) (Pennsylvania Supreme Court requires consideration of “whether the forfeiture would deprive the property owner of his or her livelihood”); *Stuart v. Dep’t of Safety*, 963 S.W.2d 28, 36 (Tenn. 1998) (Tennessee Supreme Court held that forfeitures are “less likely to be excessive when the claimant has the financial ability to replace the property without undue hardship”); *see also State v. Griffin*, 180 So. 3d 1262, 1270 n.9 (La. 2015) (recognizing that “some defendants, while not indigent, may not be able to pay the entirety of the costs assessed at one time” and urging courts to “be cognizant of this issue, and exercise discretion in determining payment requirements and schedules.”)

This Court should join its sister jurisdictions in conforming with the Excessive Fines Clause’s history and purpose, by articulating an excessiveness test in the new tradition of *Timbs*, which requires consideration of the defendant’s financial circumstances.

CONCLUSION

This Court has recognized, as a matter of public accountability and of constitutional law, that fines, fees, and forfeitures may not be excessive in proportion to a crime. But for too long this principal has applied unequally: the same forfeiture that would not cause a rich man to blink

has rendered Mr. O'Malley without any object of value to his name, as a sentence for the same offense. This result is out of step with the Excessive Fines Clause's history and purpose, and with responsive trends in state and federal law, and it is causing manifest injustice in Ohio.

Amicus urges this Court to create a uniform rule like Indiana's that requires sentencing courts to consider financial hardship when conducting a proportionality review under the Excessive Fines Clause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 21, 2020, I filed the foregoing via the Court's electronic filing system, and also served copies of this brief by e-mail as follows:

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