No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF *AMICI CURIAE* OF EIGHTH AMENDMENT SCHOLARS IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

Amici curiae John D. Bessler, Beth A. Colgan, and John F. Stinneford are law professors who study and write about the Eighth Amendment.[1]

SUMMARY OF ARGUMENT

In deciding whether the Excessive Fines Clause is incorporated against the States by the Fourteenth Amendment, this Court must also address an essential predicate question: What is the nature of the right that the Excessive Fines Clause guarantees?

This brief provides context for these questions by offering an account of the constitutional and common law history of the Excessive Fines Clause. The Clause derived from English antecedents,[2] and the traditional common law right to freedom from excessive monetary sanctions—recognized in Magna Carta, reaffirmed in the English Bill of Rights of 1689—was widely regarded as a fundamental

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[1] Biographical statements are included in the Appendix. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties consent to the filing of this brief.

[2] The Excessive Fines Clause "was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776)," *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983), and its language was drawn "verbatim from the English Bill of Rights of 1689." *United States v. Bajakajian*, 524 U.S. 321, 335 (1998). As a whole, the Eighth Amendment's text differs only in that "shall not be" replaces "ought not to be" in the two earlier documents, and in minor orthographic variations in the English version.

precept of law by the seventeenth and eighteenth centuries. This common law right protected offenders in two core ways. First, it required that the amount of a penalty bear a relationship to the gravity of the offense it was designed to punish.[3] Second, it required that a penalty not exceed an offender's ability to pay it, and permitted an offender to preserve a minimum core level of economic subsistence and security notwithstanding the imposition of punishment. This second principle—sometimes referred to in cases and treatises by a Latin maxim drawn from the language of Magna Carta, "*salvo contenemento*"[4]—also enabled offenders to avoid the severe collateral consequences often associated with oppressive economic penalties, such as imprisonment for nonpayment and the impoverishment of innocent family members.[5]

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[3] This principle has been recognized by this Court, see *Bajakajian*, 524 U.S. at 334, and has also been the subject of substantial scholarly commentary, see, e.g., John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899 (2011) [Stinneford, *Rethinking*]; John D. Bessler, *The Birth of American Law: An Italian Philosopher and the American Revolution* 142-224, 368-75 (2014).

[4] See Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 836-38, 853-72 (2013) (discussing this concept).

[5] See, e.g., 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 490 (1819 ed.); *accord* William Eden (Baron Auckland), *Principles of Penal Law* 73 (3d ed. 1775); 4 William Blackstone, *Commentaries on the Laws of England* *371-73 (1769) [Blackstone, *Commentaries*]; see *infra* I.A-B.

In America, as in England, these fundamental principles shaped early understandings of what it meant to enjoy the right to freedom from "excessive fines." This is demonstrated by colonial declarations of rights, early decisional law, the American editions of leading English treatises, and the influential works of nineteenth century American commentators.[6] Moreover, there is substantial historical evidence suggesting that in the American colonies and the early states, the term "fines" was broadly understood to encompass a variety of forms of sanctions—including monetary payments, payments in kind, payments to a sovereign, and payments to victims and nongovernmental entities—and not artificially constrained by a proceeding's label as "civil" or "criminal."[7]

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[6] See, e.g., Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 328 (1868) ("A fine should have some reference to the party's ability to pay it.") [Cooley, *Constitutional Limitations*]; Benjamin L. Oliver, *The Rights of an American Citizen* 185 (1832) (stating that, when fines are assessed, "[a] man's farm or stock in trade, ought never to be made a sacrifice, to the ruin of himself and the distress of his family"); see *infra* II.A.

[7] Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 300-08 (2014) [Colgan, *Reviving*]; see *infra* II.B.

ARGUMENT

I. THE RIGHT TO FREEDOM FROM EXCESSIVE FINES HAS DEEP HISTORICAL ROOTS

A. Magna Carta Recognized Fundamental Limitations on Monetary Penalties

The history of the right to freedom from excessive monetary sanctions stretches back at least to Magna Carta, the "foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). The barons who assembled at Runnymede in 1215 and forced King John to agree to Magna Carta "sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 270-71 (1989). Amercements were "the most common criminal sanction in 13th-century England," *id.* at 269, and were a "medieval predecessor[ ] of fines." *Bajakajian*, 524 U.S. at 335.

Chapter 14 of Magna Carta, first codified in statute in 1225, provides in relevant part:

> 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 to him his contenement ["*salvo contenemento suo*"]; (2) and a Merchant likewise, saving to

> him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy.

Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 1, 6-7 (1762 ed.).[8] Chapter 14 limited abuses by, *inter alia*, "requiring that the amount of the amercement be proportioned to the wrong," *Browning-Ferris*, 492 U.S. at 271, and by requiring that an amercement not be so severe as to take an offender's "contenement," "wainage," or "merchandise"—sometimes rendered in modern translations as "livelihood." *Id.*

"[T]o save a man's 'contenement' was to leave him sufficient for the sustenance of himself and those dependent on him." William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 293 (2d ed. 1914). This meant that "[i]n no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him." *Id.* at 287.[9] The effect of Magna Carta's protections for "[m]erchant[s]" and "villain[s]"[10] was similar: By protecting "merchandise" and "wainage," a minimum

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[8] The amercements chapter of Magna Charta, originally numbered as Chapter 20, was renumbered as Chapter 14 in the version codified by statute in 1225.

[9] See also Giles Jacob, *A New Law-Dictionary* (8th ed. 1762) (unpaginated) (defining "contenement" as "that which is necessary for the Support and Maintenance of Men, agreeable to their several Qualities, or States of Life").

[10] A "villain," or "villein," was a type of feudal tenant. See Paul R. Hyams, *King, Lords and Peasants in Medieval England* (1980) [Hyams, *Peasants*].

core level of economic subsistence was assured, despite the imposition of monetary punishment.[11]

The principles set forth in Magna Carta were confirmed and restated numerous times in subsequent legislation during the thirteenth, fourteenth, and fifteenth centuries. See Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629* 10 (1948). "Following Magna Charta a writ to enforce the concept of *salvo contenemnento* developed, fourteenth-century petitions tested it, and other laws confirmed it." Lois G. Schwoerer, *The Declaration of Rights, 1689* 91 (1981) [Schwoerer, *Declaration*]; see also Hyams, *Peasants* 44, 76, 143-44 (impact of poverty as limiting amercements); Thomas Madox, *The History and Antiquities of the Exchequer of the Kings of England* 678 (1711) (similar; noting early cases in which amercements were set such that an offender could "sav[e] the Maintenance of himself, his Wife and Children").

For subsequent generations, Magna Carta "becomes a sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had." 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 152 (1895). "In age after age a

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[11] Coke describes wainage as "the contenement or countenance of the villain," Edward Coke, *The Second Part of the Institutes of the Laws of England* 28 (E & R Brooke 1797) (1642), and also suggests (relying on Ranulf de Glanvill's late twelfth-century treatise) that the protections of Chapter 14 were "made in affirmance of the common law[.]" *Id.* at 27.

confirmation of it will be demanded and granted as a remedy for those oppressions from which the realm is suffering[.]" *Id*. Indeed, "[m]ore important than the literal intent of the men of Runnymede is the meaning that future generations were able to read into their words." 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 7 (1971) [Schwartz, *Documentary History*]. In this way, a document that was a product of thirteenth century feudal class struggles could nevertheless come to serve as a "basis for molding the foundations of a Parliamentary monarchy," as a "vehicle to enable the Parliamentary leaders to resist the misdeeds of Stuart Kings four centuries later," and, ultimately, as "the core of the rights of Englishmen asserted by American colonists[.]" *Id*.

B. The English Bill of Rights' Provision that "Excessive Fines" "Ought Not To Be" "Imposed" Was a Reaction to Notorious Seventeenth Century Abuses

The ancient right to freedom from oppressive monetary sanctions was severely tested in the seventeenth century. From the notorious and well-chronicled abuses of that era emerged the English Bill of Rights' provision that "excessive Fines" "ought not to be" "imposed."

1. The Star Chamber

"In the early seventeenth century, the levying of fines became entangled in the constitutional and political struggles between the king and his parliamentary critics." Schwoerer, *Declaration* 91.

When, from 1629 to 1640, Charles I sought to govern without convening Parliament, the absence of Parliamentary appropriations made finding new ways of raising revenue essential. Accordingly, "the King's financial advisers devised" "expedients of a novel kind" "to take advantage of the law's technicalities" to benefit the public fisc. J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* 74 (1971 ed.). The machinery of criminal justice—and the High Court of Star Chamber, in particular[12]—was a useful means to that end.

The Star Chamber "impos[ed] such fines as should supply the king with a considerable revenue, in the absence of parliamentary grants." 4 Henry Walter, *A History of England* 135 (1834); see Roger Lockyer, *The Early Stuarts: A Political History of England, 1603-1642* 260 (1989) (observing that "the impetus behind [a] spate of prosecutions in the 1630s was financial").

"The proponents of the common law sought to apply the principle of Magna Charta to fines imposed by the court[.]" Schwoerer, *Declaration* 91. A 1615 decision reported by Coke—*Godfrey's Case*, 11 Co. Rep. 42a, 43a-44a, 77 Eng. Rep. 1199, 1202 (K.B. 1615)—had held that the "reasonableness of [a] Fine shall be adjudged by the Justices; and if it appears to them to be to be excessive, it is against Law, and shall not bind; for *excessus in re qualibet jure*

[12] As a prerogative court, the Star Chamber was considerably less independent from the Crown than the common law courts were.

reprobatur communi"[13] and that "[a]n excessive Fine at the Will of the Lord, shall be said oppression of the people."

Yet the Star Chamber disregarded such limitations and "imposed heavy fines"—particularly "on the king's enemies[.]" Schwoerer, *Declaration* 91. William Hudson's *Treatise on The Court of Star Chamber*, written circa 1635, observes that in earlier years, the fines imposed by that court were "trenched not to the destruction of the offender's estate and utter ruin of him and his posterity as now they do, but to his correction and amendment, the clergy's song being of mercy[.]" William Hudson, *A Treatise on The Court of Star Chamber* (1635), reprinted in 2 Francis Hargrave, *Collectanea Juridica* (1791).

Similarly, a tract published in 1637 contrasted the contemporary practices of the Star Chamber with earlier practices under John Whitgift (Archbishop of Canterbury from 1583 until 1604), noting that "Archbishop Whitgift did constantly in this Court maintain the liberty of the *Free Charter* that none ought to be fined but *salvo contenimento*. He seldom gave any sentence but therein did mitigate in something the acrimony of those that spake before him[.]" *A Discourse Concerning the High Court of Star Chamber* (1637), reprinted in *The Star Chamber* 4, 10 (John Southerden Burn ed. 1870).

During an impeachment trial in the Irish House of Lords in March 1641, one advocate declared: "[T]hough Magna Charta be so sacred for Antiquity; though its Confirmation be strengthened by Oath,

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[13] Lit. "Excess in any thing is reprehended by common law." 2 John Bouvier, *A Law Dictionary* 179 (15th ed. 1890).

though it be the proper Dictionary that expounds *meum* and *tuum*,[14] and assigns every Subject his Birthright, it only survives in the Rolls, but is miserably rent and torn in the Practice. These Words, *Salvo Contenemento*, live in the Rolls, but they are dead in the Star-Chamber." *Impeachment of Sir Richard Bolton*, 4 How. St. Tr. 51, 53 (Parl. (Ire.) 1641) (argument).

The Star Chamber would be remembered as a cautionary tale of the danger that inheres when legitimate penological interests are warped and corrupted by financial self-interest: "[T]he strong interest of the court in these fines … had a tendency to aggravate the punishment[.]" 2 Henry Hallam, *The Constitutional History of England From the Accession of Henry VII to the Death of George II* 49 (2d. ed. 1829). As Hallam put it, "those who inflicted the punishment reaped the gain, and sat, like famished birds of prey, with keen eyes and bended talons, eager to supply for a moment, by some wretch's ruin, the craving emptiness of the exchequer"—"regardless of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means[.]" *Id*. at 47.

In July 1641, the Star Chamber's myriad abuses "brought that institution to an end at the hands of the Long Parliament[.]" *Jones v. SEC*, 298 U.S. 1, 28 (1936). But the Star Chamber's final years would live on in the legal and popular imagination as a uniquely unconstitutional moment—a clarifying, galvanizing, paradigm example of what no court should ever do.

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[14] Lit. "mine" and "yours."

2. The Bill of Rights of 1689

The right to freedom from excessive fines was again tested in the years leading up to the Glorious Revolution, when further abuses in the assessment of fines took place. See Schwoerer, *Declaration* 91. In the decades following the Star Chamber's abolition, some common law courts had recognized the applicability of Magna Carta's amercement provisions to fines imposed by courts. See, e.g., *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C.P. 1677) (North, C.J.) ("In cases of fines for criminal matters, a man is to be fined by Magna Charta with a *salvo contenemento suo*; and no fine is to be imposed greater than he is able to pay[.]").

But other judges—including the infamous George Jeffreys—held "that Magna Carta did not apply to fines for offenses against the Crown." *Browning-Ferris*, 492 U.S. at 290 (O'Connor, J., concurring in part and dissenting in part). For example, in *John Hampden's Case*, 9 How. St. Tr. 1054 (K.B. 1684), Jeffreys flatly rejected the defendant's argument that, per Magna Carta, "there should be a Salvo Contenemento in all fines[.]" *Id.* at 1124. As a purely historical and technical matter, the position Jeffreys advanced in *John Hampden's Case* was not wholly unsupportable. Historically, the terms "fines" and "amercements" had indeed referred to different forms of sanctions. See, e.g., John Fox, *Contempt of Court* 118-19 (1927) (discussing this distinction). But though fines and amercements had distinct historical antecedents, they served fundamentally similar purposes—and, by the seventeenth and eighteenth centuries, the terms were often used interchangeably in common parlance. See *Browning-Ferris*, 492 U.S.

at 290-91 (O'Connor, J., concurring in part and dissenting in part); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1264 (1987); 4 Blackstone, *Commentaries* *371-73 (identifying Magna Carta's amercement provisions as regulating "[t]he reasonableness of fines in criminal cases").

By applying an unduly narrow, technical reading to Magna Carta in *John Hampden's Case*, Jeffreys had effectively allowed an exception to swallow the rule—and violated the very principles for which Magna Carta had come to be seen to stand. See, e.g., 4 John Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England* 412 (1847) (characterizing Jeffreys' rejection of the proportionality and *salvo contenemento* principles for judge-imposed fines as having "pervert[ed] the law"; noting that John Hampden, a "young gentleman" who "was only heir apparent to a moderate estate, and not in possession of any property," "was sentenced to pay a fine of 40,000*l.*" "for a trifling misdemeanour").

Moreover, decisions such as *John Hampden's Case* had disastrous practical consequences because "English courts during the reigns of Charles II and James II took advantage of their newly acquired power and imposed ruinous fines on wrongdoers and critics of the Crown." *Browning-Ferris,* 492 U.S. at 290 (O'Connor, J., concurring in part and dissenting in part). By the mid-1680s, "the use of fines 'became even more excessive and partisan,' and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Browning-Ferris*, 492 U.S. at 267 (quotation omitted).

Initial attempts at Parliamentary reform had been unavailing. In 1680, a "Bill for the relief of the Subject against arbitrary Fines" was introduced in the House of Commons. See 8 *Debates of the House of Commons: From the Year 1667 to the Year 1694* 226 (Anchitell Grey ed. 1763). During the debate on the bill, one member observed that "[t]he Fines imposed by *Magna Charta*, and at Common Law, are with a *salvo contenemento*." *Id.* at 226. Another member recalled a case in which a man "was fined a thousand Marks, and was not worth a thousand Shillings," and suggested that "[w]hen the Judges become as great Malefactors as other men, there must be some remedy." *Id.* at 227. He continued, "[i]f the Judges had fined men according to *Magna Charta*, with *salvo contenemento*, there had been no need of this Bill." *Id.* Another member emphasized the importance of "know[ing] the ability of the Person" subjected to fines and observed, "[w]e have had excessive Fines imposed by the Judges." *Id.* at 228.

David Hume, writing in the 18th century, described the abusive nature of the penalties imposed during the 1680s. In one case in 1682, "enormous damages to the amount of 100,000 pounds were decreed." 8 David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688* 178 (1782). This, Hume explained, was unlawful: "By the law of England, ratified in the great charter, no fines or damages ought to extend to the total ruin of a criminal." *Id.*

A tract published in 1689 observed that "severe fines" had been imposed, and suggested that "the generality of people … did much complain" and some had "groaned under extravagant Summs, imposed contrary to *Magna Charta*'s *salvo contenimento*, *i.e.*,

saving to them their livelihoods[.]" Anon., *A Letter to a Gentleman at Brussels, Containing an Account of the Causes of the Peoples Revolt from the Crown* 6-7 (1689).

The "conflict between Parliament and the Crown culminat[ed] in the Glorious Revolution of 1688 and the English Bill of Rights of 1689." *Powell v. McCormack*, 395 U.S. 486, 502 (1969). "After James II fled England … the House of Commons, in an attempt to end the crisis precipitated by the vacation of the throne, appointed a committee to draft articles concerning essential laws and liberties that would be presented to William of Orange." *Browning-Ferris*, 492 U.S. at 290-91 (O'Connor, J., concurring in part and dissenting in part).

The Declaration of Rights of 1688 was "[a] distinct and solemn assertion of the fundamental principles of the constitution and of the ancient franchises of the English nation[.]" Thomas Pitt Taswell-Langmead, *English Constitutional History: From the Teutonic Conquest to the Present Time* 501 (10th ed., 1946). The document included "a recital of all the illegal and arbitrary acts committed by James II" and "an emphatic assertion, nearly following the words of the previous recital, that all such enumerated acts are illegal[.]" *Id*. Having recited, *inter alia*, that "excessive fines have been imposed," the Declaration provides "[t]hat excessive Baile ought not to be required, nor excessive Fines imposed, nor cruell and unusuall Punishments inflicted." Decl. of Rights of 1688. Shortly thereafter, Parliament enacted the Declaration by statute as the Bill of Rights of 1689, further entrenching a set of "undoubted rights and liberties[.]" 1 Wm. & Mary, 2d

Sess., ch. 2, 9 Stat. at Large 67, 69 (1764 ed.).[15] Although the Glorious Revolution represented a period of significant constitutional change, Parliamentary reformers characterized much of their work as restoring ancient rights and privileges. See, e.g., John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* 99-103 (2005).

Two leading cases, decided around the time the English Bill of Rights was framed, illustrate how that document's provision that "excessive fines" "ought not to be" "imposed" was understood at the time of its enactment. First, scholars and members of this Court have suggested that the highly publicized trial and punishment of the Anglican cleric and perjurer Titus Oates[16] may help to illuminate contemporary understandings of the protections set forth in the English Bill of Rights. See, e.g.,

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[15] The events associated with the Glorious Revolution in Scotland are also instructive. When, in April 1689, the Convention of Estates of Scotland voted to remove King James from the throne of Scotland, it declared that he had "Invade[d] the Fundamental Constitution of this Kingdom, and Altered it from a Legal Limited Monarchy, to an Arbitrary Despotick Power" by, among other things, "imposing Exorbitant Fines, to the Value of the Parties Estates, extracting extravagant Bail; and disposing Fines and Forfeitures before any Process or Conviction." *The Declaration of the Estates of the Kingdom of Scotland* 1-2 (1689). Accordingly, it was declared "[t]hat the imposing of extraordinary Fines, the exacting of exorbitant Bail, and the disposing of Fines and Forfeitures, before Sentence, are contrary to Law." *Id.* at 4. See also Claim of Right Act 1689, Wm. & Mary c. 28 (Scot.).

[16] See John H. Langbein, *The Origins of Adversary Criminal Trial* 69-73 (2003) (discussing Oates' perjury and the notorious "Popish Plot") [Langbein, *Origins*].

Harmelin v. Michigan, 501 U.S. 957, 969-70 (1991) (plurality); Stinneford, *Rethinking* 932-38.

In 1685, Judge Jeffreys and his colleagues on the King's Bench had sentenced Oates to a fine of 2,000 marks, life imprisonment, whippings, pilloring, and defrockment. *Id.* at 933 (quoting *Second Trial of Titus Oates*, 10 How. St. Tr. 1227, 1315-17 (K.B. 1685)). "[R]epresentatives from the House of Commons asserted that the House had Oates's case in mind when it drafted the Bill of Rights[.]" *Id.* at 933 (citing 10 H.C. Jour. 247 (1689)). In 1689, Oates challenged his punishments as cruel and illegal, and his fine as excessive. *Id.* In a writ of error to the House of Lords filed on Oates' behalf, the excessiveness of the fine imposed on Oates was characterized as follows:

> *4. Exception.* Fined 1,000 marks in each judgment, and committed in execution for the fines aforesaid; which fines are excessive, twice as much as the Defendant was worth, and therefore against Magna Charta, by which all fines ought to be with a *salvo contenimento*.

Petition of Titus Oates, *Rex v. Oates*, reprinted in 1 *The Manuscripts of the House of Lords, 1689-1690* 81 (1889 ed.).

Oates' petition was rejected by the House of Lords by a vote of 35 to 22, *id.* at 80, but several members dissented on the ground that the sentence was "contrary to the declaration … that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." 10 How. St. Tr. at 1325. The House of Commons aligned itself with the dissenting Lords:

"On the 2d of July, A bill was brought into the House of Commons to reverse the two judgments against Oates, it was passed and carried up to the Lords on the 6th[.]" *Id.* at 1329. Oates was pardoned and released from prison. Langbein, *Origins* 72.

A second late seventeenth century decision—*The Case of William Earl of Devonshire*, 11 How. St. Tr. 1353 (Parl. 1689)—further clarifies the sort of factors that could make a fine excessive. See, e.g., *Weems v. United States*, 217 U.S. 349, 375-76 (1910) (discussing the case). The petitioner, Lord Devonshire, "was fined £30,000 for an assault and battery[.]" *Id.* at 376. "[T]he House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine 'was excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land.'" *Id.* (quotation omitted). The case was decided just months after the English Bill of Rights had been enacted.

In *Bajakajian*, this Court suggested that the unlawful nature of the fines imposed in cases such as *Devonshire* was "described contemporaneously only in the most general terms." 524 U.S. at 335. But although the *opinion* issued in *Devonshire* did not specify exactly what was meant by "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land," the *argument* that Devonshire's advocate, Henry Booth (Lord

Delamere),[17] presented on Devonshire's behalf clarifies the grounds on which the fine was perceived to be unlawful. See *The Works of the Right Honourable Henry late L. Delamer[e], and Earl of Warrington* 563-82 (1694).[18]

In making the case for "[t]he Excessiveness of the Fine," *id.* at 565, Delamere began by invoking the nation's experience under the Star Chamber: "The Court of *Starchamber* was taken away, because of the *unmeasurable Fines* which it impos'd, which alone was a plain and direct prohibition for any other court to do the like, for otherwise the Mischief remain'd[.]" *Id.* at 574. He observed that "those great *Fines*, imposed in that Court, were inconsistent with the Law of *England*, which is a *Law of Mercy*, and concludes every *Fine* which is left at discretion, with *Salvo Contenimento*." *Id.* "If the Fines imposed in the *Starchamber* were an *intolerable Burden to the Subject, and the means to introduce an Arbitrary Power and Government*, as [the statute abolishing the Star Chamber] recites, the like proceeding in the *King's Bench* can be no less grievous, and must produce the same Evil." *Id.* at 574-75. "Laws that are grounded upon the *ancient Principles of the*

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[17] Delamere served alongside Devonshire on the "rights committee" in the House of Lords, which played an important role in drafting and revising the English Declaration of Rights. Schwoerer, *Declaration* 237-41, 306-07. John Hampden—whose argument that Magna Carta applied to fines had been rejected by Judge Jeffreys in 1684—served on a similar committee in the House of Commons. *Id.* at 91.

[18] See also 11 How. St. Tr. at 1353-66 (reproducing Delamere's argument to the Lords in this "remarkable Case").

Government cannot cease, because the Reason of them will ever continue[.]" *Id.* at 575.

Magna Carta's provisions, Delamere explained, served a critical purpose: "[T]he Judges cannot impose a greater Fine than what the Party may be capable of paying immediately into Court: but if the Judges may commit the Party to Prison till the Fine be paid, and withal set so great a Fine as is impossible for the Party to pay into Court, then it will depend upon the Judges pleasure, whether he shall ever have his *Liberty*, because the *Fine* may be such as he shall never be able to pay: And thus every Man's Liberty is wrested out of the dispose of the *Law*, and is stuck under the *Girdle* of the Judges." *Id.* at 576-77.

Delamere also alluded to the broader societal and dignitary interests that were at play: "Because the *Nation* has an *Interest* in the Person of every particular Subject, for every Man, either one way or other, is useful and serviceable in his Generation, but by these *intolerable Fines* the *Nation* will frequently lose a Member, and the Person that is Fin'd shall not only be disabled from doing his Part in the Common-wealth, but also he and his *Family* will become a *Burden* to the Land, especially if he be a man of no great Estate, for the excessive Charge that attends a Confinement will quickly consume all that he has, and then he and his *Family* must live

upon *Charity*.[19] And thus the poor man will be doubly punish'd, first, to wear out his days in *perpetual Imprisonment*; and secondly, to see Himself and Family brought to a Morsel of Bread." *Id*. at 577.[20]

The Lords agreed with Delamere, and held the £30,000 fine to be "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land[.]" 11 How. St. Tr. at 1372. Together, the two famous cases of *Oates* and *Devonshire* shed considerable light on the ancient principles that the English Bill of Rights' proscription of "excessive fines" was thought to have reaffirmed.

Following the Bill of Rights, the right to freedom from excessive fines was settled law. Consider, for example, the description of the rules governing monetary punishments set forth in the noted jurist Sollom Emlyn's preface to the 1730 edition of *State*

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[19] Cf. Cesare Beccaria, *On Crimes and Punishments and Other Writings* 53 (Richard Bellamy ed., Richard Davies trans., 1995) (1764) (observing that "fines ... take bread from the innocent when taking it from the villains"); Walter J. Baldwin, *Punishment Without Crime; or Imprisonment for Debt* 44 (1813) ("it is the spirit of the Constitution not to punish 'fault,' or even 'crime' itself, but 'according to its degree, or in proportion to its heinousness' and therefore, as neither debt nor inability to pay debt is in *any 'degree heinous*,' it is, we conceive, in direct opposition to this spirit to inflict").

[20] Delamere also argued that the amount of the fine was greater than other fines previously imposed, and that the proceedings "will make ... the government look very rigid and severe," which "will set [the people] upon their guard." *Id*. at 578.

Trials. See Sollom Emlyn, *Preface*, in *A Complete Collection of State Trials* (1730 ed.). Emlyn emphasizes that the judge, "though he be intrusted with so great power, yet he is not at liberty to do as he lists, and inflict what arbitrary Punishments he pleases; due regard is to be had to the Quality and Degree, to the Estate and Circumstances of the Offender, and to the greatness or smallness of the Offence[.]" *Id*. at x. This was important because "that Fine, which would be a mere trifle to one man, may be the utter ruin and undoing of another[.]" *Id*. Moreover, failure to abide by these precepts would undermine the proportionality principle as well: "If no Measures were to be observed in these discretionary Punishments, a Man who is guilty of a Misdemeanor might be in a worse Condition than if he had committed a capital Crime" because "he might be exposed to an indefinite and perpetual Imprisonment, a Punishment not at all favour'd by Law, as being worse than death itself[.]" *Id*.[21]

Blackstone's observations are also instructive. After noting that "[t]he reasonableness of fines has also been usually regulated by the determination of *magna carta* concerning amercements for misbehavior in matters of civil right," 4 Blackstone, *Commentaries* *372, Blackstone recites the language of Magna Carta and describes that the law requires "that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his

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[21] See also, e.g., *Rex v. Bennett*, 1 Strange 101, 93 Eng. Rep. 412, 413 (K.B. 1718) ("The fine here will be *salvo contenemento*, according to Magna Charta, and the Bill of Rights.") (argument).

merchandize; and to the countryman his wainage, or team and instruments of husbandry." *Id.* Blackstone elaborates:

> [T]he ancient practice was to enquire by a jury, when a fine was imposed upon any man, *quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum*.[22] And, since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelyhood; but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life.

Id. at *373; see also *id.* at *371 (stating that "the duration and quantity" of "discretionary fines and discretionary length of imprisonment" "must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances"); *id.* ("[t]he *quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law" because "[t]he value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's").

In the 1770s, William Eden (Baron Auckland) discussed these principles in his treatise, *Principles*

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[22] Lit. "How much from thence he be able to pay the King annually, having besides a maintenance for himself, his wife and children." Thomas Tayler, *The Law Glossary* 347 (1833 ed.).

of Penal Law. After suggesting that "the Bill of Rights was only declaratory of the old constitutional privileges," Eden writes that "[i]t is the usage of the courts, superinduced on the clause of Magna Charta relative to civil amercements, never to extend the fine of any criminal so far, as to take from him the implements, and means of his profession, and livelihood; or to deprive his family of their necessary support." William Eden (Baron Auckland), *Principles of Penal Law* 72-73 (3d ed. 1775).

Joseph Chitty's early nineteenth century criminal treatise also presents an extensive discussion of this rule. Chitty explains that where a discretionary power to punish is delegated to a court, "it must not be understood that the power thus vested in them is a mere arbitrary discretion, which ignorant or malevolent magistrates would be allowed with impunity to abuse." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 489 (1819 ed.). "Before the revolution," Chitty observes, "the court of Star-chamber levied the most exorbitant fines upon the subject in defiance of every principle of law, to enrich the treasuries of the sovereign." *Id*. "[B]y the bill of rights," however, "it was specifically enacted, that excessive fines be not imposed"; "since this provision, it is never usual to assess a larger fine than the delinquent is able to pay without touching the means of his subsistence[.]" *Id*. at 490.

In short: substantial evidence suggests that Magna Carta, the common law, and the English Bill of Rights were understood to require that a just and lawful monetary penalty (1) be proportionate to the offense and (2) not destroy a minimum core level of economic security and subsistence for those against whom penalties are assessed, determined with

reference to personal circumstances and ability to pay.

II. FROM THE EARLY YEARS OF AMERICAN HISTORY, FREEDOM FROM EXCESSIVE FINES WAS RECOGNIZED AS A FUNDAMENTAL RIGHT

A. Early American Understandings of the Right to Freedom from "Excessive Fines" Were Informed by the Lessons of History

The fundamental right to freedom from excessive fines was embraced by the American colonists. The colonists "looked upon the English Constitution as their own," H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 Colum. L. Rev. 1, 23 (1917), and "English law—as authority, as legitimizing precedent, as embodied principle, and as the framework of historical understanding—stood side by side with Enlightenment rationalism in the minds of the Revolutionary generation." Bernard Bailyn, *The Ideological Origins of the American Revolution* 31 (1967).

Even before the English Bill of Rights was enacted, American colonists had sought to claim for themselves the right to freedom from unreasonable and oppressive fines. The Pennsylvania Frame of Government of 1682—one of "the most influential of the Colonial documents protecting individual rights," 1 Schwartz, *Documentary History* 130—provided "[t]hat all fines shall be moderate, and saving men's contenements, merchandize, or wainage." Penn. Frame of Gov., Laws Agreed Upon in England, art.

XVIII (1682), reprinted in 1 Schwartz, *Documentary History* 132, 141. Likewise, the New York Charter of Liberties and Privileges of 1683 provided "[t]hat A ffreeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saveing to him his freehold, And a husbandman saveing to him his Wainage and a merchant likewise saveing to him his merchandize[.]" N.Y. Charter of Liberties and Privileges (1683), reprinted in 1 Schwartz, *Documentary History* 163, 165.

A few years later, during Maryland's Protestant Revolution of 1689—when religious and economic tensions led to a revolt against the proprietary government—one stated reason for the rebellion was "[t]he Imposseinge Exessive fines Contrary to magna Charta without any respect had to the *salvo Contenemento suo sibi* therein Injoyned." *'Mariland's Grevances Wiy The Have Taken Op Arms'*, reprinted in 8 J. S. Hist. 392, 401 (1942). See also David S. Lovejoy, *The Glorious Revolution in America* 288-91 (1987) (discussing the rebellion and its causes).

In 1721, Jeremiah Dummer's influential work *A Defence of the New-England Charters* declared that "[t]he Subjects Abroad claim the Privilege of *Magna Charta*, which says that no Man shall be fin'd above the Nature of his Offense, and whatever his Miscarriage be, a *Salvo Contenemento suo* is to be observ'd by the Judge." Jeremiah Dummer, *A Defence of the New-England Charters* 16-17 (1721).

By the Founding, documents such as Magna Carta, the Habeas Corpus Act, and the English Bill of Rights had long represented "a towering common law lighthouse of liberty—a beacon by which framing lawyers in America consciously steered their course."

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 663 (1996). Broad acceptance of common law rights was consistent with the high esteem in which the leading English expositors of the law were held. Coke's "*Institutes* 'were read in the American Colonies by virtually every student of the law," *Kerry v. Din*, 135 S.Ct. 2128, 2133 (2015) (plurality) (quotation omitted), and Blackstone was "the preeminent authority on English law for the founding generation," *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (quotation omitted). The Founders were also "aware and took account of the abuses that led to the 1689 Bill of Rights." *Browning-Ferris*, 492 U.S. at 267.

The landmark Virginia Declaration of Rights of June 1776 echoed the English Bill of Rights, providing "[t]hat excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." Va. Decl. of Rts., § 9. Section 9 was one of several provisions "borrowed from England," Edmund Randolph, *Essay on the Revolutionary History of Virginia* (c. 1809-1813), reprinted in 1 Schwartz, *Documentary History* 246, 248, in a document that in many respects "was a restatement of English principles—the principles of Magna Charta, the Petition of Rights, the Commonwealth Parliament, and the Revolution of 1688." Allan Nevins, *The American States During and After the Revolution, 1775-1789* 146 (1924).[23]

Virginia's Declaration, in turn, influenced the declarations of rights of other states and, ultimately,

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[23] Cf. *Solem*, 463 U.S. at 286 ("use of the language of the English Bill of Rights" deemed "convincing proof" of intent "to provide at least the same protection").

the Bill of Rights itself. By 1787, "[e]ight states … had state constitutions prohibiting the imposition of excessive fines"[24] and, in 1789, four states—Virginia, Pennsylvania, New York, and North Carolina—urged that the Nation's charter be amended to include such a provision. 2 Schwartz, *Documentary History* 1167. The amendments proposed by the Virginia Ratifying Convention were particularly influential. *Id*. at 762-65.

In light of this history, early decisional law interpreting the Virginia Declaration of Rights is particularly instructive. For example, in *Jones v. Commonwealth*, 5 Va. (1 Call) 555 (1799), the Supreme Court of Appeals of Virginia was called upon to consider whether a fine could be assessed jointly. At the time, the imposition of fines in Virginia was governed both by the excessive fines clause of the Virginia Declaration and by a 1786 statute that implemented the constitutional provision by requiring that "in every … information or indictment, the amercement … ought to be according to the degree of the fault, and saving to the offender his contenement[.]" 1786 Va. Laws ch. 64, at 42. One member of the *Jones* court, Judge Spencer Roane, described the 1786 statute as "founded on the spirit" of the Declaration's excessive fines provision. *Id*. at 556-57.

In deciding whether a joint fine could lawfully be imposed, Judge Roane referred to William Hawkins' *Treatise of the Pleas of the Crown*, which in turn relied upon *Godfrey's Case* as "establish[ing] the

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[24] Steven G. Calabresi et. al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1517 (2012).

doctrine … bottomed upon an article of *magna charta*, that fines be imposed *secundum quantitatem delicti salvo contenemento*[.]" *Id.*[25]

Judge Roane further reasoned that a prohibition on joint fines was "fortified not only by the principles of natural justice, which forbid that one man should be punished for the fault of another; but also, by the clause of the bill of rights prohibiting excessive fines and the act of 1786 founded on the spirit of it and providing, that the fine should be according to the degree of the fault and the estate of the offender." *Id.* at 556-57. See also *id.* (such a result would be "unjust and contrary to the spirit of the constitution"). A second member of the three-judge panel concurred that the joint fine was unlawful, reasoning that "it is clear that the makers of the constitution, as well as the Legislature contemplated, that no addition, under any pretext whatever was to be imposed, upon the offender, beyond the real measure of his own offence." See *id.* at 557-58 (Carrington, J.).

Other early state decisions also looked to traditional common law principles. See, e.g., *Commonwealth v. Morrison*, 9 Ky. (2 A.K. Marsh.) 75, 99 (1819) (fine "should bear a just proportion to the offense committed" and to "the situation, circumstances and character of the offender"); see also *Spalding v. New York*, 45 U.S. 21, 30 (1846) (argument by counsel that fine "was excessive, and was a cruel punishment for the offence, for it imposed an impossibility" and that "[t]he law never

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[25] Lit. "according to the quantity of the offense, saving contenement."

imposes a fine, where it presumes the party can have nothing to pay").[26]

American commentators also drew on the lessons of history. The 1829 edition of William Rawle's treatise characterized the Eighth Amendment as "protect[ing]" "against all unnecessary severity in the prosecution of justice," and looked to the history of the Stuart period for guidance as to the meaning of the Excessive Bail Clause. William Rawle, *A View of the Constitution of the United States* 130 (2d ed. 1829). Story's *Commentaries* similarly drew connections between the Eighth Amendment and the English Bill of Rights, explaining that the Eighth Amendment served "to warn … against" a repeat of the events that had transpired during "the arbitrary reigns of some of the Stuarts"—when, among other things, "[e]normous fines and amercements were … sometimes imposed[.]" Joseph Story, *Commentaries on the Constitution of the United States* 710-11 (1833 ed.). Benjamin Oliver's 1832 treatise suggests that imposing "[a] ruinous fine upon an inconsiderable offence, or otherwise wholly disproportioned to the magnitude of it" "would be inconsistent with the spirit" of the Eighth Amendment. Benjamin L. Oliver, *The Rights of an American Citizen* 185 (1832). Oliver further suggests that "[a] man's farm or stock in trade, ought never to be made a sacrifice, to the ruin of himself and the distress of his family, but, if necessary to make an example, he should rather be

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[26] The doctrinal basis of this Court's decision in *Spalding* is unclear, but the case—involving a state proceeding—predates not only modern incorporation jurisprudence, but the ratification of the Fourteenth Amendment itself.

imprisoned for a longer period, and a more moderate fine be imposed." *Id.*

Thomas Cooley's 1868 treatise *Constitutional Limitations*—which was "influential"[27] and "massively popular"[28] in its time—observes that although "the question what fine shall be imposed is one addressed to the discretion of the court," that discretion is "to be judicially exercised, and it would be error in law to inflict a punishment clearly excessive." Cooley, *Constitutional Limitations* 328. Cooley elaborates: "A fine should have some reference to the party's ability to pay it." *Id.* Cooley bases this conclusion on Chapter 14 of Magna Carta, the "merciful spirit" of which "addresses itself to the criminal courts of the American States through the [excessive fines] provisions of their constitutions." *Id.* at 328-29. In this regard, Cooley also refers approvingly to the general rule that "[t]he common law can never require a fine to the extent of an offender's goods and chattels[.]" *Id.* at 329 (quoting *State v. Danforth*, 3 Conn. 112, 116, 117-18 (1819)).

Additionally, the historical record suggests that at least some colonial and early state courts did, in practice, consider the individual characteristics of offenders when determining and remitting fines. See, e.g., Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982) (fines "tailored individually to the particular case" and set such that "it was within the expectation on the part of the court that it would

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[27] *McDonald v. City of Chicago*, 561 U.S. 742, 821 (2010) (Thomas, J., concurring in part and concurring in the judgment).

[28] *Heller*, 554 U.S. at 616.

be paid"); Chilton L. Powell, *Marriage in Early New England*, 1 New England Q. 323, 333 n.23 (1928) (noting court records indicating that "amount [of fines] apparently depend[ed] upon the culprits' ability to pay").

B. In Colonial and Early State History, the Term "Fines" Was Understood to Encompass a Broad Range of Penalties

There is substantial historical evidence that protection from "excessive fines," properly conceptualized, extends to a variety of different forms of economic sanctions—including civil forfeitures. The historical record does not offer a precise definition for the term "fines." See *Browning-Ferris*, 492 U.S. at 295 (O'Connor, J., concurring in part and dissenting in part). What the historical record does show is that by the eighteenth century, the term "fine" in colonial America had come to be understood as encompassing a broad swath of sanctions. These included penalties payable in cash and in kind (*i.e.*, forfeitures), and penalties made payable not only to the sovereign, but to private parties as well—and not strictly limited to nominally criminal proceedings.

Historically, the terms "fines" and "forfeitures" were used interchangeably. Leading dictionaries of the Founding era suggest that the word "'fine' was understood to include 'forfeiture' and vice versa." *Austin v. United States*, 509 U.S. 602, 614 n.7 (1993) (citing Founding-era sources). Further, many colonial and early American "statutes referenced 'fines and forfeitures' simultaneously when referencing economic sanctions[.]" Colgan, *Reviving*

302 & n.136 (citing 1778 Conn. Pub. Acts 485-89; 1776-1777 Del. Laws 354-56 (1777); 1765 Ga. Laws 248-64; 1782 Md. Laws xvii-xviii; 1747 Mass. Acts 237-39; 1780 N.H. Laws 229; 1786 N.J. Laws 344; 1782 N.Y. Laws 479; 1777 N.C. Sess. Laws 208-26; 1771 Pa. Laws 361; 1783 R.I. Pub. Laws 52; 1769 S.C. Acts i-276; 1764 Va. Acts 449-50; 1779 Vt. Acts & Resolves 64-65). For example, a 1782 Delaware statute required an offender to "forfeit and pay the Sum of Three Shillings and Nine-pence," referring to the penalty as "the said Fine and Forfeiture." *Id.* (quoting 1782 Del. Laws 4 (1782)).

Similarly, a New York statute "prohibiting willfully setting fire to the woods dictated that one so convicted 'shall forfeit and pay the sum of five pounds … and for want of effects to pay such fine the offender or offenders shall be committed" to a period of imprisonment," *id.* (quoting 1785 N.Y. Laws 63), while a Rhode Island statute prohibited grain millers from taking an excess toll "upon the Penalty of forfeiting as a Fine Twelve Pounds for each Offence," *id.* (quoting 1779 R.I. Pub. Laws 20); see also, e.g., *Hanscomb v. Russell*, 77 Mass. 373, 374-75 (1858) (observing that the term "fine" has a narrow "technical meaning[ ]," but also recognizing that "the word 'fine' has other meanings; as appears by most of the dictionaries of our language, where it is defined not only as a pecuniary punishment, but also as a forfeiture, a penalty, &c" and concluding that it was appropriate to interpret the word "fine" to "include not only one of its technical meanings, but also its meaning 'according to the common and approved usage of the language'" (quotation omitted)).

"Fines" as a category also included economic sanctions payable to parties other than the

sovereign; indeed, "[f]rom the colonies' earliest days, legislatures and courts directed fines to be paid to the sovereign as well as to a variety of other persons, a practice which continued post-Revolution and post-ratification." Colgan, *Reviving* 310. As early as 1641, the Massachusetts Body of Liberties referred to the imposition of "a proportionable fine *to the use of defendant*" as a penalty for civil suits that had been improperly brought. Mass. Body of Liberties § 37 (1641), reprinted in 1 Schwartz, *Documentary History* 71, 76 (emphasis added).

Myriad examples exist in the historical record in which "fines" were payable to victims and other nongovernmental entities. See, e.g., 1702 Conn. Pub. Acts 10-11; 1672 Conn. Pub. Acts 7 ("pay a fine of One hundred Pounds, to the Parents, Husband, Wife or Children, or next of kin to the party deceased"); 1787 N.Y. Laws 426 ("forfeit to the prisoner or party grieved" for refusal to follow writ of habeas corpus); 1787 N.Y. Laws 398 (malicious and vexatious arrests by sheriff: "forfeit and pay to the party or parties, so arrested or attached"); 1785-1786 Del. Laws 8 (1786) ("forfeit treble Damages to the Party grieved for abuse of duties"); 1785 Pa. Laws 244 ("forfeit to the prisoner or party grieved"); 1702 N.Y. Laws 49 ("forfeit and pay, to the Party thereby being grieved"); *cf.* 1759 R.I. Pub. Laws 80 (fines for fire distributed "among the Poor most distressed by the Fire"); see also Colgan, *Reviving* 302-308 (discussing additional examples).

"Colonial and state statutes, as well as courts of the period, also routinely split awards between a sovereign and individuals." *Id.* at 306. A 1766 Delaware statute awarded half of fines assessed against a public guardian to "the orphan or minor"

injured by the guardian's neglect. 1700-1769 Del. Laws 423 (1766). And a 1759 New Hampshire statute provided for a "fine" for breaking street lamps, where "all such Fines shall be Applied in this manner namely, out of the same the owner or owners of such Lamp or Lamps shall be payed the damages he she or they have sustained." 1754 N.H. Laws 73.

In *Goodall v. Bullock*, Wythe 328, 1798 WL 247 (Va. Ch. 1798), the Virginia High Court of Chancery further clarified that a "fine" need not be paid to a sovereign: "[N]ot all fines, but only those inflicted for offences against the government, were formerly payable to the king." *Id.* at *3. *Goodall* explained that "the fine in this case is appropriated to the party injured, because it is recoverable on the motion, that is, by the action, of the party injured[.]" *Id.*

Finally, the historical record is consistent with the observation, made in Justice O'Connor's separate opinion in *Browning-Ferris*, that the understanding of the term "fine" would not have been limited to proceedings labeled "criminal." In addition to historical evidence marshalled by Justice O'Connor, see *Browning-Ferris*, 492 U.S. at 287-90, 295-97 (O'Connor, J., concurring in part and dissenting in part), it is noteworthy that, in the Founding era, both fines and forfeitures were explicitly recoverable by actions of debt—a nominally civil procedure. See Colgan, *Reviving* 319.

In sum, the historical record would support the conclusion that fines were understood to encompass other forms of economic sanctions, including civil forfeitures, thus ensuring that the excessiveness inquiry be available so as to guard against arbitrary abuses that Magna Carta and its progeny were designed to prevent.

CONCLUSION

More than two decades ago, this Court began the project of "rescu[ing] from obscurity" the Excessive Fines Clause. *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 803 n.2 (1994) (Scalia, J., dissenting). That project remains ongoing.[29] As this Court continues its work, the unique history of the Excessive Fines Clause may represent one source of guidance.

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[29] For example, some courts have subjected forfeitures of homes and vehicles to particularly searching constitutional review because "in our society, a home and a vehicle are often essential to one's life and livelihood." *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 639 Pa. 239, 279, 160 A.3d 153, 177 (2017); see *Bajakajian*, 524 U.S. at 340 n.15 (reserving the question whether "wealth or income are relevant to the proportionality determination").

APPENDIX—*Amici Curiae*[30]

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[30] Parts of this brief have been drawn from Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277 (2014), and Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833 (2013).