No. 98824-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

STEVEN G. LONG,

Petitioner.

BRIEF OF AMICI CURIAE INSTITUTE FOR JUSTICE, FINES AND FEES JUSTICE CENTER, SOUTHERN POVERTY LAW CENTER, OREGON LAW CENTER, EQUAL JUSTICE UNDER LAW, POLICY ADVOCACY CLINIC, AND MACARTHUR JUSTICE CENTER IN SUPPORT OF PETITIONER

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I. INTRODUCTION

In *Timbs v. Indiana*, __ U.S. __, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019), the U.S. Supreme Court held that the Excessive Fines Clause of the Eighth Amendment applies to state and local governments. The Court of Appeals below concluded that the city of Seattle (the "City") did not violate the Clause when it imposed impound costs of $557.12 against Steven Long, an impoverished and homeless individual. *City of Seattle v. Long*, 13 Wn. App. 2d 709, 731, 467 P.3d 979 (2020). In deciding that this penalty was not excessive, the court considered only two factors: (i) did the amount reflect the costs of impounding the vehicle, and (ii) did the legislature authorize this penalty. That test effectively removes the judiciary from the decision of whether a fine is excessive, however, leaving defendants like Mr. Long at the mercy of the political branches and, in this case, a private company. Without judicial supervision of fines, Washingtonians are vulnerable to governmental efforts to raise revenue through financial penalties. Such "policing for profit" causes devastating harm to people of limited financial means and creates significant tensions between police and communities.

This Court should therefore reverse the Court of Appeals and reject the erroneous and cramped test it adopted. Instead, this Court should apply the test articulated by the Indiana Supreme Court on remand in *Timbs*

because it is a clear and comprehensive standard consistent with case law and the history of the Clause. Under this standard, the court considering whether a fine is excessive examines (i) the nexus between the property and the offense, (ii) the culpability of the defendant, (iii) the severity of the offense, and (iv) the harshness of the sanction under the defendant's circumstances.

After applying these considerations to Mr. Long's case, this Court should conclude that the impound fee is unconstitutionally excessive.

II. IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Institute for Justice, the Fines and Fees Justice Center, Southern Poverty Law Center, Oregon Law Center, Equal Justice Under Law, the Policy Advocacy Clinic, and the MacArthur Justice Center. Each signatory works extensively in criminal and constitutional law. Many have significant expertise litigating cases involving punitive financial penalties, including excessive fines cases. A full description of the identity and interests of amici is attached as Attachment A to their accompanying Motion for Leave to File Amici Curiae Brief in Support of Petitioner.

III. STATEMENT OF THE CASE

Amici adopt the Statement in Petitioner's Supplemental Brief.

IV. ARGUMENT

The first part of this brief argues that this Court should reject the test for excessiveness used by the Court of Appeals. The second part urges this Court to adopt a test for excessiveness that requires Washington courts to consider all circumstances of the specific offense and the individual offender, including the effect the fine will have on the offender's financial status. The brief concludes by applying these factors to Mr. Long's case and arguing that the City's penalty[1] here violates the Excessive Fines Clause.

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[1] The Excessive Fines Clause applies here because the impound fee is at least partially punitive. *See Timbs*, 139 S. Ct. at 689 (penalties that "are at least partially punitive" fall under the Excessive Fines Clause). As Mr. Long points out, the ordinance establishing that "vehicles in violation of this section" are subject to impound "in addition to any *other penalty* provided for by law," SMC 11.72.440(E) (emphasis added). Supp. Br. Pet'r & Cross-Resp. 7 n.17. A "penalty" is a punishment. *Penalty*, Black's Law Dictionary (10th ed. 2014) (a "penalty" is a "[p]unishment imposed on a wrongdoer, usu[ally] in the form of imprisonment or fine"). The Municipal Court concluded that the Excessive Fines Clause applied here based on the language of the impound ordinance. Order Def. Mot. Summ. J. at 12 (concluding that "[a] plain reading of the language of SMC 11.772.440(E) supports Mr. Long's argument that impound is, at least in part, a penalty."). After examining that language, the Superior Court arrived at the same conclusion. Transcript of Court's Ruling at 16, *City of Seattle v. Long* (No. 17-2-15099-1 SEA) ("So there's no question at all here that what happened to Mr. Long's vehicle was intended to and did operate as a penalty."). The Court of Appeals assumed, without deciding, that the impound fee the City charged to Mr. Long was a penalty to which the Excessive Fines Clause applied. *Long*, 13 Wn. App. 2d at 715. The City nonetheless argues here that the fee was not a punishment at all, but a purely remedial charge that recoups the amount the towing company charged to the City. *See* Supp. Br. City Seattle ("City's Supp. Br.") 11. While the ordinance may recover costs associated with impound, a "penalty," even when partially remedial, is covered by the Eighth Amendment. *See Discount Inn, Inc. v. City of Chicago*, 72 F. Supp. 3d 930, 934 (N.D. Ill. 2014) (rejecting Chicago's argument that a fine was purely remedial because, among other things, the ordinance referred to the charge as a "penalty"), *aff'd*, 803 F.3d 317 (7th Cir. 2015).

A. This Court Should Reject the Standard Used by the Court of Appeals Because It Allows the Legislature and Executive to Define Their Constitutional Boundaries and Removes the Judiciary from the Determination of When a Fine Is Excessive.

i. The Court of Appeals' Approach Gives the Political Branches the Power to Define Excessive Fines.

The Excessive Fines Clause limits the power of the government to impose economic punishments. *Timbs*, 139 S. Ct. at 689. The Court of Appeals correctly recognized that the standard for excessiveness ultimately is one of proportionality. *Long*, 13 Wn. App. 2d at 730. The court's interpretation of proportionality, however, was both incorrect and limited. Where the court below erred was in reducing this inquiry to two questions: (i) did the penalty reflect the cost of enforcement, and (ii) did the legislature approve of the penalty? *Id*. at 715 (the impound costs "are not excessive because they directly and proportionately relate to the offense of illegal parking and are the exact penalties the Seattle City Council authorized"). [2]

The court's approach conflicts with a fundamental principle of American jurisprudence. Over 200 years ago, the U.S. Supreme Court

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[2] The Court of Appeals classified the amount of the impound fee as "within the range prescribed by the legislative body." *Long*, 13 Wn. App. at 731. The legislature did not set the amount of the impound fee here, however. Instead, the amount of the impound fee resulted from a contract negotiated by the Seattle Police Department and the private towing company. *See* CP 883-84; Supp. Br. Pet. 8-9. For the purpose of this brief and the analysis of the Court of Appeals' decision, Amici will nonetheless treat the impound fee as if it were set by the Seattle City Council because that is what the court below did.

established the doctrine of judicial review, holding that legislative and executive actions must conform to the Constitution and that the courts are the ultimate arbiters of whether these branches have complied with constitutional mandates. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). Caselaw dealing with excessive fines reflect this principle. The courts have therefore held that the fact that a legislative body may have approved a penalty does not, on its own, make the fine constitutional. "It cannot be denied that a fine imposed by a court upon a person may, upon the facts and circumstances of a particular case, be excessive though within the maximum." *State v. Taylor*, 70 S.W.3d 717-22, 721 (Tenn. 2002) (quoting *Frese v. State*, 23 Fla. 267, 272, 2 So. 1 (1887)). If the legislature's imprimatur alone were determinative, the Excessive Fines Clause would largely be meaningless—it would only exist for those rare instances when the fine imposed exceeds the amount authorized by the legislature.

Similarly, the fact that the amount may reflect the cost of enforcement also does not automatically insulate a financial imposition from a challenge under the Excessive Fines Clause. Thus, this Court has specifically held that the cost of enforcement alone is insufficient to determine whether a penalty is excessive. *State v. Clark*, 124 Wn.2d 90, 104, 875 P.2d 613 (1994) ("The rough equivalence of the value of the property forfeited and the amount spent on prosecution may not always

insulate a forfeiture from a finding that the forfeiture is 'excessive.'") *Overruled on other grounds by State v. Catlett*, 133 Wn. 2d 955, 945 P.2d 700 (1997).

ii. The Court of Appeals' Standard Eliminates the Judiciary from the Determination of Whether a Penalty is Excessive.

Because the Court of Appeals' approach places the determination of proportionality in the hands of the political branches (and, in this case, a private towing company), it also necessarily removes the judiciary from the determination of whether a fine is excessive. This judicial abdication leaves defendants at the mercy of the political branches and, in this case, the financial determinations of a private, for-profit towing company. "If the Court defers to Congress for the decision of what is proportional . . ., the Court may be failing to perform its constitutional duty, offending separation of powers principles in its failure to check congressional power." David Pimental, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L. & Pol'y Rev. 541, 561 (2017). Should the Court of Appeals' approach prevail, the government—and any private companies with whom it contracts—would be able to impoverish individuals with minimal, if any, judicial oversight. Under the Eighth Amendment, however, the government "cannot override the constitutional requirement of proportionality review."

See United States v. Bajakajian, 524 U.S. 321, 339 n.14, 118 S.Ct. 2028, 141 L. Ed. 2d (1998).

Judicial oversight of financial punishments is essential for a free country. *See Timbs*, 139 S. Ct. at 689 ("For good reason, the protection against excessive fines has been a constant shield through Anglo-American history: Exorbitant tolls undermine other constitutional liberties."). At this point in the nation's history, judicial oversight has become particularly vital to the liberty and financial security of a vast number of Americans. Quite simply, fines have become a key component of municipal budgets across the country, including the budgets of many Washington cities. *See* Mike Maciag, *Addicted to Fines: A Special Report*, Governing (Aug. 21, 2019), https://governing.com/archive/fines-fee-revenues-special-report.html. The imposition of a fine beyond the defendant's ability to pay often leads to compounding fines and jail time, creating a form of "perpetual punishment" that traps people in an endless cycle of poverty and isolates them from much of modern life. Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 2 (2016). Even when defendants can pay, they are often subject to court monitoring until their fines are paid in full, which for some can be decades, leaving those of us who can least afford it trapped in everlasting entanglement with the criminal justice system. *Id*. at 16.

The temptation to replenish government treasuries emptied by the costs associated with COVID-19 and civil unrest will almost certainly exacerbate these issues. The use of fines, fees, and forfeitures to raise revenue occurs because it is perceived to be more politically feasible to levy fees on those stuck in the criminal justice system than to raise taxes more broadly. As a leading scholar on the Excessive Fines Clause has noted: "[M]any lawmakers use economic sanctions in order to avoid increasing taxes while maintaining government services, with some lawmakers even including increases in ticketing in projected budgets." Beth Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 22 (2018) (footnotes omitted). *See also Timbs*, 139 S. Ct. at 689 ("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.") (quoting Br. Am. Civ. Liberties Union et al. as *Amici Curiae* at 7, *Timbs*, 139 S. Ct. at 689 (No. 17-1091)). With Americans facing simultaneous, severe, and unprecedented challenges to public health, political stability, fiscal solvency, and economic growth, those trapped in the criminal and civil justice system will begin to look more and more like attractive sources of revenue to cash-strapped state and local governments.

The result of that approach has already been felt from Ferguson, Missouri to the streets of Seattle this previous summer. Permitting the government to impose grossly excessive fines with little to no judicial oversight will exacerbate the distrust and enmity between communities and the police, as well as the courts. The need for judicial enforcement of constitutional standards has become more than a legal or theoretical concern—it has become a societal imperative. The Excessive Fines Clause cannot meaningfully protect Washingtonians from abuse if the determining factors are set by those responsible for the abuse. Under our Constitution, the City cannot fine individuals like Mr. Long a ruinous amount and have the courts uphold that fine simply because the Seattle City Council authorized it and the amount reflects how much the towing company billed the City. The Constitution demands that "excessive fines" "shall not be . . . imposed," and it is for the courts, not the legislature, not the executive, and certainly not a private company, to determine whether a particular penalty violates that mandate.

B. In Determining Proportionality Under the Excessive Fines Clause, Courts Must Assess Several Individualized Factors.

The previous section demonstrated that this Court should not use the Court of Appeals' test in determining excessiveness. This section discusses

what factors this Court, and other Washington courts, should use in determining whether a fine is unconstitutionally excessive.

This Court has answered that question to some extent in its decision in *State v. Grocery Manufacturers Ass'n*, 195 Wn.2d 442, 476, 461 P.3d 334 (2020). There, this Court relied upon *Bajakajian*, 524 U.S. at 337-40, and remanded a penalty to the Court of Appeals to consider whether it was excessive by looking at four factors: (i) the nature and extent of the crime, (ii) whether the violation was related to other illegal activities, (iii) the other penalties that may be imposed for the violation, and (iv) the extent of the harm caused.

Bajakajian held that fines cannot be disproportionate but declined to list all the factors that may be relevant to that determination. The factors it did list, while important, are incomplete and sometimes difficult to apply. Nicolas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 845-46 (2013). As a result, "[t]his lack of guidance has created somewhat of a mess." Daniel S. Harawa, *How Much is Too Much? A Test to Protect Against Excessive Fines*, 81 Ohio St. L.J. 65, 85 (2020). Left without concrete guidance, other courts have stepped in to articulate real-world, experiential standards for determining excessiveness.

In particular, the Indiana Supreme Court, on remand of the *Timbs* case, has articulated standards for excessiveness that overlap somewhat with the *Bajakajian* standards, but provide more explicit guidelines regarding how to determine if a penalty is grossly disproportionate. *See State v. Timbs*, 134 N.E.3d 12, 36 (Ind. 2019) ("*Timbs II*"). *See also Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 188 (Pa. 2017) (adopting a similar approach). Under the test articulated in *Timbs II*, courts should consider (i) the nexus between the property[3] and the offense, (ii) the culpability of the defendant, (iii) the severity of the offense, and (iv) the harshness of the sanction under the totality of the circumstances.

The Indiana Supreme Court did not simply list these factors. It also provided thorough discussions of what considerations go into them. For the harshness of the punishment, the court held that courts should consider:

- The extent to which the penalty would remedy the harm caused;
- If property is involved in the penalty, the property's role in the underlying offense and whether it is used in other activities, criminal or lawful;

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[3] This factor, of course, would not be considered in the case of a purely monetary fine unrelated to specific property. While the impound fee at issue in this case is purely monetary, it is related to specific property related to the offense. That makes this case far more like a forfeiture than a case dealing with a purely monetary sanction.

- The property's market value;
- Other sanctions imposed on the defendant;
- The effect the penalty will have on the defendant.

Timbs II, 134 N.E.3d at 37.

The effect the penalty will have on the defendant merits more discussion here given the City's argument that "a court need not examine individual financial circumstances to determine whether a fine is excessive." City's Supp. Br. 15. The court in *Timbs II* rejected a similar argument and held that "the owner's economic means—relative to the property's value—is an appropriate consideration for determining [the punishment's] magnitude. To hold the opposite 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." *Timbs II*, 134 N.E.3d at 36. This conclusion was not a modern invention, but a recognition of an apprehension dating back centuries. "[T]he historical roots of the Excessive Fines Clause reveal concern for the economic effects a fine would have on the punished individual. Magna Carta—from which the Clause derives—specifically contemplated an economic sanction's effect on the wrongdoer, requiring 'that amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood.'" *Id*. at 37 (quoting *Bajakajian*, 524

U.S. at 335). The Indiana court is not the only state high court to so hold post-*Timbs*. *See Colo. Dep't of Labor & Empl. v. Dami Hosp., LLC*, 442 P.3d 94, 102 (Colo. 2019) ("[C]ourts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment.").

For the severity of the offense, the Indiana court held that the courts should consider:

- The seriousness of the statutory offense, considering statutory penalties;
- The seriousness of the specific crime committed compared to other variants of the offense, considering any sentences imposed;
- The harm caused by the crime committed; and
- The relationship of the offense to other criminal activity.

Timbs II, 134 N.E.3d at 37.

Finally, for the culpability of the defendant, the Indiana court held that courts should consider:

- The defendant's blameworthiness; and
- Where the defendant falls on the spectrum of culpability from being innocent of the criminal use of the property to willfully and repeatedly using it for criminal purposes.

Id. at 37-38.

Timbs II represents the most comprehensive and recent discussion of what constitutes an "excessive fine." Nonetheless, the dissent in that case argued that this methodology was still too subjective and left too much discretion to the courts. *Timbs II*, 134 N.E.3d at 40-41 (Slaughter, J., dissenting). Amici anticipate that the City will make similar arguments here. This Court should reject them. The Excessive Fines Clause, as applied by the Indiana Supreme Court, places the determination of whether a penalty is excessive squarely on judges trained in law and capable of weighing competing legal and factual considerations—that is, it requires judges to judge and not simply defer, as the Court of Appeals did here, to decisions made by the legislature, the executive, or a private towing company. If this methodology seems subjective, it is because it is supposed to be: The historical and jurisprudential development of the prohibition on excessive fines mandates the consideration of the individual circumstances of the person whom society is punishing. *See 1997 Chevrolet*, 160 A.3d at 188 (holding that the Excessive Fines Clause requires both objective and subjective considerations).

The Indiana Supreme Court suggests that courts determine what "excessive fines" actually are by using a series of questions that determine the distinction between a fine that is acceptably punitive and one that is

constitutionally excessive. This is a workable approach consistent with the history and case law interpreting "excessive fines." This Court should adopt it for consideration of Mr. Long's case.

C. The City's Impound Fee Was Unconstitutionally Excessive.

Applying these considerations to Mr. Long's case demonstrates that the City's financial penalty was unconstitutionally excessive. None of the factors used by the Indiana Supreme Court in *Timbs II* militates in favor of a finding that the City's penalty comports with the Constitution.

Nexus Between the Property and the Offense. It is uncontroverted that Mr. Long used the truck the City impounded to violate the City's 72-hour rule. However, Mr. Long was not using his truck to disrupt traffic or diminish the amount of available parking. He was using it as a place to live. He was also not deliberately parking the truck for more than 72 hours. His truck was immobile because it did not work and he could not afford to fix it. The truck was only the instrumentality of a crime because he literally could not do anything else with it.

Mr. Long's Culpability. Mr. Long comes very close to being completely blameless here. He is indigent and needed a place to shelter from Seattle's miserable weather, as well as having a place to keep his belongings. He did not choose to lose his job, become homeless, live in his truck, or have his truck stop working. He lived in an immobile truck on City

property because he was too poor to obtain housing. He did not use his truck for other crimes nor did he devote himself to other illegal activity. His "crime" (actually, a civil offense) was practically one of necessity.

The Harshness of the Punishment. The City's penalty here is particularly harmful to Mr. Long, a destitute individual living in his truck. For an indigent individual like Mr. Long, a $50-per-month payment can mean the difference between having enough food to eat or being able to obtain needed medication. For someone with nothing, a $557 penalty might as well be a $557,000 penalty—he can pay neither amount. If the purpose of a prohibition against excessive fines is to prevent a defendant from being "pushed absolutely to the wall," William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 287 (2d ed. 1914), then it is difficult to think of a more fitting case for it to be deployed than this one.

The Severity of the Offense. Mr. Long's offense harmed no one. In fact, he tried to minimize incidental harms to the community his immobile truck might cause by parking it on a lot hidden from the street where other homeless individuals lived. *Long*, 13 Wn. App. 2d at 717. Mr. Long's offense was not related to other criminal activity—indeed, the police became aware of his vehicle not because of something he had done, but because they were investigating an unrelated crime. The maximum fine for

parking in one place more than 72 hours is $44, SMC 11.31.121, which suggests that this offense is minor and that an additional penalty of $557 on top of the fine is so punitive that it bears "no relationship to the gravity of the offense it is designed to punish." *Bajakajian*, 524 U.S. at 334.

On the other side of the ledger from these considerations is the fact that the City imposed this penalty to punish Mr. Long and recoup its payment to the company that towed Mr. Long's truck. The City's desire for revenue does not outweigh the devastating harm its penalty would cause to Mr. Long, however. Put simply, the harshness of the penalty overwhelms all other considerations here and is largely, if not entirely, dispositive on its own.

Under a full consideration of the facts and circumstances of this case, and the application of the correct legal factors, the City's impound fee was grossly disproportionate to any harm Mr. Long may have caused by committing the "crime" of being so poor that he had to make an immobile truck his home.

V. CONCLUSION

For these reasons, and the reasons discussed in Mr. Long's briefing, this Court should reverse the decision of the Court of Appeals and conclude that the City's impound fee here was unconstitutionally excessive.

Dated: February 4, 2021

Respectfully Submitted,

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