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MEMORANDUM

Date: February 23, 2022

To: City Commission

From: Van D. Fischer, Esq., on behalf of Robert Janicki

Re: 1205 11th Street Lien Mitigation

BACKGROUND

This memorandum is supplemental to the lien mitigation request submitted on behalf of my client, Robert Janicki. The alleged amount of the code compliance lien is $585,250.00. My client offered $10,000.00 to settle the lien which is reasonable given the circumstances.

This matter began with the NOV (code case 18-00280) dated March 16, 2018, and an amended NOV dated March 21, 2018. A Notice of Hearing dated May 16, 2018, set the initial hearing. (These are included in the Agenda item documents.) As part of the "Flood Hazard Construction" allegation the City claimed that the tiki hut and shed had been converted to living space without a permit and were unrecognized residential units. My client retained Trepanier & Associates to apply for a lawful unit determination (LUD) which was successful. During the LUD application period all construction stopped as required by the NOV. The LUD application period lasted approximately one year and the code case was stayed pending the LUD application outcome.

Given the successful outcome of the LUD application, my client knew what permits would be needed for compliance. On May 8, 2019, my client submitted permit BLD2019-1675 to address the plumbing violation, and was diligently working on preparing other applications which addressed the violations. The other permits were submitted between May 31, 2019 and June 5, 2019. See table below for the timeline of events.

Date	Action	Document
09/13/06	ATF Variance Granted for TIKI	Res. No. 06-366
05/11/07	Construction Completed for TIKI	Bldg Permit No. 07-1374
10/20/17	Mr. Janicki purchased property	Warranty Deed
05/16/18	NOV – work w/o benefit of permit; Unrecognized dwelling unit (TIKI and acc. Structure)	Notice of Violation
06/28/18	Homeowner files the first of the permits to resolve the code case	BLD 2018-2872
07/27/18	Homeowner retains Trepanier & Associates to help resolve the code case	--
08/22/18	LUD application filed for TIKI	LUD app dated 08/22/18
03/15/19	City approves LUD application recognizing TIKI as a dwelling unit	LUD Determination
04/30/19	City issues Back Fees for TIKI	--
05/01/19	Homeowner pays Back Fees	--
05/08/19	Homeowner begins filing permit apps to resolve the remaining code violations	BLD2019-1675
05/29/19	Outgoing Chief Building Official testifies to Special Master TIKI cannot receive a C.O.	https://keywestcity.granicus.com/MediaPlayer.php?view_id=1&clip_id=993
	Special Master determines the TIKI cannot be C.O.'d based on outgoing Building Official's testimony. Finds the property in violation and starts fines running until permits are obtained.	
	City Code Attorney states the fines can be mitigated if brought into compliance	
05/31/19	Homeowner recommences filing permit apps to resolve the remaining code violations	BLD2019-1953, BLD2019-1971 BLD2019-2027, BLD2019-2031 BLD2019-2037, BLD2019-2038 BLD2021-0550, BLD2021-0567 BLD2021-0877, BLD2019-4586
December 2020	Incoming Chief Building Official issues permits for TIKI	--
01/04/21	Code Case Resolved – Fines Stop	Email dated 08/03/21 from Jim Young
07/19/21	All follow-up construction work is final'd and C.O.'d	BLD2019-1675, BLD2019-4586 BLD2020-0977, BLD2021-0550 BLD2021-0567, BLD2021-0877

On May 29, 2019, the code compliance hearing occurred. The Special Magistrate found that there was a failure of compliance for the four counts and ordered fines to start running as of May 30, 2019. It is important to note that both the Special Magistrate and

the Assistant City Attorney[1] expressly stated at the hearing that mitigation of the fines was appropriate once compliance was achieved. It is equally important to note that the City did not believe that permits were possible but would consider whatever applications were submitted. Given the testimony by the Assistant City Attorney and the Special Magistrate regarding mitigation of fine, my client proceeded with the permitting process to achieve compliance. A summary of the hearing available on the City website is attached as Exhibit A.

I. The four counts are effectively a single violation

The four counts of the NOV all relate to the same project. Count 1 is effectively the only actual violation. Namely, work without a building permit. To correct this violation, building permits needed to be obtained, which is exactly what my client did. Counts 2, 3 and 4 are directly related to Count 1 because in order to get a permit for the tiki renovation it necessarily required permits for electric, plumbing, and the design needed to comply with the flood hazard construction requirements. My client was actively and diligently working to get the tiki renovations permitted which included all four counts simultaneously. As such, the alleged four counts of violation were effectively a singular violation given that all four needed to be permitted simultaneous. Therefore, it was unreasonable and unfair that the lien accrued at a rate four-times higher than what was necessary.

II. Engineered drawings took a long time and the City permit review took over a year to complete

My client hired Rick Milelli to do the engineering work for the tiki renovation permit. Unfortunately, the initial plans took longer than anticipated to get completed. The tiki renovation permit application was submitted on December 26, 2019 (permit BLD2019-4586). The City did not approve the permit application until December 11, 2020, **nearly a year later** and finally issued the permit on January 4, 2021. This is the date on which the fines stopped.

[1] Ron Ramsingh, Esquire

The City's permit review took a year to complete for a variety of reasons, none of which my client should be penalized for. As the timeline shows, the permit review period occurred in 2020 which was at the height of the COVID-19 pandemic. As such, the City and businesses were shut down for several months and/or operating at a significantly reduced capacity. The result was that permit review took longer and it took longer to respond to addition information requests.

As mentioned, the Chief Building Official at the time was of the opinion that the tiki could not be renovated and that he did not intend to issue a certificate of occupancy (see Exhibit A). Likewise, the flood hazard review failed the initial drawings claiming that the plans did not comply with flood requirements. It is important to note that this turned out to false and that the original drawings actually met flood requirements. Regardless, this flood review failure required that the engineer redo the drawings which ended up taking several months to complete because of COVID and the workload of the engineer.

During the permitting process, the original contractor, Shaw Construction, quit the job. This was due in large part to the permitting delays. Fortunately, my client was able to hire Southernmost Contracting to take over. Many contractors were not taking on new jobs at the time due to COVID and other reasons. This contractor change caused some delay.

Before the permit was issued, Ron Wampler resigned as the Chief Building Official. As a result, the acting and incoming chief building officials reviewed the permit application objectively and issued the permit on January 4, 2021. The daily fines stopped, and the City closed the permit on July 19, 2021.

III. Mitigation of the lien to $10,000.00 is warranted

My client actively and diligently worked to achieve compliance. He always intended to bring the violations into compliance as evidenced by the timeline. Unfortunately, several things beyond the

control of my client resulted in an unusually long delay in obtaining a permit. If my client could have moved things along faster, he would have done so. However, COVID slowed everything down. Regardless, it must be recognized that my client successfully achieved compliance even though the City and Special Magistrate were skeptical. One should not be punished for perseverance and success.

As described, the four counts of violation all related to the same thing and were effectively a single violation. As such, the lien should have only accrued at a rate of $250.00 per day and not $1,000.00 per day. Even at $250.00, the resultant lien about of $146,250.00 is excessive and not commensurate with the violation and circumstances. Further, it was my client's understanding that any fines or lien would be mitigated at the end as expressly stated by both the Assistant City Attorney and Special Magistrate at the May 2019 code hearing.

Article I, Section 17 of the Florida Constitution forbids excessive fines, and that this tracks the Eighth Amendment of the United States Constitution which prohibits the imposition of excessive fines. See Tejada v. 2015 Cadillac Escalade VIN No: 1GYS4BKJ5FR157228, 267 So.3d 1032, 1037 (Fla. 4th DCA 2019)(holding "the Escalde's forfeiture in this case may be grossly disproportionate to the gravity of the two misdemeanor offenses…") Recently, the United States Supreme Court held that the Eighth Amendment's excessive fines clause is applicable to states under the Fourteenth Amendment. See Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)("…the protection against excessive fines guards against abuses of government's punitive…enforcement authority. This safeguard is fundamental to our scheme of ordered liberty with deep roots in our history and tradition. The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.")(citation omitted).

The important outcome is that my client brought his property into compliance. It took longer than expected but it was not because of a lack of diligent effort. All violations have been successfully resolved and the alleged fine of $585,000.00 is objectively excessive given the circumstances. Further, a fine of $146,250.00 is equally

excessive given that the majority of the delay in achieving compliance was not the fault of my client. It took time, but the desired result of the City was achieved—full compliance with the code. There no need to excessively punish my client with an exorbitant fine. For the reasons stated, $10,000.00 is fair and reasonable to settle this matter.

Exhibit A

Home | Setup an Account | Log In Contractor THE WILSTEN GROUP INC Password LOGIN REMEMBER ME Forgot Password

Permits
Permit Application
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Search Issues
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Case Search

Search By: Case # Begins With 18-00280 SEARCH

Click here for search examples

Search Results

Search Results

Case #
18-00280

Case #18-00280

› Site Info Contacts Fees

Type	Action Date	Staff Name
Certified Mail…	3/16/2018	BB
DOOR HAN…	3/2/2018	BB
Stop Work O…	3/7/2018	BB
Notice of Co…	3/16/2018	BB
Certificate of …	8/1/2018	BB
Notice of He…	5/16/2018	BB
ADMINISTR…	10/31/2018	Mary Anc
ADMINISTR…	11/28/2018	Mary Anc
ADMINISTR…	12/19/2018	Mary Anc
ADMINISTR…	2/27/2019	Mary Anc
ADMINISTR…	3/27/2019	Mary Anc
ADMINISTR…	4/24/2019	Mary Anc
ADMINISTR…	5/29/2019	Mary Anc

Chronology - ADMINISTRATIVE HEARING

Action Type: ADMINISTRATIVE HEARING
Action Date: 5/29/2019
Staff: Mary Anderson
Description:

6/3/2019 11:30:05 AM
This case went before the Special Magistrate on 29 May 2019: Lori Thompson from Trepanier and Assoc. and Robert Janicki attended this hearing. Officer Bonnita Badgett agreed for Ms. Thompson to speak. Mr. Thompson gave a timeline of all that was done. The Tiki hut was recognized as a second unit and the impact fees were paid and updated the BTR. Ms. Thompson feels that count 1 thru 3 are in compliance. In regards to count 4, they felt that the LUD application would solve many of their issues and there was a resolution in 2006 by Ms. Stone that

CLOSE

Exhibit A

6/3/2019 11:30:05 AM This case went before the Special Magistrate on 29 May 2019: Lori Thompson from Trepanier and Assoc. and Robert Janicki attended this hearing. Officer Bonnita Badgett agreed for Ms. Thompson to speak. Mr. Thompson gave a timeline of all that was done. The Tiki hut was recognized as a second unit and the impact fees were paid and updated the BTR. Ms. Thompson feels that count 1 thru 3 are in compliance. In regards to count 4, they felt that the LUD application would solve many of their issues and there was a resolution in 2006 by Ms. Stone that had the two structures legally recognized. Ms. Thompson stated that they are in conflict with the Building Dept. about compliance for these structures. They believe they are moving forward and ask for 60 days continuance to see if the issues can be resolved. Their first priority is to save this building but if they can't their only alternative is to demolish the tiki hut. The shed has been recognized as an accessory structure and not a third unit on the property and as such they have withdrew the application for this unit. Officer Badgett gave testimony stated that Mr. Wampler, Building Officer, and Scott Fraser, FEMA Cordinator, are attending this hearing. Ms. Badgett reiterated what Ms. Thompson had previously stated. Director Young asked that the CBO, Ron Wampler, speak about the life safety issues. Mr. Wampler stated that the first statement was in error about the 06-366 zoning hearing, all that did was allow a variance from the setbacks where the structure was with the condition that permits, verification and approvals be had within one year and that was in 2006. Nothing

has moved forward since then. A tiki hut as per building code is exempt from having building permits that is erected as a simply all wood material shade shelter not intended to be occupied. This is not intended to have electrical, plumbing, mechanical or to be occupied. There should be no foundation and is basically wooden poles stuck in the ground. All the work done to this two story thrashed roof building has been done without building permits. The CBO stated that the structure should be demoed in his opinion. He cannot issue a certificate of occupancy in good faith that this structure is anything comparable to what we have in the city that is habitable dwelling unit. There was no record of any permit for this structure. The only thing we allow in the city is open structures that are tiki huts. The Special Magistrate asked how they will be able to come into compliance if you can't get a CO. Ms. Thompson is getting an Engineer to certify the structural integrity; and the plumbing, electrical and mechanical permits have been applied for. We do have someone coming tomorrow to look at it. They understand the thatched roof is an issue and the owner would be amenable to replace with a compliant roof. The Special Magistrate stated he felt they were moving backwards by removing the roof. The CBO stated those posts will rot off at the ground. The Special Magistrate doesn't see how giving an extension that this will ever be able to come into compliance. Ms. Thompson stated that the resolution from 2006 as far as they believe should have rectified the issue about the tiki hut as all was done that needed to be done as specified in the resolution. The only thing required at that time to

Exhibit A

legalize the tiki hut was a breezeway from the house to the hut which was done and finalized by the City. The resolution was for habitual space. The CBO would like to see it demolished. Ron Ramsingh stated that from a Code perspective, there should be a starting of the fines and all of the issues can come on in the back end for mitigation if and when they come into compliance. Ms. Thompson was confused about the compliance of counts 1 and 2 believing the permits have been obtained and finaled. Officer Badgett gave testimony about the permits stating the permits were for the main house only. There is an electrical permit for the tiki hut but that has been stopped for more information needed so it has not been issued. There are no inspection approvals for the tiki hut. All counts are for the main house, tiki hut and shed. Mr. Janicki stated he hired contractors to take care of all these issues and his belief was that they know what they are doing as he gave them a copy of the violations. He believed he did all that he could to come into compliance. The Special Magistrate stated that the proper inspections have not been done. The Special Magistrate finds that there is a failure of compliance for Counts 1 - 4 and the fines will start running as of 30 May 2019. The Special Magistrate stated there are avenues for mitigation

267 So.3d 1032

Maria Serret TEJADA, Appellant,
v.
Forfeiture of 2015 CADILLAC ESCALADE VIN NO: 1GYS4BKJ5FR157228, Appellee.

No. 4D18-1474

District Court of Appeal of Florida, Fourth District.

[April 3, 2019]

Fred Haddad of Fred Haddad, P.A., Fort Lauderdale, for appellant.

Gregg Rossman and Alexander Fischer of Rossman Legal, Davie, for appellee.

May, J.

The defendant appeals a final summary judgment forfeiting an Escalade. She argues the trial court erred in entering summary judgment because: (1) there were genuine issues of material fact precluding summary judgment; (2) forfeiture actions may only be decided by a jury; (3) the vehicle was not "contraband;" and (4) the forfeiture violates the Eighth Amendment. We find no merit in the first three issues, but reverse on the fourth issue based on a recent U.S. Supreme Court decision.[1]

The Town of Davie ("Town") petitioned for forfeiture of the defendant's Escalade after she pleaded to two misdemeanors involving the registration of the vehicle in a false name. The defendant's family had contacted Massachusetts law enforcement and reported her missing. A national bulletin listed the defendant and her son as

[267 So.3d 1034]

missing. Information through homeland security indicated that the defendant might be in Davie, Florida.

Law enforcement conducted surveillance to find the defendant. They found her at her son's school. They observed her park and exit a 2015 Escalade.

When law enforcement confronted her, they asked her to identify herself, at which point she gave the false name of "Amarilys." She then gave them her real name. Law enforcement verified she was not missing or endangered and notified Massachusetts law enforcement.

They ran a teletype check of the Escalade, which listed Amarilys Ambert as the registered owner. They asked the defendant for the registered owner's contact information; she refused to provide it. Being unable to locate or contact the registered owner, and because the defendant refused to provide her driver's license, law enforcement arrested the defendant and had the Escalade towed.

During the tow inventory of the Escalade, law enforcement found a Florida driver's license on the front seat with the name Amarilys Ambert and the defendant's photo. They also found two debit cards in the name of Amarilys Ambert.

The Town filed an action to forfeit the defendant's Escalade as contraband obtained and used in violation of the Florida Contraband Forfeiture Act. The defendant moved to dismiss the action, alleging the Escalade was not contraband under section 932.701, Florida Statutes (2016). The trial court denied the defendant's motion.

In her deposition, however, the defendant explained that she was given money to purchase the Escalade in New Jersey. When the defendant signed the sales contract, she placed it under the name of Amarilys Ambert Cancel. She also titled the vehicle and applied for a tag under that name. She used the name because she was running away from her family. She had no knowledge of whether a person by that name existed.

The Town moved for summary judgment. During the hearing, the Town argued the defendant used a fictitious name to purchase and title the

Escalade. Titling the vehicle under a false name made the vehicle per se contraband.

The defendant opposed the motion and claimed the Town failed to prove any fraud. She argued a jury should determine whether fraud occurred. She demanded a jury trial. The court granted the Town's motion and entered a final judgment of forfeiture, relying on *City of Sweetwater v. Zaldivar* , 559 So.2d 660 (Fla. 3d DCA 1990).

From this judgment, the defendant now appeals.

The defendant argues that based on the totality of the evidence, the trial court erred in granting the motion for summary judgment because: (1) there were genuine issues of material fact concerning her intent to defraud and whether the inventory search was valid; (2) forfeiture actions may only be decided by a jury; (3) the Escalade was not contraband; and (4) forfeiture of the Escalade was an excessive punishment under the Florida Constitution. The Town responded that summary judgment was properly entered because it established the elements of section 319.33, Florida Statutes (2016) ; there were no material issues of fact; summary judgments are appropriate in forfeiture actions; and the Escalade's forfeiture was not excessive punishment under Article I, § 17 of the Florida Constitution.

We have de novo review. *Dennis v. Kline* , 120 So.3d 11, 20 (Fla. 4th DCA 2013).

[267 So.3d 1035]

The Third District has held that a pleader must allege facts showing the motor vehicle was used in violation of section 319.33 to be subject to forfeiture. *Zaldivar* , 559 So.2d at 661. Intentionally submitting an application with a false name is " 'inherently misleading and injurious, both to the agency responsible for the motor vehicle records, and those who depend on them.' " *Id.* (citation omitted). "Thus, no allegation or proof of intent to defraud is necessary ... in a civil action seeking forfeiture of the vehicle." *Id.* The Third District allowed the forfeiture of a vehicle under section 319.33 because the City alleged ultimate facts showing the defendant used a false name when he applied for title to the car. *Id.* at 662.

Here, the defendant violated section 319.33(1)(e), which provides it is unlawful "[t]o use a false or fictitious name, give a false or fictitious address, or make any false statement in any application or affidavit required under the provisions of this chapter or in a bill of sale or sworn statement of ownership or otherwise commit a fraud in any application." § 319.33(1)(e), Fla. Stat. (2016). "Any motor vehicle used in violation of this section shall constitute contraband which may be seized by a law enforcement agency and shall be subject to forfeiture proceedings." § 319.33(6), Fla. Stat. (2016).

The defendant admitted signing the sales contract under the name of Amarilys Ambert Cancel, which is not her real name. She had the dealership title the vehicle, applied for a tag, and applied for and received a Florida license under the same false name. In short, the Town proved sufficient facts to warrant the forfeiture.

The defendant next argues her answer and memorandum in opposition to the summary judgment motion created genuine issues of material fact for a jury to decide. However, she fails to explain what issues of fact remained. A review of the defendant's answer and affirmative defenses suggests there were issues concerning the Town's alleged violation of the 4th, 5th, 6th, and 14th Amendments of the United States Constitution by searching the Escalade without a warrant.

The Fourth Amendment of the U.S. Constitution generally prohibits warrantless searches. *See* Amend. IV, U.S. Const. An inventory search is an exception to the general rule. *State v. Waller* , 918 So.2d 363, 366 (Fla. 4th DCA 2005).

" 'An inventory search is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a towed car), and to protect

against false claims of loss or damage.' " *Id.* at 367 (citing *Whren v. United States* , 517 U.S. 806, 811 n.1, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)). "Contraband or evidence seized in a valid inventory search is admissible because the procedure is a recognized exception to the warrant requirement." *Rolling v. State* , 695 So.2d 278, 294 (Fla. 1997).

The defendant argues the Town failed to factually refute the constitutional violations raised and failed to establish the defenses are legally insufficient. However, the record shows the Town did refute these claims.

At the hearing, the defendant claimed she was not under arrest; law enforcement did not have a warrant; and they did not have probable cause when the search occurred. The Town responded that the inventory search occurred after law enforcement took the defendant into custody. The Town lawfully took the Escalade because its registered owner could not be found. It conducted an inventory search in good

[267 So.3d 1036]

faith. There was no material fact in dispute about the search.

Next, the defendant argues that issues of forfeiture must be decided by a jury. The defendant is simply wrong. Summary judgment is proper where pleadings, depositions, affidavits and other evidence disclose no issue of material fact. *See Swift v. Century Ins. Co. of New York* , 264 So.2d 88, 90 (Fla. 3d DCA 1972).

The trial court reviewed the pleadings, the defendant's deposition, the affidavits, and the arguments. There were no genuine issues of material fact. The trial court correctly granted the Town's motion for summary judgment.

The defendant next argues the Escalade is not contraband pursuant to section 932.701. She contends because she was not convicted of a felony, the Escalade cannot be contraband under this section. We disagree.

Section 932.701 defines contraband as:

> Any personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

§ 932.701(2)(a) 5., Fla. Stat. (2016). The statute does not require the individual to be convicted of a felony. It merely requires the individual be using the vehicle in the commission of a felony, which is what occurred here.

Here, law enforcement arrested the defendant for "possession of unlawfully issued, stolen, fictitious, blank, forged, counterfeit driver's license." This is a felony under section 322.212, Fla. Stat. (2016). While the State amended the information to allege a misdemeanor charge, that does not eliminate the statute's application for the forfeiture proceeding.

The Escalade was also contraband under section 319.33(1)(e). That section provides it is unlawful "[t]o use a false or fictitious name, give a false or fictitious address, or make any false statement in any application or affidavit required under the provisions of this chapter or in a bill of sale or sworn statement of ownership or otherwise commit a fraud in any application." § 319.33(1)(e), Fla. Stat. (2016). The defendant obtained the Escalade using a false or fictitious name and acquired title of the vehicle with this false name.

The statute further provides "[a]ny motor vehicle used in violation of this section shall constitute contraband which may be seized by a law enforcement agency and shall be subject to forfeiture proceedings pursuant to ss. 932.701 - 932.704." § 319.33(6), Fla. Stat. Even if it could be said that the vehicle did not automatically fall under section 932.701's definition of contraband, it fits within the definition under section 319.33.

And last, the defendant argues the seizure of the Escalade constitutes excessive punishment, prohibited by Article I, § 17 of the Florida Constitution. She explains the forfeiture is excessive punishment because she was convicted of only two misdemeanor charges, thus the punishment was disproportional. The State responds the forfeiture is directly related to the crime and does not constitute excessive punishment. By granting summary judgment, the trial court rejected the defendant's argument sub silencio.

[267 So.3d 1037]

Very recently, the United States Supreme Court has weighed in on the issue. *Timbs v. Indiana* , ––– U.S. ––––, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019). There, the Court held the Fourteenth Amendment's Due Process Clause incorporates the Eighth Amendment's protection against excessive fines. *Id.* at 687. The Court did so in a case very similar to this one where an Indiana resident had his new Land Rover SUV forfeited based on his conviction for dealing in a controlled substance and conspiracy to commit theft. *Id.* at 686.

The Indiana trial court denied the State's request to forfeit the $42,000 vehicle finding the forfeiture to be grossly disproportionate to the gravity of the offenses. *Id.* The intermediate appellate court agreed. *Id.* The Indiana Supreme Court disagreed holding the Eighth Amendment's excessive fines clause was inapplicable to the state's forfeiture. *Id.* The United States Supreme Court reversed. *Id.* at 691.

Similarly, the Escalade's forfeiture in this case may be grossly disproportionate to the gravity of the two misdemeanor offenses to which the defendant pleaded or even the felony charges for which she was arrested. Because the trial court did not have the benefit of *Timbs* when it ruled on the motion for summary judgment, we remand the case to the trial court to determine if the value of the forfeited property is grossly disproportionate to the gravity of the offenses.

Reversed and remanded.

Ciklin and Klingensmith, JJ., concur.

Notes:

[1] The trial court did not have the benefit of the Court's recent decision when it ruled on the motion for summary judgment.

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139 S.Ct. 682
203 L.Ed.2d 11

Tyson TIMBS, Petitioner
v.
INDIANA

No. 17-1091

Supreme Court of the United States.

Argued November 28, 2018
Decided February 20, 2019

Wesley P. Hottot, Seattle, WA, for Petitioner.

Thomas M. Fisher, Solicitor General, for Respondent.

Samuel B. Gedge, Scott G. Bullock, Darpana M. Sheth, Institute for Justice, Arlington, VA, Wesley P. Hottot, Institute for Justice, Seattle, WA, for Petitioners.

Office of the Attorney General, Indianapolis, IN, Curtis T. Hill, Jr., Attorney General, Thomas M. Fisher, Solicitor General, Kian J. Hudson, Deputy Solicitor General, Aaron T. Craft, Julia C. Payne, Deputy Attorneys General, for Respondent.

Justice GINSBURG delivered the opinion of the Court.

[139 S.Ct. 686]

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $ 1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $ 42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $ 42,000, more than four times the maximum $ 10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N.E.3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. We granted certiorari. 585 U.S. ––––, 138 S.Ct. 2650, 201 L.Ed.2d 1049 (2018).

The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in

[139 S.Ct. 687]

[our] history and tradition." *McDonald* v. *Chicago* , 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

I

A

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron ex rel. Tiernan* v. *Mayor of Baltimore* , 7 Pet. 243, 8 L.Ed. 672 (1833). "The constitutional Amendments adopted in the aftermath of the Civil War," however, "fundamentally altered our country's federal system." *McDonald* , 561 U.S., at 754, 130 S.Ct. 3020. With only "a handful" of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. *Id.* , at 764–765, and nn. 12–13, 130 S.Ct. 3020. A Bill of Rights protection is incorporated, we have explained, if it is "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *Id.,* at 767, 130 S.Ct. 3020 (internal quotation marks omitted; emphasis deleted).

Incorporated Bill of Rights guarantees are "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.,* at 765, 130 S.Ct. 3020 (internal quotation marks omitted). Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.[1]

B

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Taken together, these Clauses place "parallel limitations" on "the power of those entrusted with the criminal-law function of government." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.* , 492 U.S. 257, 263, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) (quoting *Ingraham* v. *Wright* , 430 U.S. 651, 664, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)). Directly at issue here is the phrase "nor excessive fines imposed," which "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.' " *United States* v. *Bajakajian* , 524 U.S. 321, 327–328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (quoting *Austin* v. *United States* , 509 U.S. 602, 609–610, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993)). The Fourteenth Amendment, we hold, incorporates this protection.

The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that "[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 ...." § 20, 9 Hen. III, ch. 14, in 1 Eng.

[139 S.Ct. 688]

Stat. at Large 5 (1225).[2] As relevant here, Magna Carta required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." *Browning-Ferris* , 492 U.S., at 271, 109 S.Ct. 2909. See also 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear ...."). But cf. *Bajakajian* , 524 U.S., at 340, n. 15, 118 S.Ct. 2028 (taking no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine).

Despite Magna Carta, imposition of excessive fines persisted. 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. *E.g.* , The Grand Remonstrance ¶¶17, 34 (1641), in The Constitutional Documents of the Puritan Revolution 1625–1660, pp. 210, 212 (S. Gardiner ed., 3d ed. rev. 1906); *Browning-Ferris* , 492 U.S., at 267, 109 S.Ct. 2909. When James II was overthrown in the Glorious Revolution, the attendant English Bill of Rights reaffirmed Magna Carta's guarantee by providing that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689).

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Adoption of the Excessive Fines Clause was in tune not only with English law; the Clause resonated as well with similar colonial-era provisions. See, *e.g.* , Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682), in 5 Federal and State Constitutions 3061 (F. Thorpe ed. 1909) ("[A]ll fines shall be moderate, and saving men's contenements, merchandize, or wainage."). In 1787, the constitutions of eight States—accounting for 70% of the U.S. population—forbade excessive fines. Calabresi, Agudo, & Dore, State Bills of Rights in 1787 and 1791, 85 S. Cal. L. Rev. 1451, 1517 (2012).

An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines. Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008).

Notwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on "vagrancy" and other dubious offenses. See, *e.g.* , Mississippi Vagrant Law, Laws of Miss. § 2 (1865), in 1 W. Fleming, Documentary

[139 S.Ct. 689]

History of Reconstruction 283–285 (1950). When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. *E.g.* , *id.* § 5; see Finkelman, John Bingham and the Background to the Fourteenth Amendment, 36 Akron L. Rev 671, 681–685 (2003) (describing Black Codes' use of fines and other methods to "replicate, as much as possible, a system of involuntary servitude"). Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor. See, *e.g.* , Cong. Globe, 39th Cong., 1st Sess., 443 (1866); *id.,* at 1123–1124.

Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. Brief in Opposition 8–9. Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment. *Id.* , at 9 (citing *Norris* v. *State* , 271 Ind. 568, 576, 394 N.E.2d 144, 150 (1979)).

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago. See *Browning-Ferris* , 492 U.S., at 267, 109 S.Ct. 2909. Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." *Harmelin* v. *Michigan* , 501 U.S. 957, 979, n. 9, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit"). This concern is scarcely hypothetical. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 ("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.").

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald* , 561 U.S., at 767, 130 S.Ct. 3020 (internal quotation marks omitted; emphasis deleted).

II

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil *in rem* forfeitures because, the State says, the Clause's specific application to such forfeitures is neither fundamental nor deeply rooted.

In *Austin* v. *United States* , 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), however, this Court held that civil *in rem* forfeitures fall within the Clause's protection when they are at least partially punitive. *Austin* arose in the federal context. But when a Bill of Rights protection is incorporated, the protection applies "identically to both the Federal Government and the States."

[139 S.Ct. 690]

McDonald , 561 U.S., at 766, n. 14, 130 S.Ct. 3020. Accordingly, to prevail, Indiana must persuade us either to overrule our decision in *Austin* or to hold that, in light of *Austin* , the Excessive Fines Clause is not incorporated because the Clause's application to civil *in rem* forfeitures is neither fundamental nor deeply rooted. The first argument is not properly before us, and the second misapprehends the nature of our incorporation inquiry.

A

In the Indiana Supreme Court, the State argued that forfeiture of Timbs's SUV would not be excessive. See Brief in Opposition 5. It never argued, however, that civil *in rem* forfeitures were categorically beyond the reach of the Excessive Fines Clause. The Indiana Supreme Court, for its part, held that the Clause did not apply to the States at all, and it nowhere addressed the Clause's application to civil *in rem* forfeitures. See 84 N.E.3d 1179. Accordingly, Timbs sought our review of the question "[w]hether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment." Pet. for Cert. i. In opposing review, Indiana attempted to reformulate the question to ask "[w]hether the Eighth Amendment's Excessive Fines Clause restricts States' use of civil asset forfeitures." Brief in Opposition i. And on the merits, Indiana has argued not only that the Clause is not incorporated, but also that *Austin* was wrongly decided. Respondents' "right, in their brief in opposition, to restate the questions presented," however, "does not give them the power to expand [those] questions." *Bray* v. *Alexandria Women's Health Clinic* , 506 U.S. 263, 279, n. 10, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (emphasis deleted). That is particularly the case where, as here, a respondent's reformulation would lead us to address a question neither pressed nor passed upon below. Cf. *Cutter* v. *Wilkinson* , 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) ("[W]e are a court of review, not of first view ...."). We thus decline the State's invitation to reconsider our unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive.

B

As a fallback, Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures. We disagree. In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted.

Indiana's suggestion to the contrary is inconsistent with the approach we have taken in cases concerning novel applications of rights already deemed incorporated. For example, in *Packingham* v. *North Carolina* , 582 U.S. ––––, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017), we held that a North Carolina statute prohibiting registered sex offenders from accessing certain commonplace social media websites violated the First Amendment right to freedom of speech. In reaching this conclusion, we noted that the First Amendment's Free Speech Clause was "applicable to the States under the Due Process Clause of the Fourteenth Amendment." *Id.,* at ––––, 137 S.Ct., at 1733. We did not, however, inquire whether the Free Speech Clause's application specifically to social media websites was fundamental or deeply rooted. See also, *e.g.* , *Riley* v. *California* , 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (holding, without separately considering incorporation, that States' warrantless

[139 S.Ct. 691]

search of digital information stored on cell phones ordinarily violates the Fourth Amendment). Similarly here, regardless of whether application of the Excessive Fines Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.

* * *

For the reasons stated, the judgment of the Indiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice GORSUCH, concurring.

The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. See, *e.g.* , *post* , at 691 – 692 (THOMAS, J., concurring in judgment); *McDonald* v. *Chicago* , 561 U.S. 742, 805–858, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment) (documenting evidence that the "privileges or immunities of citizens of the United States" include, at minimum, the individual rights enumerated in the Bill of Rights); Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St. L.J. 1509 (2007) ; A. Amar, The Bill of Rights: Creation and Reconstruction 163–214 (1998); M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986). But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

Justice THOMAS, concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

I

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." "On its face, this appears to grant ... United States citizens a certain collection of rights—*i.e.* , privileges or immunities—attributable to that status." *McDonald* v. *Chicago*

, 561 U.S. 742, 808, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment). But as I have previously explained, this Court "marginaliz[ed]" the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause "quite narrowly." *Id.* , at 808–809, 130 S.Ct. 3020. Litigants seeking federal protection of substantive rights against the States thus needed "an alternative fount of such rights," and this Court "found one in a

[139 S.Ct. 692]

most curious place," *id.* , at 809, 130 S.Ct. 3020 — the Fourteenth Amendment's Due Process Clause, which prohibits "any State" from "depriv[ing] any person of life, liberty, or property, without due process of law."

Because this Clause speaks only to "process," the Court has "long struggled to define" what substantive rights it protects. *McDonald* , *supra* , at 810, 130 S.Ct. 3020 (opinion of THOMAS, J.). The Court ordinarily says, as it does today, that the Clause protects rights that are "fundamental." *Ante* , at 686 – 687, 687 – 688, 689 – 690, 690 – 691. Sometimes that means rights that are " 'deeply rooted in this Nation's history and tradition.' " *Ante* , at 687 – 688, 690 – 691 (quoting *McDonald* , *supra* , at 767, 130 S.Ct. 3020 (majority opinion)). Other times, when that formulation proves too restrictive, the Court defines the universe of "fundamental" rights so broadly as to border on meaningless. See, *e.g.* , *Obergefell* v. *Hodges* , 576 U.S. ––––, ––––––––, 135 S.Ct. 2584, 2593, 192 L.Ed.2d 609 (2015) ("rights that allow persons, within a lawful realm, to define and express their identity"); *Planned Parenthood of Southeastern Pa.* v. *Casey* , 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"). Because the oxymoronic "substantive" "due process" doctrine has no basis in the Constitution, it is unsurprising that the Court has been unable to adhere to any "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not." *McDonald* , *supra* , at 811, 130 S.Ct. 3020 (opinion of THOMAS, J.). And because the Court's substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions. *E.g.* , *Roe* v. *Wade* , 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) ; *Dred Scott* v. *Sandford* , 19 How. 393, 450, 15 L.Ed. 691 (1857).

The present case illustrates the incongruity of the Court's due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to " 'proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions,' " or that the State failed to provide "some baseline procedures." *Nelson* v. *Colorado* , 581 U.S. ––––, ––––, n. 1, 137 S.Ct. 1249, 1264, n. 1, 197 L.Ed.2d 611 (2017) (THOMAS, J., dissenting). His claim has nothing to do with any "process" "due" him. I therefore decline to apply the "legal fiction" of substantive due process. *McDonald* , 561 U.S., at 811, 130 S.Ct. 3020 (opinion of THOMAS, J.).

II

When the Fourteenth Amendment was ratified, "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' " *Id.* , at 813, 130 S.Ct. 3020. Those "rights" were the "inalienable rights" of citizens that had been "long recognized," and "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights" against interference by the States. *Id.* , at 822, 837, 130 S.Ct. 3020. Many of these rights had been adopted from English law into colonial charters, then state constitutions and bills of rights, and finally the Constitution. "Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in [the Bill of Rights] as new entitlements, but as inalienable rights of all men, given legal

[139 S.Ct. 693]

effect by their codification in the Constitution's text." *Id.* , at 818, 130 S.Ct. 3020.

The question here is whether the Eighth Amendment's prohibition on excessive fines was considered such a right. The historical record overwhelmingly demonstrates that it was.

A

The Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689," *United States* v. *Bajakajian* , 524 U.S. 321, 335, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), which itself formalized a longstanding English prohibition on disproportionate fines. The Charter of Liberties of Henry I, issued in 1101, stated that "[i]f any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, but *according to the measure of the offence so shall he pay* ...." Sources of English Legal and Constitutional History ¶8, p. 50 (M. Evans & R. Jack eds. 1984) (emphasis added). Expanding this principle, Magna Carta required that "amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood," *Bajakajian* , *supra* , at 335, 118 S.Ct. 2028 :

> "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner, a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy." Magna Carta, ch. 20 (1215), in A. Howard, Magna Carta: Text & Commentary 42 (rev. ed. 1998).

Similar clauses levying amercements "only in proportion to the measure of the offense" applied to earls, barons, and clergymen. Chs. 21–22, *ibid.* One historian posits that, due to the prevalence of amercements and their use in increasing the English treasury, "[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." Pleas of the Crown for the County of Gloucester xxxiv (F. Maitland ed. 1884). The principle was reiterated in the First Statute of Westminster, which provided that no man should "be amerced, without reasonable cause, and according to the quantity of his Trespass." 3 Edw. I, ch. 6 (1275). The English courts have long enforced this principle. In one early case, for example, the King commanded the bailiff "to take a moderate amercement proper to the magnitude and manner of th[e] offense, according to the tenour of the Great Charter of the Liberties of England," and the bailiff was sued for extorting "a heavier ransom." *Le Gras* v. *Bailiff of Bishop of Winchester* , Y.B. Mich. 10 Edw. II, pl. 4 (1316), reprinted in 52 Selden Society 3, 5 (1934); see also *Richard Godfrey's Case* , 11 Co. Rep. 42a, 44a, 77 Eng. Rep. 1199, 1202 (1615) (excessive fines are "against law").

During the reign of the Stuarts in the period leading up to the Glorious Revolution of 1688–1689, fines were a flashpoint "in the constitutional and political struggles between the king and his parliamentary critics." L. Schwoerer, The Declaration of Rights, 1689, p. 91 (1981) (Schwoerer). From 1629 to 1640, Charles I attempted to govern without convening Parliament, but "in the absence of parliamentary grants," he needed other ways of raising revenue. 4 H. Walter, A History of England 135 (1834); see 1 T. Macaulay, History of England 85 (1899). He thus turned "to exactions, some odious and obsolete, some of very questionable legality, and others clearly against law." 1 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of

[139 S.Ct. 694]

George II 462 (1827) (Hallam); see 4 Walter, *supra* , at 135.

The Court of Star Chamber, for instance, "imposed heavy fines on the king's enemies,"

Schwoerer 91, in disregard "of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means...." 2 Hallam 46–47. "[T]he strong interest of th[is] court in these fines ... had a tendency to aggravate the punishment...." 1 *id.* , at 490. "The statute abolishing" the Star Chamber in 1641 "specifically prohibited any court thereafter from ... levying ... excessive fines." Schwoerer 91.

"But towards the end of Charles II's reign" in the 1670s and early 1680s, courts again "imposed ruinous fines on the critics of the crown." *Ibid.* In 1680, a committee of the House of Commons "examined the transcripts of all the fines imposed in King's Bench since 1677" and found that "the Court of King's Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists and Persons popishly affected; and excessively oppressing his Majesty's Protestant Subjects." *Ibid.* ; 9 Journals of the House of Commons 692 (Dec. 23, 1680). The House of Commons determined that the actions of the judges of the King's Bench, particularly the actions of Chief Justice William Scroggs, had been so contrary to law that it prepared articles of impeachment against him. The articles alleged that Scroggs had "most notoriously departed from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors" without "any Regard to the Nature of the Offences, or the Ability of the Persons." *Id.* , at 698.

Yet "[o]ver the next few years fines became even more excessive and partisan." Schwoerer 91. The King's Bench, presided over by the infamous Chief Justice Jeffreys, fined Anglican cleric Titus Oates 2,000 marks (among other punishments) for perjury. *Id.* , at 93. For speaking against the Duke of York, the sheriff of London was fined £ 100,000 in 1682, which corresponds to well over $ 10 million in present-day dollars[1] —"an amount, which, as it extended to the ruin of the criminal, was directly contrary to the spirit of [English] law." The History of England Under the House of Stuart, pt. 2, p. 801 (1840). The King's Bench fined Sir Samuel Barnadiston £ 10,000 for allegedly seditious letters, a fine that was overturned by the House of Lords as "exorbitant and excessive." 14 Journals of the House of Lords 210 (May 14, 1689). Several members of the committees that would draft the Declaration of Rights—which included the prohibition on excessive fines that was enacted into the English Bill of Rights of 1689—had themselves "suffered heavy fines." Schwoerer 91–92. And in 1684, judges in the case of John Hampden held that Magna Carta did not limit "fines for great offences" against the King, and imposed a £ 40,000 fine. *Trial of Hampden* , 9 State Trials 1054, 1125 (K. B. 1684); 1 J. Stephen, A History of the Criminal Law of England 490 (1883).

"Freedom from excessive fines" was considered "indisputably an ancient right of the subject," and the Declaration of Rights' indictment against James II "charged that during his reign judges had imposed excessive fines, thereby subverting the laws and liberties of the kingdom." Schwoerer 90. Article 10 of the Declaration declared "[t]hat excessive Bayle ought not

[139 S.Ct. 695]

to be required nor excessive fynes imposed nor cruel and unusuall Punishments inflicted." *Id.* , at 297.

Shortly after the English Bill of Rights was enacted, Parliament addressed several excessive fines imposed before the Glorious Revolution. For example, the House of Lords overturned a £ 30,000 fine against the Earl of Devonshire as "excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." *Case of Earl of Devonshire* , 11 State Trials 1354, 1372 (K. B. 1687). Although the House of Lords refused to reverse the judgments against Titus Oates, a minority argued that his punishments were "contrary to Law and ancient Practice" and violated the prohibition on "excessive Fines." *Harmelin* v. *Michigan* , 501 U.S. 957, 971, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) ; *Trial of Oates* , 10 State Trials 1080, 1325 (K. B. 1685). The House of Commons passed a bill to overturn Oates's conviction, and eventually,

after a request from Parliament, the King pardoned Oates. *Id.* , at 1329–1330.

Writing a few years before our Constitution was adopted, Blackstone—"whose works constituted the preeminent authority on English law for the founding generation," *Alden* v. *Maine* , 527 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) —explained that the prohibition on excessive fines contained in the English Bill of Rights "had a retrospect to some unprecedented proceedings in the court of king's bench." 4 W. Blackstone, Commentaries 372 (1769). Blackstone confirmed that this prohibition was "only declaratory ... of the old constitutional law of the land," which had long "regulated" the "discretion" of the courts in imposing fines. *Ibid.*

In sum, at the time of the founding, the prohibition on excessive fines was a longstanding right of Englishmen.

B

"As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen," *McDonald* , 561 U.S., at 816, 130 S.Ct. 3020 (opinion of THOMAS, J.), including the prohibition on excessive fines. *E.g.* , J. Dummer, A Defence of the New-England Charters 16–17 (1721) ("The Subjects Abroad claim the Privilege of *Magna Charta* , which says that no Man shall be fin'd above the Nature of his Offence, and whatever his Miscarriage be, a *Salvo Contenemento suo* is to be observ'd by the Judge"). Thus, the text of the Eighth Amendment was " 'based directly on ... the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.' " *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.* , 492 U.S. 257, 266, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) (quoting *Solem* v. *Helm* , 463 U.S. 277, 285, n. 10, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)); see *Jones* v. *Commonwealth* , 5 Va. 555, 557 (1799) (opinion of Carrington, J.) (explaining that the clause in the Virginia Declaration of Rights embodied the traditional legal understanding that any "fine or amercement ought to be according to the degree of the fault and the estate of the defendant").

When the States were considering whether to ratify the Constitution, advocates for a separate bill of rights emphasized the need for an explicit prohibition on excessive fines mirroring the English prohibition. In colonial times, fines were "the drudge-horse of criminal justice," "probably the most common form of punishment." L. Friedman, Crime and Punishment in American History 38 (1993). To some, this fact made a constitutional prohibition on excessive fines all the more important. As the well-known Anti-Federalist Brutus argued in an essay, a prohibition

[139 S.Ct. 696]

on excessive fines was essential to "the security of liberty" and was "as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, ... and seizing ... property ... as the other." Brutus II (Nov. 1, 1787), in The Complete Bill of Rights 621 (N. Cogan ed. 1997). Similarly, during Virginia's ratifying convention, Patrick Henry pointed to Virginia's own prohibition on excessive fines and said that it would "depart from the genius of your country" for the Federal Constitution to omit a similar prohibition. Debate on Virginia Convention (June 14, 1788), in 3 Debates on the Federal Constitution 447 (J. Elliot 2d ed. 1854). Henry continued: "[W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives" to "define punishments without this control." *Ibid.*

Governor Edmund Randolph responded to Henry, arguing that Virginia's charter was "nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects." *Id.* , at 466. According to Randolph, "the exclusion of excessive bail and fines ... would follow of itself without a bill of rights," for such fines would never be imposed absent "corruption in the

House of Representatives, Senate, and President," or judges acting "contrary to justice." *Id.* , at 467–468.

For all the debate about whether an explicit prohibition on excessive fines was necessary in the Federal Constitution, all agreed that the prohibition on excessive fines was a well-established and fundamental right of citizenship. When the Excessive Fines Clause was eventually considered by Congress, it received hardly any discussion before "it was agreed to by a considerable majority." 1 Annals of Cong. 754 (1789). And when the Bill of Rights was ratified, most of the States had a prohibition on excessive fines in their constitutions.[2]

Early commentary on the Clause confirms the widespread agreement about the fundamental nature of the prohibition on excessive fines. Justice Story, writing a few decades before the ratification of the Fourteenth Amendment, explained that the Eighth Amendment was "adopted, 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." 3 J. Story, Commentaries on the Constitution of the United States § 1896, pp. 750–751 (1833). Story included the prohibition on excessive fines as a right, along with the "right to bear arms" and others protected by the Bill of Rights, that "operates, as a qualification upon powers, actually granted by the people to the government"; without such a "restrict[ion]," the government's "exercise or

[139 S.Ct. 697]

abuse" of its power could be "dangerous to the people." *Id.* , § 1858, at 718–719.

Chancellor Kent likewise described the Eighth Amendment as part of the "right of personal security ... guarded by provisions which have been transcribed into the constitutions in this country from *magna carta* , and other fundamental acts of the English Parliament." 2 J. Kent, Commentaries on American Law 9 (1827). He understood the Eighth Amendment to "guard against abuse and oppression," and emphasized that "the constitutions of almost every state in the Unio[n] contain the same declarations in substance, and nearly in the same language." *Ibid.* Accordingly, "they must be regarded as fundamental doctrines in every state, for all the colonies were parties to the national declaration of rights in 1774, in which the ... rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright."*Ibid.* ; accord, W. Rawle, A View of the Constitution of the United States of America 125 (1825) (describing the prohibition on excessive fines as "founded on the plainest principles of justice").

C

The prohibition on excessive fines remained fundamental at the time of the Fourteenth Amendment. In 1868, 35 of 37 state constitutions "expressly prohibited excessive fines." *Ante* , at 688. Nonetheless, as the Court notes, abuses of fines continued, especially through the Black Codes adopted in several States. *Ante* , at 688 – 689. The "centerpiece" of the Codes was their "attempt to stabilize the black work force and limit its economic options apart from plantation labor." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 199 (1988). Under the Codes, "the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers." *Ibid.* The Codes also included " 'antienticement' measures punishing anyone offering higher wages to an employee already under contract." *Id.* , at 200.

The 39th Congress focused on these abuses during its debates over the Fourteenth Amendment, the Civil Rights Act of 1866, and the Freedmen's Bureau Act. During those well-publicized debates, Members of Congress consistently highlighted and lamented the "severe penalties" inflicted by the Black Codes and similar

measures, Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (Sen. Trumbull), suggesting that the prohibition on excessive fines was understood to be a basic right of citizenship.

For example, under Mississippi law, adult "freedmen, free negroes and mulattoes" "without lawful employment" faced $ 50 in fines and 10 days' imprisonment for vagrancy. Reports of Assistant Commissioners of Freedmen, and Synopsis of Laws on Persons of Color in Late Slave States, S. Exec. Doc. No. 6, 39th Cong., 2d Sess., § 2, p. 192 (1867). Those convicted had five days to pay or they would be arrested and leased to "any person who will, for the shortest period of service, pay said fine and forfeiture and all costs." § 5, *ibid.* Members of Congress criticized such laws "for selling [black] men into slavery in punishment of crimes of the slightest magnitude." Cong. Globe, 39th Cong., 1st Sess., 1123 (1866) (Rep. Cook); see *id.* , at 1124 ("It is idle to say these men will be protected by the States").

Similar examples abound. One congressman noted that Alabama's "aristocratic and anti-republican laws, almost reenacting slavery, among other harsh inflictions impose ... a fine of fifty dollars and six months' imprisonment on any servant or

[139 S.Ct. 698]

laborer (white or black) who loiters away his time or is stubborn or refractory." *Id.* , at 1621 (Rep. Myers). He also noted that Florida punished vagrants with "a fine not exceeding $ 500 and imprison[ment] for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court." *Ibid.* At the time, such fines would have been ruinous for laborers. Cf. *id.* , at 443 (Sen. Howe) ("A thousand dollars! That sells a negro for his life").

These and other examples of excessive fines from the historical record informed the Nation's consideration of the Fourteenth Amendment. Even those opposed to civil-rights legislation understood the Privileges or Immunities Clause to guarantee those "fundamental principles" "fixed" by the Constitution, including "immunity from ... excessive fines." 2 Cong. Rec. 384–385 (1874) (Rep. Mills); see also *id.* , at App. 241 (Sen. Norwood). And every post-1855 state constitution banned excessive fines. S. Calabresi & S. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008). The attention given to abusive fines at the time of the Fourteenth Amendment, along with the ubiquity of state excessive-fines provisions, demonstrates that the public continued to understand the prohibition on excessive fines to be a fundamental right of American citizenship.

* * *

The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment's prohibition on excessive fines applies in full to the States.

Notes:

[1] The sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Apodaca* v. *Oregon* , 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). As we have explained, that "exception to th[e] general rule ... was the result of an unusual division among the Justices," and it "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald* , 561 U.S., at 766, n. 14, 130 S.Ct. 3020.

[2] "Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown." *Browning-Ferris* , 492 U.S., at 269, 109 S.Ct. 2909. "[T]hough 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." Brief for Eighth Amendment Scholars as *Amici Curiae* 12.

[1] See Currency Converter: 1270–2017 (estimating the 2017 equivalent of £ 100,000 in 1680), http://nationalarchives.gov.uk/currency-converter (as last visited Feb. 8, 2019)

[2] Del. Const., Art. I, § 11 (1792), in 1 Federal and State Constitutions 569 (F. Thorpe ed. 1909); Md. Const., Decl. of Rights, Art. XXII (1776), in 3 *id* ., at 1688; Mass. Const., pt. 1, Art. XXVI (1780), in *id* ., at 1892; N.H. Const., pt. 1, Art. 1, § XXXIII (1784), in 4 *id* ., at 2457; N.C. Const., Decl. of Rights, Art. X (1776), in 5 *id* ., at 2788; Pa. Const., Art. IX, § 13 (1790), in *id* ., at 3101; S.C. Const., Art. IX, § 4 (1790), in 6 *id* ., at 3264; Va. Const., Bill of Rights, § 9 (1776), in 7 *id* ., at 3813. Vermont had a clause specifying that "all fines shall be proportionate to the offences." Vt. Const., ch. II, § XXIX (1786), in *id* ., at 3759. Georgia's 1777 Constitution had an excessive fines clause, Art. LIX, but its 1789 Constitution did not. And the Northwest Ordinance provided that "[a]ll fines shall be moderate; and no cruel or unusual punishments inflicted." § 14, Art. 2 (1787)
