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 AND FINES AND FEES JUSTICE CENTER IN SUPPORT OF PETITION FOR REVIEW

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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 the states. 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, 476 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 towing and impounding the vehicle, and (ii) did the legislature authorize this penalty? This Court should grant the Petition for Review because it meets the standards for acceptance for two reasons.

First, the factors used by the Court of Appeals are only two of many factors that courts consider in an excessive fines case. They are not determinative on their own. By reducing excessiveness to only these two factors, the court's decision conflicts with decisions of both the U.S. Supreme Court and this Court, and the history and purpose of the Excessive Fines Clause.

Second, review by this Court would be especially timely. The decision below is one of the first appellate cases in Washington to apply the Excessive Fines Clause post-*Timbs* and its conclusion conflicts with

decisions of the Indiana and Colorado supreme courts, both of which used broader inquiries into excessiveness than the Court of Appeals. This Court has used a federal standard—the contours of which have not been clearly defined—as the standard by which Washington courts should consider excessive fines. Because it is now clear that the Clause restrains Washington governments, this Court should use this case to set out a well-defined, historically grounded test for excessiveness. The need for clarity on this issue is exacerbated by the rise of municipal governments using monetary penalties to supplement their budget. This case therefore raises a significant question of law under the U.S. Constitution and involves an issue of substantial public interest that this Court should decide.

II. IDENTITY AND INTEREST OF AMICI CURIAE

The Institute for Justice (IJ) is a non-profit, public interest law firm committed to greater judicial protection of individual rights. As part of that mission, IJ routinely brings cases challenging unconstitutional systems of fines, fees, and forfeitures, including directly representing Tyson Timbs in the cases bearing his name at the U.S. and Indiana Supreme Courts.

The Fines and Fees Justice Center ("FFJC") is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local

courts. FFJC's mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably.

III. STATEMENT OF THE CASE

Amici adopt the Petition for Review's Statement of the Case.

IV. ARGUMENT

The first part of this brief discusses the Court of Appeals' decision and how its use of only two factors is inconsistent with decisions from both the U.S. Supreme Court and this Court, and the history and intent of the Excessive Fines Clause. The second section discusses why review is especially warranted now as state courts begin to flesh out the standards by which they will determine when a penalty is excessive post-*Timbs*. Moreover, the increasing use of fines as a means of raising revenue makes the need for a comprehensible and historically grounded excessiveness standard essential.

A. The Court of Appeals' Decision Is Inconsistent with Established Standards for Determining Excessiveness Here and Across the Country

The decision below correctly recognized that the test for excessiveness is ultimately one of proportionality. *Long*, 13 Wn. App. 2d at 730. However, the court erred by reducing this test to two questions: (i) does

the penalty[1] 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 proportionally relate to the offense of illegal parking and are the exact penalties the Seattle City Council authorized").

Case law clearly demonstrates that these two factors are insufficient to determine whether the impound costs here are excessive. In that regard, courts have consistently 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 the particular case, be excessive though within the maximum." *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002) (quoting *Frese v. State*, 23 Fla. 267, 272, 2 So. 1 (1887)). If the legislature's imprimatur alone were sufficient, the Excessive Fines Clause would be purposeless. Likewise, 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

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[1] The Court of Appeals assumed, without deciding, that the impound costs the City charged to Mr. Long were penalties to which the Excessive Fines Clause applied. *Long*, 13 Wn. App. 2d at 715. The court need not have been so reticent. The impound costs the City imposed are covered by the Clause. *See Timbs*, 139 S. Ct. at 689 (penalties that "are at least partially punitive" fall under the Excessive Fines Clause). Even if the City was also motivated by a desire to recoup the cost paid to the tow company, its imposition of a massive penalty that reflects this amount is undoubtedly "at least partially punitive." *See U.S. v. Bajakajian*, 524 U.S. 321, 329 n.4, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) (Excessive Fines Clause covers penalties that are remedial and punitive at the same time).

(1994)(overruled on other grounds) ("The rough equivalence of the value of property forfeited and the amount spent on prosecution may not always insulate a forfeiture from a finding that the forfeiture is 'excessive.'").

Instead of being considered in isolation, courts must consider these two factors in conjunction with other facts. What else should the courts consider? This Court answered that question (to some extent) 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, to remand a penalty to the Court of Appeals to consider whether it was excessive under 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.

Had the Court of Appeals applied the *Grocery Manufacturers/Bajakajian* factors, it would have likely concluded that Long's penalty was excessive. The nature of his "crime" (actually, a civil offense) was using his immobile truck as shelter because he was too poor to obtain housing. He was not involved in other crimes. The maximum fine for parking in one place for more than 72 hours in Seattle is $44, SMC § 11.31.121, which suggests that this offense is minor and that an additional penalty of $557 is so punitive that it bears no "relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334.

Finally, Long's "crime" harmed no one—in fact, he parked at this site because he wished to *minimize* incidental harms to the community his homelessness might cause. *Long*¸ 13 Wn. App. 2d at 717. These factors all point to the City's penalty here as being excessive.

These are not the only considerations that should guide a court in determining excessiveness, however. *Bajakajian* held that fines cannot be grossly disproportionate but declined to list all factors that may be relevant. 524 U.S. at 334. Consequently, federal circuit courts and state supreme courts have articulated real-world standards for determining excessiveness. While there may be others, a critical additional consideration used by courts, and the one most relevant to this case, is the effect of the fine on the defendant's individual circumstances.

While the U.S. Supreme Court has yet to decide whether "wealth or income are relevant to the proportionality determination," *Id.* at 340 n.15, the Court has strongly suggested that they are. *See, e.g., Timbs*, 139 S. Ct. at 688 ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . . " (quoting 4 William Blackstone, *Commentaries* *372)). Consequently, state courts post-*Timbs* have expressly adopted the defendant's financial status as an important consideration in determining whether a penalty imposed on a particular individual is excessive. *See State v. Timbs*, 134 N.E. 3d 12, 36 (Ind. 2019)

(*"Timbs II*"); *Colo. Dep't of Labor & Empl. v. Dami Hospitality, LLC*, 442 P.3d 94, 101–02 (Colo. 2019).[2]

Again, had the Court of Appeals considered this factor, it would have likely concluded that the City's impound costs were excessive as applied to Mr. Long, a destitute individual living in his truck. The use of this factor reflects centuries of Anglo-American law. Dating back to Magna Carta, the inquiry into whether a penalty is excessive includes asking whether that penalty would cause significant economic hardship for the individual defendant. *See U.S. v. Levesque*, 546 F.3d 78, 84 (1st Cir. 2008) (one of the "great object[s]" of provisions like the Excessive Fines Clause is to guarantee that "[i]n no case could the offender be pushed absolutely to the wall") (quoting William McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 287 (2d ed. 1914)).

For these reasons, this Court should grant the Petition for Review.

B. This Court Should Take This Case and Craft Meaningful Standards for Excessive Fines Determinations

In the previous section, *amici* demonstrated that the decision below was wrongly decided and inconsistent with case law and the history and intent of the Excessive Fines Clause. This case also presents an opportunity

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[2] Even prior to *Timbs*, some courts used the defendant's circumstances as a critical factor in determining proportionality. *See Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 188 (Pa. 2017).

to craft clear, historically grounded standards for courts to use in Excessive Fines Clause cases post-*Timbs*, however. It comes at a crucial time in our country and in our state when the government's increased use of fines and other monetary sanctions to raise revenue, and the effects that has on the poor, the police, and the justice system, is at the forefront of public debate. It thus raises more than just a question of error correction.

"*Timbs* made the question of what constitutes an 'excessive fine' constitutionally relevant in all fifty states. State courts need to know how to determine the constitutionality of financial punishment because now, in every state across the country, defendants can challenge fines imposed against them as violating the Constitution." Daniel S. Harawa, *How Much is Too Much: A Test to Protect Against Excessive Fines*, 81 Ohio St. L.J. 65, 68 (2020). The Washington Court of Appeals' decision is one of the first courts—not just in Washington but in the country—to try to forge an answer on what constitutes an excessive fine and its answer would make the Clause largely a dead letter. Its decision conflicts with the decisions of the high courts of Indiana and Colorado, both of which used far more searching inquiries to determine whether a particular penalty is excessive, threatening to make Washington an outlier among the states. *See Timbs II*, 134 N.E.3d at 35–40; *Dami Hospitality*, 442 P.3d at 100–03. The only thing worse would be if the Court of Appeals' conclusion set a standard not just for

Washington courts but for other courts forging an excessive fines jurisprudence post-*Timbs*.

This need for clarity is essential now for two additional reasons. First, this Court has used the standards set out in *Bajakajian* to determine excessiveness. *Grocery Manufacturers*, 195 Wn.2d at 476. However, as noted above, the *Bajakajian* factors, 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." Harawa, 81 Ohio St. L.J. at 85. This case presents this Court with an opportunity to fix this mess, at least in this state, and fashion a meaningful jurisprudence to protect Washingtonians faced with penalties and help other state courts as they wrestle with this issue.

Finally, this issue arises at a time when the issue of fines and forfeitures as a source of revenue is at the forefront of public discussion. Since 2010, 48 states have increased civil and criminal fees. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), https://goo.gl/Tft4XK. The use of fines, fees, and forfeitures continues to grow because it is more perceived to be more politically feasible to levy fees on those stuck in the criminal justice system than to raise taxes more broadly: "[M]any lawmakers use economic sanctions in

order to avoid increasing taxes while maintaining governmental services, with some lawmakers even including increases in ticketing in projected budgets." Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 22 (2018) (footnotes omitted). From Ferguson, Missouri, to cities across America today, the result of policing for profit has become alarmingly clear.

The Excessive Fines Clause "guards against abuses of government's punitive or criminal-law-enforcement authority." *Timbs*, 139 S. Ct. at 686. The Clause cannot meaningfully protect Washingtonians from abuse, however, if courts are without guidance about how it works or view its protections from a cramped, incorrect, and ahistorical perspective.

V. CONCLUSION

This Court should grant the Petition for Review.

Dated: September 25, 2020 Respectfully Submitted,

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