IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Steven H. John, Circuit Court Judge

Case No. 2017-CP-07411
(Appellate Case No. 2020-000092)

Jimmy A. Richardson, II, Solicitor for the 15th Judicial Circuit,
Enforcement on Behalf of the 15th Judicial Circuit Drug Enforcement Unit…….Appellant,

v.

Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars
($20,771.00), U.S. Currency and Travis Green……..Respondents.

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER, SOUTH CAROLINA FOR CRIMINAL JUSTICE REFORM, ROOT & REBOUND, AND PROJECT NOT A STATISTIC IN SUPPORT OF RESPONDENTS TWENTY THOUSAND SEVEN HUNDRED SEVENTY-ONE AND 00/100 DOLLARS ($20,771.00), U.S. CURRENCY AND TRAVIS GREEN

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INTRODUCTION

This case affords this Court the opportunity to update South Carolina's Excessive Fines Clause ("EFC") test to bring it in line with United States Supreme Court precedent. An appropriate test incorporates an analysis of the proportionality of the fine to the alleged offense and the individual's culpability for the offense, as well as the harshness of the fine for the individual upon whom the fine is imposed. Ensuring that a fine is not excessive requires evaluating an individual's income, assets, job status, debt, and family responsibilities such as support of dependents, eldercare, and childcare, along with whether a proposed fine affects the primary means of securing basic needs such as housing, transportation, or employment.[1]

In *United States v. Bajakajian*, the U.S. Supreme Court held that an EFC analysis requires evaluating the "proportionality" of a forfeiture to the gravity of an alleged offense. 524 U.S. 321, 334 (1998). But the South Carolina Supreme Court has not updated its EFC test in the more than twenty years since that case was decided. Building on *Bajakajian*, the U.S. Supreme Court recently issued a landmark decision in *Timbs v. Indiana*, emphasizing the deep historical roots of the EFC of the Eighth Amendment and holding that it is incorporated against the states. 139 S. Ct. 682 (2019). Those historical roots demonstrate the importance of proportionality in evaluating the

[1] While this brief focuses on forfeitures, the EFC applies to any economic sanction levied by the government, including (1) fines, which constitute punishment for civil or criminal offenses; (2) fees, assessments, and surcharges that raise revenue or recover costs associated with, *inter alia*, court administration, prosecution, public defense, incarceration or supervision; and (3) forfeitures of private property seized with or without formal criminal charges against the owner. *See generally Austin v. United States*, 509 U.S. 602, 607-08 (1993) (holding EFC applicable to both criminal and civil proceedings); Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create*, Harv. Kennedy Sch. & Nat'l Inst. Just. 2 (Jan. 2017), https://www.ncjrs.gov/pdffiles1/nij/249976.pdf; *Confronting Criminal Justice Debt: A Guide for Policy Reform*, Harv. L. Sch. Crim. Just. Pol'y Program 6 (Sept. 2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf. This brief refers to forfeitures and fines interchangeably for purposes of the EFC.

excessiveness of a fine, and they link proportionality to individual hardship. Analyzing an individual's circumstances provides the perspective necessary to ensure a proportional result.

This brief provides legal and factual support for a fundamental truth: whether a fine is excessive depends on an individual's financial means. A $1,000 fine affects someone who is indigent, has debts, and cannot afford to put food on the table differently than it does a wealthier person. Similarly, a $1,000 fine affects a sole proprietorship or small business differently than it does a multi-million dollar corporation. In the absence of revised and rigorous EFC protections, South Carolina's civil forfeiture statutes have resulted in widespread seizure of property from individuals who have not been convicted of, or even charged with, a crime—deepening and criminalizing poverty. Anna Lee et al., *TAKEN: Exclusive: How Civil Forfeiture Errors, Delays Enrich SC Police, Hurt People*, Greenville News, Jan. 17, 2020 ("Lee et al."), https://www.greenvilleonline.com/in-depth/news/taken/2019/01/29/civil-forfeiture-south-carolina-errors-delays-property-seizures-exclusive-investigation/2460107002/. [2] This Court should ensure that South Carolina's EFC test protects the rights of all South Carolinians to be free of abusive and excessive fines and reflects the historical concerns underlying the clause.

In light of *Timbs*, several states have already updated their EFC tests. Such a revision in South Carolina would be consistent with the trend across these states and would align with the directive from this Court's Chief Justice that "[w]hen imposing a fine, consideration should be given to a defendant's ability to pay" and that "principles of due process . . . cannot be abridged." Memorandum from C.J. Donald W. Beatty to Magistrates and Municipal Judges, Sentencing

[2] This includes attempts by law enforcement to seize the home of Rozina Jarvis. Jarvis was in her 80s and had lived in the same home since 1964. After criminal activity allegedly took place on her property, her ownership was imperiled, even though she was not implicated in the conduct. *See* Lee et al.

Unrepresented Defendants to Imprisonment (Sept. 15, 2017) ("Beatty Memorandum"), https://www.sccourts.org/summaryCourtBenchBook/MemosHTML/2017-09.htm.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are a group of non-partisan organizations that advocate for individuals and small businesses. They are described in greater detail in **Appendix A**.

STATEMENT OF THE CASE

Amici adopt the Statement of Facts as consented to by the parties and set forth in the Initial Brief of Appellant.

SUMMARY OF ARGUMENT

Following the U.S. Supreme Court's ruling in *Timbs* that the Eighth Amendment's EFC applies to the states under the Fourteenth Amendment, South Carolina must reevaluate its excessive fines test. Whether or not this Court finds the two civil forfeiture statutes presented in this case facially unconstitutional, amici contend that South Carolina must update its test to comport with federal and state EFC protections. The right to be free from excessive monetary penalties is "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), and lies squarely at the heart of the liberty and property interests protected by the Fourteenth Amendment. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 764 (2010). U.S. Supreme Court case law requires that a fine be proportional in order to "limit[] the government's power to extract payments, whether in cash or in kind." *Timbs*, 139 S. Ct. at 687 (citing *Bajakajian*, 524 U.S. at 327-28). That proportionality determination must take into account a person's limited financial means and the hardship a fine would impose on that person. When determining whether a fine is excessive, South Carolina courts should therefore consider a person's income and assets, employment status, housing situation, other debt, and family responsibilities including care for

dependents and elder care, along with an individual's ability to meet basic human needs such as housing, transportation, and employment.

This Court has not revisited its EFC analysis in any depth in the twenty-plus years since *Bajakajian* determined that the "proportionality" of a forfeiture is an essential element of the EFC analysis. 524 U.S. at 334. And this Court has never evaluated excessiveness in the context of asset forfeiture. Instead, South Carolina's EFC test has focused solely on whether the property was an "instrumentality" of the alleged offense and has examined the nexus of the seized property to the alleged unlawful conduct. *E.g.*, *Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001*, 322 S.C. 127, 132-33 (1996). Recently, in *Timbs*, the U.S. Supreme Court relied on foundational historical sources to trace the "venerable lineage" of the EFC and establish its deep roots, unanimously holding it incorporated against the states. 139 S. Ct. at 687. Those same historical sources establish that evaluating the impact of fines on individuals' livelihoods is an essential component of an EFC analysis.

Taken together, U.S. Supreme Court precedent and historical sources demonstrate that courts must consider the particular impact of a fine on an individual in order to determine excessiveness. As the U.S. Supreme Court has highlighted, the historical underpinnings of the Eighth Amendment required both that "economic sanctions 'be proportioned to the wrong'" and also that they "not be so large as to deprive [an offender] of his livelihood." *Timbs*, 139 S. Ct. at 687-88 (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)). Several states have already begun applying this more individualized inquiry.

The shattering effects of civil asset forfeiture on individuals with limited means have been well publicized in South Carolina. A failure to acknowledge the direct consequences economic sanctions have on poor and low-income Americans does not comport with the EFC and directly

contravenes both the United States and South Carolina Constitutions. This brief identifies ways in which individuals who are impoverished or low income are impacted by excessive fines and provides examples of the ways that South Carolina courts already take individual considerations into account, demonstrating they are capable of incorporating this analysis seamlessly.

ARGUMENT

I. IN LIGHT OF U.S. SUPREME COURT PRECEDENT, THIS COURT MUST REVISE ITS EXCESSIVE FINES CLAUSE ANALYSIS AND SHOULD CONSIDER INDIVIDUAL HARDSHIP

A. The Historical Sources Consulted in the U.S. Supreme Court's Excessive Fines Jurisprudence Consider an Analysis of Individual Financial Circumstances Essential to an Excessiveness Evaluation

The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Last year, in *Timbs*, the U.S. Supreme Court determined that the Eighth Amendment's EFC[3] is applicable to the states because it is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" 139 S. Ct. at 689 (quoting *McDonald*, 561 U.S. at 767). The Court has further noted that "[t]here is good reason to be concerned that fines, uniquely of all punishments" will be imposed improperly because, unlike punishments like imprisonment, which often costs the state money, "fines are a source of revenue" and so "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.). In evaluating support for the fundamental nature of this right, the Court looked to seminal historical sources

[3] The Eighth Amendment of the United States Constitution and Article I, section 15 of South Carolina's Constitution have near-identical formulations, and courts interpret these EFCs alike. See, e.g., *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. 33, 87-89 (2015) (evaluating excessive fines claims under the United States and South Carolina constitutions without distinction); *Medlock*, 322 S.C. at 132-33.

extending back to the Magna Carta and the English Bill of Rights, all of which demonstrate the deep-seated roots of our country's protections against excessive fines. Each of these historical sources shared a common theme: that any economic sanction should "'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'" *Id.* at 688 (quoting *Browing-Ferris*, 492 U.S. at 271); *see United States v. Levesque*, 546 F.3d 78, 83-84 (1st Cir. 2008) ("[T]he notion that a forfeiture should not be so great as to deprive a wrongdoer of his or her livelihood is deeply rooted in the history of the Eighth Amendment."). Under the Magna Carta's protections, "in no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him." William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 287 (2d ed. 1914) ("Magna Carta: A Commentary"). These historical sources emphasize that the requirement of preserving an individual's livelihood has always been on equal footing with—and, indeed, is inextricable from—the requirement that a fine be proportional to the wrong. They are two sides of the same coin.

The EFC's beginnings provide the key to its interpretation. Courts "look to the origins of the Clause and the purposes which directed its framers" when determining its application. *Browning-Ferris*, 492 U.S. at 264 n.4. Under its original meaning, the EFC prevented fines, fees, or forfeitures that were excessive as compared with an individual's particular financial means. Essentially, the EFC "encod[es] two complementary, but distinct, constitutional principles: (1) a proportionality principle, linking the penalty to the offense, and (2) an additional limiting principle linking the penalty imposed to the alleged offender's economic status and circumstances. We might call this second principle the Eighth Amendment's 'economic survival' (or perhaps 'livelihood-protection') norm." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 836 (2013) ("McLean").

From the genesis of the EFC, the evaluation of an individual's financial circumstances has been integral to a determination of whether a fine, fee, or forfeiture was excessive. The *Timbs* Court emphasized that

> 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 . . . ."

Timbs, 139 S. Ct. at 687. Saving a man's "contenement" meant "to leave him sufficient for the sustenance of himself and those dependent on him." *McLean* at 855 (quoting Magna Carta: A Commentary at 287). Preserving an individual's right to retain his living was important, and one historian wrote, "[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." *Timbs*, 139 S. Ct. at 693 (quoting *Pleas of the Crown for the County of Gloucester xxxiv* (F. Maitland ed. 1884)).[4] In his 1769 commentaries, William Blackstone emphasized the role of individual considerations in the Magna Carta's prohibition on excessive fines, observing that taxing and moderating should be done "according to the particular circumstances of the offence and offender" and that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear." 4 William Blackstone, *Commentaries* 372 (1769).

But despite the Magna Carta's protections, government and monarchical abuse of fines did not end. "The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay." *Timbs*, 139 S. Ct. at 688 (citing The Grand Remonstrance ¶¶ 17, 34 (1641), in *The Constitutional Documents of the Puritan Revolution* 1625-1660, at 210, 212 (S. Gardiner ed., 3d ed. rev. 1906)). Resisting these

[4] Amercements were "the medieval predecessors of fines." *Bajakajian*, 524 U.S. at 335.

abuses, British citizens overthrew James II in the Glorious Revolution and drafted the 1689 English Bill of Rights. That document guaranteed individual rights and reasserted the Magna Carta's protections against excessive fines. *Id.* (quoting 1 Wm. & Mary, Ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689)).[5]

Ultimately, the English Bill of Rights became the closest generational ancestor to the Virginia Declaration of Rights, and its protections evolved into the United States Constitution.

> [W]hen George Mason, of Fairfax County, drafted the Virginia Declaration of Rights (1776), he relied upon the English Bill of Rights in articulating the rights of Americans. Thus, Section 9 of Virginia's Declaration . . . reads: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 Wm. & Mary Bill of Rts. J. 989, 1049 (2019). The Eighth Amendment descends directly from this provision and, indeed, the First Congress "adopted [it] almost verbatim," *Timbs*, 139 S. Ct. at 688, "as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts . . . [when] [e]normous fines and amercements were . . . sometimes imposed." *Id.* at 696 (Thomas, J., concurring) (quoting Joseph Story, *Commentaries on the Constitution of the United States § 1896*, at 750-51 (1833)); *see Levesque*, 546 F.3d at 84 ("[R]uinous monetary punishments are exactly the sort that motivated the 1689 Bill of Rights and, consequently, the Excessive Fines Clause."). By the time the United States Constitution enshrined this protection into law, a majority of the states had also incorporated

[5] In 1771, William Eden outlined the same concept in his treatise the Principles of Penal Law, writing, "[i]t is the usage of the courts, superinduced on the clause of [the] Magna [Carta] relative to civil amercements, never to extend the fine of any criminal so far, as to take from him the implements, and means of his profession, and livelihood; or to deprive his family of their necessary support." William Eden & Baron Auckland, *Principles of Penal Law* 64-65 (2d ed. 1771).

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

Protecting individual livelihood is central to South Carolina's origin story as well as the nation's. In 1790, the South Carolina General Assembly adopted a state constitutional provision prohibiting excessive fines. S.C. Const. of 1790, art. IX, § 4. Even before establishing this provision, South Carolina's laws preserved freedom from excessive fines and protected individual livelihood. 1712 S.C. Acts 28 ("[T]hat no City, Borough, nor Town, nor any man be amerced, without reasonable Cause, and according to the quantity of his Trespass; that is to say, every Free-man, saving his Freehold, a Merchant saving his Merchandise, a Villain saving his Waynage."). Echoing the Magna Carta's "[a] free-man shall only be amerced . . . saving to him his contenement, . . . a merchant saving his merchandise," provision, South Carolina's homestead exemption provided for "a dressmaker to keep her machine in order to make her living." D.D. Wallace, *The South Carolina Constit. Convention of 1895*, 4 Sewanee R. 348, 358 (1896). As a review of the origins of the Eighth Amendment's protections demonstrates, the concept of excessive fines in American and South Carolinian law is inextricable from a consideration of individual circumstances. *Timbs*, 139 S. Ct. at 687-88.

But South Carolina's EFC test presently does not account for the twin concepts enshrined in these historical sources that a fine must be proportional to the alleged offense and that it must preserve an individual's livelihood. In fact, South Carolina's test has not been updated for more than twenty years, despite being superseded by U.S. Supreme Court precedent. In *Bajakajian*, the U.S. Supreme Court relied on the same historical sources as the *Timbs* court to find that "[t]he touchstone of the constitutional inquiry under the EFC is the principle of proportionality: The

amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334.[6] In *Bajakajian*, the Court held that a fine of $357,144 for failing to declare the transportation of more than $10,000 outside of the United States was "grossly disproportional" and therefore excessive. 524 U.S. at 339-40. The *Bajakajian* Court cemented the importance of evaluating proportionality as one facet of the dual historical inquiry. However, it could not consider the second facet—whether a fine preserved an individual's livelihood—because the individual in that case had not raised hardship and there were no facts in the record relevant to hardship. After invoking the Magna Carta's provision that "amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood," the Court noted that the individual had offered no evidence "that full forfeiture would deprive him of his livelihood . . . and the District Court made no factual findings in this respect." *Id.* at 335, 340 n.15.

Though *Bajakajian* established the importance of evaluating proportionality, South Carolina has not yet updated the test it uses to determine whether a fine is excessive. Instead, it relies on an outdated test developed by the Fourth Circuit that rejected proportionality and considered only whether the property sought to be forfeited was an instrumentality of a crime. *United States v. Chandler*, 36 F.3d 358, 360 (4th Cir. 1994); *see Medlock*, 322 S.C. at 132; *Pope*

[6] The *Bajakajian* test applies to any forfeiture that is punitive. 524 U.S. at 334. In *Austin v. United States*, the Supreme Court held that civil in rem forfeitures are subject to the EFC when they are "payment to a sovereign as punishment for some offense." 509 U.S. at 622 (citation omitted). In determining whether the forfeiture was "punitive" (or "punishment for some offense"), the Court looked at whether the statute connected the forfeiture to the violation of a crime and whether there was an "innocent owner" defense (*i.e.*, where it could be shown that the owner did not know of or consent to the criminal act involving the property, the property was not forfeitable). *Id.* at 619. Notably, South Carolina's criminal forfeiture statutes both connect forfeiture to the violation of drug crimes and provide for an innocent owner defense, suggesting that they are punitive in nature. *See, e.g.*, S.C. Code Ann. § 44-53-520(a)(8) (2002).

v. Gordon, 359 S.C. 572, 586 (Ct. App. 2004), *aff'd*, 369 S.C. 469 (2006). Both *Chandler* and *Medlock*, from which South Carolina developed its existing test, were decided prior to *Bajakajian*. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.* appears to be the only case in South Carolina state courts citing *Bajakajian*, and it did so without substantial discussion of the standard. 414 S.C. at 87-88.[7] Now, after *Timbs* and more than twenty years after *Bajakajian*, an update to South Carolina's test is overdue.

B. South Carolina Should Join the Multitude of Other States that Consider Individual Financial Circumstances in an Excessive Fines Analysis

Though they did not prescribe a single methodology to determine if a fine is excessive, *Bajakajian* and *Timbs* relied on historical sources to demonstrate the original purpose of the EFC: to ensure a fine was both proportional to the alleged wrong and that it preserved an individual's source of livelihood. This Court should reconfigure its EFC test to explicitly consider and evaluate individual financial circumstances and hardship as an essential factor in determining proportionality. As South Carolina develops a new test, Indiana and the cohort of other states that already take individual financial circumstances and hardship into account provide useful models.

Following the U.S. Supreme Court's decision in *Timbs* and subsequent remand, the Indiana Supreme Court confronted the same challenge presented by this case. Faced with establishing a new test to consider proportionality and determine whether a fine was excessive, that court

[7] There, the appellant was a large pharmaceutical company challenging a trial judge's imposition of civil penalties totaling $327 million for violations of the South Carolina Unfair Trade Practices Act. In initially setting the civil penalty amount, one factor the trial court considered was "ability to pay." *Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. at 85. By the time this Court reached the question of constitutional excessiveness, it had already reduced the award by more than 60% on other grounds, modifying it to approximately $124 million, an amount within the statutory limit. *Id.* at 87. The Court made passing reference to *Bajakajian*'s standard, but it did not discuss proportionality in depth and did not reconcile it with the incompatible "instrumentality" test it also cited. *Id.* (citing *Medlock*, 322 S. C. at 132, as "adopting the federal 'instrumentality' standard").

determined that individual economic hardship should be an explicit element of the test. To evaluate the magnitude of a punishment, the court looked to "the owner's economic means—relative to the property's value." *State v. Timbs*, 134 N.E.3d 12, 36 (Ind. 2019). Indiana ultimately formalized a test whereby any property forfeited based on its use in a crime "must meet two requirements: (1) the property must be the actual means by which an underlying offense was committed; and (2) the harshness of the forfeiture penalty must not be grossly disproportional to the gravity of the offense and the claimant's culpability." *Id.* at 27. One of the factors to consider in determining whether the penalty is grossly disproportional is the "harshness of the forfeiture's punishment," including the "effects the forfeiture will have on the claimant." *Id.* at 36. The court emphasized that "the historical roots of the Excessive Fines Clause reveal concern for the economic effects a fine would have on the punished individual" and that failing to consider an owner's economic means relative to the property's value "would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally." *Id.* at 36-37. This test encompasses the twin protections of the EFC: protection against disproportionate fines and individually devastating penalties.[8]

Like Indiana, Colorado found the U.S. Supreme Court's citations to "historical predecessors" compelling, concluding that they were "persuasive evidence that a fine that is more than a person can pay may be 'excessive.'" *Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019). Colorado determined that "ability to pay is an appropriate element of the Excessive Fines Clause gross disproportionality analysis" because "[a] fine that would bankrupt a person or put a company out of business would be a substantially more onerous fine

[8] Amici contend that a key component of a constitutional EFC test is considering the hardship of the individual; whether that is considered a subset of the proportionality review or a separate analysis is a distinction without a difference.

than one that did not." *Id.* at 101-02. Ultimately, Colorado concluded that "courts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment." *Id.* at 102. North Carolina courts have also examined excessiveness of a fine in terms of an individual's "financial resources available to pay the fine" as part of a gross disproportionality analysis. *State v. Sanford Video & News, Inc.*, 553 S.E.2d 217, 220 (N.C. Ct. App. 2001).

Other courts have noted that what is proportional hinges in part on the nature of the property to be forfeited. They have acknowledged that the loss of certain forms of property could be particularly devastating when they are the primary means of securing a basic need such as housing, transportation, or employment. Pennsylvania, for example, notes that

> While a simple market value may be appropriate in some instances, . . . certain property—such as a residence, a vehicle, or other similar necessities in our daily life—carry additional value to the owner and possibly others, and, thus, call for a subjective non-pecuniary evaluation of the property sought to be forfeited. Such a valuation would consider whether the property is a family residence, or is essential to the owner.

Commonwealth v. 1997 Chevrolet & Contents Seized from Young, 160 A.3d 153, 188 (Pa. 2017). In *1997 Chevrolet*, Elizabeth Young was a 71-year-old grandmother who had owned her home for forty years and purchased a used minivan "to meet her transportation needs." *Id.* at 159. After suffering two blood clots, she was hospitalized, placed on bedrest, and prescribed medication. Her son, who was living with her at the time, was accused of selling small amounts of marijuana. Law enforcement executed a search warrant on the home. After uncovering the son's drug paraphernalia, they seized the grandmother's car and home. On appeal, the Supreme Court of Pennsylvania developed a detailed test similar to Indiana's. In evaluating the proportionality of a fine, Pennsylvania courts consider several factors including "whether the property is a family residence or if the property is essential to the owner's livelihood; . . . the harm forfeiture would

bring to the owner or innocent third parties; and . . . whether the forfeiture would deprive the property owner of his or her livelihood." *Id.* at 192.

Similarly, Tennessee has explicitly held that courts should consider the monetary value of forfeited property in light of the individual's resources because forfeitures are "less likely to be excessive when the claimant has the financial ability to replace the property without undue hardship. Conversely, a forfeited vehicle may be worth little, but undue hardship may still result if the claimant's family cannot afford to replace it and has no other means of transportation." *Stuart v. Dep't of Safety*, 963 S.W.2d 28, 36 (Tenn. 1998). Tennessee's test thus guards against the risk of injustice stemming from a deceptive proportionality analysis that implicitly assumes equality of individual financial circumstances.

Like state courts in Indiana, Colorado, Pennsylvania, Tennessee, and North Carolina, numerous other federal and state jurisdictions incorporate a review of individual financial circumstances and hardship into their EFC analysis.[9] In addition, some states have reevaluated

[9] *See, e.g., United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016) (holding that courts may consider "whether the forfeiture would deprive the defendant of his livelihood, i.e., his 'future ability to earn a living'"); *United States v. Fogg*, 666 F.3d 13, 18-20 (1st Cir. 2011) (inquiring whether defendant's post-incarceration livelihood would be imperiled by a forfeiture); *United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007) (finding it appropriate to consider whether a forfeiture would deprive an individual of his livelihood based on the history of the EFC); *State v. Yang*, 452 P.3d 897, 904 (Mont. 2019) (holding that sentencing judges must consider "the financial resources of the offender, and the nature of the burden that payment of the fine will impose"); *State v. Griffin*, 180 So. 3d 1262, 1270 n.9 (La. 2015) (recognizing that "some defendants, while not indigent, may not be able to pay the entirety of the costs assessed at one time" and urging courts to "be cognizant of this issue, and exercise discretion in determining payment requirements and schedules"); *State v. Goodenow*, 153, 282 P.3d 8, 17 (Or. Ct. App. 2012) ("Whether an otherwise proportional fine is excessive can depend on, for example, the financial resources available to a defendant, the other financial obligations of the defendant, and the effect of the fine on the defendant's ability to be self-sufficient."); *Nez Perce Cnty. Prosecuting Att'y v. Reese*, 136 P.3d 364, 370 (Idaho Ct. App. 2006) (identifying "the fair market value of the property, the intangible or subjective value of the property, and the hardship to the defendant" among the factors that a court should consider); *State v. Kish*, 2003-Ohio-2426, 2003 WL 21078099, at *11 (Ohio Ct. App. May 14, 2003) (holding "the hardship to the defendant, including the effect of forfeiture on the

their civil forfeiture laws post-*Timbs*, finding them unconstitutional where they do not provide a window for a court to evaluate the individual's circumstances and whether a fine is grossly disproportionate.[10]

Here, the Court is faced with determining whether two of South Carolina's forfeiture statutes, S.C. Code Sections 44-53-520 and 44-53-530 (the "Statutes"), are unconstitutional. Regardless of whether this Court overturns the Statutes as unconstitutional,[11] the Court should

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defendant's family and financial condition" are factors to consider when determining the harshness of a forfeiture and whether it is excessive); *Cnty. of Nassau v. Canavan*, 1 N.Y.3d 134, 140 (N.Y. 2003) (evaluating "the economic circumstances of the defendant" when determining gross proportionality); *State v. Real Prop. at 633 E. 640 N., Orem, Utah*, 994 P.2d 1254, 1260 (Utah 2000) (requiring that courts consider "the hardship to the defendant, including the effect of the forfeiture on defendant's family or financial condition" when evaluating the harshness of a forfeiture).

[10] *See, e.g.*, *Yang*, 452 P.3d at 903-05 (finding a Montana statute that imposed a mandatory fine of 35% of market value of drugs facially unconstitutional under federal and state constitutional protections against excessive fines because it prohibited a trial court from considering whether the fine was grossly disproportionate based on factors such as the financial resources of the defendant and the nature of the burden that payment of fine would impose). While one judge in the District of South Carolina has been presented with the question of whether South Carolina's forfeiture statutes are unconstitutional, the court did not resolve the issue, remanding the state claims and dismissing the federal claims because the plaintiff lacked standing. *Pooler v. Wilson*, No. 2:19-cv-3347, 2020 WL 1663451, at *5-7 (D.S.C. Apr. 3, 2020).

[11] For the reasons stated in Respondents' Initial Brief, there is strong support for upholding the lower court and finding the two Statutes facially unconstitutional because they violate due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section Three of the South Carolina Constitution. South Carolina's civil forfeiture statutes allow for the forfeiture of "all monies seized in close proximity to forfeitable controlled substances" regardless of who owns the money, and they shift the burden to the person from whom the money was taken to "establish to the satisfaction of a court of competent jurisdiction that the monies seized are not products of illegal acts." S.C. Code Ann. § 44-53-520(a)(8). The Statutes do not require an evaluation of the excessiveness of the seizure and in particular, they do not require an inquiry into the hardship that the forfeiture would create for a person given their individual circumstances. The vacuum of judicial oversight created by the Statutes means that there is no guaranteed point at which a judge can perform the essential evaluation to determine whether a fine is grossly disproportionate. A facial unconstitutionality determination about the Statutes would be appropriate; indeed, this Court has already invalidated a portion of § 44-53-520 as unconstitutional. *Medlock v.1985 Ford F-150 Pick Up,* 308 S.C. 68, 72-73 (1992).

update its EFC analysis to bring it in line with recent U.S. Supreme Court precedent. A test like Indiana's and the multitude of other states' that takes hardship into account when assessing constitutionality comports with U.S. Supreme Court precedent and the historical backdrop of the EFC. The test for excessiveness of a forfeiture should evaluate whether the harshness of the punishment would be grossly disproportional to the gravity of the alleged offense and the owner's culpability for the property's misuse. In evaluating the proportionality of the punishment, any analysis that does not consider the impact the forfeiture would have on the individual would be fundamentally incomplete and out of step with the foundational purpose of the EFC.

C. South Carolina Courts Are Already Called Upon to Consider an Individual's Financial Circumstances in Certain Circumstances

South Carolina courts are well equipped to undertake an individualized analysis of a person's means and ability to pay. In fact, South Carolina courts have long been mandated to consider an individual's financial circumstances in a variety of legal settings. Most notably, the Chief Justice of the Court has explicitly directed magistrate and municipal judges that "[w]hen imposing a fine, consideration should be given to a defendant's ability to pay." *See* Beatty Memorandum.

In several civil contexts, such as when awarding alimony, South Carolina courts are required to evaluate a range of factors, including ability to pay and "the current and reasonably anticipated earnings of both spouses." *Sweeney v. Sweeney*, 426 S.C. 229, 301 (2019). Courts are called upon to make similar calculations in determining whether to award attorney's fees and costs, where in addition to the ability to pay and "the parties' respective financial conditions," the "effect of the attorney's fee on each party's standard of living" is a consideration. *Buist v. Buist*, 410 S.C.

569, 573 n.3 (2014).[12] In child support cases, courts are charged with evaluating incomes, ability to pay, and individual facts and circumstances to evaluate whether a child support award would be "unjust or inappropriate." S.C. Code Ann. § 63-17-470(A); *Burch v. Burch*, 395 S.C. 318, 331 (2011). The same is true of punitive damages in tort, when South Carolina trial judges are charged with conducting a post-trial review of damages awards to consider, in part, the defendant's ability to pay and whether an award is grossly excessive. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 588 & n.8 (2009); 11 S.C. Jur. Damages § 43. Similarly, South Carolina courts have considered ability to pay as a factor in assessing civil penalties under the South Carolina Unfair Trade Practices Act. *Wilson*, 414 S.C. at 85 & n.31. Courts are routinely tasked with assessing an individual's financial status when determining indigency, because indigent parents who are subject to Termination of Parental Rights proceedings have an "absolute statutory right to counsel" and "*must* be appointed counsel." *Broom v. Jennifer J.*, 403 S.C. 96, 108 (2013) (citing S.C. Code Ann. § 63-7-2560(A)).

In criminal law contexts as well, South Carolina courts are called upon to assess individual financial circumstances. They should regularly evaluate a defendant's indigent status when appointing counsel in post-conviction relief contexts. *Gary v. State*, 347 S.C. 627, 630 (2001).[13]

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[12] *See also* S.C. Code Ann. § 31-21-140(B) (providing that in civil actions for discriminatory housing practices, the court may award "court costs and reasonable attorney's fees in the case of a prevailing party, if the prevailing party in the opinion of the court is not financially able to assume the attorney's fees").

[13] *See* S.C. Code Ann. § 17-3-10 ("Any person entitled to counsel under the Constitution of the United States shall be so advised and if it is determined that the person is financially unable to retain counsel then counsel shall be provided upon order of the appropriate judge unless such person voluntarily and intelligently waives his right thereto."); *see also id.* § 17-27-60 ("If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing and legal services, these costs and expenses shall be made available to the applicant in the trial court, and on review, in amounts and to the extent funds are made available to indigent defendants by the General Assembly."); *id.* § 17-3-30 ("A person to whom counsel has been provided shall execute an affidavit that he is financially unable to employ counsel and that affidavit must set forth all his assets."); *id.* § 17-22-350 ("Participation in a traffic education program may

Additionally, South Carolina courts have stated that supervision fees for the Department of Probation, Parole and Pardon Services should be determined on a sliding scale based on ability to pay because "a probationer whose sole violation consists of nonpayment of fines or restitution, and who is willing but unable to pay, should not be penalized for being poor." S.C. Code Ann. § 24-21-80; *State v. Hamilton*, 333 S.C. 642, 649 (Ct. App. 1999); *see also* S.C. Dep't of Prob., Parole and Pardon Servs. Fines and Fees Rep. FY 2018-2019, at 2.

II. ATTENTION TO INDIVIDUALS' LIMITED FINANCIAL MEANS IS NECESSARY TO PROTECT INDIVIDUAL RIGHTS AND PREVENT ABUSES OF POWER

A robust EFC analysis is vital to preventing the abuse of civil asset forfeiture as well as abusive levying of other fines and fees. While civil forfeiture has often been portrayed as a way to seize ill-gotten gains from drug kingpins or money launderers, the reality in South Carolina is that more than fifty-five percent of the time, money seized is less than $1,000, an amount that can severely impact poor individuals and small businesses. *See* Lee et al. In an in-depth investigation, the *Greenville News* found that South Carolina agencies have at times held money for decades before asking a court for permission to keep it and by then they have sometimes "lost track of the owner." Nathaniel Cary, *Mass Forfeiture, Incomplete Records Delivered $1.1M to SC Police*, Greenville News (Jan. 17, 2020), https://www.greenvilleonline.com/indepth/news/taken/2019/02/12/mass-forfeiture-sc-incomplete-records-police-seize-assets/2460476002/. Civil forfeiture can therefore become a tax on poor people and small businesses who are unable to afford the cost of an attorney to challenge the seizure.

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not be denied due to a person's inability to pay. If a person is deemed unable to pay, both the application fee and the participation fee must be waived.").

Due process protections are "of particular importance" where the government is imposing a financial sanction because "the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55-56 (1993). Abuse of the Eighth Amendment's EFC is as historic as the clause itself. The Supreme Court has recognized that, "[n]otwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued." *Timbs*, 139 S. Ct. at 688 (describing Black Codes which imposed "draconian fines" for crimes like vagrancy "and other dubious offenses" after the Civil War).

Exploitation of civil asset forfeiture is a nationwide problem, and the system has "led to egregious and well-chronicled abuses" now that it has become "widespread and highly profitable." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting the denial of certiorari); Sarah Stillman, *Taken*, The New Yorker at 54-56 (Aug. 12 & 19, 2013), (describing "cash-for-freedom deals" and the abuse of civil asset forfeiture). "Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue." *Timbs*, 139 S. Ct. at 689 (quoting Brief for American Civil Liberties Union et al. as Amici Curiae at 7). The concern that these fines could be abused is "scarcely hypothetical." *Id.* "In allowing agencies to keep some or all of what they forfeit, civil forfeiture laws permit, if not encourage, law enforcement to police for profit." Dick M. Carpenter et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10, Inst. for Just. (2d ed. Nov. 2015).

Economic sanctions have skyrocketed across the country in recent years, and asset seizure has come under particular scrutiny in South Carolina.[14] An in-depth investigation by the *Greenville News* calculated that $17.6 million had been seized in the state between 2014 and 2016 and found that more than 1,500 individuals have had property taken despite never being convicted of a crime. *See* Lee et al.; Nick Sibilla, *South Carolina Judge Declares Civil Forfeiture Unconstitutional*, Forbes (Oct. 22, 2019), https://www.forbes.com/sites/nicksibilla/2019/10/22/south-carolina-judge-declares-civil-forfeiture-unconstitutional/ (discussing the circuit court's decision in this case). Roughly half of those individuals had never even been charged. *See* Lee et al. This means that police took property with no criminal conviction in "almost 40% of the state's civil forfeiture cases." Nick Sibilla, *South Carolina Could Abolish Civil Forfeiture*, Forbes (Feb. 14, 2019), https://www.forbes.com/sites/nicksibilla/2019/02/14/south-carolina-could-abolish-civil-forfeiture/.

The *Greenville News* highlighted egregious instances of civil asset forfeiture, including two instances where "agencies tried to seize widows' homes because they said the women didn't do enough to stop drug sales taking place beyond their front stoop." *See* Lee et al. In one such example, a woman in her 80s had been living in the same home since 1964 but nearly lost it when the county sheriff's chief deputy threatened to seize the woman's property after criminal activity

[14] *See generally* National Public Radio, New York University's Brennan Center for Justice, & the Nat'l Ctr. for State Courts, *State-By-State Court Fees* (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312455680/state-bystate-court-fees (finding that every state except Alaska, North Dakota and the District of Columbia had increased civil and/or criminal fees since 2010). Between 2007 and 2017, the U.S. Department of Justice seized $28 billion in cash and property through its asset forfeiture program. Office of the Inspector General, U.S. Dep't of Justice, *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities*, at I (Mar. 2017), https://oig.justice.gov/reports/2017/e1702.pdf. In one study, the total amount of asset seizures in 14 states "more than doubled from 2002 to 2013." Carpenter et al., at 5. As of 2017, 10 million people owed more than $50 billion in economic sanctions. Martin et al., *Shackled to Debt* at 2.

took place on her lawn. She was ultimately able to fight the forfeiture, but not without hiring a lawyer. *Id.* In a similar case, another woman nearly lost her home after drug sales took place on her property while she was at work or asleep. Although she put up "no trespassing" signs and trimmed hedges so law enforcement could have a better view, officials sought to seize her home. As part of a settlement, the woman agreed to pay $5,000 to keep her home and another $5,000 any time someone was caught selling drugs on her property; if she did not pay, she could lose the home. The city acknowledged this had been an "extreme remedy" but deemed it necessary to promote a "peaceful atmosphere and retain community standards." Mike Ellis, *For Years, a SC City Tried to Seize a Widow's Home. It Still Might.*, Greenville News (Jan. 17, 2020), https://www.greenvilleonline.com/in-depth/news/taken/2019/01/27/taken-ella-bromell-conway-sc-civil-forfeiture-investigative-journalism/2459430002/. After additional drug sales took place on the property, a judge ultimately found law enforcement lacked evidence the homeowner was part of or had any actual knowledge of criminal activity. Despite the verdict in her favor, the woman still fears that her home could be subject to future seizure attempts. *Id.*

Excessive fines also severely impact small businesses, which can be especially vulnerable.[15] *The New York Times* has profiled the Internal Revenue Service's practice of targeting small business owners who had made small cash deposits. Agents viewed the practice as an attempt to avoid government reporting requirements for deposits over a $10,000 threshold. In one example, Carole Hinders owned a small cash-only restaurant in Iowa for forty years. Though she was never charged with any crime, $33,000 was seized from her checking account

[15] Approximately 73% of small businesses operate as a sole proprietorship, and approximately 52% operate with a home as the primary business location. *See, e.g.*, SBA Frequently Asked Questions, https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (citing U.S. Census Survey of Business Owners and Statistics of U.S. Businesses data as of 2012).

after she made several small deposits, leaving her to prove her innocence. Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. Times (Oct. 25, 2014), https://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html. In a similar case, the IRS seized more than $107,000 from the owner of a small convenience mart in North Carolina after he made several cash deposits under $10,000, though he was never charged with a crime. Nick Sibilla, *IRS Seizes Over $100,000 From Innocent Small Business Owner, Despite Promise To End Raids*, Forbes (May 5, 2015), https://www.forbes.com/sites/instituteforjustice/2015/05/05/irs-seizes-over-100000-from-innocent-small-business-owner-despite-promise-to-end-raids. Police have also raided a small computer repair shop—seizing over 100 computers, many of which belonged to customers awaiting repair services—after a sole tip alleged the shop-owner may have purchased stolen electronics. The shop owner ultimately proved he had followed the proper protocol for the one laptop whose provenance was questioned, but then entered into a protracted legal battle to reclaim the property. Connor Sheets, *When the Police Keep Your Stuff: Alabamians Lose Property to Controversial Practices*, AL.com (Mar. 6, 2019), https://www.al.com/news/2017/10/when_the_police_keep_your_stuf.html.

These examples in which property was seized, triggering expensive legal battles with no apparent wrongdoing by the property owner, show the importance of bolstering and enforcing the protections of the EFC. A constitutional jurisprudence that does not account for individual circumstances and hardship in determining excessiveness fails to protect people and is fundamentally inadequate.

III. ECONOMIC SANCTIONS ARE MORE LIKELY TO BE IMPOVERISHING—AND THEREFORE EXCESSIVE—WHEN IMPOSED ON PERSONS WITH LIMITED FINANCIAL MEANS, AND MAY DISPROPORTIONATELY IMPACT COMMUNITIES OF COLOR

For people who cannot pay immediately, even relatively small economic sanctions have the tendency to snowball into additional fines and fees as they accumulate interest, late fees, and legal costs. Alexes Harris et al., *Monetary Sanctions in the Criminal Justice System* 4 (Apr. 2017), http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf. They can also result in the accumulation of collateral consequences, exacerbating already precarious situations by piling on loss of drivers' licenses, public benefits, and voting rights. Other collateral consequences can include the extension of probation or parole, and even incarceration for failure to pay.[16] Where individuals do not have the ability to pay for a lawyer, the property may be seized by default. "More than 70 percent of forfeiture cases filed against individual property owners from 2014-2016 [in South Carolina] were won by default . . . . That means the police never had to persuade a judge or jury about the merits of a claim." *See* Lee et al. In this way, excessive fines have the effect of generating a vicious cycle of poverty from which it is difficult to emerge, resulting in an inability to obtain basic necessities, including housing, groceries, or medicine.[17]

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[16] Martin, *Shackled to Debt*, at 9; Harris et al., *Monetary Sanctions in the Criminal Justice System*, at 4; Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1603-04 (2015).

[17] *See* Nicholas Kristof, Opinion, *Is It a Crime to Be Poor?*, N.Y. Times (June 11, 2016), https://www.nytimes.com/2016/06/12/opinion/sunday/is-it-a-crime-to-be-poor.html (reporting story of Rosalind Hall, who was sentenced to pay restitution for writing bad checks totaling $100, and yet owed $1,200 in total fees and surcharges after making payments for eight years); Sarah Stillman, *Get Out of Jail, Inc.*, The New Yorker (June 16, 2014), https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc (in survey of 60 people on private probation, "[t]he vast majority of respondents had forgone rent, groceries, medicine, or all three to pay fees to private-probation firms"). "Financial penalties that push an individual beyond a certain fundamental level of economic survival and self-sufficiency are unnecessarily harsh and utterly counterproductive." McLean at 890.

Relatively small fines can become so insurmountable that individuals end up in jail for inability to pay. For example, when Tina Bairefoot was convicted of shoplifting about $163 worth of merchandise from Walmart, she was sentenced "to pay a fine and court costs of $2,220, or to serve thirty days in jail." *Bairefoot v. City of Beaufort, S.C.*, 312 F. Supp. 3d 503, 506-07 (D.S.C. 2018). She went to jail. *Id.* Similarly, when Dae'Quandrea Nelson was 17 and got in a fight with students at high school, he applied for and received pretrial intervention. But when he failed to complete his community service and missed a $30 payment (after he had already paid $350 for pretrial diversion), he was sentenced to "pay a fine and court costs of $3,212.50, or to serve two concurrent 30-day jail sentences." *Id.* at 506. Mr. Nelson had an income "below the federal poverty guidelines" and was incarcerated when he could not pay the fine. *Id.* The same was true of an indigent defendant named Michael Turner, who was sentenced to "twelve months in a detention center" when he failed to pay child support. *Price v. Turner*, 387 S.C. 142, 144-46 (2010), *vacated sub nom., Turner v. Rogers*, 564 U.S. 431 (2011). These scenarios demonstrate the ways in which even seemingly small fines can be financially catastrophic. For individuals of limited means, as little as $30 can be the difference between a day in court and jail time.[18]

[18] As a result of the threat of imprisonment for the inability to pay, "some describe the imposition of unmanageable economic sanctions and additional penalties for nonpayment as a form of modern debtors' prison." Beth A. Colgan, *Addressing Modern Debtors' Prisons with Graduated Economic Sanctions that Depend on Ability to Pay* 4, The Hamilton Project (Mar. 2019), https://www.hamiltonproject.org/papers/addressing_modern_debtors_prisons_with_graduated_economic_sanctions_that_de. This harkens back to some of the early abuses of the EFC, including the Black Codes, which instituted "draconian fines for violating broad proscriptions on 'vagrancy' and other dubious offenses." *Timbs*, 139 S. Ct. at 688-89 (citing Mississippi Vagrant Law, Laws of Miss. § 2 (1865), in 1 W. Fleming, *Documentary History of Reconstruction* 283-85 (1950)).

Even before the coronavirus pandemic sent shock waves through the economy, 40 percent of Americans could not afford an unplanned $400 emergency expense.[19] Now, people who had been on shaky financial footing are even more vulnerable to financial devastation. Small businesses, too, are suffering, and they face a reality that is "particularly bleak." McKinsey & Co., *Which Small Businesses Are Most Vulnerable to COVID-19—and When*, (June 18, 2020), https://www.mckinsey.com/featured-insights/americas/which-small-businesses-are-most-vulnerable-to-covid-19-and-when; *see* Emily Flitter, *'I Can't Keep Doing This:' Small-Business Owners Are Giving Up*, N.Y. Times (July 13, 2020), https://www.nytimes.com/2020/07/13/business/small-businesses-coronavirus.html. Since the start of the pandemic, poverty has increased and unemployment is expected to rise to a level "not seen since the Great Depression" after 22 million people registered for unemployment benefits by mid-April 2020. *Unequal Protection: American Inequality Meets Covid-19*, The Economist (Apr. 18, 2020), https://www.economist.com/united-states/2020/04/18/american-inequality-meets-covid-19; Anneken Tappe & Tami Luhby, *22 Million Americans Have Filed for Unemployment Benefits in the Last Four Weeks*, CNN (Apr. 16, 2020), https://www.cnn.com/2020/04/16/economy/unemployment-benefits-coronavirus/index.html. Economic projections indicate that the impact of the crisis could push more than 71 million people into extreme poverty in 2020, likely with long-lasting impact. *The World Bank, Projected poverty impacts of COVID-19 (coronavirus)* (June 8, 2020), https://www.worldbank.org/en/topic/poverty/brief/projected-poverty-impacts-of-COVID-19. The outbreak has exacerbated income inequalities among marginal groups identified by race,

[19] Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2017*, at 3 (May 2018), https://www. federalreserve.gov/publications/files/2017-report-economic-well-being-us- households-201805.pdf.

gender, and immigration status, and communities of color in the South will likely suffer severe impact.[20]

The impact of fines, fees, and forfeitures on all individuals, and particularly communities of color, is stark. Even though black men make up only 13% of South Carolina's population, "[s]even out of 10 people who have property taken are black, and 65 percent of all money police seize is from black males." Nathaniel Cary & Mike Ellis, *65% of Cash Seized by SC Police Comes from Black Men. Experts Blame Racism*, Greenville News (Jan. 27, 2019), https://www.greenvilleonline.com/story/news/taken/2019/01/27/south-carolina-racism-blamed-civil-forfeiture-black-men-taken-exclusive-investigation/2459039002/; *see also* Sibilla, *South Carolina Judge Declares Civil Forfeiture Unconstitutional*.

An EFC jurisprudence rooted in the history of the clause must be attentive and not blind to differences in the way fines, fees, and forfeitures impact individuals. Amici curiae urge the Court to bring South Carolina into compliance with constitutional mandate and to find that the impact of a penalty on an individual is an essential element of evaluating the proportionality of a fine.

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[20] *U.S.: Address Impact of Covid-19 on Poor: Virus Outbreak Highlights Structural Inequalities*, Human Rights Watch (Mar. 19, 2020), https://www.hrw.org/news/2020/03/19/us-address-impact-covid-19-poor. Communities of color in the South will likely suffer severe impact. Christine Vestal, *The South May See the Largest Share of Coronavirus Misery*, Pew Stateline (Apr. 13, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/04/13/the-south-may-see-the-largest-share-of-coronavirus-misery ("Southern poverty rates are high, social welfare programs spotty and health care infrastructure threadbare . . . . 'The South is expected to be hit hard, because African Americans are expected to be hit hard . . . . There's no getting around that.'"). Simply put, the challenges of excessive fines can disproportionately impact communities of color, which are most likely subject to discrimination, have fewer opportunities for stable employment, and are more likely to be targeted by law enforcement. U.S. Comm'n on Civil Rights, *Targeted Fines and Fees against Communities of Color: Civil Rights and Constitutional Implications* at 3 (Sept. 2017), https://www.usccr.gov/pubs/docs/Statutory_Enforcement Report2017.pdf; Jamelle Bouie, *Why Coronavirus Is Killing African-Americans More Than Others*, N.Y. Times (Apr. 14, 2020), https://www.nytimes.com/2020/04/14/opinion/sunday/coronavirus-racism-african-americans.html.

CONCLUSION

For the foregoing reasons, amici submit that this court should hold that the South Carolina civil forfeiture statutes are unconstitutional and, regardless of the constitutionality finding, hold that the impact of a fine on an individual is an essential element of a proportionality determination.

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Respectfully submitted,

s/ Susan K. Dunn

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Appendix A

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, non-partisan organization of more than 1.6 million members dedicated to defending the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. Through its Racial Justice Program, the ACLU engages in nationwide litigation and advocacy to enforce and protect the constitutional rights of impoverished people against unlawful fine, fee, and forfeiture practices.

American Civil Liberties Union of South Carolina Foundation is the affiliate of the ACLU that is dedicated to defending and expanding individual rights and personal freedoms throughout the entire state of South Carolina. It is incorporated in South Carolina as a not-for-profit corporation and recognized as exempt from tax pursuant to Section 501(c)(3) of the Internal Revenue Code.

National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing approximately 300,000 members in Washington, D.C., and all 50 state capitals, including over 8,000 in South Carolina. A 2015 ballot of NFIB members found that 92% of respondents favor federal legislation that would require law enforcement to provide a judge with clear and convincing evidence of a crime before seizing a small business's assets.

South Carolina Appleseed Legal Justice Center ("SC Appleseed") is a nonprofit advocacy organization focused on overcoming social, economic, and legal injustice that affects low-income South Carolinians. SC Appleseed's efforts include policy advocacy, litigation, and community outreach and education in areas such as consumer protection, criminal justice, education policy, housing, healthcare, hunger, public benefits, and immigration.

South Carolina for Criminal Justice Reform ("SC4CJR") is a state-wide, non-partisan, grassroots organization composed of academics, formerly incarcerated individuals, defense attorneys, former prosecutors, business owners, and other citizens who are passionate about criminal justice reform in South Carolina. Through research, education, and advocacy, SC4CJR's mission is to achieve practical reform and fair treatment of the accused, convicted, and incarcerated throughout each stage of South Carolina's criminal justice system.

Root & Rebound ("R&R") is a national reentry advocate. R&R's mission is to restore power and resources to the families and communities most harmed by mass incarceration through legal advocacy, public education, policy reform and litigation—a model rooted in the needs and expertise of people who are directly impacted. In 2019, R&R launched the Second Chance Justice Collaborative ("SCJC") in partnership with Greenville-based Soteria Community Development Corporation. The SCJC serves South Carolina's justice-involved population statewide through direct services and policy advocacy, including advocacy around excessive fines and fees that often disproportionately impact people of color and low-income communities.

Project Not A Statistic ("Project NAS"), established in Columbia, South Carolina in 2011, is a non-profit 501(c)3 organization that provides professional guidance and resources to formerly incarcerated individuals. Project NAS's mission is dedicated to reducing recidivism of incarceration in South Carolina. Project NAS offers whole person development skills, re-entry consultation and training, resource workshops, legislative advocacy, community outreach and provides resource referrals.