

No. 18-1053

IN THE
Supreme Court of the United States

ASHLAND SPECIALTY CO. INC.,

Petitioner,

v.

DALE W. STEAGER, STATE TAX
COMMISSIONER OF WEST VIRGINIA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**SUPPLEMENTAL BRIEF TO PENDING PETITION
FOR A WRIT OF CERTIORARI**

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Under Rule 15.8, “any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases...or other intervening matter not available at the time of the party’s last filing.” Petitioner Ashland Specialty, Inc. (“Ashland Specialty”) filed its petition for writ of certiorari on February 6, 2019, seeking review of an opinion issued by the Supreme Court of Appeals of West Virginia. On February 20, 2019, the Court issued its opinion in *Timbs v. Indiana* (USSC 17-1091), which held that the Eighth Amendment’s Excessive Fines Clause applies to the states through the Fourteenth Amendment’s Due Process Clause.

But, the *Timbs* opinion did not hold that the civil forfeiture therein at issue violated the Eighth Amendment. Nor did the Court delineate the standards which state and federal courts must follow in evaluating penalties for gross disproportionality, because reconciling the myriad standards state and federal courts currently employ was not before the Court.

The instant case provides the Court with a ready vehicle to complete its important work in *Timbs*.

A. The Instant Case.

The pending petition involves a 500% civil penalty which state taxing authorities automatically assessed against Ashland Specialty, amounting to ***64 times the profit*** it made on the sales at issue, and ***5 times*** the equivalent of an in rem seizure of the involved property (more than in *Timbs*). Although the West

Virginia Court purported to apply Eighth Amendment scrutiny to the penalty imposed, the standard it utilized reflects the hopelessly muddled and confusing Eighth Amendment landscape which now plagues the state and lower federal courts. Each state and federal circuit applies its own tests for gross disproportionality. This multitude of standards cries out for resolution by this Court.

B. *Timbs v. Indiana* is Relevant to the Questions Presented in the Instant Petition.

In *Timbs*, this Court only addressed whether the Eighth Amendment's Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment.

In the opinion of the Court, Justice Ginsburg explained that because "the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority" it is a "safeguard" which "is 'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.'" *Timbs*, slip op. at 2, quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010) (brackets in original). Accordingly, the Court held that the "Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment." *Id.*¹

¹ Although the means through which that Eighth Amendment protection should bind the States was questioned (Gorsuch, J. concurring, and Thomas, J., concurring in judgment, both

Especially pertinent to the issues presented in the pending petition, the opinion made clear that fines are uniquely susceptible to abuse, and thus Eighth Amendment rights must be carefully protected:

[F]ines 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 (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.”).

Timbs, slip op. at 6-7.

These concerns continue unabated following *Timbs*, for the Court did not establish standards which state and federal courts must follow in weighing whether a particular civil fine, penalty, or forfeiture violates the

preferring the Fourteenth Amendment’s Privileges and Immunities Clause), the Court unanimously held that the Eighth Amendment’s Excessive Fines Clause applies to the States.

Eighth Amendment’s excessive fines prohibition. And, until that is accomplished, the Constitutional right this Court announced in *Timbs* – and the protections that flow from it – will not be fully realized.

Indeed, the American Civil Liberties Union, whose *amicus curiae* brief this Court cited in *Timbs*, recently observed that “[w]hile ‘encouraging,’...the ruling may not turn out to be much of a check on police and prosecutors.” See “Justices Answer On Excessive Fines Invites New Questions,” R.J. Vogt, Law360 (Feb. 24, 2019). As an attorney for the American Civil Liberties Union explained, ‘The [C]ourt said that the excessive fines clause applies to Timbs’ forfeiture case, but it did not say that Timbs’ forfeiture case violates the excessive fines clause....In other words, the [C]ourt has said that the rule applies *but it hasn’t clearly articulated what the rule is.*’ (emphasis added). And the attorney added that prevailing in an excessive fines challenge is “exceptionally difficult . . . because the Supreme Court has not clearly defined the substantive contours of the right.”

The article cited here, just one of many published articles following *Timbs*, further predicted “an avalanche of litigation” seeking to answer the question of how to determine excessiveness, and to define the contours of this Constitutional right.

CONCLUSION

As the first Eighth Amendment petition this Court will consider following *Timbs*, the instant petition is particularly timely, affording this Court the vehicle to

announce workable factors that state and lower federal courts should apply when evaluating a penalty for excessiveness, including whether they ought to be different for different types of fines, penalties, or forfeitures. By accepting this petition now, the Court may avert the predicted “avalanche” of new Eighth Amendment litigation, thus serving judicial economy, and give effect to the fundamental Constitutional protections this Court unanimously recognized in *Timbs*.

Respectfully submitted,

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