No. 20-1370

IN THE SUPREME COURT OF THE UNITED STATES

NIDAL AMHMED WAKED HATUM

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

Brief of Amicus Curiae Florida Association of Criminal Defense Lawyers

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INTEREST OF AMICUS CURIAE[1]

Amicus, Florida Association of Criminal Defense Lawyers, is a non-profit statewide organization of criminal defense practitioners with twenty-eight chapters and more than 2000 members. FACDL strives to be the unified voice of an inclusive criminal defense community, to improve the criminal justice system at the judicial, legislative, and executive levels, and to promote the protection of the rights of individuals.

Amicus is concerned about imposition of forfeiture money judgments, especially upon the indigent. Specifically, Florida and other states bar individuals from voting if they are unable to pay forfeiture and other fine penalties—even if the individuals have satisfied all of the other aspects of their sentence. In this way, imposition of an impermissible forfeiture money judgment would also represent an unconstitutional voting tax. Importantly, because petitioner in this case is not a United States citizen, he has no occasion to present these arguments. Thus, amicus presents arguments that might otherwise not appear in this case. Amicus, joined by CATO Institute and multiple other amici, raised similar concerns in an amicus brief in *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020) (*en banc*). *See En Banc* Br. Fines and Fees Justice Center, Cato Institute, R Street Institute & FACDL, 2020 WL 4698619 (11th Cir. Sept. 11, 2020).

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[1] The parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel has made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In this case, the Eleventh Circuit reversed the sentence and ordered the district court to impose forfeiture penalties through a forfeiture money judgment (for which there is no statutory authority). The district court found that the petitioner returned the proceeds of his crime to the victim long before any government investigation, and that petitioner had no property that could be forfeited. Nevertheless, the Eleventh Circuit ruled that a forfeiture money judgment must still be imposed, even though petitioner is indigent.

Florida and several other states do not restore citizens' voting rights until they fully satisfy all financial penalties imposed at sentencing. Consequently, individuals who cannot pay all such penalties never regain their voting rights.

This circumstance is common because forfeiture money judgments have become a regular and required feature of the federal criminal justice system. In Florida and in a number of other states, persons of limited means have no hope ever to be able to pay even modest financial sentencing obligations. Even the wealthiest individuals often can never satisfy forfeiture judgments that can reach a figure of tens of millions of dollars.

Because unpaid forfeiture money judgments deprive so many citizens of their voting rights, this Court should decide whether such judgments have a statutory basis or are instead an impermissible mandatory criminal fine.

ARGUMENT

Florida and several other states exclude convicted felons from voting until the individuals satisfy all of their criminal monetary penalties. *See En Banc* Br. States Tex., Ark., Ga., Ky., La., Miss., Neb., & S.C. Amici Curiae ("Texas Amici Br.") 1, *Jones v. Governor of Florida*, No. 20-12003, 2020 WL 4201299 (11th Cir. July 20, 2020) (explaining that seven states expressly condition re-enfranchisement on payment of criminal monetary penalties).

The Eleventh Circuit approved this practice in *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020) (*en banc*). Sitting *en banc*, a majority of the court of appeals held: "The people of Florida could rationally conclude that felons who have completed all terms of their sentences, including paying their fines, fees, costs and restitution are more likely to responsibly exercise the franchise than those who have not." *Id*. at 1035. Consequently, Floridians with criminal convictions may not vote until they have served their full sentence and paid all associated financial penalties.

The *Jones* dissent notes that over one million individuals who have been convicted of a felony are eligible for restoration of their voting rights, and that 77.4% of them owe some form of financial obligation. In the district court proceedings for *Jones*, testimony showed that the public defender represented 80% of defendants—a clear indication that these individuals were indigent. *See Jones*, 975 F.3d at 1066-67 (Jordan, J., dissenting); *see generally* Eric Blumenson, Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L.

Rev. 35 (Winter 1998); Alicia Bannon et al., Brennan Ctr. for Justice, *Criminal Justice Debt: A Barrier to Reentry* 8 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf; U.S. Comm'n on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* 36–37 (2019) (describing challenges people convicted of crimes face obtaining gainful employment).

While the implications today for so many citizens' voting rights are grave, courts have exercised limited constitutional scrutiny over the use of forfeiture provisions. For example, the text of the Eighth Amendment prohibits excessive fines and implies at least some level of judicial discretion in deciding the amount of a fine. Yet this Court observed in 1998 that it "has had little occasion to interpret" and "has never actually applied" the Excessive Fines Clause. *See United States v. Bajakajian*, 524 U.S. 321, 327 (1998). Two years ago, however, the Court held that the clause "guards against abuses of government's punitive or criminal-law-enforcement authority," is "'fundamental to our scheme of ordered liberty'" and has "'deep roots in our history and tradition,'" and therefore is an "incorporated" protection that applies to the states under the Fourteenth Amendment. *Timbs v. Indiana*, 139 S.Ct. 682, 686-87 (2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)) (cleaned up).

Nevertheless, as far as the Eleventh Circuit is concerned, forfeiture remains largely outside the Eighth Amendment's scope because forfeiture implies disgorgement of property, not a financial penalty. *See*, *e.g.*, *United States v. Dicter*,

198 F.3d 1284, 1292 n.11 (11th Cir. 1999) ("[W]e do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment."); *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999) (holding that "excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender").

In this environment, the forfeiture money judgment is particularly problematic because it has no statutory basis. Congress has only authorized these judgments in one instance—when there is a conviction for bulk cash smuggling in violation of 31 U.S.C. § 5332(a) and substitute property under 21 U.S.C. § 853(p) is unavailable.

In addition to being unauthorized by statute, the forfeiture money judgment is essentially a mandatory criminal fine in this case. The Eleventh Circuit reasoned that the government did not receive compensation for its loss, but the government suffered no loss. To be sure, even the victim bank suffered no loss because all of the loans were repaid. The petitioner received no ill-gotten gain. In short, the financial penalty in this case has none of the hallmarks that justify forfeiture.

Moreover, the petitioner is indigent. The district court did not order a fine because of the petitioner's inability to pay, yet the court of appeals has mandated imposition of an unpayable forfeiture money judgment that will last forever.

In *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966), this Court held the Equal Protection Clause forbids states from making the "payment of any

fee an electoral standard" for state elections. Unjustified interference with voting is especially pernicious because voting is "regarded as a fundamental political right because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

In *Raysor v. Desantis*, 140 S.Ct. 2600 (2020), a related case to *Jones*, three Justices of this Court appeared amenable to address the significant impact of unrealistic financial burdens on voting rights. In their dissent from the Court's decision to decline jurisdiction, the three Justices recognized that impossible-to-pay fines and other penalties exclude a vast number of otherwise eligible individuals from participating in civic life. *Id.* at 2600 (Sotomayor, J., dissenting from denial of application to vacate stay) (recognizing that the monetary penalty conundrum presented "implicates the 'fundamental political right' to vote'") (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)); *see id.* ("Under [Florida's] scheme, nearly a million otherwise-eligible citizens cannot vote unless they pay money.").

CONCLUSION

The Court should grant review in this case to address the imposition of forfeiture in a manner that goes beyond the statutory authorization, which may impinge on other fundamental civil liberties. As this Court has noted, "[e]xorbitant tolls undermine other constitutional liberties." *Timbs*, 139 S.Ct. at 689.

Respectfully submitted,

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