No. 21-5305

In the Supreme Court of the United States

ALEJANDRO ROSALES-GONZALEZ,

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 *AMICI CURIAE* EIGHTH AMENDMENT SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

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SUMMARY OF ARGUMENT

This Court has held that the protections of the Excessive Fines Clause are "'both fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and traditions.'" *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (citation omitted). The Court should now grant the petition and decide that the centuries-old guarantee that a person's financial condition is constitutionally relevant remains a component of the fundamental and deeply rooted protections afforded by the Clause.

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[1] *Amici curiae* requested consent from both parties to this case more than 10 days before this brief was due. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

This brief provides an historical account of the importance of considering financial condition—the ability to pay a fine or absorb the loss of cash or property through forfeiture—to the Excessive Fines Clause and its two key antecedents: Magna Carta of 1215 and the English Bill of Rights of 1689. Magna Carta first codified an ancient understanding that fines should "not be so large as to deprive [a person] of his livelihood." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989). Magna Carta's protections would later be incorporated into a prohibition on excessive fines in the English Bill of Rights and, ultimately, into the Eighth Amendment's Excessive Fines Clause.

This trilogy of documents has served as a "constant shield throughout Anglo-American history." *Timbs*, 139 S. Ct. at 688-89. Even in moments in which government officials and complicit courts have abused the prosecutorial power to extract revenues through fines and forfeitures against those with limited political power, the commitment to preventing ruinous economic sanctions has remained a constant refrain. This is evident over time in the repeated reaffirmation of constitutional protections, in their embrace in statutes and court proceedings, and in the guidance provided by influential treatises. This Court has an opportunity to endorse the Excessive Fines Clause's historical role and to ensure that the financial condition remains constitutionally relevant in a modern age.

ARGUMENT

I. The Constitutional Relevance of Financial Condition Has Ancient Origins.

As this Court has recognized, the "venerable lineage" of the Excessive Fines Clause is traced at least to Magna Carta. *Timbs*, 139 S. Ct. at 687-88. Drafted in 1215 in response to abusive practices, including the use of exorbitant economic sanctions, Magna Carta's drafters "sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements [a predecessor of the fine] as a source of royal revenue, and as a weapon against enemies of the Crown." *Browning-Ferris*, 492 U.S. at 270-71.

In relevant part Magna Carta declared:

> A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner, a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy.

Magna Carta, ch. 20 (1215), in A. Howard, *Magna Carta: Text & Commentary* 42 (rev. ed. 1998). The proportionality guarantee assured that economic sanctions would be set in accordance with the severity, or lack thereof, of the offense. The savings guarantee—*salvo contenemento* in the original Latin—ensured that a person fined would be left "sufficient for the sustenance of himself and those dependent on him." William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 293 (2d ed. 1914). The savings guarantee codified a pre-existing, ancient understanding that the setting of fines should account

for a person's financial condition. *E.g.*, *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, 114 (G.D.G. Hall ed., 1965) (writing circa 1188: "Amercement by the lord king means that he is to be amerced … so as not to lose any property necessary to maintain his position.").

In the decades that followed, historical records suggest the seriousness with which many took Magna Carta's guarantees. It was recodified 44 times over the next two centuries. Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629*, at 10 (1948). Its protections were also extended to all men in the first Statute of Westminster, 3 Edw. 1 Ch. 6 (1275); *see* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1252, n.109 (1987).

Fine rolls during the period showed patterns of remission consistent with responsiveness to a person's financial condition. *See* Alfred N. May, *An Index of Thirteenth-Century Peasant Impoverishment? Manor Court Fines*, 26 Econ. Hist. Rev. 389, 395-99 (1973) (analyzing court rolls dating from 1208 to 1321 and concluding, based in part on references to poverty in the records and the existence of an economic crisis, that declining fine rates in the period may be explained by consistent attention to individual financial condition in setting fines); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 856 (2013) (discussing fine rolls of King Henry III dating from 1216 to 1272, which include references to setting penalties while "saving their contenement" and "saving his livelihood").

But adherence to Magna Carta's proportionality and savings guarantees were not universal, falling into particular disuse in England's notorious Court of the Star Chamber. John Southerden Burn, *The Star Chamber: Notices of the Court and Its Proceedings; with a Few Additional Notes of the High Commission* (J., Russell Smith 1870).

During the reign of Henry VII (1485-1509), the King and his ministers were "industrious in hunting out persecutions upon old or forgotten laws, in order to extort money from the subject," and so "[t]o this end the Court of Star Chamber was remodelled, and armed with powers the most dangerous and unconstitutional over the persons and properties of the subject." *Id.* at 30, n.1. The King employed "promoters"—lawyers who would both initiate prosecutions and serve as debt collectors—but he himself was so involved in the collection of fines imposed in the Star Chamber that his handwriting is found in the margins of collection books. *Id.* at 30-31.

Though the Star Chamber continued to operate, the death of Henry VII offered a temporary reprieve from the Chamber's worst abuses and a return to implementation of Magna Carta's savings guarantee. For example, during the reign of Henry VIII, after a conviction for rioting and drawing arms, a defendant "was afterward ordered to be discharged 'after a time' as from his poverty he could not pay the fine." *Id.* at 41 & n.2. Similarly, the sentencing practices of the Archbishop of Canterbury John Whitgift, a jurist during the reign of Elizabeth I, were later described as follows: "Archbishop Whitgift did constantly in this Court maintain the Liberty of the *Free Charter* that none ought to be fined but *salvo contenimento*. He seldom

gave any sentence but therein did mitigate in something the acrimony of those that spake before him." *Id.* at 10. Further, Elizabeth I issued a general pardon forgiving fines and forfeitures previously assessed, excepting certain serious offenses. 27 Eliz. C.30 (1584-5), *in* Statutes of the Realm (1547-1624).

Between 1603 and 1641, however, the Star Chamber's abuses were revived. James I revoked Elizabeth I's general pardon, calling in debts from fines previously imposed. Burn at 85, n.3. Once again, the Star Chamber took aim at enemies of the Crown. For example, when the attorney general, Sir Henry Yelverton, passed "clauses in the City Charter, not agreeable to the King's warrant," he was "fined £4,000 and sent to the Tower." *Id.* 87.

Charles I continued these abuses in kind while expanding the type and quantity of criminal cases heard in the Star Chamber, thereby effectuating three ends: drain power from Parliament by creating a source of revenue that undermined its taxing authority, personally enrich monarchs and nobles in good standing, and severely punish those who spoke out against the Church and Crown. *Id.* at 90-156; 2 Henry Hallam, *The Constitutional History of England from the Accession of Henry VII. to the Death of George II.* 46-47 (2d ed. 1829); *Timbs*, 139 S. Ct. at 693-94 (Thomas, J., concurring in judgment). To aid in these endeavors, members of the judiciary beholden to the Crown drew a distinction between the "amercements" referenced in Magna Carta, and the "fines" imposed in the Star Chamber. Massey at 1251-54, 1262-63. While there were initially distinctions between the two—amercements were discretionary punishments whereas fines were voluntary payments to the Crown—the two

concepts eventually merged, with the language used interchangeably during the 17th and 18th centuries. *Id.* By ignoring the merging of that terminology, jurists in the Star Chamber claimed that the protections afforded by Magna Carta, which spoke only of amercements, did not extend to the ruinous fines they imposed. *Id.* As one commentator remarked: "those who inflicted the punishment reaped the gain, and sat, like famished birds of prey, with keen eyes and bended talons, eager to supply for a moment, by some wretch's ruin, the craving emptiness of the exchequer" and did so "regardless of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means." 2 Hallam at 46-47; *see also Impeachment of Sir Richard Bolton et al.*, 4 State Trials 53 (1641) ("Magna Charta … survives in the Rolls, but is miserably rent and torn in Practice. These words, '*salvo contenemento*,' live in the Rolls, but they are dead in the Star-chamber.").

Along with other abusive practices, the ongoing imposition of excessive fines led to the Star Chamber's abolition in 1641. Like Magna Carta before it, the abolishing statute forbade the levying of excessive fines. 16 Car. 1, c. 10 (1641); Lois G. Schwoerer, *The Declaration of Rights, 1688* (1981). This admonition appears to have registered in at least some courts. *E.g.*, *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C.P. 1677) (North, C.J.) (explaining that "[i]n cases of fines for criminal matters, a man is to be fined by Magna Charta with a *salvo contenmento suo*; and no fine is to be imposed greater than he is able to pay.").

Yet, like before, the partisan practice of imposing crushing fines continued in courts operating in fealty to the Crown. Schwoerer at 91; 9 Journals of the House

of Commons 692, 698 (Dec. 23, 1680) (finding, based on a review of court transcripts, that "the Court of King's Bench, in the Imposition of Fines on Offenders of Later Years, hath acted arbitrarily, illegally, and partially" including by imposing fines without "any Regard to the Nature of the Offences, or the Ability of the Persons"); *John Hampden's Case*, 9 How. St. Tr. 1054 (K.B. 1684) (rejecting an argument that Magna Carta's mandate of "Salvo Contenemento" applied to fines as well as amercements); *Timbs*, 139 S. Ct. at 694 (Thomas, J., concurring in judgment) (describing cases involving exorbitant fines imposed against Titus Oates, Sir Samuel Barnadiston, and John Hampton).

Ultimately, the "conflict between Parliament and the Crown culminat[ed] in the Glorious Revolution of 1688 and the English Bill of Rights of 1689." *Powell v. McCormack*, 395 U.S. 486, 502 (1969); *see generally* John 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 Rts. J. 989 (2019). Faced with being overthrown, James II fled and the House of Commons put forth the Declaration of 1688 to William of Orange, in which it detailed prior abuses including that "excessive fines have been imposed." Decl. of Rights of 1688. The Declaration further demanded "[t]hat excessive Baile ought not be required, nor excessive Fines imposed, nor cruell and unusuall Punishments inflicted." *Id.* Parliament then enacted the English Bill of Rights, constitutionalizing that prohibition. 1 Wm. & Mary, 2d Sess., ch. 2, § 10, in 3 Stat. at Large 441 (1689). Neither the Declaration nor the Bill of Rights were seen as creating a new right prohibiting excessive fines, but rather as reaffirming what was "indisputably an

ancient right of the subject" already guaranteed by Magna Carta. Schwoerer at 90.

Upon the enactment of the English Bill of Rights, the English government took steps to undo some of the abuses wrought through the Star Chamber. *See* McLean at 858-62; John Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 933 (2011). One form of abuse was the practice of imposing unpayable fines and then requiring the person to remain incarcerated until paid, leading to indefinite detention. *Timbs*, 139 S. Ct. at 688. These fines came to be known as "ransoms" to the Crown. 4 William Blackstone, *Commentaries on the Laws of England* 373 (1769). Ransoming was later challenged contemporaneously with the enactment of the English Bill of Rights, in a case in which the Earl of Devonshire had been fined £30,000 for an assault and battery. *Case of Earl of Devonshire*, 11 How. St. Tr. 1353 (Parl. 1689). His counsel argued that failing to account for a defendant's financial condition created a risk of indefinite detention, particularly for a "man of no great estate, for the excessive Charge that attends a Confinement will quickly consume all that he has . . . and thus the poor man will be doubly punish'd, first, to wear on his days in *perpetual Imprisonment*; and secondly to see Himself and Family brought to a Morsel of Bread." *The Works of the Right Honourable Henry late L. Delamer[e], and Earl of Warrington* 574-77 (1694). Though the House of Lords did not explain its reasoning, having heard this argument it held the fine to be "excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." 11 How. St. Tr. at 1370.

In sum, the principle of *salvo contenemento* is an ancient right. Periods of great governmental abuse of the prosecutorial power caused significant harm, but also served to entrench that right. Out of that abuse came Magna Carta, which for generations has been seen as a "sacred text," 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 152 (1895). Out of the Star Chamber came its reaffirmation in the prohibition against excessive fines in the English Bill of Rights. As detailed below, the promise of *salvo contenemento* carried over to and has been long-cherished in America as well.

II. The Constitutional Relevance of Financial Condition Is Firmly Rooted in the Colonial and Early American Experience

Significant evidence in the historical record shows that the colonists and early Americans held the protections of Magna Carta and the English Bill of Rights as their own, and that they ultimately reaffirmed those protections through the Excessive Fines Clause. As in England, this history is interspersed with periods of significant government abuse of the power to fine employed against the politically vulnerable. And yet, as in England, the commitment to *salvo contenemento* remained.

A. The Colonial Period

As subjects of the Crown, the colonists would have understood the guarantees of Magna Carta, and ultimately the English Bill of Rights, to protect them from the imposition of excessive fines. Jeremiah Dummer, *A Defence of the New-England Charters* 16-17 (1721) ("The Subjects Abroad claim the Privilege of *Magna Charta*, which says that no Man shal be fin'd above the Nature of his Offence, and whatever his Miscarriage be, a *Salvo Contenemento suo* is to be observ'd by the Judge.").

This understanding of the applicability of Magna Carta's savings guarantee is evident in early colonial statutes that required protection of basic human needs or consideration of a defendant's financial condition. *E.g.*, *The General Laws and Liberties of Connecticut Colonie: Revised and Published by Order of the General Court* 39-40 (1672) ("[t]he like Order shall be observed in Levying Fines; Provided it shall not be lawful for such Officer to Levy any mans necessary bedding, apparrel, tools, or arms, neither Implements of Houshold, which are for the necessary upholding of his Life"); 1666 Va. Acts ch. 13 (prohibiting the imposition of costs "where no Estate, or not sufficient, can be found and discovered"). *See also* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 330-36 (2014).

Likewise, attention to financial condition is evident in records of early trial practices. *E.g.*, *Records of the Courts of Trials of the Colony of Providence Plantations 1647-1662 (1920), Proceedings of the County Courts of Kent (1648-1676), Talbot (1662-1674) and Somerset (1665-1668) Counties* 405-07 (1937) (noting

that "the Court haue Considered theire poverty and ability to make any other satisfaction"); *id.* at 69-70, 74 (remitting a fine after a husband argued that his wife's offense was not his doing and that he had "pressures upon him"); *Records of the Court of Assistants of the Colony of Massachusetts Bay 1630-1692*, Vol. 2 33 (1904) (granting a request to reduce a fine after the petitioner explained he had a "poore wife and distressed family"); *Records of the Suffolk County Court 1671-1680*, Part 2 644 (1933) (remitting a fine in "consideration of her necessitous condition").

But as in England, the mid- to late-17th century included governmental abuse of the penal laws as a mechanism for revenue generation. In New York, for example, officials instituted "prosecutions [for treason] in order that the debts of the Province might be satisfied from the forfeitures."[2] Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* 714 (1944). These and other "signs of indulgence" led the citizenry to view prosecutorial practices "with a jaundiced eye." *Id.* at 702.

Aware of the controversy surrounding the Star Chamber in England, *Browning-Ferris*, 492 U.S. at 267, and with government overreach increasing at home, the colonists began more explicitly claiming a right to Magna Carta's protections against excessive economic sanctions. Pennsylvania lawmakers enacted the Pennsylvania Frame of Government of 1682, which provided: "all fines shall be moderate, and

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[2] For a discussion of colonial and early American records indicating that forfeitures would have been understood to constitute fines, see Colgan at 302-19.

saving men's contenements, merchandize, or wainage." Penn. Frame of Gov., Laws Agreed Upon in England &c., art. XVIII (1682), reprinted in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 132, 141 (1971). One year later, lawmakers in New York followed suit, establishing the New York Charter of Liberties and Privileges, which provided "[t]hat A freeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saveing to him his freehold, And a husbandman saveing to him his Wainage and a merchant likewise saveing to him his merchandize." N.Y. Charter of Libertyes and Priviledges (1683), reprinted in 1 Schwartz at 163, 165. Further, though largely spurred on by anti-Catholic sentiment, concern about excessive fines contributed to Maryland's Protestant Revolution of 1689, resulting in a declaration that "[t]he Imposseinge Excessive fines Contrary to magna Charta without any respect had to the *salvo Contenemento suo sibi* [is] therein Injoyned." *'Mariland's Grevances Wiy The Have Taken Op Arms'*, reprinted in Beverly McAnear, *The Journal of Southern History*, 8 J.S. Hist. 392, 401 (1942).

The enactment of the English Bill of Rights' prohibition on excessive fines shortly thereafter may have further bolstered attention to financial condition on American shores. For example, South Carolina lawmakers enacted a statute entitled "English Statutes made of Force: The Great Charter. A Confirmation of Liberties" that replicated the first Statute of Westminster. 1712 S.C. Acts No. 331 ("[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."). Other statutes in the mid-eighteenth century also attended to the ability of a person to pay economic sanctions. See, e.g., 1744 S.C. Acts No. 734 (charging those who could pay incarceration and enforcement costs but not those who "shall not have werewithal to defray the charges and fees of prosecution"); *Laws of New Hampshire Vol. III, Province Period 1754-1794*, at 29-30 (Henry Harrison Metcalf, ed. 1915) (directing courts to consider "the Quality & Circumstances of the Offender").

Like statutory enactments, trial court records in this period document remissions of fines due to the defendant's financial condition. *E.g.*, *The Burlington Court Book, A Record of Quaker Jurisprudence in West New Jersey 1680-1709*, at 163 (1944) (remitting a fine for selling liquor without a license in full "because of her Condition"); *id.* at 266 (noting the imposition of a contempt fine "Which in consideration of her poverty Was remitted unto her"); *id.* at 326 (discharging fees "in Consideration of his Poverty"); Hugh F. Rankin, *Criminal Trial Proceedings in the General Court of Colonial Virginia* 114 n.62 (1965) (regarding the trial of John Sparks, a habitual criminal whose fine was remitted as "a concession to the 'unhappy Circumstances of his Family'" and his youth).

Further, highly influential treatises published in America and England in this era also confirmed the constitutional relevance of financial condition. Jeremiah Dummer's 1721 treatise on the New England charters made direct reference to Magna Carta's guarantee of *salvo contenemento*. Dummer at 16-17. In 1769, William Blackstone spoke at length on the issue, explaining that the setting of fines must include

consideration of "the quality and condition of the parties" in part because "what is ruin to one man's fortune may be a matter of indifference to another's." Blackstone at 371; *see also id.* at 372 ("no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear"). *See also* Sollom Emlyn, *Preface to the Second Edition of the State Trials, in* T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783* xxxv (1816) ("due regard is to be had to the quality and degree, to the estate and circumstances of the offender, and to the greatness or smallness of the offence; that Fine, which would be a mere trifle to one man, may be the utter ruin and undoing of another"); William Eden, *Principles of Penal Law* 72-73 (3d ed. 1775) ("It is the usage of the courts, superinduced on the clause of Magna Charta 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.").

B. The Early American Period

In the weeks before the colonists declared independence from England, Virginians took up the mantle of prior efforts to secure the rights handed down from Magna Carta, ratifying the Virginia Declaration of Rights, which adopted the prohibition in the English Bill of Rights: "nor excessive fines imposed." Va. Decl. of Rts., § 9 (1776). Identical language would be included in the Eighth Amendment upon its ratification in 1791. In the time between, 12 states adopted the language "nor excessive fines imposed" or similar

language or declared that they continued to enjoy the rights of English subjects in their own constitutions. Colgan at 323 n.238. Some states also enacted statutes specifically referencing Magna Carta's savings guarantee. *E.g.*, 1786 Va. Acts. ch. 64 ("the amercement which ought to be according to degree of the fault, and saving to the offender his contenement"); 1787 N.Y. Laws ch. 1 (requiring that any "fine or amerciament shall always be according to the quantity of his or her trespass or offence and saving to him or her, his or her contenement"). Lawmakers also passed laws directing relief from oppressive economic sanctions. Colgan at 330-32. Likewise, the Northwest Ordinance mandated that "[a]ll fines shall be moderate." Northwest Ordinance of 1787 § 14, Art. 2.

The American commitment to the principle of *salvo contenemento*, however, was challenged by the Revolutionary War itself. First in England, and then in the colonies, capital offenses were punished not only by execution, but by attaint, which included forfeiture of estate and corruption of blood. James Fitzpatrick Stephen, *A History of the Criminal Law of England*, 487-89 (1883). The extent to which forfeiture of estate would have been used in the colonies is uncertain, as convictions for crimes that would trigger attaint were rare. Kathryn Preyer, *Penal Measurses in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 332-34 (1982). This may be in part due to benefit of clergy, a process by which people tried for a first capital offence could be exempted and subject to only lesser punishments. Preyer at 331-32 & n.9. Further, jury nullification, common at the time, included the refusal to convict on crimes that would carry forfeiture or to

find the existence of forfeitable property. *E.g.*, Goebel & Naughton at 715-16; Preyer at 346, 348.

Before the Revolutionary War, the colonists had begun tempering forfeiture practices. There had been some use of forfeiture of estate upon treason convictions related to earlier uprisings. Preyer at 332. But in general over time statutes became less oppressive, limiting forfeitures so that the defendant or surviving relatives were able to retain property sufficient to sustain their livelihoods. *E.g.*, 1777 N.C. Sess. Laws ch. 5(II) ("*Provided*, That the judge . . . shall and may order and appropriate so much of the traitor's estate as to him or them may appear sufficient for the support of his or her family."); *see also* Colgan at 332, nn.275-76. Forfeiture of property remained, both as a punishment in its own right and as a means of collecting fines, *e.g.*, 1766 N.C. Sess. Laws ch. 14(V), but the most extreme versions of attaint fell away.

And though the War brought with it a renewed interest in forfeitures of estate for the crime of treason, even that ultimately gave way to less punitive responses. Several colonies passed statutes allowing for forfeiture of estate against colonists who supported the British, some of which excluded property sufficient for the maintenance of the person's family, *e.g.*, 1778 Conn. Pub. Acts. (*Estates of inimical Persons confiscated*), while others did not, *e.g.*, 1777 Mass. Acts ch. 32. After the War, and perhaps at the behest of Congress, however, many reversed or amended their statutes in favor of remission. *See Acts, Ordinances, and Resolves of the General Assembly of the State of South Carolina, Passed in the Year 1784*, at 59-62 (J. Miller, printer 1784) (noting that Congress "ha[s] earnestly recommended to the several states to reconsider and

revise their laws regarding confiscation, so as to render the said laws perfectly consistent, not only with justice and equity, but with that spirit of conciliation which, on the returns of the blessings of peace, should universally prevail"); *see also* Colgan at 332-33.

Further, though documentation of the post-ratification litigation of excessive fines clause issues in this era is limited, reflections of Magna Carta's *salvo contenemento* provision and its link to the Excessive Fines Clause were evident in appellate decisions. *Jones v. Commonwealth*, 5 Va. (1 Call) 555, 556-57 (1799) (describing a Virginia statute that mirrored Magna Carta as "founded on the spirit" of the Virginia Declaration of Right's excessive fines provision); *Commonwealth v. Morrison*, 9 Ky. (2 A.K. Marsh.) 75, 99 (1819) (stating that a fine "should bear a just proportion to the offense committed, the situation, circumstances and character of the offender").

And, yet again, several key treatises published in the years following independence reaffirmed both the risks of government overreach and the importance of attending to a person's financial condition. These treatises often described the Excessive Fines Clause as a bulwark against governmental abuses, with the Star Chamber serving as a warning. William Rawle, *A View of the Constitution of the United States* 130 (2d ed. 1829); Joseph Story, *Commentaries on the Constitution of the United States* 710-11 (1833 ed.). Several of these treatises also heralded the consideration of a person's financial condition as key to those protections. Benjamin L. Oliver, *The Rights of an American Citizen* 185 (1832); *see also* Thomas Cooley, *A Treatise on the Constitutional Limitations with Rest Upon the Legislative*

Power of the State of the American Union 328-29 (1868).

But despite this evidence of the historical acceptance of financial condition as constitutionally relevant, certain practices appear to have been incompatible with that constitutional commitment. For example, corporal punishment—whipping, standing in the pillory, and various forms of mutilation—was available not only as a punishment in its own right, but also a substitute penalty for those unable to pay fines. *E.g.* Colgan at 309 & nn.167-68. It is unclear how often that substitution occurred. Preyer at 346 ("As in the seventeenth century, modest fines were imposed far more frequently—nearly twice as often—as whippings for the same offenses."). There is also evidence to suggest corporal punishment would not have been understood to be more severe than even moderate fines, at least for those of limited means. *E.g.*, *Laws of New Hampshire Vol. I: Province Period* 62-63 (Albert Stillman Batchellor, ed. 1904) (reprinting a statute enacted in 1682 that expressed concern that paying fines would be "very injurious" to indigent people and set a poverty line below which a defendant could be whipped in the alternative). Simply put, modern notions of the abusiveness of these practices do not map neatly onto the colonial and early American period.

In addition to corporal punishment, imprisonment and forced labor were used as substitute punishments for those unable to pay fines. And again, it is important to attend to anachronisms. There had been some efforts to limit the use of imprisonment for unpaid fines in early statutes. *E.g.*, 1769 S.C. Acts No. 1103 (limiting detention to 2 months); *see also* Joel Prentiss Bishop, *Commentaries on the Law of Criminal*

Procedure 618, § 874 (1866). Likewise, there were attempts to limit imprisonment for civil debt in the late 18th century. *E.g.*, Debtors' Relief Act of 1792, Pub. L. 2-29, 1 Stat. 265. Yet, debtors' prisons were common debt collection tools through at least the lead up to the Civil War. Colgan at 334. So too was forced labor. In addition to the institution of slavery—in which millions of people were forced to labor in brutal conditions—people, even orphaned children, were regularly indentured due to debt or poverty. *Id.*

Though penal statutes applying exclusively or differentially to people of color predate the close of the Civil War, *Id.* at 329-30, perhaps the most notorious example of the use of imprisonment and forced labor in relation to fines is found in the Black Codes. *Timbs*, 139 S. Ct. at 688-89; *id.* at 697-98 (Thomas, J., concurring). These laws were applicable explicitly or through practice only to black people in the post-emancipation South. *See generally* Douglas A. Blackmon*, Slavery by Another Name: The Reenslavement of Black Americans from the Civil War to World War II* (2008). Following trials that were often at best a sham, fines were imposed and used as grounds either for imprisoning people to "work off" the fines through chain gangs and other forms of penal labor, or selling them to private parties who then extracted labor under conditions that mirrored enslavement. *Id.*

One would not expect lawmakers and judges who participated in this project to take seriously the dictates of Magna Carta and the Excessive Fines Clause. One example of that failure can be seen in *State v. Manuel*, 3 & 4 Dev. & Bat. 20 (N.C. 1838), which involved an excessive fines challenge to a North Carolina statute that applied only to a "free negro or free person of

colour." *Id.* at 21. It dictated that a person unable to immediately pay a fine was to be taken to the courthouse door where the debt—and thus the person's labor—would be auctioned off. *Id.* The North Carolina Supreme Court acknowledged both that race and poverty were effectively used as "aggravating" factors in the statute, and that "[w]hether a fine be reasonable or excessive ought to depend on the nature of the offence, and the ability of the offender." *Id.* at 34-35. But it then upheld the statute, reasoning: "What would be a slight inconvenience to a free negro man, might fall upon a white man as intolerable degradation." *Id.* at 37.

In this period, some appellate courts adhered to a maxim embraced by jurists in the Star Chamber: "that he who cannot pay in purse must pay in person," a policy derided as "too much like making poverty a crime and offering an indemnity to riches." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 711-12 (1816). *E.g., State v. Cannady*, 78 N.C. 539, 543-44 (1878) (upholding forced labor if a person proved unable to pay fines); *Ex parte Bryant*, 24 Fla. 278, 278-79 (1888) (reasoning that imprisonment was merely a mode of executing the fine).

In other words, just as the Stuart Kings used the Star Chamber as a tool to generate revenue and squelch political dissent, *Browning-Ferris*, 492 U.S. at 267, some colonial and early American lawmakers and courts used imprisonment and forced labor, particularly through the Black Codes, for economic gain to the detriment of people with tremendous political vulnerability.

But even in this dark period, the ancient principle of *salvo contenemento* retained a foothold. On the specific point, some courts directly questioned the constitutionality of imprisoning people who could not pay. *E.g.*, *State ex rel. Garvey v. Whitaker*, 48 La. Ann. 527, 528-533 (1896) (striking down a sentence because "it would be equivalent to recognizing [the judge's] power to sentence an individual to an indefinite period of imprisonment in default of paying exorbitant or numerous fines for the simple infraction of a city ordinance."); *Jones*, 1 Call at 556-57 (concluding that a fine that may lead to incarceration would violate the spirit of Magna Carta and the Excessive Fines Clause by failing to account for the "estate of the offender"). Others took up and reaffirmed Magna Carta directly. *E.g.*, *People ex. rel. Robinson v. Haug*, 68 Mich. 549, 560-64 (1888) ("[t]he great charter made it unlawful to impose any penalty or forfeiture which should deprive a man of what is translated his "contenement"). Still others treated financial condition as constitutionally relevant. *E.g.*, *Frese v. State*, 23 Fla. 267, 270-71 (1887) (quoting Blackstone for the proposition that "the quality and condition of the parties" is relevant to excessiveness); *Burlington, C.R. & N. Ry. Co. v. Dey*, 48 N.W. 98, 105-06 (Iowa 1891) (upholding a fine against a corporation even though "if imposed upon individuals, might appear excessive" because "corporations hav[e] great incomes and cont[rol] vast properties"); see also McLean at 885 & n.195 (detailing early 20th century cases).

In sum, this historical account shows that the promise of Magna Carta's savings guarantee held steady in the American colonies through independence from England, the ratification of the Excessive Fines

Clause, and beyond. It is, therefore, a key component of the Clause's protections, central to its ability to continue serving as a "constant shield" in a modern age. *Timbs*, 139 S. Ct. at 688-89.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 13, 2021