

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 DRUG POLICY ALLIANCE, THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, THE
LAW ENFORCEMENT ACTION PARTNERSHIP,
THE INDEPENDENCE INSTITUTE, LIBERTAS
INSTITUTE, AND DUE PROCESS INSTITUTE
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

Amici curiae are Drug Policy Alliance, the National Association for the Advancement of Colored People, the Law Enforcement Action Partnership, the Independence Institute, Libertas Institute, and Due Process Institute. Although they have diverse missions and perspectives, *amici* share a commitment to improve the welfare of all Americans by curbing abusive use of asset-forfeiture laws. *Amici* believe the modern experience with asset forfeiture counsels in favor of granting the petition for certiorari, and holding that the Eighth Amendment's Excessive Fines Clause requires consideration of a defendant's ability to pay.

Amici consist of the following organizations:

1. **Drug Policy Alliance** ("DPA") is a non-profit organization seeking to advance policies and attitudes that best reduce the harms of both drug use and drug prohibition. DPA is composed of and supported by a broad coalition of individuals who share the belief that the war on drugs has failed. As part of its mission, DPA is interested in curtailing the practice of civil asset forfeiture, which (as detailed above) is a drug enforcement tool that is used disproportionately to harm the poor and minorities.

¹ Counsel of record received timely notice of the intent to file this brief under Supreme Court Rule 37.2, and all parties have consented. No counsel for a party authored this brief in whole or in part, and no person other than *Amici's* counsel made a monetary contribution to fund the preparation or submission of this brief.

2. **The National Association for the Advancement of Colored People** (“NAACP”), founded in 1909, is the country’s largest and oldest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used the legal process to champion equality and justice for all persons. Since its inception, the NAACP has advocated for fair criminal justice laws and procedures to protect communities of color and other vulnerable communities. In 2014, the NAACP published a report entitled *Born Suspect*, which provides important research and information regarding how the criminal justice system in our nation disproportionately harms African Americans and other communities of color. The NAACP advocates for fairness in policing procedures. The NAACP passed a resolution calling for the termination of programs which condone and even reward civil asset forfeiture, including the so-called “Equitable Sharing Program” at the federal level which allows state and local law enforcement to seize property from individuals without proving criminal wrongdoing and then refer this property to federal authorities to pursue forfeiture.
3. **The Law Enforcement Action Partnership** is a 501(c)(3) nonprofit of police, judges, prosecutors, corrections officials, and other law enforcement professionals who seek to make communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and

incarceration, addressing the root causes of crime, and working toward healing police-community relations.

4. **The Independence Institute** is a non-profit Colorado public policy research organization founded in 1985 on the eternal truths of the Declaration of Independence. The Institute is the second-oldest state think tank. The Institute has written and testified extensively on forfeiture abuse and forfeiture reform at the state, local, and congressional levels. The Institute has participated in many constitutional cases. The Institute's *amicus* briefs and scholarship were cited by Justices Alito, Breyer, and Stevens in *District of Columbia v. Heller* and *McDonald v. Chicago*, *New York State Rifle & Pistol Association v. City of New York* (Alito, J., dissenting), *Espinoza v. Montana Dept. of Revenue*, (Alito, J., concurring), and *Rogers v. Grewel* (Thomas, J., dissenting from denial of cert.). The research of the Institute's Senior Fellow in Constitutional Jurisprudence, Robert G. Natelson, was cited by Justice Thomas in *Adoptive Couple v. Baby Girl* (concurring), and *Upstate Citizens for Equality v. United States* (dissenting from denial of certiorari); by Justices Scalia, Thomas, and Alito, and Chief Justice Roberts in *N.L.R.B. v. Noel Canning* (concurring) and *Arizona State Legislature v. Arizona Independent Redistricting Comm'n* (dissenting); Justices Alito and Scalia in *Town of Greece v. Galloway* (concurring); Justice Kennedy in *Arizona v. Tribal Council of Arizona* (concurring in part and dissenting in

part); and by then Judge Gorsuch in *Kerr v. Hickenlooper* (dissenting).

5. **Libertas Institute** is a non-profit think tank and educational organization that collaborates with a diverse group of organizations and allies to create and promote innovative policy reforms on a nationwide scale. They effect change through legal research, public advocacy and advertising, lawsuits against government, events, publications, and more.
6. **Due Process Institute** is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal justice system.

SUMMARY OF THE ARGUMENT

The modern experience with civil asset forfeiture provides a stark example of the abuse of power the Excessive Fines Clause was meant to curtail. That abuse demonstrates why the Court should grant the petition for certiorari to address whether, and then hold that, a defendant's ability to pay should be considered when determining if a fine is excessive under the Eighth Amendment.

Congress expanded the federal asset-forfeiture regime in the 1970s in an effort to cripple drug-trafficking organizations and their kingpins. The federal experiment led the states to adopt their own similar statutes. The proceeds of forfeiture often go to the enforcement agency itself, leading state agencies to employ forfeiture schemes as a mechanism for funding government operations. These days, however, states often seize the assets of ordinary Americans rather than drug kingpins—seizures predominantly from the poor and people of color.

As a result of their current focus, asset seizures often threaten the very livelihoods of their targets. Forfeitures of homes, cash, cars, and even phones, especially from those unable to afford them, may affect whether a defendant is housed, employed, in school, with her family, or, in some cases, out of jail. Such deprivations severely undermine other liberties, just as this Court warned in *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

This Court has already held that forfeitures can be “fines” under the Eighth Amendment. It should now grant the petition for certiorari to consider, and then hold that, the Excessive Fines Clause requires consideration of a defendant's ability to pay in determining whether a fine is unconstitutionally

excessive. Doing so will better safeguard the rights of all Americans against a troubling abuse of power.

ARGUMENT

I. The Modern Experience With Asset Forfeiture Seriously Counsels In Favor Of Granting The Petition For Certiorari.

A. Congress Significantly Altered And Expanded The Forfeiture Landscape Starting In The 1970s And 1980s.

Asset forfeiture had “humble beginnings in maritime law.” Rachel L. Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture To Take From Property Owners and Pad the Pockets of Local Government—The Righteous Hunt for Reform Is On*, 46 Tex. Tech L. Rev. 1169, 1174 (2014). And it was little used until the “War on Drugs.”

Starting in the 1970s and continuing through the 1980s, however, the government came to believe that asset forfeiture could be a powerful tool in its efforts to curtail drug trafficking. For example, a 1981 report from the Government Accountability Office to the Chair of the Senate Criminal Justice Subcommittee stated that forfeiture was not being used to its full potential to take “the profit out” of the drug trade, and recommended that forfeiture be an “additional dimension in the war on drugs.” Milton J. Socolar, Comptroller General, *Asset Forfeiture — A Seldom Used Tool In Combatting Drug Trafficking* (1981), <https://bit.ly/2Npcmm3>. The Department of Justice articulated the similar view that forfeiture could be used to confront the “high echelon criminal elements who are isolated from the actual distribution of drugs, but who direct, control and profit from the drug

traffic.” U.S. Department of Justice, Drug Abuse Policy Office, and Office of Policy Development, *National Strategy for Prevention of Drug Abuse and Drug Trafficking* 51 (Sept. 1984) (“DOJ National Strategy”), <https://bit.ly/2NQ9USu>.

Consistent with these objectives, over time, Congress significantly broadened the categories of assets subject to seizure. In 1970, Congress enacted two statutes permitting the seizure of controlled substances, raw materials, and equipment involved in their production and distribution. Organized Crime Control Act, Pub. L. No. 91–452, 84 Stat. 922 (1970); Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91–513, 84 Stat. 1236 (1970). In 1978, Congress allowed for the forfeiture of money and other objects of value furnished or intended to be furnished “in exchange for a controlled substance” and “all proceeds traceable to such an exchange.” Psychotropic Substances Act, Pub. L. No. 95–633, 92 Stat. 3768. Then, in 1984, it allowed for the forfeiture of real property connected to a drug crime. Comprehensive Crime Control Act, Pub. L. No. 98–473, 98 Stat. 1837; see also S. Rep. No. 225, 98th Cong., 1st Sess. (1983) (noting that, “[i]n recent years the Justice Department and other federal agencies have made a concerted effort to increase the use of forfeiture in narcotics and racketeering cases,” and that the 1984 statute was “intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by federal law enforcement agencies”).

By the mid-1980s, having expanded the federal forfeiture laws to reach all species of property connected to drug offenses, Congress began to enlarge federal law to enable enforcement agencies to target

the proceeds of other crimes. Congress permitted forfeiture of money laundering proceeds in 1986, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; proceeds from the unlawful receipt of loan commissions, embezzlement by bank employees, and bank fraud in 1989, Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183; and proceeds from mail fraud, wire fraud, altering motor vehicle identification numbers, armed robbery of automobiles, and transporting stolen motor vehicles in the early 1990s, Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384. The federal civil forfeiture statute, first enacted in 1986, now reaches the proceeds of a wide array of crimes, as well as conspiracy to commit them. See 18 U.S.C. § 981.

The War on Drugs led Congress to alter the forfeiture landscape along another dimension as well. In 1984, to incentivize enforcement agencies to reduce the profits from the drug trade, Congress began to permit the agencies that seized forfeited assets to retain those assets. It did this through two key amendments. First, while all assets seized through forfeiture proceedings under the prior regime had been deposited into the general fund of the U.S. Treasury, the Act created a new “Department of Justice Assets Forfeiture Fund,” into which seized assets were deposited. Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1837, 2052 (removing reference to the “general fund of the United States Treasury” and establishing a “special fund to be known as the Department of Justice Assets Forfeiture Fund”). The Fund’s assets could be used for future enforcement activities, and the Fund was intended to

be “self-sustaining.” *Id.*; Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 *Ariz. St. L.J.* 683, 695 (2014).

Second, in an effort to encourage cooperation from state and local law-enforcement partners in the War on Drugs, the Comprehensive Crime Control Act of 1984 provided the Attorney General authority to transfer to state or local law-enforcement agencies a share of forfeiture proceeds, through a program referred to as “Equitable Sharing.” See Pub. L. No. 98–473, § 309, 98 Stat. 1837, 2052 (referring to the “equitable transfer” of forfeited property to state or local law enforcement); Office of the Inspector General, U.S. Department of Justice, *Review of the Department’s Oversight of Cash Seizure and Forfeiture Activities* 7–8 (March 2017) (“DOJ Review”), <https://bit.ly/2oxYt4S>. As implemented by the Attorney General, the Equitable Sharing program allows state and local law enforcement to receive up to eighty percent of forfeiture proceeds. DOJ Review at 8.²

B. States Adopted Forfeiture Laws Modeled On The Federal Example, With Perverse Consequences.

The federal experiment inspired many states to enact their own forfeiture statutes. By 1984, thirty-six states had adopted various aspects of the federal Drug

² *Id.* (noting that the DOJ has provided over \$6 billion to state and local enforcement through the Equitable Sharing Program between fiscal years 2000 and 2016); U.S. Department of Justice and U.S. Department of Treasury, *Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies*, at 9–10 (July 2018), <https://bit.ly/2o2NB0k> (“The *minimum* federal share is 20 percent.”) (emphasis in original).

Enforcement Agency's model forfeiture law. DOJ National Strategy, *supra*, at 51.

Today, many states have forfeiture statutes that are just as broad in application as the federal counterpart, and many of the state statutes permit the enforcement agency to retain at least part of the assets seized through forfeiture proceedings. See, e.g., Utah Code Ann. § 24-4-115(3); W. Va. Code § 60A-7-706; Mass. Gen. Laws ch. 94C, § 47(d); see also Lisa Knepper et al., Institute for Justice, *Policing for Profit, The Abuse of Civil Asset Forfeiture* 14–16 & Appendix B (3d ed. Dec. 2020) (“Policing for Profit”) (surveying state laws), <https://bit.ly/3BBCTCk>; Bruce L. Benson & David W. Rasmussen, *Predatory Public Finance and the Origins of the War on Drugs 1984–1989*, 1 *The Indep. Rev.* 163, 185 (1996) (noting that numerous states have “forfeiture laws” that cover the proceeds of “any criminal activity”).

In states with these laws on the books, forfeiture proceedings are a way to fill budgetary gaps, one that does not involve the typical democratic process with city councils, county commissions, or state legislatures. In the words of one police chief, civil asset forfeiture is like “pennies from heaven.” *Policing for Profit, supra*, at 49 n.196 (quoting Columbia, Mo., police chief Kenneth M. Burton). Indeed, many local authorities have come to rely on asset forfeiture to fund their local budgets. See, e.g., John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 *J. Crim. Just.* 171, 179–82 (2001) (reporting results of survey of 1400 law enforcement agency chiefs, and noting that nearly 40% of responding agencies agreed that civil asset forfeiture was necessary as a budget supplement).

Dependency on civil asset forfeiture to fund the operations of law enforcement does not just create perverse incentives. It also undermines the rule of law, in the same way that over-reliance on court fees and fines places law enforcement and the judiciary in the role of bill collector, rather than arbiter of justice. *Timbs*, 139 S. Ct. at 689 (“[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,” internal quotation marks omitted); see, e.g., U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 9–15 (2015) (documenting the ways in which the law enforcement in the City of Ferguson prioritized generating revenue to meet budgetary needs), <https://bit.ly/1V31kb>; Alicia Bannon et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 30–31 (2010) (noting ways in which reliance on court fees creates conflicts of interest in courts and probation departments), <https://bit.ly/2M5KCOF>.

C. Forfeiture Laws Have Caused State Agencies To Pursue Assets Of Low-Income Individuals.

Proponents of asset forfeiture viewed (and still view) the laws as essential to deter drug trafficking by making the assets of kingpins subject to forfeiture. E.g., Stefan D. Casella, United States Attorneys’ Bulletin, *Overview of Asset Forfeiture Law in the United States* 8 (Nov. 2007), <https://bit.ly/2BFE1Fo>; DOJ National Strategy, *supra*, at 51. But this purpose has not panned out in practice.

1. Over time, in no small part due to the perverse budgetary incentives that forfeiture statutes create,

law enforcement has shifted its focus from powerful kingpins and crime bosses to less-culpable actors. The Alabama Supreme Court has observed that “forfeiture laws are being used more frequently to punish [drug] users like [petitioner] rather than to punish those higher up the drug distribution chain.” *Ex parte Kelley*, 766 So. 2d 837, 839 (Ala. 1999) (quoting lower court concurrence). In fact, most forfeitures today involve small dollar amounts—not the stashes of drug kingpins. See, e.g., Radley Balko, *Chicago civil asset forfeiture hits poor people the hardest*, Washington Post (June 13, 2017) (“[R]oughly 11,000 seizures in Cook County over the five-year period were for amounts lower than \$1,000. Nearly 1,500 were for amounts under \$100.”), <https://wapo.st/2PFgyvz>; Utah Commission on Criminal and Juvenile Justice, *2019 Utah Annual Forfeiture Report 2* (listing median cash value of property seized in Utah in 2018 as under \$1,800), <https://bit.ly/3iI4JB>.

States’ focus on seizing small sums of money from less-culpable individuals also results from the fact that forfeiture laws generally permit enforcement agencies to retain seized cash while requiring them to destroy seized drugs. This feature encourages agencies to target low-level operatives, and to seize cash after completion of a drug sale, rather than targeting drug traffickers or preventing drug sales. See Brian D. Kelly, Institute for Justice, *Fighting Crime or Raising Revenue? Testing Opposing Views of Forfeiture* 12 (June 2019), <https://bit.ly/3oL5xOa> (describing an investigation that revealed Tennessee police officers focused on westbound lanes where smugglers hauled cash back to Mexico, rather than eastbound lanes, where smugglers transport drugs to the east coast).

2. Worse, the incentive structure created by forfeiture statutes also means that state agencies are targeting individuals with little or no connection to criminal activity in order to fill their coffers rather than to recover the proceeds of crimes. Or, in the words of the Alabama Supreme Court, “state[s] [are] edging ever closer to abusing the forfeiture laws, confiscating individuals’ property with no thought or proof of whether the items it is taking are actually the fruits of illegal drug sales or are actually being used to facilitate drug use or distribution.” *Kelley*, 766 So. 2d at 839 (quoting lower court concurrence).

Take the example of Consuela, a low-income Philadelphia resident in her mid-sixties, whose niece rented a room in Consuela’s home. Rebecca Vallas et al., Center for American Progress, *Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-income Communities and Communities of Color* 10 (April 2016) (“Forfeiting the American Dream”), <https://ampr.gs/2OZeEFK>. Local law enforcement searched Consuela’s home while she was away, on suspicion that her niece’s boyfriend (who was arrested during the search) was involved with drugs. *Id.* Once the boyfriend was released from jail, Consuela told him he was not allowed in her home and she never had contact with him again. *Id.* Four months later, despite Consuela’s lack of knowledge of or relationship to the boyfriend’s crimes, the Philadelphia District Attorney initiated an action to seize and forfeit Consuela’s home. *Id.* Unable to afford an attorney, but lucky enough to secure free legal help from a university clinic, Consuela challenged the forfeiture. *Id.* With legal assistance, Consuela negotiated a settlement that let her keep her house in exchange for banning her niece

and her niece's boyfriend from the home forever. *Id.* Of course, Consuela is not unique, but few of those who come to be in the cross-hairs of enforcement agencies are fortunate enough to secure able legal representation.³

Even law-enforcement agencies have voiced concern about whether seizure and forfeiture activities actually further investigations, rather than target non-culpable individuals in the pursuit of items of value. See, e.g., DOJ Review, *supra*, at 16, 20–30 (finding that the DOJ could but does not measure how its asset seizure and forfeiture activities advance criminal investigations, and reviewing a sample of seizures that “provided evidence that many of the DEA’s interdiction seizures may not advance or relate to criminal investigations”).

3. The enforcement trend of seizing the assets of those with little to no connection to serious crime disproportionately affects low-income communities and communities of color. See, e.g., *Forfeiting the American Dream*, *supra*, at 6. In Las Vegas, one study found that sixty-six percent of forfeitures occurred in twelve of the poorest forty-eight zip codes in Clark County, containing higher-than-average non-white populations. Daniel Honchariw, *Who Does Civil Asset Forfeiture Target Most? A Review of LVMPD’s Forfeiture Activities for Fiscal Year 2016 3*, Nev. Policy Research Inst. (2017), <https://bit.ly/3lvsjaN>. Asset

³ Inadequate procedural protections also exacerbate the outsized impact that the forfeiture statutes have on “the poor and other groups least able to defend their interests in forfeiture proceedings.” *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring in denial of writ of cert.).

forfeitures in Chicago are concentrated in its poorest neighborhoods. *Policing for Profit* at 10 n.18.

Communities of color are also particularly hard hit. In South Carolina, sixty-five percent of cash seized by police comes from black men. *Policing for Profit* at 10 n.16. Roughly the same is true in Philadelphia, where the figure jumps to seventy percent if there is no supporting conviction. American Civil Liberties Union of Pennsylvania, *Guilty Property: How Law Enforcement Takes \$1 Million in Cash from Innocent Philadelphians Every Year—and Gets Away with It* 10 (2015), <https://bit.ly/3DiWtUo>. Two-thirds of cash seizures in ten Oklahoma counties come from racial and ethnic minorities. David Love, *Civil Asset Forfeiture is The New Stop and Frisk, as Oklahoma Study Reveals Two-Thirds of Cash Seizures by Police Come From Blacks, Other Minorities*, Atlanta Black Star (Oct. 8, 2015), <https://bit.ly/3lmKqzf>.

II. Excessive Forfeitures Illustrate Why The Court Should Grant The Petition To Address, And Hold That, The Excessive Fines Clause Requires Consideration Of A Defendant’s Ability To Pay.

The breadth of the property rights that may be seized through forfeiture, the incentives for abuse modern statutes create, and forfeiture’s disproportionate application to the poor and persons of color all suggest that the Court should grant the petition for certiorari and hold that the Excessive Fines Clause requires consideration of a defendant’s ability to pay. Forfeiture’s dire real-life consequences on an individual’s ability to earn and keep a living also present an urgent public policy problem that demands

a resolution. Given the split of authority on the constitutional question, the time is ripe for this Court's review.

A. The Excessive Fines Clause Prohibits Fines That Destroy An Individual's Right To Earn And Keep A Living.

The historical context makes plain the Clause prohibits fines so excessive that they deprive a defendant of his or her "livelihood." See *Timbs*, 139 S. Ct. at 688; *Colo. Dep't of Labor & Emp't v. Dami Hosp.*, 442 P.3d 94, 101 (Colo. 2019) (determining that a person's ability to pay is relevant to the excessiveness inquiry, citing this Court's reliance on historical sources such as the Magna Carta and Blackstone).

Considering more than 500 years of Anglo-American legal history, the Court in *Timbs* observed that the Magna Carta required fines should "not be so large as to deprive [an offender] of his livelihood"; Blackstone determined that fines should not be greater than a person's "circumstances or personal estate will bear"; and colonial-era rules required that "fines shall be moderate, and saving men's contentments, merchandize, or wainage." 139 S. Ct. at 688 (citations omitted). In his concurring opinion, Justice Thomas discussed historical interpretations of the Magna Carta antecedent of the Excessive Fines Clause to the effect "that no man shall be amerced even to the full extent of his means" and that a fine in "an amount, which . . . extended to the ruin of the criminal, was directly contrary to the spirit of [English] law." *Id.* at 694.

This understanding continued and sharpened through the Civil War into a prohibition on fines so oppressive that they destroy an individual's right to

earn and keep a living. After the Civil War, Southern States sought to impose excessive fines through the Black Codes in order to extract involuntary labor from former slaves. *Id.* at 689. The “centerpiece” of these Codes was their “attempt to stabilize the black work force and limit its economic options apart from plantation labor.” *Id.* at 697 (Thomas, J., concurring) (quoting Eric Foner, *Reconstruction: America’s Unfinished Revolution 1863–1877*, p. 199 (1988)). Congressional debates over the Fourteenth Amendment “repeatedly mentioned the use of fines to coerce involuntary labor” to support passage of the Fourteenth Amendment, *id.* at 689, further showing the Clause bars fines that are excessive in the context of a defendant’s ability to pay.

B. Asset Forfeitures Deprive Defendants Of The Ability To Earn And Keep A Living.

The modern experience also supports the view that, for asset-forfeiture purposes, the Excessive Fines Clause analysis should consider a defendant’s ability to pay. That such deprivations are not only unconstitutional, but also ruinous for the people on whom they are imposed, renders the split of authority Petitioner highlights an exceptionally important one for this Court to resolve.

Vehicles. The poor are more likely to have their vehicles seized and forfeited. *Forfeiting the American Dream* at 7 (in one study, the average value of forfeited vehicles was less than \$6,000, strongly suggesting that low-income people are the most affected by vehicle seizures in the studied states.). This is likely to have serious consequences.

The loss of an automobile will almost certainly limit or deprive a low-income defendant of access to

gainful employment and educational opportunity. Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After Timbs*, 129 Yale L.J. Forum 430, 440–43. In many areas of the country, there is “virtually no alternative to the automobile” to reach jobs and educational resources. *Id.* at 440 (quoting John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 Transp. Q. 49, 58 (2003)); see also Tami Gurley & Donald Bruce, *The Effects of Car Access on Employment Outcomes for Welfare Recipients*, 58 J. of Urb. Econ. 250, 270 (2005) (access to a car decreases unemployment, increases weekly work hours, and leads to better-paying jobs). And even where alternatives exist, commutes may take too long. By one estimate, over two-thirds of available jobs in the country’s largest metropolitan areas “are inaccessible within an hour and a half by way of existing transit systems,” a figure that jumps to seventy-five percent or greater for low- and medium-skilled jobs. Adie Tomer et al., *Missed Opportunity: Transit and Jobs in Metropolitan America*, Brookings Institution 12, 17–19 (May 2011), https://www.brookings.edu/wp-content/uploads/2016/06/0512_jobs_transit.pdf.

A car seizure may also deprive or limit access to medical care and food, disproportionately so in low-income areas. Samina T. Syed et al., *Traveling Towards Disease: Transportation Barriers to Health Care Access*, 38 J. Community Health 976, 987 (2013) (“[L]ack or inaccessibility of transportation may be associated with less health-care utilization, lack of regular medical care, and missed medical appointments, particularly for those from lower

economic backgrounds.”). In D.C., for example, “food deserts”—where access to healthy food is limited—are concentrated where car-ownership rates are lowest and poverty rates highest. Randy Smith, *Food Access in D.C. is Deeply Connected to Poverty and Transportation*, D.C. Policy Center (Mar. 13, 2017), <https://bit.ly/3ajjhXN>.

Vehicle forfeitures may also affect a defendant’s ability to fulfill other legal obligations, including conditions of probation and parole. The loss of a car “may interfere with conditions requiring attendance at work or school, meetings with probation and parole staff, mental health or chemical dependency treatment, as well as the payment of supervision fees,” made more difficult by a loss of employment. Colgan & McLean at 446 (citing Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 *Geo. L.J.* 291, 310–17 (2016)).

Cash. More disconnected from the financial mainstream and more likely to carry sums of cash, low-income individuals and people of color often have their cash—and savings—seized during routine traffic stops. *Forfeiting the American Dream* at 6. With no or only limited access to financial institutions, they “are often forced to carry relatively large sums of cash—such as a full month’s rent payment or wages from an entire pay period.” *Id.* A seizure of cash may thus have disproportionate effects on low-income defendants. For example, the Los Angeles Sheriff’s Department seized \$10,000 a taco-truck owner had from his lawful business after a police dog smelled the cash. American Civil Liberties Union, *Civil Asset Forfeiture, Profiting from California’s Most Vulnerable* 8 (2016), <https://bit.ly/2PB1QWd>. San Diego Police seized

\$18,000 from another individual who had been pulled over in a traffic stop, despite having paperwork demonstrating the money was lawfully earned. *Id.* at 7. Forfeitures such as these can strike at lower-income business owners' ability to keep their businesses—their livelihoods—going.

Homes. Forfeiture of a home may make it difficult to obtain and maintain employment, remain healthy enough to work, and meet other basic needs for a defendant and his or her family. Housing insecurity has indeed been tied to “reduced success in the labor market and worse health outcomes for adults and their children.” Colgan & McLean at 438 (citing studies). Home forfeiture can increase housing costs, also making it more difficult to meet basic needs. *Forfeiting the American Dream* at 8; *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 177 (Pa. 2017) (recognizing “a home and a vehicle are often essential to one’s livelihood”). It can break apart families. Colgan & McLean at 436 n.41 (citing Gregory Bonett et al., *Priced Out, Pushed Out, Locked Out: How Permanent Tenant Protections Can Help Communities Prevent Homelessness and Resist Displacement in Los Angeles County* 30 (2019), <http://www.publiccounsel.org/tools/assets/files/1188.pdf>). And at its worst, for low-income defendants, home forfeiture can result in homelessness. *United States v. Robinson*, 721 F. Supp. 1541, 1544 (D.R.I. 1989) (taking into account that “[a]n order of forfeiture here would be, in effect, a sentence of homelessness for the defendant and her three young children”).

Phones. Even the loss of a phone may make it impossible to find and keep a job or access public benefits. *Carpenter v. United States*, 138 S. Ct. 2206,

2220 (2018) (“[C]ell phones and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society.”) (quotation marks and citation omitted).

* * *

As historical context and modern experience instruct, proper application of the Excessive Fine Clause’s protections requires consideration of an individual’s ability to earn and keep a living. Such analysis is necessary to maintain the Constitution’s protections and to curtail abusive seizures of property under the guise of law enforcement.

CONCLUSION

The Court should grant the petition for certiorari and hold that a defendant's ability to pay should be considered when determining whether a fine is excessive under the Eighth Amendment.

Respectfully submitted,

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