

No.

In the Supreme Court of the United States

BENNIE ANDERSON, PETITIONER

v.

STATE OF NEW JERSEY, RESPONDENT(S)

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT*

PETITION FOR A WRIT OF CERTIORARI

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I

QUESTION PRESENTED

The Excessive Fines Clause provides an overwhelming protection against exorbitant economic sanctions and is fundamental to our system of “ordered liberty”. *Austin v. United States*, 509 U.S. 602, 609-610 (1993); *Timbs v. Indiana*, 586 S.Ct. 682, 686-687 (2019)

This Court has determined that the scope of the Eighth Amendment is broad and applies to every government action that is even partially punitive. *Austin v. United States*, 509 U. S. 602, 609-610 (1993) Several Courts are nevertheless allowing states to engage in punitive conduct and still evade Eighth Amendment review. These Courts have specifically found that punitive pension forfeitures are not “fines” or “punishment” for purposes of Eighth Amendment scrutiny.

As such, these jurisdictions are depriving many of America’s 21 million public pensioners of their most basic Eighth Amendment rights. More specifically, several states are punishing individuals by seizing the entirety of their pensions, and are doing so without any constitutional safeguards. There is also a split of authority on this most important national issue which warrants United States Supreme Court review.

The Question Presented is:

Can a state insulate its punitive forfeitures from federal constitutional scrutiny by limiting the definition of what constitutes a “fine” for purposes of the Eighth Amendment?

RELATED CASES

State v. Bennie Anderson, MER-L-600-19, Superior Court of New Jersey, Law Division, Mercer County. Judgment entered May 20, 2019

State v. Bennie Anderson, Superior Court of New Jersey, Appellate Division, A-4289-18T3. Judgment entered on March 30, 2020

State v. Bennie Anderson, Supreme Court of New Jersey, 084365. Judgment entered on August 11, 2021

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PARTIES TO THE PROCEEDINGS

The Petitioner is Bennie Anderson and the Respondent is the State of New Jersey

OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 248 N.J. 53 (2021) *See* App. 1a to 36a. The opinion of New Jersey's Appellate Division is reported at 463 N.J. Super. 168 (App. Div. 2020) *See* App. 37a to 57a. The Order from the Superior Court of New Jersey, Law Division, Mercer County is unpublished, but is included in the Appendix at 58a to 61a.

JURISDICTION

The New Jersey Supreme Court rendered its decision on August 11, 2021. *See* App. 1a-36a. Petitioner requests a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOKED

The United States Constitution, Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

This Petition addresses an unsettled question of national importance. The United States Supreme Court has consistently found that the Eighth Amendment applies to any state action that is even partially punitive. *Austin v. United States*, 509 U.S. 602, 609-610 (1993); *United States v. Bajakajian*, 524 U.S. 321, 329-332 (1998); *Timbs v. Indiana*, 586 S.Ct. 682, 689 (2019)

There is now a split of authority on the applicability of the Excessive Fines Clause to all punitive forfeitures. This disagreement is based on lower courts either ignoring or misapplying Supreme Court precedent. More specifically, several Courts have not applied the Clause to all punitive financial state actions, as required by this Court. These lower Courts have refused to do so even when the state's exclusive and stated goal is to penalize an individual.

In cases involving punitive pension forfeitures, these Courts have evaded Eighth Amendment scrutiny by improperly limiting the definitions of "fine", "property" and/or "punishment".

The New Jersey Supreme Court adopted this very approach in Bennie Anderson's case. Bennie Anderson worked for the City of Jersey City for almost four decades. App. at 4a. It is undisputed that the forfeiture of Bennie Anderson's pension was punitive in nature. And punitive it was. Bennie Anderson lost a pension worth well over \$1,000,000 as punishment for taking a single \$300 bribe. App. at 33a -34a.

In a 5-1 decision, the New Jersey Supreme Court determined that the complete forfeiture of

Bennie Anderson's pension did not implicate the Excessive Fines Clause. The Court found that Bennie Anderson failed to meet the "honorable service" requirement of his pension. App. at 21a. As such, the Court determined that Bennie Anderson never "earned" his pension at all and that the forfeiture was therefore not a "fine" for purposes of the Eighth Amendment. App. at 23a. The Court reached this conclusion even though Bennie Anderson's pension was vested and in pay status at the time of forfeiture. App. at 39a. Remarkably, the New Jersey Court nevertheless found that "one cannot lose what one did not have to begin with." App. at 23a. In reality, Bennie Anderson was penalized by losing a benefit that he had earned over the course of 38 years.

The Court refused to apply the four-part proportionality test set forth in *United States v. Bajakajian*, 524 U.S. 321, 329-332 (1998); App. at 23a. Simply put, the state was able to insulate itself from any federal Eighth Amendment scrutiny by defining the word "fine" in an extraordinarily narrow and specious manner.

The New Jersey Supreme Court's decision mirrors the approach of several other jurisdictions. These Courts that have ignored one basic fact: that the Excessive Fines Clause is implicated whenever there is a punitive state action.

The Tenth Circuit Court of Appeals, the Third Circuit Court of Appeals, the Pennsylvania Commonwealth Court, the New Jersey Supreme Court and the Supreme Court of Appeals in West Virginia have all ignored this most fundamental constitutional principle. *Hopkins v. Okla. Pub. Emps. Ret. Syst.*, 150 F.3d

1155, 1162 (10th Cir. 1998); *Dailey v. City of Philadelphia*, No. 19-3409 (3d Cir. Jun. 23, 2020); *Scarantino v. Pub. Sch. Emps.' Ret. Bd.*, 68 A.3d 375 (Pa. Cmmw. Ct. 2013); *Hames v. City of Miami*, 479 F. Supp. 2d 1276 (S.D. Fla. 2007); *West Virginia Pub. Emps. Ret. Serv. v. Dodd*, 183 W.Va. 544 (1990). And this error has occurred, time and again, in cases involving public pension forfeitures.

The approach of these lower Courts is misguided. While states have the inherent power to define punishments and set fines, they cannot curtail basic federal constitutional rights, including the right to be free of a punishment which exceeds the crime. This is precisely what happened in New Jersey, where the statute requiring mandatory forfeitures was enacted 11 years after the *Bajakajian* decision. The New Jersey Supreme Court acknowledged that : “this case turns on the legislative decision in 2007 to take discretion away from courts and administrative agencies when public employees commit any of the identified offenses.” App. At 23a. Before the statute was enacted, pensioners in New Jersey were entitled to a proportionality analysis. See App. At. 23a. In other words, the New Jersey legislature curtailed rights established by this Court.

As it stands now, several Courts have also ignored the most basic definition of a “fine”, which is a “sum imposed as punishment for an offense.” *Merriam-webster.com* (emphasis added)

In cases like Bennie Anderson’s, the punishment imposed is the pension forfeiture itself. Courts throughout this country are nevertheless denying

Americans their Eighth Amendment protections by claiming that some forfeitures are not actually fines. Multiple courts are effectively engaging in a legal fiction with devastating real-life consequences for pensioners throughout this country.

This Petition certainly involves an issue of national importance. Nearly 21 million Americans participate in public pension plans, including active employees and those who have already retired. The lower Courts are denying Eighth Amendment protections to pensioners in a number of jurisdictions, making this an issue of national interest. For millions of Americans like Bennie Anderson, their pensions are their only source of income. Many individuals rely on their pensions to pay day to day expenses and to save money for unforeseen expenses. Most pension plans guarantee payments for life, making financial security upon retirement much more achievable. And for older Americans with severe health issues, like Bennie Anderson, their pension is often a lifeline.

A punitive pension forfeiture can lead to indigency. Individuals in civil forfeiture proceedings nevertheless have no right to appointed counsel. A growing number of states are seizing pensions with no regard for proportionality, making America's pensioners particularly vulnerable. In this case, the State of New Jersey imposed a punishment by seizing the entirety of Bennie Anderson's pension. As it stands now, a state can effectively do so automatically and by operation of statute. A full forfeiture is mandated in many jurisdictions even when the penalty is grossly disproportionate to the offense; the very result that the Excessive Fines Clause was designed to prevent.

Simply put, pensioners are being denied basic constitutional protections for what is often their only asset.

While this is already occurring in cases involving punitive pension forfeitures, the faulty logic of the lower Courts can certainly be applied to other penalties and fines unless this Court intervenes.

And unless this Court clarifies the scope of the Excessive Fines Clause and renders an “authoritative decision”, Courts will continue to reach conclusions that are inconsistent with Supreme Court precedent. More specifically, Courts will fail to recognize that it is the state’s punitive conduct which implicates the Eighth Amendment in every circumstance, making the label of such action irrelevant. To put it another way, the question is not whether the state is actually taking property, but whether the state is seeking to punish an individual.

The questions presented are particularly important today. Punitive fines and forfeitures have mushroomed at the state and local levels. As noted by Justice Thomas in *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017), civil forfeitures are now “widespread and highly profitable” causing “egregious and well-chronicled abuses”.

Only this Court can clarify its own precedent as to this fundamental Constitutional dispute and resolve what is inherently a national question; that is, whether the Excessive Fines Clause applies to all punitive forfeitures regardless of the label attached. Since this case is an ideal vehicle for doing so, the Court should grant certiorari.

STATEMENT OF THE CASE

Bennie Anderson began working for the Jersey City municipal government in October of 1978 shortly after being honorably discharged from the military. He began his employment through a government funded work program. He was employed by the City of Jersey City for almost four decades. By 1990, he was an Inspector in the Tax Assessor's Office. He initially worked on a part-time basis and then transferred to a full-time position. By the time he retired in March of 2017, Bennie Anderson had held every position in that office, except for Assessor.

After 38 years and six months of service, Bennie Anderson retired with a fully vested pension. On March 1, 2017, he was granted an early service retirement pension of \$60,173.67 per year.

Bennie Anderson is in extremely poor health. He suffers from very high blood pressure and severe Type 2 Diabetes requiring daily injections of insulin. He has a cyst in his left knee. Bennie Anderson also suffers from a weak heart, severe diabetic nerve pain in both feet and a skin condition on his arms. He takes 11 medications daily and receives stem cell treatments twice a week in New York. Bennie Anderson's only source of income was his pension. On November 21, 2017, Bennie Anderson was convicted of receiving a \$300 bribe. As a result of his conviction, the Employees Retirement System of Jersey City reduced his pension benefit to \$47,918.76 per year.

Bennie Anderson's situation then became far more dire. On March 27, 2019, the State of New Jersey sought the full forfeiture of Bennie Anderson's pension

pursuant to state statute. N.J.S.A. 43:1-3.1. On May 30, 2019, the trial court granted the state's request and found that the Defendant was not entitled to any Eighth Amendment protections. App. at 58a – 61a. The trial Court relied largely on rulings from other Courts which found that the Excessive Fines Clause did not apply to punitive pension forfeitures.

Bennie Anderson filed an appeal. New Jersey's Appellate Division found that the Eighth Amendment did in fact apply to punitive pension forfeitures. App. at 53a. The appellate court applied the four-part *Bajakajian* test but determined that Mr. Anderson's full pension should have been seized given the "gravity" of his offense. App. at 55a – 57a.

Both Bennie Anderson and the State filed Petitions for Certification with the New Jersey Supreme Court. Both applications were granted. In a 5-1 decision, the Court found, in pertinent part, that the Eighth Amendment to the United States Constitution did not apply to punitive forfeitures in New Jersey. The Court rendered this decision even though the State's action was intended to punish Bennie Anderson and even though his pension was fully vested.

Like the trial court, the New Jersey Supreme Court relied, in part, on rulings from other Courts wherein punitive forfeitures were not deemed to be "fines" if the pensioners failed to meet certain pre-conditions. App. at 21a.

Justice Albin filed a dissent and found that "the majority has denied Anderson the protections afforded by the federal Constitution by failing to call a fine by

its true name and by characterizing state law in a way that seemingly evades federal review.” App. at 36a.

REASONS FOR GRANTING THE PETITION

I. The New Jersey Supreme Court’s Decision Conflicts With This Court’s precedent

It is axiomatic that The Excessive Fines Clause of the Eighth Amendment limits the government's power to impose any financial penalties, whether in cash or in kind. *Austin v. United States*, 509 U. S. 602, 609-610 (1993)

A civil penalty implicates the Excessive Fines Clause if it constitutes a "punishment for some offense." *Id.*, 609-10, (1993)

In determining whether the Excessive Fines Clause applies, Courts must determine whether the state action is even “partially punitive” or purely remedial. *Austin*, at 610; *Bajakajian*, at 329-332; *Timbs*, at 689

That is the threshold question.

This Court has specifically determined that “We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish.” *Austin*, at 610 (emphasis added)

In Bennie Anderson’s case, the relevant statute, N.J.S.A. 43:1-3.1 is entitled “Forfeiture of pension, retirement benefit for conviction of certain crimes”. “Forfeiture” is defined as “the loss or giving up of

something as a penalty for wrongdoing.” *Oxford Languages* (emphasis added). And in *Hudson v. United States*, 522 U.S. 93, 103 (1997), this Court specifically found that the “Eighth Amendment protects against excessive civil fines, including forfeitures.” (quoting *Alexander v. United States*, 509 U. S. 544 (1993) and *Austin v. United States*, 509 U. S. 602 (1993))(emphasis added) .

The forfeiture of Bennie Anderson’s pension was a textbook example of a penalty. This much is readily apparent from the plain language of the applicable statute, not to mention United States Supreme Court precedent. And the Excess Fines Clause therefore applied. But the New Jersey Supreme Court erroneously disagreed, even though the statute in question imposed civil penalties based on criminal convictions. And even though the law was specifically designed to deter and prevent criminal conduct.

This Court has pointed out that a civil sanction which serves a “retributive or deterrent purpose”, is punishment for purposes of the Excessive Fines Clause. *Austin*, at 610

And in *Kokesh v. Sec. & Exch. Comm'n*, 137 S. Ct. 1635, 1642 (2017), this Court determined that a pecuniary sanction operates as a penalty if it is sought “for the purpose of punishment, and to deter others from offending in like manner”—as opposed to compensating a victim for his loss. This definition certainly includes pension forfeitures which do not simply serve to compensate victims for their losses, but instead are designed to punish and deter state employees.

It should also be noted that lower Courts have recognized that forfeitures which are “overwhelmingly disproportionate to the value of the offense must be classified as punishment” for purposes of the Eighth Amendment unless the forfeitures are shown to serve “articulated, legitimate civil purposes.” *U.S. v. Certain Real Property and Premises*, 954 F.2d 2 9, 35 (1992)(emphasis added)

Here, Bennie Anderson’s forfeited pension was at least three thousand three hundred thirty-three times greater than the value of his offense. While his pension was worth at least \$1,000,000, his offense amounted to \$300. It would be an understatement to say that the forfeiture was disproportionate to the value of the offense. As such, it was certainly a punishment which mandated constitutional scrutiny

Simply put, the first and only question regarding the applicability of the Excessive Fines Clause is whether the state action is even partially punitive, and not purely remedial. *Austin*, at 609-610. That requirement was certainly met here and in every other case involving punitive forfeitures throughout the country. However, lower Courts have almost always denied Eighth Amendment protections to pensioners who challenge their punitive pension forfeitures.

Bennie Anderson raised these pertinent arguments repeatedly below. In his appellate brief, the Petitioner argued that a payment required by the government is “punishment” within the meaning of the Eighth Amendment when it ‘can only be explained as serving in part to punish’. He cited the landmark case of *Austin v. United States*, in that regard. 509 U.S. at 610 (1993)

In his response to the state's Cross-Petition for Certification, Bennie Anderson once again relied on this Court's precedent by arguing that the Eighth Amendment applies "to each and every penalty and fine imposed by the government". *Austin v. United States*, 509 U.S. 602 (1993)

Bennie Anderson's lawyers also emphasized this point during oral argument before the New Jersey Supreme Court.

In addressing Bennie Anderson's arguments, the New Jersey Supreme Court was focused on the definition of "fine" and of "property". See App. 40a to 46a. And in deciding those issues, the Court relied almost exclusively on the language of the applicable statute, N.J.S.A. 43:1-3.1. App. at 41a. In other words, the Court simply deferred to the legislature without applying the "partially punitive" test required by this Court. New Jersey's approach therefore renders both the Excessive Fines Clause and this Court's precedent meaningless.

Supreme Court review is therefore mandated for purposes of clarification and correction.

II. The New Jersey Supreme Court's Decision Deepens a Split of Authority As To Whether the Excessive Fines Clause Applies to All Punitive Forfeitures

In rendering its decision in Bennie Anderson's case, the New Jersey Supreme Court adopted the view of several other jurisdictions which have also ignored or failed to properly apply the "partially punitive test" required by the United States Supreme Court. To

make matters worse, these Courts have defined “property”, “punishment” and/or “fine” in ways that avoid constitutional scrutiny. Their overall approach highlights the gravity of this issue and the need for Supreme Court review.

The relevant cases which have created a split of authority are set forth below:

Supreme Judicial Court of Massachusetts

In *Public Employee Retirement Administration Commission v. Bettencourt*, 474 Mass. 60 (Mass.2016), the Supreme Judicial Court of Massachusetts found that a punitive pension forfeiture does implicate the Excessive Fines Clause since an employee’s pension did constitute property. The *Bettencourt* Court dealt with facts similar to Bennie Anderson’s matter. In *Bettencourt*, the Defendant was a police officer whose pension was forfeited because he was convicted of a crime. Massachusetts’s highest Court found that the officer’s pension was “property” and that the forfeiture was a fine for purposes of the 8th Amendment. The Court determined that the proportionality test required by *Bajakajian* was therefore required. In other words, the highest Courts in New Jersey and Massachusetts addressed a similar set of facts but reached very different conclusions.

Tenth Circuit, Court of Appeals

In *Hopkins v. Okla. Pub. Emps. Ret. Syst.*, 150 F.3d 1155, 1162 (10th Cir. 1998), the Tenth Circuit found that the threshold question in determining the applicability of the Excessive Fines Clause is whether a forfeiture involved a “payment of property” to the state. The Tenth Circuit found that the Plaintiff did

not have a “property” right to his vested pension, because he failed to serve honorably. *Id.* The decision fails to properly consider whether the state action was punitive, which again, is the question that needs to be asked, as per this Court’s directive. *Id.*

Third Circuit, Court of Appeals

In *Dailey v. City of Philadelphia*, the Third Circuit determined that the punitive forfeiture of the Plaintiff’s pension did not implicate the Excessive Fines Clause at all. No. 19-3409 (3d Cir. Jun. 23, 2020) Like Bennie Anderson, the Plaintiff here argued that the key inquiry was whether the state action was punitive. The federal district Court disregarded her argument and denied her application. 417 F. Supp. 3d 597, at 625. On appeal, the Third Circuit then determined that the Plaintiff’s pension was not a fine at all, and that pensions were not property, but merely creatures of contract. No. 19-3409 (3d Cir. Jun. 23, 2020) Again, the Court did not address the fact that any punitive state action implicates the 8th Amendment.

Pennsylvania Commonwealth Court

In *Scarantino v. Pub. Sch. Emps.’ Ret. Bd.*, 68 A.3d 375 (Pa. Cmmw. Ct. 2013), the pensioner lost up to \$1.5 million in pensions benefits after being convicted for receiving a \$5,000 “gratuity”. The Pennsylvania Commonwealth Court found that the punitive forfeiture of Petitioner’s pension was not a fine and denied him a proportionality analysis pursuant to the Eighth Amendment. *Id.* At 384-385

United States District Court, S.D. Florida

In *Hames v. City of Miami*, 479 F. Supp. 2d 1276 (S.D. Fla. 2007), in addressing a punitive pension forfeiture, the District Court determined that the Excessive Fines Clause did not apply since the a “fine” only impacts property that belonged to the defendant. *Id.* at 1287-1288 In rendering its decision, the District Court cited the *Hopkins* decision as precedent. *Id.* at 1287-1288.

Somewhat ironically, the *Hames* Court also cited *Austin v. United States* in coming to its conclusion. *Id.* at 1287. While *Austin* involved the forfeiture of existing property, this Court determined that the Excessive Fines Clause applies to all cases wherein the relevant statute was punitive. *Austin*, at 620 In fact, the *Austin* Court looked to the legislative history of the statute in question and rejected the government’s argument that its actions were purely remedial. *Id.* In *Austin*, the appropriate test was applied, whereas in the above-stated jurisdictions it was not.

The West Virginia Supreme Court of Appeals

The Supreme Court of Appeals in West Virginia reached similar result as the Courts listed above. See *West Virginia Pub. Emps. Ret. Serv. v. Dodd*, 183 W.Va. 544 (1990), overruled on other grounds by *Booth v. Sims*, 193 W.Va. 323, 327-328 (1995)

This demonstrates that there is an ongoing split of authority as to whether the Eighth Amendment applies to punitive pension forfeitures.

This inconsistency certainly calls out for Supreme Court review. While states may define property

rights, they do not have the right to evade federal constitutional scrutiny by conveniently defining “property”, “fine” or “punishment” in such a limited and inconsistent manner.

This Court has rejected similar arguments made in the past.

In *Cleveland Board of Education v Loudermill*, 470 U.S. 532 (1985), a school employee challenged the propriety of his termination on due process grounds.

The Cleveland Board of Education argued that the Petitioner had no property right under state law because he obtained his employment by lying on his job application. *Id.* at 541. As such, the Board argued that the Petitioner was not entitled to due process protections pursuant to the United States Constitution. *Id.* This Court flatly rejected this assertion and specifically found that “property” cannot be defined by the procedures provided for its deprivation. *Cleveland Board*, at 539-541; footnote 5.

This is precisely what has happened to Bennie Anderson and to pensioners across the country. Several lower Courts have denied 8th Amendment protections by defining “property” with a singular focus on how pensions can be “forfeited”.

This Court also found that “the Board cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why Mr. Loudermill should not have been hired in the first place.” *Cleveland Board*, at 539, footnote 5. Here, the lower Courts have engaged in that same flawed logic by claiming that pensioners never actually earned their benefits if they failed to “perform honorably.”

By doing so, multiple lower Courts have deprived individuals of the proportionality test guaranteed by this Court in *United States v. Bajakajian*, just as the Board in *Loudermill* sought to thwart an individual's federal Due Process rights. In this regard, it is axiomatic that while states may expand constitutional protections, they cannot limit or curtail the rights afforded by the Court.

Many of the Courts listed above have also defined property in an inherently inconsistent way; using a double standard which benefits the government. In doing so, they have adopted an approach which ignores the essence of the Excessive Fines Clause. More specifically, these jurisdictions have recognized that pensions, even unvested pensions, constitute property for purposes of matrimonial proceedings, but not when it comes to Eighth Amendment review. As it stands now, a pensioner's spouse is protected in a divorce matter; but the pensioner has no right to protect his or her pension from government overreach.

Such an illogical and inconsistent approach violates both the letter and spirit of the Eighth Amendment which again provides an overwhelming protection against exorbitant economic sanctions imposed by the government.

The New Jersey Supreme Court made little effort to reconcile this difference even though Bennie Anderson emphasized this point, time and again.

There is also a conflict between the Courts listed above and other jurisdictions which recognize that any

and all punitive state actions are automatically subject to Eighth Amendment scrutiny.

By way of example, in *Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000) the Ninth Circuit acknowledged that "Two questions are pertinent when determining whether the Excessive Fines Clause has been violated: (1) Is the statutory provision a fine, i.e., does it impose punishment? and (2) If so, is the fine excessive?" The *Wright* Court also stated that "once a statute is deemed to be punitive and *is thus a 'fine'* within the meaning of the Excessive Fines Clause, we must turn to the question of whether the fine is excessive. *Id.* at 916. (emphasis added) As such, the *Wright* Court recognized that any punitive financial action, by definition, constitutes a "fine" for purposes of Eighth Amendment review, whereas many of the Courts listed above have not.

In *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999) the Seventh Circuit also acknowledged that civil sanctions which serve a punitive, and not a remedial purpose, implicates the Excessive Fines Clause.

In *Tillman v. Lebanon County Correctional Facility*, the Third Circuit found that penalties which can only be explained as serving in part to punish, are in fact "punishment" for purposes of the Excessive Fines Clause. 221 F. 3d. 410, 420 (3rd Cir. 2000)(citing *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, (1989)) Ironically, the Third Circuit did not apply this test in deciding *Dailey v. City of Philadelphia*.

And in *Pimentel v. City of Los Angeles*, 966 F.3d 934 (9th Cir. 2020) found that even municipal fines for

rather modest amounts of money are subject to the 8th Amendment since they constitute punishment.

Unlike most pension forfeiture cases, these decisions are consistent with this Court's reasoning.

Simply put, various Courts have improperly carved out an exception for punitive pension forfeitures in terms of Eighth Amendment scrutiny. Under their approach, the Excessive Fines Clause applies to all punitive actions except when the state targets an individual's public pension. Such an inconsistent approach which disregards this Court's precedent should not be allowed to continue.

These Courts have in fact employed a standard which ignores both the letter and spirit of Supreme Court decisions; decisions that have recognized the broad scope of the Excessive Fines Clause. In *Austin*, the Supreme Court determined that the Clause applied to civil punitive in rem forfeitures. 509 U.S. 602. And in *Timbs*, this Court determined that the Clause was fully applicable to the states. *Timbs v. Indiana*, 586 S.Ct. 682

Various Courts throughout the country are nevertheless taking a contrary approach by limiting the reach of the Excessive Fines Clause and by disregarding the most basic definitions of "fine", "property" and/or "punishment".

This erroneous approach is now becoming more entrenched, with the most recent decision by the New Jersey Supreme Court. As such, Supreme Court review is not only warranted, but necessary.

III. The Question Presented Raises Issue of National Importance That Warrant This Court's Review

Whether the Excessive Fines Clause applies to all punitive forfeitures is an important and recurring national issue. It is important that every lower Court be given clear guidance as to the constitutional parameters involved. And this sense of clarity is certainly important to the many Americans whose pensions are being forfeited.

This Court has stated that the Excessive Fines Clause is an essential check on the government's ability to "use [] civil courts to extract large payments or forfeitures". *Browning-Ferris Indus. Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. at 275. That protection carries little weight if Courts can "decline" to apply it all, as various Courts have already done.

Few issues are more important than the fundamental Constitutional protections contained in the Bill of Rights when individuals are being targeted by the government. The lower Courts have addressed the specific issue raised herein, with disparate results. As such, there is a lack of unity and consistency when it comes to an individual's rights under the Excessive Fines Clause.

This case offers an excellent vehicle for resolving the question presented. In *United States v. Bajakajian*, this Court set a floor as to how the Eighth Amendment should be applied to cases involving forfeiture; a floor that the Court disregarded in Bennie Anderson's case and in multiple other cases throughout the country. 524 U.S. 321 The fact that these cases

have made their way to the Circuit Courts of Appeal and to state Supreme Courts demonstrates the importance of this matter, especially since there is a split of authority.

State legislatures can never limit federally protected rights. But that is precisely what has happened throughout the country in cases involving punitive pension forfeitures. With the exception of *Bettencourt*, the decisions in each of the pension forfeiture cases were based on laws that defined “property” in a way that resulted in individuals losing a right that is derived from the Bill of Rights. In those cases that were decided after *Bajakajian*, the Court failed to apply the four-part proportionality test that is specifically required in cases involving forfeiture.

It is axiomatic that “the National government and, beyond it, the separate states are bound by the prospective mandate of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection”. *Kennedy v. Louisiana*, 554 U.S. 407, 412(2008) This Court has repeatedly issued holdings to that effect; however, the lower Courts and the American people need a “definitive” holding as to whether the Excessive Fines Clause applies to each and every punitive state action.

The issue was properly preserved below and the underlying facts are not in dispute. The trial Court, New Jersey’s Appellate Division and New Jersey’s Supreme Court addressed Bennie Anderson’s claim in detail, but with varying results. It is respectfully submitted that the disparate decisions within one Court

system, as well as the varied approach of Courts throughout this country highlight the need for review and clarification.

CONCLUSION

This writ should be granted for the reasons stated above.

Respectfully submitted.

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November 9, 2021

APPENDIX

**APPENDIX A — OPINION OF THE SUPREME
COURT OF NEW JERSEY,
DATED AUGUST 11, 2021**

SUPREME COURT OF NEW JERSEY

A-15/16 September Term 2020
084365

STATE OF NEW JERSEY,

Plaintiff-Respondent/Cross-Appellant,

v.

BENNIE ANDERSON,

Defendant-Appellant/Cross-Respondent.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 463 N.J. Super. 168, 230 A.3d 324 (App. Div. 2020)

March 30, 2021, Argued
August 11, 2021, Decided

Judges: JUSTICE LaVECCHIA delivered the opinion of the Court.

Appendix A

JUSTICE LaVECCHIA delivered the opinion of the Court.

Defendant Bennie Anderson, a former employee in the tax assessor’s office in the City of Jersey City (the City or Jersey City), was convicted of a federal offense touching upon his position of public employment. Based on that conviction, the State of New Jersey filed an action in state court pursuant to N.J.S.A. 43:1-3.1 to compel the forfeiture of defendant’s public pension. This appeal concerns defendant’s claim that forfeiture of his right to a public pension violates his constitutional right to be free of excessive fines.

The trial court and the Appellate Division brought the appropriate structure to their analyses of defendant’s excessive-fine claim, addressing first whether the penalty imposed was a “fine,” and if so, whether the fine was excessive. The trial court’s analysis ended at the first step: the court found that no fine was exacted because honorable service is a condition of eligibility for the pension benefit, and one could not lose that to which one did not have a right to begin with. The Appellate Division disagreed with the trial court’s analysis of the first inquiry but affirmed the grant of summary judgment to the State because it concluded that the fine to which defendant was subjected was not excessive. Accordingly, the Appellate Division upheld the pension forfeiture.

We granted defendant’s petition for certification, 244 N.J. 288, 239 A.3d 1039 (2020), in which defendant contends that the Appellate Division applied an inappropriate

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analysis for excessiveness, and the State's cross-petition, 244 N.J. 288, 288-89, 239 A.3d 1039 (2020), in which the State argues that defendant's forfeiture of his public pension does not constitute a fine.

We now affirm the judgment upholding the forfeiture of defendant's pension, but our reasoning differs from that of the Appellate Division. We conclude, as did the trial court, that defendant was not subjected to a fine. Accordingly, our conclusion on that first inquiry eliminates the need to assess whether the forfeiture constitutes an excessive fine. As a result, we need not review or express an opinion on the test for excessiveness employed by the Appellate Division.

I.**A.**

Defendant was employed by Jersey City in the Tax Assessor's office. His position gave defendant the opportunity to alter property tax descriptions without the property owner filing a formal application with the Zoning Board. That power of alteration included the significant ability to alter the number of housing units permitted on a parcel of property, which is what led to the forfeiture issue before us.

During the period from December 9 to December 13, 2012, defendant and an individual cooperating with federal law enforcement engaged in an illicit transaction. The record from defendant's federal conviction was

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presented in this forfeiture action. That record reveals that the individual, “a Jersey City property owner whose property was zoned for a two-unit dwelling,” sought to establish and exploit a back channel with defendant to have property rezoned as a three-unit dwelling. The individual contacted defendant on December 9, and on December 12, defendant agreed to rezone the property in exchange for a \$300 bribe. On December 13, 2012, defendant told the individual that he had rezoned the property and accepted \$300 in cash.

Defendant retired from his position in the first quarter of 2017 having served in the government of Jersey City for thirty-eight and one-half years. His public position and years of service allowed him to apply for a public pension provided and administered locally by the City. On March 1 of that year, he was “granted an early service retirement pension of \$60,173.67” per year.

Later that year, the United States Attorney’s Office for the District of New Jersey charged defendant with violating 18 U.S.C. § 1951(a), interference with commerce by extortion under color of official right,¹ a charge that carried a maximum prison sentence of twenty years and a maximum fine that was “the greatest of: (1) \$250,000; (2) twice the gross amount of any pecuniary gain that any persons derived from the offense; or (3) twice the gross amount of any pecuniary loss sustained by any

1. Although the charging document provided by the State in the record is undated, the State represents that this criminal information was filed on November 21, 2017, with defendant’s plea form.

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victims of the offense,” plus interest. Defendant and the federal government entered into a plea agreement on June 30, 2017, whereby defendant pled guilty to one count of violating § 1951(a), and he stipulated to the above-recited facts. Defendant entered a formal plea on November 21, 2017, and on March 5, 2018, the United States District Court for the District of New Jersey sentenced defendant to two years of probation with five months of home detention and imposed a fine in the amount of \$3,000 and a special assessment of \$100.

B.

With respect to defendant’s pension, which he received through the locally administered pension fund for public employees of Jersey City, the following facts and procedural history are pertinent.

Between the conclusion of defendant’s federal prosecution and the institution of the litigation that led to the instant appeal, the Board of Trustees of the Employees’ Retirement System of Jersey City held a hearing on defendant’s pension status. It resolved, on account of defendant’s federal conviction, to reduce his pension to \$47,918.76 per year.

The State then took action against defendant based on the prescriptions in N.J.S.A. 43:1-3.1. On March 26, 2019, the State commenced the instant action by way of “verified complaint in lieu of prerogative writ seeking forfeiture of public office and position, permanent disqualification from any position of public honor, trust, or profit, and forfeiture

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of pension or retirement benefits.” The complaint sought total forfeiture of defendant’s pension pursuant to N.J.S.A. 43:1-3.1.²

The next day, the State applied for an order to show cause to dispose of the matter “as a summary proceeding” and to require defendant to show cause “why summary judgment should not be entered.” The trial court granted the application to proceed summarily.

Defendant filed an answer on May 7, 2019, admitting most of the allegations in the State’s complaint but denying that his federal conviction was for a crime substantially similar to an enumerated state offense in N.J.S.A. 43:1-3.1. Defendant also protested that “the proposed forfeiture of Bennie Anderson’s entire pension under these facts would be an excessive fine” within the meaning of the Eighth Amendment of the United States Constitution and Article I, Paragraph 12 of the New Jersey Constitution.³

2. According to the State, the federal offense of which defendant was convicted was substantially similar to the following offenses listed in N.J.S.A. 43:1-3.1: theft by extortion (N.J.S.A. 2C:20-5), commercial bribery (N.J.S.A. 2C:21-10), bribery in official matters (N.J.S.A. 2C:27-2), acceptance or receipt of unlawful benefit by public servant for official behavior (N.J.S.A. 2C:27-10), tampering with public records or information (N.J.S.A. 2C:28-7), and official misconduct (N.J.S.A. 2C:30-2). Thus, the State considered N.J.S.A. 43:1-3.1(a)’s forfeiture requirement applicable to defendant.

3. Defendant also argued that “[t]he State of New Jersey is estopped from seeking the forfeiture of Bennie Anderson’s entire pension.” That argument is not part of this appeal.

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The Honorable Mary Jacobson, A.J.S.C., heard argument on the matter and entered judgment for the State. The court focused on the Legislature's 2007 amendment to the pension laws, L. 2007, c. 49, § 2, codified at N.J.S.A. 43:1-3.1. The court determined that the 2007 amendment eliminated judicial discretion in certain circumstances by calling for mandatory pension forfeiture for the commission of identified offenses touching on or involving a public office, position, or employment, "to preclude individuals who have once violated the public trust from having a second opportunity to do so," and to ensure "there should be no stigma of conviction of a crime of dishonesty among public employees." The court reviewed this Court's earlier decision in *Uricoli v. Board of Trustees, Police & Firemen's Retirement System*, 91 N.J. 62, 449 A.2d 1267 (1982), which found, under the prior statutory law, that the pension laws did not mandate forfeiture and set forth factors for courts to use when exercising their discretion in determining whether to order forfeiture.

However, the trial court found that case law to have been superseded by changes to the statute. The court reasoned from a review of the 2007 amendment and later case law that "the policy in these forfeiture statutes is a harsh response, but . . . it was a harsh response to a problem serious enough to justify its harshness." The court noted that "the forfeiture statute itself codifies a long-standing policy against retention of offenders in government service," and stated further that "the statute reflects a legislative determination governing the standards of conduct to be observed by those who serve the public as a condition to continued employment."

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In applying the forfeiture statute to defendant, the trial court further agreed with the State that the federal statute Anderson was convicted of violating was similar enough to the state offenses enumerated in N.J.S.A. 43:1-3.1 to justify entering the order sought by the State.⁴

Addressing defendant's argument that the forfeiture of his pension violated the Excessive Fines Clause of the Eighth Amendment of the United States Constitution, the court determined that "pensions are more of a contractual arrangement between a public employee and the employer," which are "conditioned on honorable service," than they are a property right. Noting that "there was no property right to the pension benefits when there's a breach of the honorable service" condition, the court concluded that, therefore, "forfeiture of the pension benefits does not constitute a payment to the State" or fine. The court reasoned that without a property right at stake, the Excessive Fines Clause was not implicated.

Defendant appealed, and the Appellate Division affirmed the grant of summary judgment to the State, but on different grounds. *State v. Anderson*, 463 N.J. Super. 168, 186, 230 A.3d 324 (App. Div. 2020). The Appellate Division was persuaded that the forfeiture of defendant's pension was a "fine" within the meaning of the constitutional provisions "because he had a property interest in the form of a contractual right to receive pension benefits, despite the fact that this right was conditioned

4. As readily acknowledged by the State, defendant's individual contributions toward his pension are returned upon forfeiture.

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on his performance of honorable service.” *Id.* at 172. In reaching that decision, the court acknowledged that a majority of other states take a contract-right approach to pension forfeiture and conclude otherwise when confronted with an excessive-fine argument. However, the court was persuaded to adopt its property right analysis and conclude that forfeiture constituted a fine. Importantly however, the Appellate Division did not find that requiring defendant to forfeit his pension was “excessive,” for two reasons. *Id.* at 172-73. The court explained,

[f]irst, by enacting N.J.S.A. 43:1-3.1, the Legislature expressed its clear intent that such a remedy was appropriate for the precise official misconduct committed by defendant. Second, . . . defendant’s taking of a bribe in exchange for a favorable and unjustified change in a property’s tax description is a profound breach of the public trust such that a total pension forfeiture is not a disproportionate result.

[*Id.* at 173.]

II.

Defendant does not raise a categorical challenge to the forfeiture statute itself. Instead, the parties divide their arguments into parts that address (1) whether forfeiture constitutes a fine and, if so, (2) whether the forfeiture applied here is an excessive fine. We granted leave to appear as friends of the Court to the American Civil Liberties Union of New Jersey (ACLU) and the

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Association of Criminal Defense Lawyers of New Jersey (ACDL), participating jointly, and to the Institute for Justice. We consider amici's arguments with those of the parties.

A.

On the question whether the pension forfeiture in this appeal constitutes a fine, the State maintains in its cross-petition that there is a quasi-contractual right rooted in the statutory benefit of a pension, but that right is conditional and dependent on honorable service as defined by the statutory pension scheme. According to the State, receipt of a pension was always conditioned on honorable service, and N.J.S.A. 43:1-3.1 has merely clarified *when* the precondition of honorable service is not satisfied, namely through conviction for any of the enumerated offenses touching on or involving public positions such as defendant's.

The State further maintains that the case law, up to *Uricoli*, recognized forfeiture to be absolute. With *Uricoli* determining that the Legislature had not clearly expressed such an absolute requirement, the State argues that *Uricoli* merely set forth factors for a court to use when forfeiture is discretionary and subject to equitable considerations, which is no longer the case since enactment of the prescriptions of N.J.S.A. 43:1-3.1.

Defendant advances the property right analysis that the Appellate Division found persuasive, reasoning largely by analogy to matrimonial cases addressing the

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distribution of pension benefits following divorces. The ACLU and ACDL support defendant's position that public employees have property rights in their pensions and that pension forfeitures constitute fines.

B.

Defendant's petition asserts that the Appellate Division applied an erroneous standard for excessiveness. He maintains that a court must look at factors other than just the nature and impact of the offense. Asserting that the United States Supreme Court "has considered factors other than the offense" in Eighth Amendment cases, he asks this Court to fashion an analysis that considers the impact of the fine on the individual in addition to the offense.

Criticizing the Appellate Division's excessiveness analysis as leaning too much on legislative intent and not enough on the historical roots and purposes of the excessive fines prohibition, amici ACLU and ACDL advance an interpretation that takes into account an individual's means and ability to pay a fine, and argue that even if the Federal Constitution's protection does not take those circumstances into account, then the State Constitution may.

Amicus curiae the Institute for Justice similarly criticizes the Appellate Division's excessiveness analysis. The Institute urges adoption of an individualized analytical method that focuses on the harm actually caused by the defendant and the harshness of the proposed penalty vis-à-vis the defendant, in light of his or her ability to pay.

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In countering the position taken by defendant and amici, the State urges that we not reach the issue and, instead, end our analysis by finding that forfeiture as applied here does not constitute a fine.

III.

Certain standards of review apply in the analysis of this matter. As an appellate court, we approach the review of the grant of summary judgment “de novo, applying the same standard as the trial court.” *Woytas v. Greenwood Tree Experts, Inc.*, 237 N.J. 501, 511, 206 A.3d 386 (2019); *see also R. 4:46-2(c)*. We also “review the interpretation of a statute de novo.” *State v. Pinkston*, 233 N.J. 495, 507, 187 A.3d 113 (2018). In doing so, “our overarching duty is ‘to construe and apply the statute as enacted.’” *Daidone v. Buterick Bulkheading*, 191 N.J. 557, 565, 924 A.2d 1193 (2007) (quoting *DiProspero v. Penn*, 183 N.J. 477, 492, 874 A.2d 1039 (2005)). When a court construes a statute “[t]o interpret [its] meaning and scope . . . , we look for the Legislature’s intent.” *State v. McCray*, 243 N.J. 196, 208, 233 A.3d 523 (2020). As we often have said, “the statute’s plain language” is “the best indicator of intent.” *In re T.B.*, 236 N.J. 262, 274, 199 A.3d 744 (2019).

Before this Court, defendant advances an as-applied constitutional claim that an order forfeiting the remaining part of his pension violates federal and state constitutional prohibitions against excessive fines. 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

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punishments inflicted.” Article I, Paragraph 12 of the New Jersey Constitution provides in relevant part that “[e]xcessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.”⁵

As defendant, the State, the trial court, and Appellate Division all recognize, courts apply the test promulgated by *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), to determine whether a forfeiture constitutes an excessive, and therefore prohibited, fine. *See, e.g., United States v. Bikundi*, 926 F.3d 761, 794-96, 441 U.S. App. D.C. 293 (D.C. Cir. 2019); *United States v. Cheeseman*, 600 F.3d 270, 282-85 (3d Cir. 2010). The federal Excessive Fines Clause and *Bajakajian*’s analysis bind the states by operation of the Due Process Clause of the Fourteenth Amendment. *Timbs v. Indiana*, 586 U.S. , 139 S. Ct. 682, 686-87, 203 L. Ed. 2d 11 (2019); *Davanne Realty*, 408 N.J. Super. at 22; *see also Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells*, 204 N.J. 79, 131, 7 A.3d 720 (2010) (“[T]he U.S. Supreme Court is, of course, the ultimate arbiter of the Federal Constitution.”).

5. As noted by Professor Williams, this first sentence of Paragraph 12 of Article I “was carried over verbatim from Article I, Section 15, of the 1844 Constitution.” Robert J. Williams, *The New Jersey State Constitution* 76 (2012). The excessive-fine provision has not been the subject of much Supreme Court review, and has to date not veered from federal precedent in application. *See Davanne Realty v. Edison Township*, 408 N.J. Super. 16, 22, 25 N.J. Tax 203, 972 A.2d 1164 (App. Div. 2009) (applying United States Supreme Court precedent), *aff’d o.b.*, 201 N.J. 280, 281, 990 A.2d 639 (2010).

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The *Bajakajian* test entails a two-part inquiry. “By its plain language, the Excessive Fines Clause of the Eighth Amendment is violated only if the disputed [forfeiture is] both [a] ‘fine[]’ and ‘excessive.’” *Tillman v. Lebanon Cnty. Corr. Facility*, 221 F.3d 410, 420 (3d Cir. 2000); *cf. Menendez*, 204 N.J. at 105 (“Our analysis begins with the plain language of the Federal Constitution.”).

Therefore, before determining whether a “fine” is “excessive,” a court must first determine whether the government action at issue is a “fine,” such as to implicate the Eighth Amendment. *See Bajakajian*, 524 U.S. at 334 (“Because the forfeiture of respondent’s currency constitutes . . . a ‘fine’ within the meaning of the Excessive Fines Clause, we now turn to the question whether it is ‘excessive.’”).

“[A]t the time the Constitution was adopted, ‘the word “fine” was understood to mean a payment to a sovereign as punishment for some offense.’” *Bajakajian*, 524 U.S. at 327 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)). “The Excessive Fines Clause thus ‘limits the government’s power to extract payments, whether in cash or in kind, “as punishment for some offense.”’” *Id.* at 328 (quoting *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)). “Forfeitures -- payments in kind -- are thus ‘fines’ if they constitute punishment for an offense.” *Ibid.* “Implicit in this interpretation of the Excessive Fines Clause is the notion that it applies only when the payment to the government involves turning over ‘property’ of

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some kind that once belonged to the defendant.” *Hopkins v. Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1162 (10th Cir. 1998); *see also Bajakajian*, 524 U.S. at 328 (explaining that the Clause “limits the government’s power *to extract* payments” from an individual) (emphasis added).

In the typical case, the status of the forfeited asset as “property” is not disputed. *E.g., Timbs*, 586 U.S. at , 139 S. Ct. at 686 (discussing forfeiture of automobile); *Bajakajian*, 524 U.S. at 324 (discussing forfeiture of currency); *Cheeseman*, 600 F.3d at 284 (discussing forfeiture of firearms and ammunition). However, in cases in which the status of the asset taken from the individual is disputed, courts resolve the dispute by examining state law. *E.g., Hopkins*, 150 F.3d at 1162 (applying Oklahoma law); *Pub. Emp. Ret. Admin. Comm’n v. Bettencourt*, 474 Mass. 60, 47 N.E.3d 667, 674-76 (Mass. 2016) (applying Massachusetts law).

Thus, as both the trial court and Appellate Division properly recognized, in accordance with the *Bajakajian* inquiry, the analysis in the instant matter must begin by asking whether, under New Jersey law, defendant had a property right in his pension such that the forfeiture of that “right” is a “fine” within the meaning of the Eighth Amendment or the State Constitution. We will consider defendant’s claim that the exaction is constitutionally “excessive” only if we determine that, under New Jersey law, defendant had such a protectible right in the first instance.

*Appendix A***IV.**

Determination of whether a fine was imposed on defendant requires review of the legal principles governing the forfeiture of public pensions in New Jersey to ascertain the nature of defendant's interest in his pension.

A.

For many years, the seminal case on pension forfeiture was *Uricoli*, which involved a question of pension forfeiture for a Chief of Police caught fixing a motor vehicle ticket. *See* 91 N.J. at 65. After he was found guilty of one count of malfeasance in office, Uricoli applied for a pension and was denied based on his failure to render honorable service. *Ibid.* When administrative appeals brought no relief, our Court granted Uricoli's petition for certification. *Id.* at 65-66.

The Court's decision in *Uricoli* "reaffirmed the rule that honorable service is an implicit requirement of every public pension statute, whether or not this conditional term appears in the particular statute." *Id.* at 66. Contrary to the position being taken by the State, however, the Court determined that an inflexible forfeiture rule was not clearly expressed in the language of the pension statute and concluded that the Legislature meant to leave room for judicial discretion. *Id.* at 77.

To assist courts and administrative bodies with implementation of a flexible test for pension forfeiture, the Court identified factors to be considered and balanced

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when applying that test to determine the reasonableness of pension forfeiture, in the absence of any perceived legislative intent for mandatory forfeiture. *Id.* at 77-78. The factors were rooted in equitable considerations. *Id.* at 78. It bears noting that there is no suggestion of a constitutional underpinning to the Court's analysis.

Uricoli remained the key case on the exercise of discretion by pension boards and courts considering whether to impose a pension forfeiture for many years. Then, in 2007, the Legislature added N.J.S.A. 43:1-3.1 -- the statute pursuant to which the State seeks forfeiture of defendant's pension.

N.J.S.A. 43:1-3.1(a) provides that

[a] person who holds or has held any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of any crime set forth in subsection b. of this section, or of a substantially similar offense under the laws of another state or the United States which would have been such a crime under the laws of this State, which crime or offense involves or touches such office, position or employment, *shall forfeit* all of the pension or retirement benefit earned as a member of any State or locally-administered pension fund or retirement system in which he participated at the time of the commission of the offense and which covered the office, position or

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employment involved in the offense. As used in this section, a crime or offense that “involves or touches such office, position or employment” means that the crime or offense was related directly to the person’s performance in, or circumstances flowing from, the specific public office or employment held by the person.

[(emphasis added).]

The next subsection lists the state-law offenses that trigger application of subsection (a). *See* N.J.S.A. 43:1-3.1(b)(1) to (23). Critically, subsection (c)(2) mandates that

[a] court of this State shall enter an order of pension forfeiture pursuant to this section . . . [u]pon application of the county prosecutor or the Attorney General, when the pension forfeiture is based upon a conviction of an offense under the laws of another state or of the United States. An order of pension forfeiture pursuant to this paragraph shall be deemed to have taken effect on the date the person was found guilty by the trier of fact or pled guilty to the offense.

N.J.S.A. 43:1-3.1 (section 3.1) was in effect in 2012 when defendant’s offense occurred.⁶

6. *See L. 2007, c. 49, § 2.* N.J.S.A. 43:1-3.1(b) was amended after December 2012 to add two crimes to the list of predicate offenses that trigger mandatory pension forfeiture. Those offenses are not implicated here.

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Also in effect at that time was N.J.S.A 43:1-3. N.J.S.A. 43:1-3(a) provides that “[t]he receipt of a public pension or retirement benefit is hereby expressly conditioned upon the rendering of honorable service by a public officer or employee.” Other subsections of section 3 allow for a flexible, discretionary analysis of whether full or partial forfeiture of a pension is an appropriate response to dishonorable conduct.

Subsection (b) provides that

The board of trustees of any State or locally-administered pension fund or retirement system created under the laws of this State is authorized to order the forfeiture of all or part of the earned service credit or pension or retirement benefit of any member of the fund or system for misconduct occurring during the member’s public service which renders the member’s service or part thereof dishonorable and to implement any pension forfeiture ordered by a court pursuant to section 2 of *L. 2007, c. 49* ([N.J.S.A.] 43:1-3.1).

[N.J.S.A. 43:1-3(b).]

And N.J.S.A. 43:1-3(c) lists factors for a board of trustees to “consider and balance” “[i]n evaluating a member’s misconduct to determine whether it constitutes a breach of the condition that public service be honorable and whether forfeiture or partial forfeiture of earned service credit or earned pension or retirement benefits is appropriate.”

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Those factors, which reflect the considerations found in case law, *see Uricoli*, 91 N.J. at 77-78, are:

- (1) the member's length of service;
- (2) the basis for retirement;
- (3) the extent to which the member's pension has vested;
- (4) the duties of the particular member;
- (5) the member's public employment history and record covered under the retirement system;
- (6) any other public employment or service;
- (7) the nature of the misconduct or crime, including the gravity or substantiality of the offense, whether it was a single or multiple offense and whether it was continuing or isolated;
- (8) the relationship between the misconduct and the member's public duties;
- (9) the quality of moral turpitude or the degree of guilt or culpability, including the member's motives and reasons, personal gain and similar considerations;
- (10) the availability and adequacy of other penal sanctions; and

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(11) other personal circumstances relating to the member which bear upon the justness of forfeiture.

[N.J.S.A. 43:1-3(c)(1) to (11).]

The flexible analysis that the Legislature has left in place within section 3 does not give rise to ambiguity about the legislative scheme. Section 3 makes honorable service a condition of a right to a pension, and section 3.1 makes forfeiture of any right to a pension the result when honorable service is not provided due to conviction of an enumerated offense.

The plain language of section 3.1 expresses an unambiguous legislative intent to make the commission of certain offenses the basis for mandatory and absolute pension forfeiture. The statutory language in section 3.1 leaves no discretion for courts dealing with the entry of a judgment of conviction, whether by trial verdict or plea, for the offenses enumerated in subsection (b). N.J.S.A. 43:1-3.1(a) directs that the convicted individual “*shall* forfeit all of the pension” (emphasis added). *See State v. Thomas*, 188 N.J. 137, 149-50, 902 A.2d 1185 (2006) (explaining that “shall” is typically mandatory).

The factors identified in section 3 apply when mandatory absolute forfeiture is not required by section 3.1. In other words, the factors for consideration contained in N.J.S.A. 43:1-3, which resemble those set forth in *Uricoli*, apply to public employee misconduct raising honorable service questions *outside of* circumstances involving convictions for which section 3.1 requires mandatory and absolute forfeiture.

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Defendant's reliance on *Uricoli* and its discussion is therefore unavailing. The Legislature has spoken, filling the gap in the pre-2007 pension statutes on which the *Uricoli* decision was premised. As a result of the adoption of section 3.1, no longer can this Court conclude, as it did in *Uricoli*, *see* 91 N.J. at 77, that the Legislature did not, unequivocally and categorically, condition the receipt of a pension on the rendering of uniformly honorable service.

Defendant committed his offense after the 2007 amendment to the pension laws was enacted and, thus, by the time he committed his offense, the Legislature had eliminated all doubt as to its intent that there be a certain category of offenses the commission of which precludes receipt of a publicly funded pension in New Jersey.⁷ And to the extent that there is any question that defendant's federal conviction is an analogue to the state offenses listed and, as per the statute's wording, qualifies as the basis for the State's application, we endorse the findings and conclusion of the trial court.

7. It is apparent the Legislature has woven a piece that reiterates that honorable service is a condition of eligibility for pension receipt, N.J.S.A. 43:1-3, and individual pensions remain forfeitable, *see* N.J.S.A. 43:3C-9.5(d). N.J.S.A. 43:3C-9.5 was amended by chapter 78, Laws of 2011, in connection with the Legislature's discussion of non-forfeitable pension rights. Of particular import is subsection (d), which provides that nothing in that subsection altered the forfeitability of individual pensions. The Legislature took pains to state expressly that individual pensions are still subject to forfeiture.

*Appendix A***B.**

Having determined that forfeiture of a pension is automatic and mandatory upon the commission of certain offenses under section 3.1, it is clear that defendant did not possess a property right in his pension protected by the Federal or State Constitutions.

The Legislature has established that the pre-condition of honorable service to the statutory right is not met when a conviction for an enumerated offense occurs. In such a case, the conditional quasi-contractual right to receive a public pension has not become the “property” of the employee. As the trial court said, one cannot lose what one did not have to begin with. And, without loss, there is no fine for purposes of the *Bajakajian* analysis.

In short, this case turns on the legislative decision in 2007 to take discretion away from courts and administrative agencies when public employees commit any of the identified offenses. The trial court correctly noted that and faithfully applied the law as written. And, as the court’s analysis noted, New Jersey’s approach to treat public pensions as quasi-contractual rights rooted in statute, and not as property rights, is consistent with the majority of courts to have addressed this issue. *E.g., Hopkins*, 150 F.3d at 1162; *Hames v. City of Miami*, 479 F. Supp. 2d 1276 (S.D. Fla. 2007).⁸ Those decisions have

8. We note that to the extent that the Appellate Division, and now the dissent, found the reasoning of the *Bettencourt* decision persuasive, we find that decision to be based on a significantly differently drawn statutory scheme and body of case law. *See* 47 N.E.3d at 673-77.

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similarly denied excessive-fine claims on the basis of the first prong of the analysis. The Appellate Division's reliance on family law cases that have, in that setting, treated pensions as property subject to equitable distribution was misplaced. So too does the dissent misplace reliance on family law equitable-distribution law. That case law does not and cannot convert a public pension into a nonforfeitable property right.

That first prong to an excessive-fine analysis -- whether the forfeiture here was a "fine" within the meaning of the Eighth Amendment -- proves to be an impediment that defendant cannot overcome. We hold that the forfeiture of defendant's pension under section 3.1 does not constitute a fine for purposes of an excessive-fine analysis under the Federal or State Constitutions.

C.

As a result of our conclusion that the forfeiture worked here by operation of N.J.S.A. 43:1-3.1 is not a fine, there is no reason to embark on a constitutional analysis for excessiveness. The Appellate Division engaged in that endeavor only because it reached a different conclusion on the issue of whether this forfeiture constitutes a fine. Here, however, we need not reach the question. Accordingly, we decline to review the Appellate Division's analysis for excessiveness and we vacate that portion of its opinion. *See, e.g., Menendez*, 204 N.J. at 95-96 (noting that courts do not engage in constitutional rulings when unnecessary to our determination of an appeal).

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V.

For the reasons expressed herein, we affirm with modification the Appellate Division judgment. The award of summary judgment to the State is affirmed.

JUSTICES PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in JUSTICE LaVECCHIA's opinion. JUSTICE ALBIN filed a dissent. CHIEF JUSTICE RABNER did not participate.

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JUSTICE ALBIN, dissenting.

The Eighth Amendment of the United States Constitution prohibits a state from imposing an excessive fine on a person convicted of a crime. In this case, the complete forfeiture of defendant Bennie Anderson's pension for an isolated crime for which he received a probationary sentence and modest fine by a federal court violates the Excessive Fines Clause. In my view, the majority has denied Anderson the protections afforded by the Federal Constitution by failing to call a fine by its true name and by characterizing state law in a way that seemingly evades federal review. I therefore respectfully dissent.

I.

Bennie Anderson, a Vietnam War veteran, served in various municipal positions in Jersey City for thirty-eight and a half years, retiring in March 2017 at the age of fifty-nine with an early-service-retirement pension of \$60,173.67 per year. Based on the estimate that Anderson would live to the age of eighty-three, his pension at retirement was worth \$1,462,220.18.¹

1. According to the New Jersey Court Rules' Table of Life Expectancies for All Races and Both Sexes, a person who is fifty-nine can expect to live between 23.9 and 24.7 more years, or 24.3 years on average. *R. app. I-A.* Multiplying \$60,173.67 per year by 24.3 years (assuming Anderson lives to the age of eighty-three) yields the value of \$1,462,220.18.

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On November 21, 2017 -- while Anderson was receiving his pension -- he entered a plea of guilty in federal court to the offense of interference with commerce by extortion under color of official right, which carried a maximum sentence of twenty years of imprisonment and a maximum fine of \$250,000. 18 U.S.C. §§ 1951(a); 3571(b)(3), (d). In his plea, Anderson took responsibility for accepting a \$300 bribe in exchange for altering the tax description of a property for zoning-classification purposes when he worked in the Tax Assessor's Office in December 2012.

On March 5, 2018, a federal district court judge sentenced Anderson to two years of probation and five months of home detention and ordered him to pay a \$3,000 fine and a \$100 special assessment. As a result of his conviction, the Employees' Retirement System of Jersey City reduced Anderson's pension to \$47,918.76 per year.

In 2019, two years after Anderson's retirement, the Attorney General's Office filed a verified complaint in lieu of prerogative writs in the Superior Court seeking the forfeiture of Anderson's entire pension pursuant to N.J.S.A. 43:1-3.1. That statute provides that a public employee who is convicted of the type of crime that Anderson committed, a crime touching his office, "shall forfeit all of the pension or retirement benefit earned as a member of" a government retirement system. N.J.S.A. 43:1-3.1(a). In accordance with the statute, the court ordered the total forfeiture of Anderson's pension.²

2. Anderson's personal contributions into his pension were not forfeited. The parties have not submitted documentation of the value of his contributions or the total value of the forfeiture;

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The issue before this Court is whether the total forfeiture of Anderson's pension valued at over one million dollars -- in comparison to the probationary sentence and \$3,100 financial penalty imposed by the federal court -- violated the Eighth Amendment's prohibition against excessive fines.

II.**A.**

The Eighth Amendment's prohibition against excessive fines applies to the states through the Due Process Clause of the Fourteenth Amendment. *Timbs v. Indiana*, 586 U.S. , 139 S. Ct. 682, 686-87, 203 L. Ed. 2d 11 (2019). "The touchstone of the constitutional inquiry under the Excessive Fines Clause 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." *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). "[A] punitive forfeiture violates the Excessive Fines Clause if it is *grossly disproportional* to the gravity of a defendant's offense." *Ibid.* (emphasis added). That inquiry is informed by the history of the Excessive Fines Clause, which "traces its venerable lineage back to at least 1215, when Magna Carta . . . required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to

however, Anderson's counsel represented at oral argument before this Court that he calculated the forfeiture value as "over a million" dollars.

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deprive [an offender] of his livelihood.” *Timbs*, 586 U.S. at , 139 S. Ct. at 687-88 (alteration in original) (emphasis added) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)); accord *Bajakajian*, 524 U.S. at 335-36.

The majority asserts, however, that the proportionality review mandated by the Eighth Amendment is unnecessary because the forfeiture of Anderson’s pension is not a fine -- that because of Anderson’s dishonorable service he was never entitled to the pension he was receiving and, accordingly, nothing was taken from him. The meaning of what constitutes a fine for Eighth Amendment and state law purposes therefore is critical to the analysis.

Under the Eighth Amendment, a fine is any payment extracted by the government “whether in cash or in kind, as punishment for some offense.” *Bajakajian*, 524 U.S. at 328 (quotation omitted). “Forfeitures -- payments in kind -- are thus ‘fines’ if they constitute punishment for an offense.” *Ibid.* The “threshold question” for whether a payment constitutes a “fine” is whether “the payment to the government involves turning over ‘property’ of some kind that once belonged to the defendant.” *Hopkins v. Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1162 (10th Cir. 1998); accord *Pub. Emp. Ret. Admin. Comm’n v. Bettencourt*, 474 Mass. 60, 47 N.E.3d 667, 672-73 (Mass. 2016). To answer that question, we look to New Jersey law to determine whether Anderson had a cognizable property interest in the pension that was forfeited upon his conviction.

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That a pension is a creature of contract does not mean that a public employee does not have a property interest in his pension. A contract may create a property right. *See Saginario v. Att'y Gen.*, 87 N.J. 480, 492 n.3, 435 A.2d 1134 (1981) (referring to “a statutory or contractual entitlement creating a property interest”); 1 *Williston on Contracts* § 1:1 (4th ed. 2021) (“Enforceable contract rights are deemed to be property rights.”).

Public workers enter into government service with a promise that part of their wages will be deferred until their retirement. That deferred compensation -- like the wages they receive weekly -- is earned every day through their labor. *See, e.g., Burgos v. State*, 222 N.J. 175, 182, 118 A.3d 270 (2015) (“The individual members of the public pension systems, by their public service, earned this delayed part of their compensation.”); *Steinmann v. Dep't of the Treasury*, 116 N.J. 564, 572, 562 A.2d 791 (1989) (“Pensions for public employees . . . are in the nature of compensation for services previously rendered and act as an inducement to continued and faithful service.” (quoting *Geller v. Dep't of the Treasury*, 53 N.J. 591, 597-98, 252 A.2d 393 (1969))); *Spina v. Consol. Police & Firemen's Pension Fund Comm'n*, 41 N.J. 391, 401, 197 A.2d 169 (1964) (recognizing that a government pension “[i]n part . . . compensates for services already rendered”).

That public employees have a property interest in their pensions -- their deferred wages -- is made clear by our family law jurisprudence. This Court has stated that

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“a pension is considered property subject to equitable distribution [I]t is additional compensation for services rendered for the employer and a right acquired during the marriage.” *L.M. v. Div. of Med. Assistance & Health Servs.*, 140 N.J. 480, 496-97, 659 A.2d 450 (1995) (quotation omitted); *see also Whitfield v. Whitfield*, 222 N.J. Super. 36, 45, 535 A.2d 986 (App. Div. 1987) (“[A] pension plan [is] a form of deferred compensation for services rendered. As a substitute for wages such benefits unquestionably constitute property.”).

A pension should not constitute property for one purpose but not another -- particularly when the other results in evading the Excessive Fines Clause. The Eighth Amendment is intended “to limit the government’s power to punish.” *Austin v. United States*, 509 U.S. 602, 609, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). Taking from a retired public employee the pension he is collecting is little different from taking monies from the savings account where he has banked his wages for years.

C.

Anderson had retired and was collecting his pension at the time of his criminal conviction. No one disputes that “honorable service” is a condition for the receipt of one’s pension. N.J.S.A. 43:1-3(a) provides that “[t]he receipt of a public pension or retirement benefit is hereby expressly conditioned upon the rendering of honorable service by a public officer or employee.” Accordingly, N.J.S.A. 43:1-3 permits the partial or total forfeiture of a public employee’s pension for misconduct, depending

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on a weighing of eleven statutory factors. *See* N.J.S.A. 43:1-3(b), (c) (authorizing a pension board “to determine whether [an employee’s misconduct] constitutes a breach of the condition that public service be honorable *and whether forfeiture or partial forfeiture of earned service credit or earned pension or retirement benefits is appropriate*” (emphasis added)). Under N.J.S.A. 43:1-3.1, however, forfeiture of a pension is mandated for certain convictions.

To be clear, it was Anderson’s conviction -- a condition subsequent to his retirement on pension -- that permitted the State to subject Anderson’s pension to forfeiture. *See* 13 *Williston on Contracts* § 38:9 (4th ed. 2021) (defining “condition subsequent” as a condition that divests a duty to perform a contract after the duty has accrued). In other words, the conviction, the condition subsequent that triggered the forfeiture, did not arise until after Anderson’s pension had vested and he was receiving monthly pension checks.

This issue is not whether Anderson’s pension can be forfeited but whether a pension is a species of property, which, when forfeited, is subject to the strictures of the Eighth Amendment. *See Uricoli v. Bd. of Trs., PFRS*, 91 N.J. 62, 76 (1982) (“[F]orfeiture -- whether of one’s pension *or any other property* or benefit to which one is otherwise entitled -- is a penalty or a punishment for wrongful conduct.” (emphasis added)).

The Massachusetts Supreme Judicial Court has addressed that issue and held that the forfeiture of a pension resulting from a “violation of the laws applicable

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to [a public employee's] office or position" exacted a fine within the meaning of the Excessive Fines Clause. *Bettencourt*, 47 N.E.3d at 670, 672, 676-77 (quoting Mass. Gen. Laws ch. 32, § 15(4)). Bettencourt, a police officer, was convicted of twenty-one counts of unauthorized access to a computer system and, at the time, had been a member of the municipal retirement system for over twenty-five years. *Id.* at 670-71. The public employee retirement administration commission found that his conviction related to his office, mandating forfeiture of his entire pension under the applicable statute. *Id.* at 671.

The Massachusetts high court held that the forfeiture of the entirety of Bettencourt's pension violated the Eighth Amendment. *Id.* at 670, 680-81. The court explained "that a public employee who is a member of a retirement system holds an interest in retirement benefits that originates in a 'contract' and in substance amounts to a property right." *Id.* at 675. According to the court, "it is precisely [that] property interest that the employee is required to forfeit, and the forfeiture effects what is in substance an extraction of payments from the employee to the Commonwealth," rendering it a fine subject to Eighth Amendment review. *Id.* at 677.

Anderson should stand in no different shoes than Bettencourt. Anderson had a property interest in his pension -- deferred compensation accumulated over thirty-eight and a half years of public employment. The punitive forfeiture of Anderson's pension is a fine for Eighth Amendment purposes. The question remains whether the forfeiture of a pension valued at over one million dollars

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was so disproportionate to the offense of accepting a \$300 bribe that it violates the Excessive Fines Clause.

III.**A.**

In evaluating whether a forfeiture is “grossly disproportional to the gravity of a defendant’s offense” under the Eighth Amendment, *Bajakajian*, 524 U.S. at 334, courts may consider the following factors: (1) “the nature of the substantive crime”; (2) whether the defendant “fit into the class of persons for whom the [criminal] statute was principally designed”; (3) the maximum sentence and fine “permitted under the statute” and “recommended by the Sentencing Guidelines,” as “compare[d] [to] the amount the government sought to forfeit”; and (4) the harm caused by the defendant’s conduct, *United States v. Cheeseman*, 600 F.3d 270, 283-84 (3d Cir. 2010) (citing *Bajakajian*, 524 U.S. at 337-39); *accord United States v. Viloski*, 814 F.3d 104, 110 (2d Cir. 2016). At least two federal circuit courts have held that a court may also consider the fine’s effect on a person’s livelihood. *See Viloski*, 814 F.3d at 111 (“[H]ostility to livelihood-destroying fines became ‘deeply rooted’ in Anglo-American constitutional thought and played an important role in shaping the Eighth Amendment.”); *United States v. Levesque*, 546 F.3d 78, 84 (1st Cir. 2008) (“Such ruinous monetary punishments are exactly the sort that motivated the 1689 [English] Bill of Rights and, consequently, the Excessive Fines Clause.”).

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By the standards governing the Excessive Fines Clause, the complete forfeiture of Anderson's pension -- deferred compensation earned over a career of thirty-eight and a half years and intended to sustain him in his retirement -- was "grossly disproportional" to his offense. That conclusion does not diminish the seriousness of the crime committed by Anderson. By accepting a \$300 bribe in return for altering a tax description of a property from a two-unit dwelling to a three-unit dwelling, Anderson betrayed a public trust. The betrayal of that trust, even once in a long career, must be condemned and punished. But the grossly disproportionate punishment here -- a forfeiture likely to cause a ruinous financial hardship in the later years of Anderson's life -- does not fit the crime.

Anderson did not take a series of bribes or engage in financial chicanery over a course of years. He received a benefit of \$300 for accepting a single bribe in an almost four-decade career. In Anderson's plea agreement, the government acknowledged that he "clearly demonstrated a recognition and affirmative acceptance of personal responsibility." Although the federal crime to which Anderson pled guilty exposed him to a potential twenty-year maximum prison sentence and a \$250,000 maximum fine, and although the sentencing guidelines called for a range of between ten and thirty-seven months of imprisonment, *see* U.S. Sentencing Comm'n, *Guidelines Manual* 420 (Nov. 1, 2016), the court sentenced Anderson to only a probationary term with five months of home detention and ordered him to pay only \$3,100 in financial penalties. *See Bajakajian*, 524 U.S. at 339 n.14 ("That the

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maximum fine and Guideline sentence to which respondent was subject were but a fraction of the penalties authorized . . . show that respondent's culpability relative to other potential violators . . . is small indeed.”).

“The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” *Id.* at 334. Measuring the punishment imposed by the federal court against the forfeiture exacted by the State -- the taking of over one million dollars in pension benefits that Anderson had already begun receiving -- leads to but one conclusion: The forfeiture of Anderson’s entire pension was “grossly disproportional” to the crime and therefore violated the Eighth Amendment’s Excessive Fines Clause.³

IV.

In my view, a state court’s decision cannot evade Eighth Amendment review by calling a fine imposed as punishment by some other name. Anderson had a property interest in his pension, and the State exacted a forfeiture of the entirety of that pension in violation of the Excessive Fines Clause.

I therefore respectfully dissent.

3. That is not to say that a lesser forfeiture would not pass constitutional muster. Indeed, the Employees’ Retirement System of Jersey City found a reduction of Anderson’s pension from \$60,173.67 to \$47,918.76 per year appropriate. That forfeiture, reducing his pension by \$297,794.31 over 24.3 years, might well withstand constitutional scrutiny.

**APPENDIX B — OPINION OF THE SUPERIOR
COURT OF NEW JERSEY, APPELLATE
DIVISION, DATED MARCH 30, 2020**

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

DOCKET NO. A-4289-18T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BENNIE ANDERSON,

Defendant-Appellant.

January 27, 2020, Submitted;
March 30, 2020, Decided

Approved For Publication
March 30, 2020
APPELLATE DIVISION

Before Judges Sabatino, Sumners and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Mercer County, Docket No. L-0600-19.

The opinion of the court was delivered by

NATALI, JR., J.A.D.

Appendix B

Defendant Bennie Anderson appeals from that portion of a Law Division order compelling the forfeiture of his entire pension earned while employed by the City of Jersey City (City) since 1978.¹ The court based its forfeiture decision on the fact that defendant pled guilty to a federal information in the United States District Court for the District of New Jersey to interference with commerce by extortion under color of official right, contrary to 18 U.S.C. § 1951(a), for accepting a \$300 bribe while employed in the City's Tax Assessor's office. Defendant raises the following related points on appeal:

POINT I

THE STATE'S FORFEITURE OF THE DEFENDANT'S PENSION VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

POINT II

THE FORFEITURE OF BENNIE ANDERSON'S PENSION WAS EXCESSIVE AND SHOULD BE REVERSED ON APPEAL.

We agree with defendant that forfeiture of his pension was a fine that implicates the Eighth Amendment of the

1. The court also ordered defendant to forfeit any “public employment, office, or position” and “forever disqualified” him from “holding any office or position of honor, trust, or profit under this State or any of its administrative or political subdivisions.” Defendant does not challenge those provisions of the court’s order.

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United States Constitution and Article I, Paragraph 12 of the New Jersey Constitution because he had a property interest in the form of a contractual right to receive pension benefits, despite the fact that this right was conditioned on his performance of honorable service. We disagree, however, with defendant's argument that the Excessive Fines Clause precludes the forfeiture of his entire pension for two reasons. First, by enacting N.J.S.A. 43:1-3.1, the Legislature expressed its clear intent that such a remedy was appropriate for the precise official misconduct committed by defendant. Second, we conclude that defendant's taking of a bribe in exchange for a favorable and unjustified change in a property's tax description is a profound breach of the public trust such that a total pension forfeiture is not a disproportionate result.

I.

Defendant commenced employment with the City in October 1978. He held various positions in the Demolition Division and Engineering Division when, in 1990, he became an inspector in the Tax Assessor's office. According to defendant, at the time of his March 2017 retirement, he had held "every position in the office except that of assessor." When he retired, defendant had worked for the City for nearly four decades amassing a fully vested pension that entitled him to payments of \$60,173.67 per year.

At all relevant times, in Jersey City a property's tax description included information related to its attendant

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zoning, including if the property was a two or three-unit dwelling. To amend or alter that description, a property owner would ordinarily need to obtain approval from the Zoning Board for a variance which, if successful, would result in the Tax Assessor's office amending the property's tax description. As part of his responsibilities in the Tax Assessor's office, however, defendant had the power to alter the tax descriptions of City property without requiring a property owner to file a formal application with the City's Zoning Board.

In December 2012, a witness cooperating with law enforcement told defendant that he owned property currently zoned as a two-unit dwelling. He requested that defendant change the tax description of the property to reflect that the home was a three-unit dwelling. Defendant agreed to change the tax description without requiring approval from the Jersey City Zoning Board and accepted a \$300 bribe for doing so. Defendant was promptly charged and pled guilty to a single count of 18 U.S.C. § 1951(a). He was sentenced consistent with his negotiated plea bargain to a two-year probationary term, with five months of home confinement, and fined \$3,000.

After defendant's guilty plea, the City reduced his pension to \$47,918.76. The State then filed a verified complaint and order to show cause seeking, among other relief, the complete forfeiture of defendant's pension and any related retirement benefits. The State alleged, consistent with the federal information to which defendant pled guilty, that at all relevant times defendant was an employee of the Jersey City Tax Assessor's Office, a

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position of public office or employment within the meaning of N.J.S.A. 2C:51-2.

The trial court granted the State's application to proceed summarily and after hearing oral arguments, issued an oral decision and order granting the State's summary judgment application. In its oral decision, the court first determined that because defendant pled guilty to a federal crime involving dishonesty, the equivalent of a third-degree or higher offense that also "touch[ed]" upon his public employment, New Jersey law required that he forfeit his position in the Tax Assessor's office and be barred from future public employment. *See* N.J.S.A. 2C:51-2. Second, as to his pension, the court relied on N.J.S.A. 43:1-3.1 and *State v. Steele*, 420 N.J. Super. 129, 18 A.3d 1087 (App. Div. 2011), and concluded that defendant's federal conviction mandated a complete pension forfeiture. As it explained, subsection (a) of N.J.S.A. 43:1-3 conditions the "receipt of public pension or retirement benefit[s] . . . upon the rendering of honorable service by a public . . . employee."

The trial court also noted that the Legislature amended N.J.S.A. 43:1-3.1 to mandate the complete forfeiture of a public employee's pension if convicted of one of the enumerated offenses in subsection (b), or of a "substantially similar offense under the laws of another state or the United States," which "involves or touches . . . [public] office." As it was undisputed that defendant's federal conviction was substantially similar to several enumerated offenses and directly related to the discharge of his public duties in the Tax Assessor's office, the trial court granted the State's motion.

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The court rejected defendant's arguments that N.J.S.A. 43:1-3.1 violated the Excessive Fines Clause of the Eighth Amendment of the United States Constitution and Article I, Paragraph 12 of the New Jersey Constitution. Relying on *Hopkins v. Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155 (10th Cir. 1998), *Hames v. City of Miami*, 479 F. Supp. 2d 1276 (S.D. Fla. 2007), *Scarantino v. Pub. Sch. Emps.' Ret. Bd.*, 68 A.3d 375 (Pa. Commw. Ct. 2013), and *Kerner v. State Emps. Ret. Sys.*, 72 Ill. 2d 507, 382 N.E. 2d 243, 21 Ill. Dec. 879 (Ill. 1978), the court reasoned that because "pensions are more of a contractual arrangement between a public employee and [an] employer" which are conditioned on honorable service, as opposed to a property right, the breach of that condition vitiated any right to a pension benefit and, therefore, forfeiture of that benefit was not a payment or fine. Having determined that a public employee's pension benefits were not a property right, the court concluded that forfeiture of those benefits did not implicate the Excessive Fines Clause as the Eighth Amendment would only apply when payment to the government involved "turning over 'property' that belonged to defendant." *Hopkins*, 150 F.3d at 1162 (quoting *Austin v. United States*, 509 U.S. 602, 604, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)).

After the court denied defendant's stay application, this appeal followed.

II.

Our review of a ruling on summary judgment is *de novo* and we apply the same legal standard utilized by the

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trial court. *Townsend v. Pierre*, 221 N.J. 36, 59, 110 A.3d 52 (2015). “Summary judgment must be granted if ‘the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law.’” *Town of Kearny v. Brandt*, 214 N.J. 76, 91, 67 A.3d 601 (2013) (quoting *R. 4:46-2(c)*). We accord no special deference to a trial judge’s conclusions on issues of law. *Nicholas v. Mynster*, 213 N.J. 463, 478, 64 A.3d 536 (2013).

III.

We note that defendant does not challenge the applicability of N.J.S.A. 43:1-3.1 to the facts before us. In this regard, defendant does not deny that the conduct for which he was convicted under 18 U.S.C. § 1951(a) also violates, or was substantially similar to, N.J.S.A. 2C:27-2 (bribery in official and political matters) and N.J.S.A. 2C:27-10 (acceptance or receipt of unlawful benefit by public servant for official behavior). Nor does defendant dispute that upon a finding that defendant committed such an offense, the court was required to order a complete forfeiture of his pension. *See N.J.S.A. 43:1-3.1(c)(1)* (“A court of this State shall enter an order of pension forfeiture pursuant to this section . . . [i]mmediately upon a finding of guilt by the trier of fact or a plea of guilty entered in any court of this State.”); *Steele*, 420 N.J. Super at 133-34, 18 A.3d 1087.

Instead, defendant renews his argument that requiring forfeiture of his pension benefits is an unconstitutional

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excessive fine under the State and Federal Constitutions. *See U.S. Const. amend. VIII* (“[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); *N.J. Const. art. I, ¶ 12* (“Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.”). We disagree and affirm, albeit for different legal reasons than those stated by the trial court in its decision. *See El-Sioufi v. St. Peter’s Univ. Hosp.*, 382 N.J. Super. 145, 169, 887 A.2d 1170 (App. Div. 2005) (recognizing that an appellate court’s function is to review orders, not reasons, and that we can affirm a trial court’s orders without adopting its legal reasoning).

To determine whether a forfeiture is excessive under the Eighth Amendment, courts must first determine whether the punishment constitutes a payment or fine within the meaning of the Excessive Fines Clause. *See United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). If the forfeiture constitutes such a fine, courts must then determine whether such a fine was excessive. *Ibid.*

The Eighth Amendment was “intended to prevent the government from abusing its power to punish” and the “Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.” *Austin*, 509 U.S. at 607, 113 S.Ct. 2801 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)). “[A]t the time the Constitution was adopted, ‘the word ‘fine’ was understood to mean a payment to a sovereign

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as punishment for some offense.” *Bajakajian*, 524 U.S. at 327-28, 118 S.Ct. 2028 (quoting *Browning-Ferris*, 492 U.S. at 265, 109 S.Ct. 2909). The Excessive Fines Clause, therefore, “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’” *Id.* at 328, 118 S.Ct. 2028 (quoting *Austin*, 509 U.S. at 609-10, 113 S.Ct. 2801).

Consequently, the forfeiture of property only qualifies as a fine for Eighth Amendment purposes if it constitutes punishment for an offense. *See Bajakajian*, 524 U.S. at 328, 118 S.Ct. 2028. In *Bajakajian*, the Court noted that the civil forfeiture at issue there constituted punishment because it was “imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent [person], but only upon a person who has himself been convicted of a . . . violation.” *Ibid.* The Supreme Court also held that “a civil sanction that cannot fairly be said solely to serve a remedial purpose . . . is punishment.” *Austin*, 509 U.S. at 610, 113 S.Ct. 2801 (quoting *United States v. Halper*, 490 U.S. 435, 448, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)).

As to whether such a fine is excessive, the Supreme Court has held that a punitive forfeiture in the civil context violates the Eighth Amendment “if it is grossly disproportional to the gravity of defendant’s offense.” *Bajakajian*, 524 U.S. at 334, 118 S.Ct. 2028. In articulating that standard, the Supreme Court reasoned that “[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality [and] [t]he amount of the forfeiture must bear some

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relationship to the gravity of the offense that it is designed to punish.” *Ibid.* It noted that “judgments about the appropriate punishment for an offense belong in the first instance to the legislature,” *id.* at 336, 118 S.Ct. 2028, and “a court’s review of the propriety of a punishment will be inherently imprecise.” *Ibid.* According to the Court, “[b]oth of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense,” and are thus taken into account by its adoption of the standard of gross proportionality. *Ibid.*

As noted, the Supreme Court explained that “[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant’s offense, it is unconstitutional.” *Id.* at 337, 118 S.Ct. 2028. In analyzing the gravity of the offense, the *Bajakajian* Court considered four factors: 1) the nature and extent of the crime; 2) whether the violation was related to other illegal activities; 3) the other penalties that may be imposed for the violation; and 4) the extent of the harm caused. *See id.* at 337-40, 118 S.Ct. 2028.

Several courts in other jurisdictions have considered excessive fine arguments with respect to pension forfeitures. As noted by the trial court, the majority of those courts have held that pension forfeitures are not subject to an excessive fines analysis because receipt of pension funds is in the nature of a contractual arrangement between a public employee and employer conditioned on honorable services, rather than a property right. *See e.g. Hopkins*, 150 F.3d at 1162, *Hames*, 479 F. Supp. 2d at 1288, *Scarantino*, 68 A.3d at 385, and *Kerner*, 21 Ill.Dec. 879, 382 N.E.2d at 246-47.

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In *Hopkins*, a retired state employee was convicted in federal court of accepting a bribe in connection with his public employment. 150 F.3d at 1157-58. At the time of his conviction, Hopkins was credited with thirty-two years of service and received a monthly pension of \$4,293.18. *Id.* at 1157. After his conviction, Hopkins was notified that his pension would be reduced by seventy percent in accordance with Oklahoma's pension forfeiture statute. *Id.* 1157-58. Hopkins estimated that this pension reduction resulted in an estimated loss of \$706,452.85 and challenged his pension forfeiture in federal court alleging that the statute violated the Excessive Fines Clause of the Eighth Amendment. *Id.* at 1158.

The Tenth Circuit first noted that implicit in the interpretation that a fine was "payment to a sovereign as punishment for some offense," *id.* at 1162, was the notion that "it applies only when the payment to the government involves turning over 'property' of some kind that once belonged to the defendant." *Ibid.* (quoting *Austin*, 509 U.S. at 604, 113 S.Ct. 2801). The court agreed with the District Court's reasoning that "under Oklahoma law, Hopkins had no 'property' right in his pension benefits — even though he had already begun to receive the pension benefits — because Hopkins' right to his pension always was contingent on maintaining honorable service during his tenure in office." *Id.* at 1162. The Tenth Circuit concluded that when Hopkins accepted a bribe, he "breached his duty of honorable service" and thus under Oklahoma law, Hopkins had no "vested right" in his pension benefits. *Ibid.*; *see also Hames*, 479 F. Supp. 2d at 1288 (holding under Florida law that a public employee has no property

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interest in pension benefits because the pension vests “subject to the conditions in the forfeiture statute”); *Scarantino*, 68 A.3d at 385 (holding under Pennsylvania law that a public employee’s right to pension benefits depends upon certain conditions precedent including that an employee not be convicted of certain crimes).

Defendant principally relies upon the Supreme Judicial Court of Massachusetts’s decision in *Pub. Emp. Ret. Admin. Comm’n v. Bettencourt*, 474 Mass. 60, 47 N.E.3d 667 (Mass. 2016), which reached a contrary result to the *Hopkins*, *Hames*, and *Scarantino* courts. In that case, Edward Bettencourt, a police officer with over twenty-seven years of public service, was convicted of accessing without authorization the civil service examination scores of twentyone other police officers. *Id.* at 671, 679. The court noted that “the essence of his crime, in substance, was one of ‘snooping.’” *Id.* at 679. His subsequent application for retirement benefits was denied because his criminal convictions related to his public position and fell within the state’s pension forfeiture statute. *Id.* at 671, 678.

In *Bettencourt*, the court concluded that under the facts before it, a total pension forfeiture constituted an excessive fine under the Eighth Amendment and rejected the view that Bettencourt “had only a future interest in receiving retirement allowance payments . . . that was wholly contingent on . . . not being convicted of a crime involving misconduct in office.” *Id.* at 674. The court explained that Massachusetts courts had “long held the view” that public employees who were members of the retirement system held an interest that originated in

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contract but in substance amounted to a property right. *Id.* at 675.

The court reasoned that at the point Bettencourt became a contributing member of the retirement system with deductions taken from his salary, “he acquired a protected interest in the retirement allowance provided by the retirement system that amounted to a property interest.” *Id.* at 676-77. The court disagreed with the reasoning in the *Hopkins* line of cases and explained:

[w]e are not persuaded by the reasoning in these cases. If an employee has a protected contract right and, derivatively, a property interest in retirement benefits, the fact that the benefits may be subject to forfeiture on account of misconduct does not change the fundamental character of the contract right or property interest. Rather, it simply means that the employee will lose his or her right and interest as a result of the misconduct.

[*Id.* at 676.]

The court further explained that the Massachusetts forfeiture statute “effects what is in substance an extraction of payments from the employee to the Commonwealth” and concluded that because the pension forfeiture “involve[s] an ‘extraction of payments’ and is punitive, it is a fine within the meaning of the [E]xcessive [F]ines [C]lause of the Eighth Amendment,” and total forfeiture was excessive under the circumstances. *Id.* at 677, 680-81.

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We agree, in part, with the court's analysis in *Bettencourt* and are similarly unpersuaded by the reasoning in *Hopkins* and those courts which have held that public employees do not have a *property right* in pension benefits because that right is contingent on the employee maintaining honorable service during his or her tenure in office. Indeed, the New Jersey Supreme Court, like courts in Massachusetts, has recognized that a public employee's right to pension benefits is analogous to a property interest. See *Uricoli v. Bd. of Trustees, Police & Firemen's Ret. Sys.*, 91 N.J. 62, 76, 449 A.2d 1267 (1982) (in analyzing the legislative intent of a pension forfeiture statute, the Court acknowledged two predilections that weighed against a total pension forfeiture including that "forfeiture — whether of one's pension or any other property or benefit to which one is otherwise entitled — is a penalty or a punishment for wrongful conduct" and that it is also "remedial in character." (citations omitted)); *Eyers v. State, Bd. of Trustees*, 91 N.J. 51, 56, 449 A.2d 1261 (1982) ("[T]he pension forfeiture policy is penal in nature and has as its objectives the same considerations underlying all such schemes: punishment of the individual and deterrence . . .").²

We have also acknowledged that pension benefits are inherently property rights when equitably distributing

2. We also note the Court in *Spina v. Consol. Police and Firemen's Pension Fund Comm'n*, 41 N.J. 391, 401-02, 197 A.2d 169 (1964), stated that "it seems idle to sum up either the public's or the employee's contribution in one crisp word . . . [but] [w]e have no doubt that pension benefits are not a gratuity" and "[t]he employee has a property interest in an existing fund which the State could not simply confiscate."

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assets in matrimonial proceedings. For example, in *Whitfield v. Whitfield*, 222 N.J. Super. 36, 45, 535 A.2d 986 (App. Div. 1987), we concluded that a spouse's pension interest accrued during a marriage, even if not yet vested, was subject to equitable distribution because "a pension plan [is] a form of deferred compensation for services rendered" and "[a]s a substitute for wages such benefits unquestionably constitute property." When discussing the non-vested pension at issue, we explained that "such a pension is property in the form of a contract right to deferred compensation subject only to the fulfillment of the condition of the requisite number of years of employment by the employee." *Ibid.*

And, in *Barr v. Barr*, 418 N.J. Super. 18, 28, 11 A.3d 875 (App. Div. 2012), we addressed a dependent spouse's right to the "increases [in the supporting spouse's military pension benefits] resulting from his post-judgment, preretirement promotion." Although we vacated the trial judge's determination that the plaintiff had an interest in the "post-dissolution pension increases" and remanded for a plenary hearing, in our decision, we again observed that a pension reflects "deferred compensation for services rendered," and "[r]ather than receiving current income, the monies are deferred until retirement." *Id.* 418 N.J. Super. at 33, 11 A.3d 875 (quoting *Whitfield*, 222 N.J. Super. at 45, 535 A.2d 986).

Like the police officer in *Bettencourt*, defendant here had a protected property interest in his pension benefits, for purposes of an Eighth Amendment analysis, because he had a contractual right to receive those benefits in

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exchange for his public employment. As the court in *Bettencourt* cogently observed, the nature of defendant's property interest does not change merely because receipt of those benefits is conditioned on defendant's rendering of honorable service. Instead, "it simply means that the employee will lose his or her right and interest as a result of the misconduct." 47 N.E.3d at 676. By withholding payment of defendant's pension income, the State effectively extracted payments that were due to defendant (and to which he was already receiving) because of his misconduct. Under such circumstances, we conclude defendant's right to a pension was a property right and the forfeiture was a "fine" within the meaning of the Eighth Amendment. *See Bajakajian*, 524 U.S. at 328, 118 S.Ct. 2028 (quoting *Austin*, 509 U.S. at 609-10, 113 S.Ct. 2801).

And, the pension forfeiture ordered by the trial court was a "punishment" for purposes of an Eighth Amendment analysis. Indeed, neither party argues that pension forfeitures pursuant to N.J.S.A. 43:1-3.1 are solely remedial and, as in *Bajakajian*, defendant's loss of pension benefits was "imposed at the culmination of a criminal proceeding and require[d] conviction of an underlying felony, and it cannot be imposed upon an innocent [public employee]." 524 U.S. at 328, 118 S.Ct. 2028; *see also Corvelli v. Bd. of Trs. Police & Firemen's Ret. Sys.*, 130 N.J. 539, 550, 617 A.2d 1189 (1992) ("[P]ension forfeiture operates as a 'penalty or punishment for wrongful conduct.' (quoting *Uricoli*, 91 N.J. at 76, 449 A.2d 1267)); *Fiola v. State, Dep't of Treasury, Div. of Pensions*, 193 N.J. Super. 340, 347-48, 474 A.2d 23 (App. Div. 1984) ("Forfeiture of earned pension rights . . . constitutes a

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drastic penalty which the New Jersey Supreme Court has become increasingly loath to permit even in the case of employee misconduct unless that penalty has been clearly mandated by the Legislature.”)

IV.

In light of our decision that the forfeiture of pension benefits is a punitive fine that implicates the Excessive Fines Clause, we next address defendant’s second point. Defendant argues that the forfeiture of \$47,918.76 per year in pension income for the duration of his life because he accepted a \$300 bribe is an excessive fine under the Eighth Amendment and warrants reversal. We disagree.³

As discussed, in determining whether a fine violates the Excessive Fines Clause, courts must “compare the forfeiture amount to that offense, and ‘[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant’s offense, it is unconstitutional.’” *Bettencourt*, 47 N.E.3d at 678 (citing *Bajakajian*, 524 U.S. at 337, 118 S.Ct. 2028). The *Bajakajian* Court initially emphasized that “judgments about the appropriate punishment for

3. We recognize that the trial court did not address whether forfeiture of defendant’s pension benefits was unconstitutionally excessive because it held that the forfeiture was not a payment or fine that implicated the Eighth Amendment. We nevertheless address that argument as the issue was briefed by the parties, “the record is adequate to terminate the dispute[,] and no further fact-finding[,] . . . administrative expertise[,] or discretion is involved.” *Price v. Himeji, LLC*, 214 N.J. 263, 294, 69 A.3d 575 (2013) (quoting *Vas v. Roberts*, 418 N.J. Super. 509, 523-24, 14 A.3d 766 (App. Div. 2011)).

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an offense belong in the first instance to the legislature.” *Id.* at 336, 118 S.Ct. 2028. The Court then considered four factors in weighing the gravity of a defendant’s underlying offense: 1) the nature and extent of the crime; 2) whether the violation was related to other illegal activities; 3) the other penalties that may be imposed for the violation; and 4) the extent of the harm caused. *See id.* at 337-40, 118 S.Ct. 2028.

Applying that analysis here, we first note that while mandatory forfeiture of defendant’s pension benefits may seem like a harsh penalty given his receipt of a mere \$300 bribe, the Legislature deemed such a result to be an appropriate consequence for that precise official misconduct.⁴ It was well within the Legislature’s power to set this penalty as it saw fit. *See Steele*, 420 N.J. Super at 133-34, 18 A.3d 1087; *Brown v. Heymann*, 62 N.J. 1, 10-11, 297 A.2d 572 (noting that policy decisions rest with the Legislature and that a statute’s constitutionality “does not turn upon whether a plan is wise or unwise in a judge’s view”).

Further, N.J.S.A. 43:1-3.1, like all statutes, is presumed constitutional. *See Whirlpool Props. v. Dir., Div. of Taxation*, 208 N.J. 141, 175, 26 A.3d 446 (2011). The judiciary has always exercised its power to invalidate a legislative act with restraint and “a deep awareness that

4. As conceded by the State, defendant will receive a total return of his pension contributions. *See Legislative Fiscal Estimate*, Senate No. 14, 212 Leg. (N.J. Feb. 14, 2007) (“[A] member whose pension is forfeited receives a refund of his own contributions to the fund or system, and this bill is not intended to change this practice.”).

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the challenged enactment represents the considered action of a body composed of popularly elected representatives.” *New Jersey Sports & Exposition Authority v. McCrane*, 61 N.J. 1, 8, 292 A.2d 545 (1972). A legislative act will only be declared void if “its repugnancy to the Constitution is clear beyond a reasonable doubt.” *Harvey v. Bd. of Chosen Freeholders*, 30 N.J. 381, 388, 153 A.2d 10 (1959).

Moreover, N.J.S.A. 43:1-3.1 is not unprecedented in its imposition of pension forfeiture as a penalty for misconduct as “[t]he policy requiring forfeiture of pension rights on account of dishonorable service has been part of our law for over half a century.” *Corvelli*, 130 N.J. at 550, 617 A.2d 1189. Indeed, “[a]ll public pension statutes in this State carry an implicit condition precedent of honorable service . . . [and] operate[] as a penalty or punishment for wrongful conduct.” *Ibid.* As noted, pension forfeiture serves two significant government objectives: “punishment of the individual and deterrence, both as to the offending individual and other employees.” *Eyers*, 91 N.J. at 56, 449 A.2d 1261. In serving these dual purposes of punishment and deterrence, N.J.S.A. 43:1-3.1 operates to protect the public from the serious problem of government corruption.

Turning to the gravity of defendant’s offense, we acknowledge that he pled guilty to a single count of violating 18 U.S.C. § 1951(a) after accepting a \$300 bribe and that his offense was unrelated to other illegal activities. We note, however, that the maximum punishment authorized for a single offense under 18 U.S.C. § 1951 is a fine or imprisonment of up to twenty years, or both.

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Further, when defendant took the \$300 bribe, he significantly and materially breached the public's trust. Indeed, honest, hardworking taxpayers and property owners have the right to expect, require, and demand that public servants perform their jobs honorably. That certainly is true with respect to zoning decisions which necessarily affect the health and safety of the tenants and owners of the affected properties. It is beyond peradventure that those decisions must be based on the diligent and conscientious application of the law to the relevant facts, as appropriate, and not the result of illegal payments, even a bribe of \$300, which may appear to be a modest sum, but in actuality is a colossal amount when measured against the damage to the public trust caused by that illegal act.

We acknowledge that the court in *Bettencourt* deemed the pension forfeiture in that case to be constitutionally excessive. In doing so, it concluded that "no harm to the public fisc was accomplished or threatened," "there was no improper or illegal gain involved," "the offenses did not warrant concern about protection of the public," and *Bettencourt* received no "personal benefit, profit, or gain from his actions." *Bettencourt*, 47 N.E.3d at 680. Here, defendant was not convicted of effectively "snooping" on his colleagues' test results. *Id.* at 679. He took money illegally to perform a function he was being paid to honorably discharge. As noted, our Legislature in enacting N.J.S.A. 43:1-3.1 deemed that conduct sufficiently egregious to warrant a complete pension forfeiture and we conclude that such a remedy is not constitutionally disproportionate.

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V.

Having considered the Legislature's determination that total forfeiture of pension benefits is an appropriate consequence of certain public employee misconduct, and that the punishment here was not grossly disproportional in comparison to the gravity of his offense, we conclude that forfeiture of defendant's pension was not excessive under either the Eighth Amendment of the United States Constitution or Article I, Paragraph 12 of the New Jersey Constitution.

Affirmed.

**APPENDIX C — OPINION OF THE SUPERIOR
COURT OF NEW JERSEY, LAW DIVISION,
MERCER COUNTY, FILED MAY 30, 2019**

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY

DOCKET NO. MER-L-

STATE OF NEW JERSEY,

Plaintiff,

v.

BENNIE ANDERSON,

Defendant.

STATE OF NEW JERSEY

COUNTY OF MERCER

CIVIL ACTION

ORDER OF FORFEITURE OF PUBLIC OFFICE AND
POSITION, PERMANENT DISQUALIFICATION
FROM ANY POSITION OF PUBLIC HONOR, TRUST,
OR PROFIT, AND FORFEITURE OF PENSION AND
RETIREMENT BENEFITS

This action having been opened to this Court by Gurbir
S. Grewal, Attorney General of New Jersey (Claudia Joy

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Demitro, Deputy Attorney General, appearing), for forfeiture of public office and position and permanent disqualification from public office, and forfeiture of all pension or retirement benefits earned as a member of any State or locally-administered pension fund or retirement system in which defendant, Bennie Anderson participated at the time of the commission of his crimes and which coveted his position as an employee of the Jersey City tax assessor's office, and defendant having pleaded guilty in the United States District Court for the District of New Jersey on November 21, 2017, to attempt to obstruct, delay, and affect interstate commission by extortion under color of official right in violation of 18 U.S.C. § 1951(a), for which he was found guilty: (1) constituting an offense involving dishonesty; and (2) being equivalent to at least a third-degree crime under New Jersey law; and (3) being an offense that involved or touched upon his employment as a Jersey City tax assessor's office employee; and (4) constituting crimes substantially similar to crimes enumerated under N.J.S.A. 43:1-3.1(b), e.g., theft by extortion (N.J.S.A. 2C:20-5), commercial bribery (N.J.S.A. 2C:21-10), bribery in official matters (N.J.S.A. 2C:27-2), acceptance or receipt of unlawful benefit by public servant for official behavior (N.J.S.A. 2C:27-10), tampering with public records or information (N.J.S.A. 2C:28-7), and official misconduct (N.J.S.A. 2C:30-2), and for good cause shown for the reasons set forth on the record: The court further adds that Plaintiff's estopped argument cannot prevail against the action taken here by the Attorney General under N.J.S.A. 43:1-3.1(c)(2), since he is not precluded from taking action seeking a pension forfeiture made by the previous decision of the Jersey

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City locally administered system to [unreadable text] Mr. Anderson's pension for the [unreadable text] See N.J.S.A. 43:1-3.1(c).

IT IS ON THIS 30th day of May, 2019, ORDERED that Bennie Anderson, forfeit any public employment, office, or position held by him, including but not limited to his position as a Jersey City tax assessor's office employee.

IT IS FURTHER ORDERED that Bennie Anderson is forever disqualified from holding any office or position of honor, trust, or profit under this State or any of its administrative or political subdivisions, pursuant to N.J.S.A. 2C:51-2(d). The defendant further understands that if he makes any future application for public employment in violation of this Order, he will be subject to a charge under N.J.S.A. 2C:29-9(a) (fourth-degree contempt of court).

IT IS FURTHER ORDERED that Bennie Anderson forfeit all pension or retirement benefits earned as a member of any State or locally-administered pension fund or retirement system in which defendant participated at the time of the commission of his crimes and which covered his positions as a Jersey City tax assessor's office employee, pursuant to N.J.S.A. 43:1-3.1(a). The forfeiture of all pension and retirement benefits shall only apply to the employer's contributions pursuant to N.J.S.A. 43:15C-3(b), and not the employee's contributions pursuant to N.J.S.A. 43:15C-3(a)1 as determined by the locally administered pension fund.

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IT IS FURTHER ORDERED that the above forfeiture of public office and permanent disqualification from holding any public office or position, and order of forfeiture of all pension or retirement benefits earned, is deemed to have taken effect on November 21, 2017, the date defendant pleaded guilty to the federal information, unless and until Bennie Anderson successfully overturns his federal conviction on appeal to the Circuit Court of Appeals for the Third Circuit or the Supreme Court of the United States.

/s/

Hon. Mary C. Jacobson,
A.J.S.C.