

No. 25-246

IN THE
Supreme Court of the United States

KENNETH JOHN JOUPPI,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

**On Writ of Certiorari to the
Supreme Court of Alaska**

**BRIEF OF EIGHTH AMENDMENT SCHOLARS
AS AMICI CURIAE IN SUPPORT OF
NEITHER PARTY**

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INTEREST OF AMICI CURIAE

Amici curiae John D. Bessler, Nicholas M. McLean, and John F. Stinneford are law professors who study and write about the Eighth Amendment.¹ They have spent years examining the historical record and publishing scholarship on the Amendment’s origins, including its historical predecessors and the purpose of its prohibition on cruel and unusual punishment and excessive fines. Amici have an interest in assisting the Court to reach a decision informed by a complete and historically accurate understanding of the Amendment’s origins, purposes, and scope.

SUMMARY OF ARGUMENT

“The text and history of the Excessive Fines Clause,” this Court has explained, “demonstrate the centrality of proportionality to the excessiveness inquiry.” *United States v.ajakajian*, 524 U.S. 321, 335 (1998). But how should courts assess proportionality, and what considerations should guide and discipline that inquiry? This case asks the Court to clarify one important aspect of the excessiveness calculus: whether “courts may consider the gravity of the underlying offense purely in the abstract” or whether they should, instead, “consider the gravity of the specific defendant’s wrongdoing.” Pet’r Br. i. This brief—which reviews the constitutional and common-law backdrop

¹ Biographical statements are included in the appendix. Pursuant to Supreme Court Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief.

from which the Excessive Fines Clause emerged—offers historical context for the Court as it considers this question.

The Excessive Fines Clause derived from English antecedents.² The traditional common law right to freedom from excessive monetary sanctions—recognized in Magna Carta and reaffirmed in the English Bill of Rights of 1689—was widely regarded as fundamental by the seventeenth and eighteenth centuries. From the beginning, this common law right regulated the excessiveness of economic sanctions in ways that necessarily took into account offenders’ individual circumstances: punishment was to be set “after the manner of fault” and was to leave the offender his “contentment,” or means of livelihood. This latter principle, often captured by a Latin maxim drawn from the language of Magna Carta, “*salvo contenimento*,”³ supplied limits on punishment based on an individual offender’s ability to pay.⁴

² The Excessive Fines Clause “was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776),” *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983), and its language was drawn “verbatim from the English Bill of Rights of 1689.” *Bajakajian*, 524 U.S. at 335. As a whole, the Eighth Amendment’s text differs only in that “shall not be” replaces “ought not to be” in the two earlier documents, and in minor orthographic variations in the English version. See *Solem*, 463 U.S. at 284-85.

³ See Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 836-38, 853-72 (2013) (discussing this concept); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Calif. L. Rev. 277, 324 (2014) (explaining that, historically, “fines that serve to impoverish would be prohibited”).

⁴ See, e.g., 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 490 (Philadelphia, E. Earle 1819); accord William Eden, *Principles of Penal Law* 73 (3d ed., London B. White & T. Cadell 1775); 4 William Blackstone, *Commentaries on the Laws of*

In America, as in England, these principles shaped and influenced early understandings of what it meant to enjoy the right to freedom from “excessive fines.” This is demonstrated by colonial declarations of rights, early decisional law, the American editions of leading English treatises, and the influential works of nineteenth-century American commentators.⁵

ARGUMENT

I. THE HISTORICAL ROOTS OF THE RIGHT TO FREEDOM FROM EXCESSIVE FINES SUPPORT LOOKING TO INDIVIDUAL CIRCUMSTANCES

A. Magna Carta Recognized Limitations on Economic Penalties Attuned to Specific Offenders’ Individual Circumstances

The constitutional right to freedom from excessive monetary sanctions “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 deprive an offender of his livelihood.’” *Timbs v. Indiana*, 586 U.S. 146, 151 (2019) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)) (alterations

England *371-73 (1769) [Blackstone, *Commentaries*]; see *infra* Sections I.A–B.

⁵ See, e.g., Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 328 (Boston, Little, Brown & Co. 1868) (“A fine should have some reference to the party’s ability to pay it.”) [Cooley, *Constitutional Limitations*]; Benjamin L. Oliver, *The Rights of an American Citizen* 185 (1832) (stating that, when fines are assessed, “[a] man’s farm or stock in trade, ought never to be made a sacrifice, to the ruin of himself and the distress of his family”).

omitted); *accord Bajakajian*, 524 U.S. at 335. The barons who assembled at Runnymede in 1215 and forced King John to agree to Magna Carta “sought to reduce arbitrary royal power, and in particular to limit the King’s use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown.” *Browning-Ferris*, 492 U.S. at 270-71. Amercements were “the most common criminal sanction in 13th-century England,” *id.* at 269, and were a “medieval predecessor[] of fines.” *Bajakajian*, 524 U.S. at 335.

Chapter 14 of Magna Carta (which was first codified in statute in 1225) provides in relevant part:

A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement [*“salvo contenemento suo”*]; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other’s villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy.

Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 1, 6-7 (1762 ed.).⁶

This Chapter limited abuses by, among other things, “requiring that the amount of the amercement be proportioned to the wrong,” and prohibiting amercements so severe as to take an offender’s “contenement,” “wainage,” “merchandise,” or—as simply put in modern translations—their “livelihood.” *Browning-Ferris*, 492 U.S. at 271.

⁶ The amercements chapter of Magna Charta, originally numbered as Chapter 20, was renumbered as Chapter 14 in the version codified by statute in 1225.

This command of Chapter 14 was, by its nature, individualized. For example, “to save a man’s ‘contenement’ was to leave him sufficient for the sustenance of himself and those dependent on him.” William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 293 (2d ed. 1914). This meant that “[i]n no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him.” *Id.* at 287.⁷ By protecting “merchandise” and “wainage,” Magna Carta instructed that the circumstances of the individual defendant must be considered and punishment must be calibrated to ensure the defendant maintained a minimum core level of economic subsistence.⁸

The principles set forth in Magna Carta were confirmed and restated repeatedly in legislation during the thirteenth, fourteenth, and fifteenth centuries. See Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629* 10 (1948). “Following Magna Charta a writ to enforce the concept of

⁷ See also Giles Jacob, *A New Law-Dictionary* (3d ed., Savoy, E. & R. Nutt & R. Gosling 1736) (unpaginated) (defining “contenement” as “that which is necessary for the Support and Maintenance of Men, agreeable to their several Qualities, or States of Life”).

⁸ Coke describes wainage as “the contenement or countenance of the villen,” 2 Edward Coke, *The Second Part of the Institutes of the Laws of England* 28 (1642), and also suggests (relying on Ranulf de Glanvill’s late twelfth-century treatise) that the protections of Chapter 14 were “made in affirmance of the common law[.]” *Id.* at 27.

salvo contenemento developed, fourteenth-century petitions tested it, and other laws confirmed it.” Lois G. Schworer, *The Declaration of Rights, 1689* 91 (1981) [hereinafter Schworer, *Declaration*]; see also Hyams, *Peasants* 44, 76, 14344 (impact of poverty as limiting amercements); Thomas Madox, *The History and Antiquities of the Exchequer of the Kings of England* 208 (2d ed., London, William Owen & Benjamin White 1769) (similar; noting early cases in which amercements were set such that an offender could “sav[e] the Maintenance of himself, his Wife and Children”).

For subsequent generations, Magna Carta would serve as “a sacred text, the nearest approach to an ir-repealable ‘fundamental statute’ that England has ever had.” 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 152 (1895). “In age after age a confirmation of it will be demanded and granted as a remedy for those oppressions from which the realm is suffering[.]” *Id.* In this way, a document that was a product of thirteenth century feudal class struggles came to serve as a “basis for molding the foundations of a Parliamentary monarchy,” as a “vehicle to enable the Parliamentary leaders to resist the misdeeds of Stuart Kings four centuries later,” and, ultimately, as “the core of the rights of Englishmen asserted by American colonists[.]” 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 7 (1971) [hereinafter Schwartz, *Documentary History*].

B. The English Bill of Rights’ Provision that “Excessive Fines” “Ought Not to Be” “Imposed” Was a Reaction to Notorious Seventeenth-Century Abuses

A series of notorious and well-chronicled abuses in the seventeenth century tested the ancient right to freedom from oppressive monetary punishment. The

courts whose infamous conduct prompted the English Bill of Rights' provision that "excessive Fines" "ought not to be" "imposed" shared a common failing—setting fines with an eye to the Crown's needs, rather than the fault and circumstances of the person before them.

1. The Star Chamber

"In the early seventeenth century, the levying of fines became entangled in the constitutional and political struggles between the king and his parliamentary critics." Schwoerer, *Declaration* 91. When, from 1629 to 1640, Charles I sought to govern without convening Parliament, the absence of Parliamentary appropriations made finding new ways of raising revenue essential; so "the King's financial advisers devised" "expedients of a novel kind" "to take advantage of the law's technicalities" to benefit the public fisc. J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* 74 (1961 ed.). The machinery of criminal justice—and the High Court of Star Chamber, in particular⁹—was a useful means to that end.

The Star Chamber took "every opportunity [to] impos[e] such fines as should supply the king with a considerable revenue, in the absence of parliamentary grants." 4 Henry Walter, *A History of England* 135 (London, J.G.F. & J. Rivington 1834); see Roger Lockyer, *The Early Stuarts: A Political History of England, 1603-1642* 261 (1989) (observing that "the impetus behind [a] spate of prosecutions in the 1630s was financial"); see also *Timbs*, 586 U.S. at 152 (observing that "[t]he 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass

⁹ As a prerogative court, the Star Chamber was considerably less independent from the Crown than the common law courts were.

their political foes, and indefinitely detain those unable to pay”).

In response, “proponents of the common law sought to apply the principle of Magna Charta to fines imposed by the court[.]” Schwoerer, *Declaration* 91. A 1615 decision reported by Coke—*Godfrey’s Case*, 11 Co. Rep. 42a, 43a–44b, 77 Eng. Rep. 1199, 1202–03 (K.B. 1615)—had held that the “reasonableness of [a] fine shall be adjudged by the justices; and if it appears to them to be excessive, it is against law, and shall not bind; for *excessus in re qualibet jure reprobatur communi*”¹⁰ and that “[a]n excessive fine at the will of the lord, shall be said oppression of the people.”

The Star Chamber disregarded such limitations, however, and “imposed heavy fines”—particularly “on the king’s enemies[.]” Schwoerer, *Declaration* 91.¹¹ The court became “trenched ... to the destruction of the offender’s estate and utter ruin of him and his posterity.” William Hudson, *A Treatise on The Court of Star Chamber* (1635), reprinted in 2 Francis Hargrave, *Collected Juridica* 36 (1792).

A tract published in 1637 contrasted the contemporary practices of the Star Chamber with earlier practices under John Whitgift (Archbishop of Canterbury from 1583 until 1604), noting that “Archbishop Whitgift did constantly in this Court maintain the liberty of the *Free Charter* that none ought to be fined but *salvo*

¹⁰ Lit. “Excess in any thing is reprehended by common law.” 2 John Bouvier, *A Law Dictionary* 126 (14th ed. 1875).

¹¹ The Star Chamber’s imposition of enormous fines served multiple purposes: Not only could they supply revenue, but “an unpayable fine would cause the offender to be imprisoned, in effect, at the pleasure of the crown.” Donald A. Dripps, *The “Cruel and Unusual” Legacy of the Star Chamber*, 1 J. Am. Const. Hist. 139, 179 (2023).

contenimento.” *A Discourse Concerning the High Court of Star Chamber* (1637), reprinted in *The Star Chamber* 4,10 (London, John Southerden Burn ed. 1870).

During an impeachment trial in the Irish House of Lords in March 1641, one advocate declared: “[T]hough Magna Charta be so sacred for Antiquity; though its [C]onfirmation be strengthened by [O]ath, though it be the proper [D]ictionary that expounds *meum* and *tuum*,^[12] and assigns every Subject his [B]irtheright, it only survives in the Rolls, but is miserably rent and torn in the Practice. These [W]ords, *Salvo Contenemento*, live in the Rolls, but they are dead in the Star-[C]hamber.” *Impeachment of Sir Richard Bolton*, 4 How. St. Tr. 51, 53 (Parl. (Ire.) 1641) (argument).

The Star Chamber became a cautionary tale of the danger that exists when penological interests are warped and corrupted by financial self-interest: “[T]he strong interest of the court in these fines ... had a tendency to aggravate the punishment[.]” 2 Henry Hallam, *The Constitutional History of England From the Accession of Henry VII to the Death of George II* 49 (2d ed., London, John Murray 1829). As Hallam put it, “those who inflicted the punishment reaped the gain, and sat, like famished birds of prey, with keen eyes and bended talons, eager to supply for a moment, by some wretch’s ruin, the craving emptiness of the exchequer”—“regardless of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means[.]” *Id.* at 47.

¹² Lit. “mine” and “yours.”

In July 1641, the Star Chamber’s abuses “brought that institution to an end at the hands of the Long Parliament.” *Jones v. SEC*, 298 U.S. 1, 28 (1936); *see also Timbs*, 586 U.S. at 152 (citing *The Grand Remonstrance* ¶¶ 17, 34 (1641), in *The Constitutional Documents of the Puritan Revolution 1625–1660*, 210, 212 (S. Gardiner ed., 3d ed. rev. 1906)); John D. Bessler, *Lost and Found: The Forgotten Origins of the “Cruel and Unusual Punishments” Prohibition*, 14 Brit. J. Am. Legal Stud. 213, 354, 369 (2025) (discussing The Grand Remonstrance (1641) and an Ulster Remonstrance (1642) setting forth grievances against “heavy fines, mulcts, and censures of pillory, stigmatizings, and other like cruel and unusual punishments”) [hereinafter Bessler, *Lost and Found*]. But the Star Chamber’s final years would live on in the legal and popular imagination as a uniquely unconstitutional moment—a paradigm example of abusive practices.

2. The Bill of Rights of 1689

The right to freedom from excessive fines was again tested in the years leading up to the Glorious Revolution, when further abuses in the assessment of fines took place. *See* Schwoerer, *Declaration* 91. In the decades following the Star Chamber’s abolition, some common law courts recognized the applicability of Magna Carta’s amercement provisions to fines imposed by courts. *See, e.g., Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C.P. 1677) (North, C.J.) (“In cases of fines for criminal matters, a man is to be fined by Magna Charta with a *salvo contenemento suo*; and no fine is to be imposed greater than he is able to pay[.]”).

But other judges—including the infamous George Jeffreys—held “that Magna Carta did not apply to fines for offenses against the Crown.” *Browning-Ferris*, 492 U.S. at 290 (O’Connor, J., concurring in part

and dissenting in part). For example, in *John Hampden's Case*, 9 How. St. Tr. 1054 (K.B. 1684), Jeffreys flatly rejected the defendant's argument that, per Magna Carta, "there should be a Salvo Contentamento in all fines." *Id.* at 1124.¹³ Thus, rather than ask whether the fine imposed on Hampden—40,000*l.*, on a "young gentleman" "not in possession of any property," "for a trifling misdemeanor"—was excessive, Jeffreys asked only whether Hampden's offense fell within a special category ("offenses against the Crown") to which, in his view, Magna Carta's individualized protection did not extend. 3 John Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England* 423 (2d Am. Ed. from the 3d London ed., Blanchard & Lea 1851). In doing so, Jeffreys allowed an exception to swallow the rule—and violated the principles for which Magna Carta stood. *See id.*

Decisions such as *John Hampden's Case* had disastrous practical consequences because "English courts during the reigns of Charles II and James II took advantage of their newly acquired power and imposed ruinous fines on wrongdoers and critics of the Crown."

¹³ As a purely historical and technical matter, the position Jeffreys advanced in *John Hampden's Case* was not wholly unsupportable. Historically, the terms "fines" and "amercements" had indeed referred to different forms of sanctions. *See, e.g.,* John Fox, *The History of Contempt of Court* 118-19 (1927) (discussing this distinction). But though fines and amercements had distinct historical antecedents, they served fundamentally similar purposes—and, by the seventeenth and eighteenth centuries, the terms were often used interchangeably in common parlance. *See Browning-Ferris*, 492 U.S. at 290-91 (O'Connor, J., concurring in part and dissenting in part); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1264 (1987); 4 Blackstone, *Commentaries* *371-73 (identifying Magna Carta's amercement provisions as regulating "[t]he reasonableness of fines in criminal cases").

Browning-Ferris, 492 U.S. at 290 (O'Connor, J., concurring in part and dissenting in part). By the mid-1680s, “the use of fines ‘became even more excessive and partisan,’ and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed.” *Id.* at 267 (citation omitted).

Parliament understood the problem as a judicial failure to attend to the individual. In 1680, a “Bill for the relief of the Subject against arbitrary Fines” was introduced in the House of Commons. See 8 *Debates of the House of Commons: From the Year 1667 to the Year 1694* 226 (Anchitell Grey ed. 1763). During debate on the bill, one member observed that “[t]he Fines imposed by *Magna Charta*, and at Common Law, are with a *salvo contenemento*.” *Id.* at 226. Another member recalled a case in which a man “was fined a thousand Marks, and was not worth a thousand Shillings,” and suggested that “[w]hen the Judges become as great Malefactors as other men, there must be some remedy.” *Id.* at 227. He continued, “[i]f the Judges had fined men according to *Magna Charta*, with *salvo contenemento*, there had been no need of this Bill.” *Id.* Another member emphasized the importance of “know[ing] the ability of the Person” subjected to fines and observed, “[w]e have had excessive Fines imposed by the Judges.” *Id.* at 228.

David Hume, writing in the eighteenth century, described the abusive nature of penalties imposed during the 1680s. In one case in 1682, “enormous damages to the amount of 100,000 pounds were decreed.” 8 David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688* 173 (1782). This, Hume explained, was unlawful: “By the law of England, ratified in the great charter, no fines or damages ought to extend to the total ruin of a criminal.” *Id.*

A tract published in 1689 observed that “severe fines” had been imposed, and suggested that “the generality of people ... did much complain” and some had “groaned under extravagant Summs, imposed contrary to *Magna Charta’s salvo contenimento*, i.e., saving to them their livelihoods[.]” Anon., *A Letter to a Gentleman at Brussels, Containing an Account of the Causes of the Peoples Revolt from the Crown* 6-7 (1689).

The “conflict between Parliament and the Crown culminat[ed] in the Glorious Revolution of 1688 and the English Bill of Rights of 1689.” *Powell v. McCormack*, 395 U.S. 486, 502 (1969). “After James II fled England ... the House of Commons, in an attempt to end the crisis precipitated by the vacation of the throne, appointed a committee to draft articles concerning essential laws and liberties that would be presented to William of Orange.” *Browning-Ferris*, 492 U.S. at 290-91 (O’Connor, J., concurring in part and dissenting in part).

The Declaration of Rights of 1688 was “[a] distinct and solemn assertion of the fundamental principles of the constitution and of the ancient franchises of the English nation[.]” Thomas Pitt Taswell-Langmead, *English Constitutional History: From the Teutonic Conquest to the Present Time* 501 (10th ed. 1946). Having recited that “excessive Fines have been imposed,” the Declaration provided “[t]hat excessive Baile ought not to be required, nor excessive Fines imposed, nor cruell and unusuall Punishments inflicted.” Bill of Rights of 1688. Shortly afterward, Parliament enacted the Declaration as the Bill of Rights of 1688, further entrenching a set of “undoubted rights and liberties.” 1 Will. & Mar., 2d Sess., ch. 2, 9 Stat. at Large 67, 69

(1764 ed.).¹⁴ Although the Glorious Revolution represented a period of significant constitutional change, Parliamentary reformers characterized much of their work as restoring ancient rights and privileges. *See, e.g.,* John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* 99-103 (2005). And in a number of respects, “[t]he codified prohibition in the English Bill of Rights reflected a general understanding of what the English common law prohibited—or at least was thought to already prohibit—even in the absence of a written constitutional guarantee.” Bessler, *Lost and Found* 260.

Two leading cases, decided around the time the English Bill of Rights was framed, suggest how that document’s provision that “excessive fines” “ought not to be” “imposed” was understood at the time of its enactment: the highly publicized trial and punishment of Anglican cleric and perjurer Titus Oates,¹⁵ and the House of Lords review of fines imposed on Lord Devonshire. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957,

¹⁴ Events associated with the Glorious Revolution in Scotland are also instructive. When, in April 1689, the Convention of Estates of Scotland voted to remove King James from the throne of Scotland, it declared that he had “Invade[d] the Fundamental Constitution of this Kingdom, and Altered it from a Legal Limited Monarchy, to an Arbitrary Despotick Power” by, among other things, “imposing Exorbitant Fines, to the Value of the Parties Estates, extracting extravagant Bail; and disposing Fines and Forfeitures before any Process or Conviction.” *The Declaration of the Estates of the Kingdom of Scotland* 1-2 (1689). Accordingly, it was declared “[t]hat the imposing of extraordinary Fines, the exacting of exorbitant Bail, and the disposing of Fines and Forfeitures, before Sentence, are contrary to Law.” *Id.* at 4. *See also* Claim of Right Act 1689, Will. & Mar. ch. 28 (Scot.).

¹⁵ *See* John H. Langbein, *The Origins of Adversary Criminal Trial* 69-73 (2003) (discussing Oates’ perjury and the notorious “Popish Plot”) [hereinafter Langbein, *Origins*].

969-70 (1991) (plurality) (discussing *Oates*); John Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 932-38 (2011); *Weems v. United States*, 217 U.S. 349, 375-76 (1910) (discussing *Devonshire*).

First, in 1685, Judge Jeffreys and his colleagues on the King’s Bench had sentenced Oates to a fine of 2,000 marks, life imprisonment, whippings, pillorying, and defrockment. *Id.* at 933 (quoting *Second Trial of Titus Oates*, 10 How. St. Tr. 1227, 1315-17 (K.B. 1685)). “[R]epresentatives from the House of Commons asserted that the House had Oates’s case in mind when it drafted the Bill of Rights[.]” *Id.* at 933 (citing 10 H.C. Jour. 247 (1689)). In 1689, Oates challenged his punishments as cruel and illegal, and his fine as excessive. *Id.* A writ of error to the House of Lords characterized the excessiveness of the fine as:

4. *Exception.* Fined 1,000 marks in each judgment, and committed in execution for the fines aforesaid; which fines are excessive, twice as much as the Defendant was worth, and therefore against Magna Charta, by which all fines ought to be with a *salvo contenimento*.

Petition of Titus Oates, *Rex v. Oates*, reprinted in 1 The Manuscripts of the House of Lords, 1689-1690 81 (1889 ed.).¹⁶

Oates’ petition was rejected by the House of Lords by a vote of 35 to 22, *id.* at 80, but several members dissented on the ground that the sentence was “contrary to the declaration ... that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.” 10 How. St. Tr. at

¹⁶ “A *mark* was equivalent to two-thirds of a pound.” Bessler, *Lost and Found* 252 n.146 (citation omitted).

1325. The House of Commons aligned itself with the dissenting Lords: “On the 2d of July, A bill was brought into the House of Commons to reverse the two judgments against Oates, it was passed and carried up to the Lords on the 6th[.]” *Id.* at 1329. Oates was pardoned and released from prison. Langbein, *Origins* 72.

The second late seventeenth century decision—*The Case of William Earl of Devonshire*, 11 How. St. Tr. 1353 (Parl. 1689)—further clarifies the factors that could make a fine excessive. See *Weems*, 217 U.S. at 375-76. The petitioner, Lord Devonshire, “was fined £30,000 for an assault and battery[.]” *Id.* at 376. “[T]he House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine ‘was excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land.’” *Id.* (citation omitted). The case was decided just months after the English Bill of Rights had been enacted.

In *Bajakajian*, this Court noted that the unlawful nature of the fines imposed in cases such as *Devonshire* was “described contemporaneously only in the most general terms.” 524 U.S. at 335. But while the *opinion* in *Devonshire* might have been general, the *argument* that carried the House of Lords was not. Devonshire’s advocate, Henry Booth (Lord Delamere),¹⁷ spoke directly to the grounds on which the fine was perceived to be “excessive and exorbitant, against Magna Charta, the common right of the subject, and

¹⁷ Delamere served alongside Devonshire on the “rights committee” in the House of Lords, which played an important role in drafting and revising the English Declaration of Rights. Schwoerer, *Declaration* 237-41, 306-07. John Hampden—whose argument that Magna Carta applied to fines had been rejected by Judge Jeffreys in 1684—served on a similar committee in the House of Commons. *Id.* at 91.

the law of the land.” See *The Works of the Right Honourable Henry late L. Delamer[e], and Earl of Warrington* 563-82 (1694).¹⁸

In making the case for “[t]he Excessiveness of the Fine,” *id.* at 565, Delamere began by invoking the nation’s experience under the Star Chamber: “The Court of *Starchamber* was taken away, because of the *unmeasurable Fines* which it impos’d, which alone was a plain and direct prohibition for any other court to do the like, for otherwise the Mischief remain’d[.]” *Id.* at 574. He observed that “those great *Fines*, imposed in that Court, were inconsistent with the Law of *England*, which is a *Law of Mercy*, and concludes every *Fine* which is left at discretion, with *Salvo Contentimento*.” *Id.* “If the *Fines* imposed in the *Starchamber* were an *intolerable Burden to the Subject*, and the means to introduce an *Arbitrary Power and Government*, as [the statute abolishing the Star Chamber] recites, the like proceeding in the *King’s Bench* can be no less grievous, and must produce the same Evil.” *Id.* at 574-75. “Laws that are grounded upon the *ancient Principles of the Government* cannot cease, because the Reason of them will ever continue[.]” *Id.* at 575.

Magna Carta’s provisions, Delamere explained, served a critical purpose: “[T]he Judges cannot impose a greater Fine than what the Party may be capable of paying immediately into Court: but if the Judges may commit the Party to Prison till the Fine be paid, and withal set so great a Fine as is impossible for the Party to pay into Court, then it will depend upon the Judges pleasure, whether he shall ever have his *Liberty*, because the *Fine* may be such as he shall never be able to pay: And thus every Man’s Liberty is wrested out of

¹⁸ See also 11 How. St. Tr. at 1353-66 (reproducing Delamere’s argument to the Lords in this “remarkable Case”).

the dispose of the *Law*, and is stuck under the *Girdle* of the Judges.” *Id.* at 576-77.

Delamere also alluded to the broader societal and dignitary interests that were at play: “Because the *Nation* has an *Interest* in the Person of every particular Subject, for every Man, either one way or other, is useful and serviceable in his Generation, but by these *intolerable Fines* the *Nation* will frequently lose a Member, and the Person that is Fin’d shall not only be disabled from doing his Part in the Common-wealth, but also he and his *Family* will become a *Burden* to the Land, especially if he be a man of no great Estate, for the excessive Charge that attends a Confinement will quickly consume all that he has, and then he and his *Family* must live upon *Charity*.^[19] And thus the poor man will be doubly punish’d, first, to wear out his days in *perpetual Imprisonment*; and secondly, to see Himself and Family brought to a Morsel of Bread.” *Id.* at 577.²⁰

The Lords agreed with Delamere, and held the £30,000 fine to be “excessive and exorbitant, against Magna Charta, the common right of the subject, and

¹⁹ Cf. Cesare Beccaria, *On Crimes and Punishments and Other Writings* 53 (Richard Bellamy ed., Richard Davies trans., 1995) (1764) (observing that “fines ... take bread from the innocent when taking it from the villains”); Walter J. Baldwin, *Punishment Without Crime; or Imprisonment for Debt* 44 (1813) (observing that “it is the spirit of the Constitution not to punish ‘fault,’ or even ‘crime’ itself, but ‘according to its degree, or in proportion to its heinousness,’ and therefore, as neither debt nor inability to pay debt is in any ‘degree heinous,’ it is, we conceive, in direct opposition to this spirit to inflict”) (emphasis omitted).

²⁰ Delamere also argued that the amount of the fine was greater than other fines previously imposed, and that the proceedings “will make ... the government look very rigid and severe,” which “will set [the people] upon their guard.” *Id.* at 578.

the law of the land[.]” 11 How. St. Tr. at 1372. Together, these two famous cases shed considerable light on the ancient principles reaffirmed in the English Bill of Rights’ proscription of “excessive fines.”

C. Post-1689 Theory and Practice Reaffirmed These Proportionality Principles

“Case law invoking the English Bill of Rights in the years following its adoption recognized the premise that the ‘excessiveness’ of a fine could be determined with reference to an offender’s individual circumstances.” Nicholas M. McLean, *The Law of Minimum Entitlements*, 59 U. Mich. J.L. Reform (forthcoming 2026). For example, Matthew Newman—a resident of colonial Bermuda—was convicted in 1707 of “repeatedly threatening and abusing in a very gross manner the Governor, Judges and Justices of the island.” 2 *Acts of the Privy Council of England* 600, 606 (W. L. Grant et al., eds. 1910). The trial court fined Newman, and Newman appealed to the Privy Council on excessiveness grounds.²¹ The Privy Council held that “the fine imposed” on Newman “was ... excessive in view of his mean circumstances and contrary to the Bill of Rights.”²²

²¹ The Privy Council “heard appeals from colonial cases,” and “requir[ed] that colonial laws not be ‘repugnant’ to those of England.” Christian R. Burset, *Why Didn’t the Common Law Follow the Flag?*, 105 Va. L. Rev. 483, 495 (2019). “In doing so, it laid the framework for an often contentious debate about the precise scope of English liberties abroad—but one that assumed a jurisprudential unity between England and its colonies.” *Id.*

²² 2 *Acts of the Privy Council of England* 606 (W. L. Grant et al., eds. 1910). Newman had already “lain in prison for two years” before the appeal was heard, and the Privy Council regarded this as “sufficient punishment.” *Id.* The bail the trial court had required was also deemed excessive. *Id.*

Influential treatises reflect the same principles. Take the description of the rules governing monetary punishments set forth in the noted jurist Sollom Emlyn's²³ preface to the 1730 edition of *State Trials*. See Sollom Emlyn, *Preface*, in *A Complete Collection of State Trials and Proceedings for High-Treason, and Other Crimes and Misdemeanors* (2d ed., London, J. Walthoe Sen. et al. 1730). Emlyn writes that the judge, "though he be intrusted with so great power, yet he is not at liberty to do as he lists, and inflict what arbitrary Punishments he pleases; due regard is to be had to the Quality and Degree, to the Estate and Circumstances of the Offender, and to the greatness or smallness of the Offence[.]" *Id.* at x.

This was important because "that Fine, which would be a mere trifle to one man, may be the utter ruin and undoing of another[.]" *Id.* Moreover, failure to abide by these precepts would undermine the proportionality principle as well: "If no Measures were to be observed in these discretionary Punishments, a Man who is guilty of a Misdemeanor might be in a worse Condition than if he had committed a capital Crime" because "he might be exposed to an indefinite and perpetual Imprisonment, a Punishment not at all favour'd by Law, as being worse than [d]eath itself[.]" *Id.*

Blackstone's observations are also instructive. Blackstone notes that "[t]he reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna carta* concerning amerce-ments for misbehaviour in matters of civil right."

²³ "Sollom Emlyn (1697-1754) was an Irish legal writer who became a member of Lincoln's Inn, was the compiler of the six-volume second edition of *State Trials*, and contributed 'a lengthy preface critically surveying the condition of English law at the time.'" Bessler, *Lost and Found* 288 n.283.

4 Blackstone, *Commentaries* *372. Then Blackstone describes that the law requires “that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenment, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry.” *Id.* Blackstone elaborates:

[T]he ancient practice was to enquire by a jury, when a fine was imposed upon any man, *quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum*.^[24] And, since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelyhood; but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life.

Id. at *373. Blackstone recognized that, from case to case and offender to offender, the degree of punishment “must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances.” *Id.* at *371. As for monetary punishment, he noted that “[t]he *quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law” because “[t]he value of money itself changes from a thousand causes; and, at all events, what is ruin to one man’s fortune, may be matter of indifference to another’s.” *Id.*

²⁴ Lit. “How much from thence he be able to pay the King annually, having besides a maintenance for himself, his wife and children.” Thomas Tayler, *The Law Glossary* 347 (1866 ed.).

In the 1770s, William Eden (Baron Auckland) discussed these principles in his treatise, *Principles of Penal Law*. Eden writes that “[i]t is the usage of the courts, superinduced on the clause of Magna Charta relative to civil amercements, never to extend the fine of any criminal so far, as to take from him the implements, and means of his profession, and livelihood; or to deprive his family of their necessary support.” William Eden (Baron Auckland), *Principles of Penal Law* 72-73 (3d ed. 1775).

Joseph Chitty’s early nineteenth century criminal treatise also presents an extensive discussion of this rule. “Before the revolution,” Chitty observes, “the court of Star-chamber levied the most exorbitant fines upon the subject in defiance of every principle of law, to enrich the treasuries of the sovereign.”¹ Joseph Chitty, *A Practical Treatise on the Criminal Law* 489 (Philadelphia, E. Earle 1819). “[B]y the bill of rights,” however, “it was specifically enacted, that excessive fines be not imposed”; “since this provision, it is never usual to assess a larger fine than the delinquent is able to pay without touching the means of his subsistence[.]” *Id.* at 490.

In short, substantial evidence suggests that Magna Carta, the common law, and the English Bill of Rights were understood to require that a just and lawful monetary penalty be proportionate to the offense not only in the abstract, but also in the sense that it not destroy a minimum core level of economic security and subsistence—determined with reference to personal circumstances and ability to pay of the individual.

II. EARLY AMERICAN SOURCES FURTHER SUPPORT LOOKING TO INDIVIDUAL CIR- CUMSTANCES

The fundamental right to freedom from excessive fines was embraced by the American colonists. The earliest colonial charters did not merely prohibit “excessive” fines; they reproduced Magna Carta’s *salvo contenemento* formula—and the individualized inquiry embodied in it—nearly word for word.

The colonists “looked upon the English Constitution as their own,” H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 Colum. L. Rev. 1, 22 (1917), and “English law—as authority, as legitimizing precedent, as embodied principle, and as the framework of historical understanding—stood side by side with Enlightenment rationalism in the minds of the Revolutionary generation.” Bernard Bailyn, *The Ideological Origins of the American Revolution* 31 (1967); see *Trump v. Barbara*, 146 S. Ct. 2438, 2458 (2026) (recognizing that “the colonists demanded the ‘rights of Englishmen’”); *Timbs*, 586 U.S. at 164 (Thomas, J., concurring in the judgment) (“As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen, ... including the prohibition on excessive fines.”) (citation and internal quotation marks omitted). Indeed, “Americans were steeped in the English constitutional writings of Coke and Blackstone, and justified their break from England on the ground that the British refused to respect their longstanding common-law rights.” John F. Stinneford, *Experimental Punishments*, 95 Notre Dame L. Rev. 39, 57 (2019).

Even before the English Bill of Rights was adopted, American colonists had sought to claim for themselves the right to freedom from unreasonable and oppressive

finer. The Pennsylvania Frame of Government of 1682—one of “the most influential of the Colonial documents protecting individual rights,” 1 Schwartz, *Documentary History* 130—provided “[t]hat all fines shall be moderate, and saving men’s contenements, merchandize, or wainage.” *Pennsylvania Frame of Government, Laws Agreed Upon in England*, art. XVIII (1682), reprinted in 1 Schwartz, *Documentary History* 132, 141. Likewise, the New York Charter of Liberties and Privileges of 1683 provided “[t]hat A freeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saveing to him his freehold, And a husbandman saveing to him his Wainage and a merchant likewise saveing to him his merchandize[.]” *N.Y. Charter of Liberties and Privileges* (1683), reprinted in 1 Schwartz, *Documentary History* 163, 165.

A few years later, during Maryland’s Protestant Revolution of 1689, one stated reason for the rebellion was “[t]he Imposseinge Excessive fines Contrary to magna Charta without any respect had to the *salvo Contenemento suo sibi* therein Injoynd.” *Mariland’s Grevances Wiy The Have Taken Op Arms*, reprinted in 8 J. S. Hist. 392, 401 (1942). See also David S. Lovejoy, *The Glorious Revolution in America* 288–91 (1987) (discussing the rebellion and its causes).

In 1721, Jeremiah Dummer’s influential work *A Defence of the New-England Charters* similarly declared that “[t]he Subjects Abroad claim the Privilege of *Magna Charta*, which says that no Man shall be fin’d above the Nature of his Offense, and whatever his Mis-carriage be, a *Salvo Contenemento suo* is to be observ’d by the Judge.” Jeremiah Dummer, *A Defence of the New-England Charters* 16-17 (1721).

By the Founding, documents such as Magna Carta, the Habeas Corpus Act, and the English Bill of Rights

had long represented “a towering common law lighthouse of liberty—a beacon by which framing lawyers in America consciously steered their course.” Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 663 (1996). Coke’s “*Institutes* ‘were read in the American Colonies by virtually every student of the law,’ *Kerry v. Din*, 576 U.S. 86, 91 (2015) (plurality opinion) (citation omitted), and Blackstone was “the preeminent authority on English law for the founding generation,” *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (citation omitted). The Founders were also “aware and took account of the abuses that led to the 1689 Bill of Rights.” *Browning-Ferris*, 492 U.S. at 267.

The landmark Virginia Declaration of Rights of June 1776 echoed the English Bill of Rights, providing “[t]hat excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.” Va. Decl. of Rts., § 9. Section 9 was one of several provisions “borrowed from England,” Edmund Randolph, *Essay on the Revolutionary History of Virginia* (c. 1809–1813), reprinted in 1 Schwartz, *Documentary History* 246, 248, in a document that in many respects “was a restatement of English principles—the principles of Magna Charta, the Petition of Right[], the Commonwealth Parliament, and the Revolution of 1688.” Allan Nevins, *The American States During and After the Revolution, 1775-1789* 146 (1927).²⁵

Virginia’s Declaration, in turn, influenced the declarations of rights of other states and, ultimately, the Bill of Rights itself. By 1787, “[e]ight states ... had

²⁵ Cf. *Solem*, 463 U.S. at 286 (“use of the language of the English Bill of Rights” deemed “convincing proof” of intent “to provide at least the same protection”).

state constitutions prohibiting the imposition of excessive fines”²⁶ and, in 1789, four states—Virginia, Pennsylvania, New York, and North Carolina—urged that the Nation’s charter be amended to include such a provision. 2 Schwartz, *Documentary History* 1167. The amendments proposed by the Virginia Ratifying Convention were particularly influential. *Id.* at 762-65.

In light of this history, early interpretations of the Virginia Declaration of Rights are particularly instructive. For example, in *Jones v. Commonwealth*, 5 Va. (1 Call) 555 (1799), the Supreme Court of Appeals of Virginia considered whether a fine could be assessed jointly. At the time, the imposition of fines in Virginia was governed both by the excessive fines clause of the Virginia Declaration and by a 1786 statute that implemented the constitutional provision by requiring that “in every ... information or indictment, the amercement ought to be according to the degree of the fault, and saving to the offender his contenment[.]” 1786 Va. Laws ch. 64, Gen. Assemb, at 42. One member of the *Jones* court, Judge Spencer Roane, described the 1786 statute as “founded on the spirit” of the Declaration’s excessive fines provision. *Jones*, 5 Va. at 556–57.

In deciding that a joint fine could not lawfully be imposed, Judge Roane referred to William Hawkins’ *Treatise of the Pleas of the Crown*, which in turn relied upon *Godfrey’s Case* as “establish[ing] the doctrine ... bottomed upon an article of *magna charta*, that fines

²⁶ Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1517 (2012).

be imposed *secundum quantitatem delicti salvo contem-
emento.*" *Id.*²⁷

Judge Roane reasoned that a prohibition on joint fines was "fortified not only by the principles of natural justice, which forbid that one man should be punished for the fault of another; but also, by the clause of the bill of rights prohibiting excessive fines and the act of 1786 founded on the spirit of it and providing, that the fine should be according to the degree of the fault and the estate of the offender." *Id.* at 556-57; *see also id.* (such a result would be "unjust and contrary to the spirit of the constitution"). A second member of the three-judge panel concurred that the joint fine was unlawful, reasoning that "it is clear that the makers of the constitution, as well as the Legislature contemplated, *that no addition, under any pretext whatever was to be imposed, upon the offender, beyond the real measure of his own offence.*" *See id.* at 557-58 (Carrington, J.) (emphasis added).

Other early state decisions also looked to traditional common law principles. *See, e.g., Commonwealth v. Morrison*, 9 Ky. (2 A.K. Marsh.) 75, 99 (1819) (fine "should bear a just proportion to the offense committed" and to "the situation, circumstances and character of the offender").

So did leading American commentators. The 1829 edition of William Rawle's treatise characterized the Eighth Amendment as "protect[ing]" "against all unnecessary severity in the prosecution of justice," and looked to the history of the Stuart period for guidance

²⁷ Lit. "according to the quantity of the offense, saving contem-
ement."

as to the meaning of the Excessive Bail Clause. William Rawle, *A View of the Constitution of the United States* 130 (2d ed. 1829).²⁸

Story's *Commentaries* similarly drew connections between the Eighth Amendment and the English Bill of Rights, explaining that the Eighth Amendment served “to warn ... against” a repeat of the events that had transpired during “the arbitrary reigns of some of the Stuarts”—when, among other things, “[e]normous fines and amercements were ... sometimes imposed[.]” Joseph Story, *Commentaries on the Constitution of the United States* 710-11 (1833 ed.). Benjamin Oliver's 1832 treatise suggests that imposing “a ruinous fine upon an inconsiderable offence, or otherwise wholly disproportioned to the magnitude of it ... would be inconsistent with the spirit” of the Eighth Amendment. Benjamin L. Oliver, *The Rights of an American Citizen* 185 (1832). Oliver further suggests that “[a] man's farm or stock in trade, ought never to be made a sacrifice, to the ruin of himself and the distress of his family, but, if necessary to make an example, he should rather be imprisoned for a longer period, and a more moderate fine be imposed.” *Id.*

²⁸ See generally John D. Bessler, *The Baron and the Marquis: Liberty, Tyranny, and the Enlightenment Maxim That Can Remake American Criminal Justice* (2019) (recounting the long history of the principle of parsimony—the precept that punishment should be no more severe than necessary—in Anglo-American law).

Thomas Cooley’s 1868 treatise *Constitutional Limitations*—which was “influential”²⁹ and “massively popular”³⁰ in its time—observes that although “the question what fine shall be imposed is one addressed to the discretion of the court,” that discretion is “to be judicially exercised, and it would be error in law to inflict a punishment clearly excessive.” Cooley, *Constitutional Limitations* 328. Cooley elaborates: “A fine should have some reference to the party’s ability to pay it.” *Id.* Cooley bases this conclusion on Chapter 14 of Magna Carta, the “merciful spirit” of which “addresses itself to the criminal courts of the American States through the [excessive fines] provisions of their constitutions.” *Id.* at 328-29. In this regard, Cooley also refers approvingly to the rule that “[t]he common law can never require a fine to the extent of an offender’s goods and chattels[.]” *Id.* at 329 (quoting *State v. Danforth*, 3 Conn. 112, 115, 117-18 (1819)).

The historical record thus suggests that the ancient proportionality principles the Founders inherited—including the inherently individualized tenet of *salvo contentamento*—informed historical understandings of the U.S. Constitution’s decree that “excessive fines” not be “imposed.”

²⁹ *McDonald v. City of Chicago*, 561 U.S. 742, 821 (2010) (Thomas, J., concurring in part and concurring in the judgment).

³⁰ *Heller*, 554 U.S. at 616.

CONCLUSION

Amici respectfully ask that the Court consider the foregoing historical principles in resolving the question presented.

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APPENDIX A: List of Amici

John D. Bessler is a Professor of Law at the University of Baltimore School of Law, an Adjunct Professor at the Georgetown University Law Center, and is Of Counsel at Stinson LLP. His scholarship focuses on capital punishment, legal history, and international human rights law. He has written numerous books about capital punishment and American legal history, serving as an editor for former Justice Stephen Breyer's book, *Against the Death Penalty* (2016), and authoring others, such as *Death in the Dark: Midnight Executions in America* (1997); *Cruel and Unusual: The American Death Penalty and The Founders' Eighth Amendment* (2012); *The Death Penalty as Torture: From the Dark Ages to Abolition* (2017); *The Baron and the Marquis: Liberty, Tyranny, and the Enlightenment Maxim That Can Remake American Criminal Justice* (2019); *Private Prosecution in America: Its Origins, History, and Unconstitutionality in the Twenty-First Century* (2022); and *The Death Penalty's Denial of Fundamental Human Rights: International Law, State Practice, and the Emerging Abolitionist Norm* (2023). His books have received various honors, including the Scribes Book Award for *The Birth of American Law: An Italian Philosopher and the American Revolution* (2014). He also has taught at other law schools, including the University of Minnesota Law School, where he is currently a visiting scholar at its Human Rights Center.

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