No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KATHERINE & MICHAEL HENRY,
PETITIONERS,

vs.

CITY OF ORMOND BEACH, FLORIDA,
RESPONDENT.

On Petition For A Writ Of Certiorari To The
District Court of Appeal of the State of Florida for the Fifth District

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The lower tribunals committed harmful errors by violating Henrys' right to Equal Protection, issuing orders violating state and local laws, and issuing orders forcing Henrys into LDC noncompliance. The lower tribunals' harmful errors also included violating Henrys' rights to protection against excessive fines. These harmful errors have adversely affected Henrys' substantial rights, resulting in a miscarriage of justice, which can only be remedied through granting this Petition and overturning the entirety of Magistrate's orders (and circuit court order portions upholding Magistrate's orders). Moreover, these harmful errors implicated four important questions of federal law which this Court should address in order to protect the inherent rights of millions of Americans across the country.

1. Whether, in a class of one Equal Protection claim, three distinct offenses (being simultaneously appealed) should be combined for purposes of defining the class of those similarly situated.
2. Whether a homeowner may be ordered to take action that would force their property into noncompliance with local law.
3. Whether fines (and liens) may properly be imposed when there is no alleged harm caused by an offense.
4. Whether a never-ending daily fine is grossly disproportionate to a malum prohibitum one-time act.

LIST OF PARTIES

[✔] All parties appear in the caption of the case on the cover page.

RELATED CASES

- *City of Ormond Beach v Michael & Katherine Henry,* 22-112237, Ormond Beach Special Magistrate Tribunal. Order Finding Violation and Imposing Fines entered March 1, 2023. Order Imposing Fines entered May 29, 2024.
- *City of Ormond Beach v Michael & Katherine Henry,* 22-112246, Ormond Beach Special Magistrate Tribunal. Order Finding Violation and Imposing Fines entered March 1, 2023. Order Imposing Fines entered May 29, 2024.
- *City of Ormond Beach v Michael & Katherine Henry,* 22-112247, Ormond Beach Special Magistrate Tribunal. Order Finding Violation and Imposing Fines entered March 1, 2023. Order Imposing Fines entered May 29, 2024.
- *Michael and Katherine Henry v City of Ormond Beach*, 2023-30711-CICI, Circuit Court, 7th Judicial Circuit, Volusia County, Florida. Order on Appeal entered March 4, 2024.
- *Michael and Katherine Henry v City of Ormond Beach*, 5D2024-0915, Fifth District Court of Appeal, Florida. Order Dismissing Petition for Writ of Certiorari entered June 10, 2025. Order Denying Motion for Rehearing entered July 16, 2025.

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APPENDIX TABLE OF CONTENTS

*Per Rule 12.7, Henrys also reference parts of the lower court record (in the 5th District Court of Appeals) not appended here. To be consistent with lower court filings and thereby reduce confusion, Henrys' Appendix to Amended Petition for Writ of Certiorari, filed 4/11/24, is referred to as App1, the Appendix filed on 4/30/24 as App2, the Appendix to filed on 6/5/24 as App3, and the Appendix filed on 6/17/25 as App4.

TABLE OF AUTHORITIES CITED

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished. The 2023 opinions of the Magistrate Tribunal appear at Appendix B to the petition and are unpublished.

JURISDICTION

The highest state court decided my case on June 10, 2025. A copy of that decision appears at Appendix C. A timely motion for rehearing was thereafter denied on July 16, 2025, and a copy of the order denying rehearing appears at Appendix D. Had the Florida 5th District Court of Appeals [hereinafter "5DCA"] issued a written opinion, the Florida Supreme Court would have had discretionary jurisdiction to hear this case per FL Rule of Appellate Procedure [hereinafter, "FRAP"] 9.030(a)(2). However, because the 5DCA denied Henrys' motion for written opinion, that left the Florida Supreme Court without jurisdiction to hear the case. *See* FRAP 9.030 1980 Committee Note, also cited later herein. As the constitutionality of a state statute is drawn into question, 28 USC § 2403(b) may apply, thus the notifications required by Rule 29.4(c) have been made. A substantially similar notice was served on the State Attorney General on April 8, 2024, pursuant to FRAP 9.425. The jurisdiction of this Court is invoked under 28 USC §1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES & ORDINANCES

The Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment provides no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Due Process Clause of the U.S. Constitution's Fourteenth Amendment

provides no State may "deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1. The Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed." U.S. CONST. amend. VIII. Pertinent statutory provisions are reproduced at Appendix F.

STATEMENT OF THE CASE

While purchasing a prior residence at 924 Rollins Ave, Ormond Beach in Summer 2021, Henrys had in-depth communication with OB regarding the Land Development Code [LDC]. As described below, OB cherry-picked their enforcement of the LDC regarding permit requirements, resulting in an equal protection violation and significant monetary damages to Henrys.[1] Henrys consequently instead decided to purchase their homestead on Cypress that November. The property already had pavers in the front and back yards (many covered by weeds), and there was a dilapidated privacy fence. Henrys replaced the fence with a sturdy one, and uncovered the pavers and placed new ones. In early 2022, two small conexes were set in the backyard.[2] On 9/2/22, OB (Janet Bruce) called Henrys about their pavers, fence, and conexes [hereinafter, PFCs]. On 10/20/22, OB served Henrys with Notices of Violation for the PFCs.[3]

Henrys' PFCs are entirely on Henrys' property. Except the ONE neighbor who complained Henrys "have ruined the neighborhood since they got here," *most* neighbors genuinely appreciate the PFCs. Consequently, Henrys obtained hundreds of neighbors' signatures in just a few days who all agree "Henrys' parking pavers, privacy fence & 2 backyard conexes don't harm me, my

[1] Henrys brought this issue up at the hearing and in the 11/8/22 Notice. *See,* App1:12,13,19,20.

[2] A Conex is a metal, weather-resistant container used to store or ship goods. It has two standard lengths - 20 and 40 feet. The US military has used these containers for storage since the 1950s. https://search.brave.com/search?q=what+is+a+conex&source=desktop

[3] App1:3, et al.

property or the community, so the Henrys should not be fined for those improvements."[4]

So, on 11/8/22, Henrys served OB with a Notice to Cease & Desist.[5] However, OB held a magistrate hearing on 2/27/23. At the Hearing, Henrys moved for dismissal due to several legal issues. Without providing legal reasoning, Magistrate denied Henrys' motion for dismissal.[6]

Henrys also objected to the cherry-picked manner in which these LDC provisions are enforced.[7] Henrys started by pointing to OB's different treatment of Henrys regarding permits at 924 Rollins, a property that increased in value from $307,900 in June 2021 to $485,000 in December 2021 through extensive unpermitted remodeling:

> ***ANN-MARGARET EMERY: Okay. Did you know you needed to get a permit to install a fence on your property?***
>
> KATHERINE HENRY: I knew that we didn't need to have permits because of the interaction we specifically had with the city in July and August and September and October about 924 Rollins Avenue.
>
> ***No, I'm asking you about this particular property. Did you know you needed a permit --***
>
> I'm answering about this property because if it's not required for 924 Rollins Avenue, then it's not required for 33 Cypress Circle either.
>
> ***Was there a new fence installation on Rollins?***
>
> There was an entire gut job done on that property. Dumpsters kept being pulled up and the sellers were supposed to have pulled the permits, and we were told days before closing that they never did. They actually then went and prohibited us from getting whatever permits that they should have gotten, and they canceled the permits that we had been able to obtain to that point, and then when they temporarily got possession of the property as we were litigating this issue and trying to sue them for specific performance, they brought up one dumpster after another to completely tear out and gut the house and the city refused to do anything about it whatsoever.

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[4] *See* signature sheets admitted as evidence by Magistrate on May 20, 2024, filed in 5DCA as App3:54-63, and reproduced here as Appendix P.

[5] Starting on App1:17, and reproduced here at Appendix G:73.

[6] App1:283.

[7] *See, e.g.,* App1:297-302,310-312,331-333,390-392.

> ***Well, you're a lawyer. You didn't think to call the city to find out --***
>
> We did.
>
> ***Did you call the city to find out if you needed a pens[sic] permit for the property we're here talking about today?***
>
> I would not call somebody when a answer was already provided to me in the same year.
>
> ***On a different property?***
>
> Like I said, equal protection applies, so I wouldn't assume we're going to cherry-pick and say we're not going to enforce the statutes or the Land Development Code when it would benefit us at 924 Rollins, but we are going to try to enforce some sort of regulations on a different property when it would not benefit us or harm us. So, no, I wouldn't think that there would have been something in the books saying that you could do that. (App1:309-312.)

Magistrate overruled Henrys' objections with no legal reason provided and rendered three Orders in favor of OB on 3/3/23.[8] On 3/24/23, Henrys filed their Notice of Appeal and filed with Magistrate their Motion for Relief from Order.[9] On 4/3/23, Henrys filed a Motion for Stay in circuit court (App1:128), which was granted on 4/6/23 (App1:150). The circuit court rendered the order on appeal on 3/7/24.

Magistrate's 2023 orders purport to authorize OB to enter Henrys' homestead, remove and dispose of their property, and charge Henrys for and have no liability for damage from OB's said removal. Finding these portions "depart[ed] from the essential requirements of the law," the circuit judge struck them from the orders. However, the court allowed the rest of the orders to stand, including costs, a one-time fine and a never-ending daily fine.

While the case was pending in the 5DCA, OB held *another* magistrate hearing, from which additional magistrate orders imposing fines were signed May 29, 2024, and are based on the

[8] App1:85-106, reproduced here as Appendix B.

[9] App1:107, reproduced here as Appendix H.

findings of violation and the daily fine amounts in the 2023 orders.[10] The 5DCA dismissed Henrys' Petition with no reason stated on June 10, 2025. Given the issues raised by Henrys, the Florida Supreme Court would have had discretionary jurisdiction *if* the 5DCA had issued a written opinion. So, Henrys filed a Motion on June 17, 2025 for Rehearing, and in the alternative, for Written Opinion. On July 16, 2025, the 5DCA summarily denied those motions.

The issue of Equal Protection was raised during the phone call with OB in September 2022, and in every major pleading since.[11] Yet, the Circuit Court did everything in its power to dismiss this serious claim. During oral argument, it stated Henrys could *not* raise an Equal Protection violation as a defense to the charges against them, but must instead assert such a claim in a separate cause of action. (Appendix O:320-321.) There was no mention of the court's intention to combine the three distinct offenses for purposes of defining the class of those similarly situated - not until the court issued its written opinion and order, holding that in a class of one Equal Protection claim, three distinct offenses (being simultaneously appealed) must be combined for purposes of defining the class of those similarly situated.[12]

Given the timing of the circuit court's wrongful expansion of well-established Equal Protection precedent, Henrys were prohibited from addressing this specific issue with that court. Instead, Henrys promptly raised it in their initial Petition for Writ of Certiorari with the 5DCA, and again in their 4th Amended Petition. Appendix K:239-240. As aforementioned, though, the 5DCA dismissed Henrys' Petition without ever ruling on the merits.

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[10] App3:4-19, reproduced here as Appendix C.

[11] 11/8/22 Notice to Cease & Desist, App1:17-25; 2/27/23 Henry Response in Magistrate Tribunal, AppG:67-70, 38-77; Brief on Appeal in Circuit Court, AppI:162-167; Reply Brief on Appeal, AppJ:211-213; original Petition for Writ of Certiorari to 5DCA; 4th Amended Petition, AppK:p237-245; Reply to Response, AppL:p299,310-312.

[12] The Circuit Court held Henrys must identify "another nonconforming property . . . with the same three distinct violations." Appendix A:6.

Given the Citations Issued by OB on 1/10/23 (Appendix Q) only informed the Henrys of a possible fine being imposed, and not of the possibility of being ordered to take steps that would place their home in noncompliance with the LDC, Henrys did not raise the 2nd question presented here during the initial Magistrate hearing. However, once the Magistrate issued orders that, if followed, would force Henrys' property into noncompliance with the LDC, Henrys filed a Motion for Relief from Orders with the Magistrate addressing this issue. Appendix H:146-148,155. Henrys also raised this with the Magistrate during the second hearing. Appendix R: 358-360. Henrys also raised this issue with the Circuit Court in their Brief on Appeal (Appendix I:173, 201) and Reply Brief (Appendix J:217), and with the 5DCA in their Petition (Appendix K:280-284) and their Reply to OB's Response (Appendix L:308-309).

Although the Circuit Court did not expressly state that a homeowner may be ordered to take action that would force their property into noncompliance with local law, the ruling implicitly did so. The bulk of Henrys' arguments in their Brief on Appeal were in Section IV, including subsection B "OB May Not Deny Henrys Substantive Due Process," and its subpart 3 "OB Cannot Force Henrys into Noncompliance." These issues were properly before the court, and OB made *not one* argument to refute them. Indeed, the court did not state Henrys were inaccurate about any issues relating to the forced noncompliance. Merely, the court dismissed the substantive due process (SDP) arguments entirely, claiming the orders forcing noncompliance were unchallengeable executive actions. This implicitly ruled that homeowners may be ordered to take action that would force their property into noncompliance with local law - which violates all notions of SDP and common sense. Such a ruling decided an important federal question that conflicts with relevant decisions of this Court.

As described below, the Magistrate issued the initial orders imposing fines prematurely and

without giving Henrys notice and opportunity to be heard on the issue of fines. As such, Henrys were not able to raise the third and fourth questions presented here with the Magistrate. Henrys did raise the issue of fines (and liens) being imposed where there is no harm with the Circuit Court in their Brief on Appeal (Appendix I:167,201) and Reply Brief (Appendix J:217,218,221), and with the 5DCA in their Petition (Appendix K:230, 275-277) and their Reply to Response (Appendix L:314-315). Henrys also raised the issue of never-ending daily fines being disproportionate to their one-time act of installing their PFCs with the Circuit Court in their Brief on Appeal (Appendix I:167, 200-201) and Reply Brief (Appendix J:216-218, 221), and with the 5DCA in their Petition (Appendix K:272-275) and their Reply to Response (Appendix L:307,314-315), as well as their Motion for Rehearing. The Circuit Court ignored the issue of harm altogether and held that the never-ending daily fines are fine even for malum prohibitum one-time acts, because, it held, the court only looks to the daily - and not cumulative - amount in determining proportionality.

REASONS FOR GRANTING THE WRIT

The four questions presented here involve basic constitutional protections to equal protection of the law, substantive due process and to be free from excessive fines. Each of these are important on their own, but there is a common underlying theme here of the utmost importance: the right to reasonable and customary use of one's homestead without undue restriction or punishment.

It is to secure our inalienable rights that "Governments are instituted among Men,"[13] meaning the purpose of government is to secure our individual, God-given liberties, so that in my exercise of my rights, I am not impeding upon your exercise of your rights. So, the *purpose* of government, and it's laws, is to *protect our rights*, not to regulate and punish us. Hence why the Fourteenth

[13] Declaration of Independence.

Amendment guarantees no State shall "deny to any person within its jurisdiction the equal ***protection*** of the laws." Moreover, the right to have and protect private property is even more sacred than some other rights.[14] Indeed, "[t]he great end for which men entered into society was to *secure their property*." *Id* at 627. Consequently,

> Property rights are among the basic substantive rights expressly protected by the Florida Constitution. Those property rights are particularly sensitive where residential property is at stake, because individuals unquestionably have constitutional privacy rights to be free from governmental intrusion in the sanctity of their homes and the maintenance of their personal lives. Additionally, Floridians have substantive rights to be free from excessive punishments.[15]

As such, "the means by which the state can protect its interests must be narrowly tailored to achieve its objective through the least restrictive alternative where such basic rights are at stake."[16]

In evaluating these four questions, we must remember Henrys "have a compelling interest in retaining their real and personal property free of undue interference or improper clouds of title,"[17] and if *reasonable doubt* should arise as to whether the municipality possesses a specific power, such ***doubt will be resolved against the City***.[18] Indeed, "Constitutional provisions for the security of person and property are to be liberally construed," and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[19]

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[14] *See, Boyd v United States,* 116 US 616 (1886), supra.
[15] *Department of Law Enf. v Real Property*, 588 So. 2d 957, 964 (Fla. 1991).
[16] *Id* at 963, *citing* Art. I, Sec 9, Fla. Const; *see also, Massey v Charlotte County*, at 147 (Fla.2DCA 2003).
[17] *Massey* at 146, *citing Real Property* at 964.
[18] *City of Miami Beach v Fleetwood Hotel,* 261 So. 2d 801, 803 (Fla. 1972), citing *Liberis v Harper* (Fla:1925).
[19] *Byars v United States,* 273 US 28, 32 (1927), citing *Boyd v US* at 635.

I. This Case Is The Perfect Vehicle Within Which To Address These Issues

This case presents a unique opportunity to address these vital issues. This case originates from three Special Magistrate Orders finding violation of city codes and imposing fines for the same. Across the US, these are often administrative proceedings and the procedures involved are often informal and even unclear. For example, in a Florida civil proceeding, it is the responsibility of the parties to provide for their own court reporter during the proceedings if they plan to obtain a transcript. The vast majority of people responding to city code violation complaints are not represented by counsel, and they are not aware of this requirement. Thus, they show up to the hearings without a court reporter or a proper method of recording the proceedings. This leaves them unable to obtain a transcript of the proceeding, which denies them the opportunity for a full judicial review.

Many also do not realize the importance of raising all their issues (legal and factual) during the administrative hearing, as most issues not so raised will be deemed as waived. Many also do not understand the proper procedure for obtaining judicial review (such as the 30-day timeframe to appeal, etc.),[20] and cannot afford counsel. Indeed, although the issues raised by Henrys in this Petition impact both criminal and civil cases across the nation, Henrys point to all cases involving FS 162.09 (the statute involved here) for purposes of example. In all the cases involving FS 162.09 in the Florida Supreme Court or Court of Appeals in the last 20 years, there is not one single case (with a written opinion issued) where the property owner properly appealed their case to the circuit court (let alone secured a recording of the proceeding, hired a court reporter, raised all the issues in the lower tribunal, etc.)! The vast majority of cases arise as

[20] Indeed, the Second District Court of Appeal in Florida recently explained in a challenge to a FS 162.09 order that the homeowner "was required to appeal from the City's order that provided a single daily fine for multiple violations within thirty days from the date that order was executed. *See* § 162.11, Fla. Stat." *DJB Rentals v City of Largo,* 373 So.3d 405, 414 (Fla:2DCA 2023).

appeals from a final judgment of foreclosure of a municipal lien, with a few others on various other issues such as lawsuits over superiority of lien status.

However, Katherine Henry is a constitutional attorney who always does her homework. She raised constitutional issues within the first phone call from OB. She raised various legal and constitutional issues in a written response filed with the Magistrate Tribunal, as well as in oral motions made at the hearing, and in oral argument. She promptly filed a Motion for Relief from Order with the Magistrate Tribunal raising the relevant issues. When the Magistrate did not timely rule on her Motion, she timely filed the appeal to the circuit court. When the Henrys only obtained partial relief through that appeal, Katherine timely filed a Petition for Writ of Certiorari with the Court of Appeals. When that Petition was ultimately denied without reason, and in such a manner to deprive the Florida Supreme Court of jurisdiction, Katherine timely prepared and filed this Petition. At each lower tribunal, Katherine followed all court rules and procedures, and properly supported her claims with appropriate pleadings, transcripts, and evidence introduced at the Magistrate Tribunal. In short, this case presents an extremely rare case where the issues were preserved and the proper procedures were followed.

Moreover, this case presents a uniquely "clean" Equal Protection claim. In many Equal Protection cases, the parties disagree over the facts, especially those pertaining to which others can reasonably be considered part of the class of those similarly situated. But that is not the case here. On appeal, there has not been *any* factual disputes involving the Equal Protection claim. At the Magistrate Tribunal, and every court since, OB has *never* contested the validity of the *hundreds* of other properties similarly situated in Henrys' immediate neighborhood. Rather, the dispute is one of a legal nature.

II. The Equal Protection Question Warrants Review

A. The Equal Protection Question Presented Is Important

Distinct offenses (being simultaneously appealed) must *not* be combined for purposes of defining the class of those similarly situated. This issue has not been explicitly decided by this Court, but it must be. In every jurisdiction all across the country, defendants are commonly charged with multiple unrelated offenses. They are entitled to all Constitutional protections for *each* of those offenses. As it is, an Equal Protection claim has a relatively high hurdle as "courts are 'properly hesitant to examine the decision whether to prosecute.'"[21] Defendants must show 1) others similarly situated who are 2) intentionally treated differently. This is quite a burden for defendants to bear. Allowing the standard of showing others similarly situated to be improperly inflated (by combining distinct offenses) would render it virtually impossible for most defendants to ever raise an Equal Protection claim.

B. The Decision Below is Wrong

Under the Equal Protection Clause, government may not selectively enforce laws against one individual while ignoring similarly situated individuals.[22] However, that's exactly what OB did. The Circuit Court held that in a class of one Equal Protection claim, three distinct offenses (being simultaneously appealed) must be combined for purposes of defining the class of those similarly situated.[23] The court also held that Henrys did not point to any other properties with the same three distinct violations which were not prosecuted by OB. While Henrys actually *did* offer

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[21] *US v Armstrong*, 517 US 456, 465 (1996).

[22] The US Supreme Court expressly acknowledges a "class of one," where a party "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," just as Henrys did. *Willowbrook v Olech,* 528 US 562, 564 (2000).

[23] The Circuit Court held Henrys must identify "another nonconforming property . . . with the same three distinct violations." Appendix A:6.

proof of six other properties in Henrys' neighborhood with the "same three distinct violations," (*see* Appendix M:288), there is a bigger issue here. There is *no case precedent* or other legal authority to support the holding that "three distinct violations" may be combined for purposes of defining those similarly situated. It is common place for a criminal complaint to contain multiple charges. It is also common for defendants in civil and criminal cases to be charged with multiple offenses under separate complaints or case files. The Henrys themselves were recently victims of such a crime - a mentally ill neighbor assaulted their son; the week prior she had stolen utilities from another neighbor; the day after the assault, she resisted arrest. This all happened on three separate dates, where three separate court cases were filed, and where none of the cases were dependent on the others. No case precedent exists to support combining these cases for purposes of identifying those similarly situated because it would not even make sense to do so. The same holds true in Henrys' underlying code violation cases.

This appeal stems from three *separate cases* in front of Magistrate, thus Henrys need not identify a *single* property with all three violations.[24] Certainly, none of the three underlying cases are contingent upon another. Nor does caselaw support the notion that the three cases can be combined for the purposes of redefining the class of those similarly situated. Indeed, in the Magistrate Tribunal, Henrys raised this equal protection claim as to each separate case.[25] So, Henrys must only show properties with fence permit issues as it relates to the fence case, properties with paver/parking area permit issues as it relates to the paver case, or properties with shed/structure permit issues as it relates to the conex case. In looking through that lens, in Henrys' neighborhood, 99% of properties have *pavers/parking* area permit/LDC issues, 61% have *shed/structure* permit/LDC issues, and 20 have *fence* permit/LDC issues. *See* Appendix

[24] Although those exist. *See,* Appendix M:288, which summarizes App1:39-55.
[25] *See, e.g.,* App1:298,331-333,390-392.

M:287. Undeniably, since NONE of these LDC violations have been prosecuted by OB, this shows *many* others similarly situated (but treated differently) for each of the three underlying cases.

The next step is to determine if the different treatment from those similarly situated was intentional. Henrys claimed all along this selective treatment was intentional,[26] which OB never disputed.

One year before *this* case began, when Henrys moved to Florida, a permit/LDC situation arose where OB denied Henrys equal *protection* of the law.[27] It was undisputed at the Magistrate hearing, and remains undisputed in lower tribunal pleadings, that OB's selective enforcement of the permitting requirements at 924 Rollins cost Henrys over $60,000 by enforcing permits against Henrys (as buyers in possession) but ***not*** enforcing permit requirements against the sellers when ***they began*** the demolition, or when they retook possession while Henrys' specific performance action was pending. In September 2021, OB was called to ascertain why they were refusing Henrys equal *protection* of the law by not enforcing the LDC to stop the sellers' unpermitted work while the case was litigated. Not only did OB Attorney Emery say OB would *not* do anything to enforce the LDC *as against sellers*, but she referred to Henrys as "squatters"! This is despite OB receiving copies of Henrys' CounterComplaint and exhibits.[28] Although *this* equal protection denial was briefed in the lower tribunals (App1:13,163-165), Henrys don't raise it here - merely mentioning it now to show OB's pattern of singling Henrys out for selective enforcement. Instead, Henrys focus now on OB's *current* equal protection violations.

[26] I.e., the 9/2/22 phone call with Bruce and the Notice at App1:19, et al.
[27] OB raised no factual disputes on this issue, even when specifically stated by Henrys. *See, e.g.,* App1:309-312.
[28] Sellers eventually returned some of Henrys' funds.

Therefore, OB's enforcement of the LDC *as against Henrys* at the Rollins property, outright refusal to enforce the LDC *as against sellers* **at the same property**,[29] and current attempts to enforce the LDC *as against Henrys* for their current property undoubtedly shows OB intentionally treating Henrys differently (enforcing vs not enforcing permit requirements) from others similarly situated (doing work on their property without a permit) with no rational basis for the difference in treatment. Moreover, one neighbor made a complaint against Henrys, to which OB immediately followed up on and responded. However, as discussed in prior pleadings, when Henrys made complaints to OB regarding the Rollins property, and OB's own LDC violations[30] at 54 Seton and the city attorney's office, OB failed to take *any* action, or even respond to Henrys. Especially considering their undisputed thorough follow-up with the neighbor who complained *against* the Henrys, this undoubtedly shows intentional different treatment.[31]

Furthermore, the numbers speak for themselves. Enforcement of permits and/or setbacks for Henrys while not enforcing them for *pavers/parking areas* in 99% of properties, for *sheds/structures* in 61% of properties, or for *fences* at 20 properties in Henrys' immediate neighborhood (within a 0.28mi radius) shows the intentionality.

Intentionality was also demonstrated elsewhere in OB's testimony. The ***only*** violation Magistrate adjudged was Henrys did not obtain permits for their PFCs.[32] As Henrys explained in the courts below (Appendix K:249-257; Appendix I:183-185), and will further explain in the

[29] especially throughout August and September 2021.

[30] City Park's LDC Violation re Pods Container, City Attorney's LDC Violation re Parking Surface, City Attorney's LDC Violation re Utility Structure. Links to these verified complaints were provided as hyperlinks within the Reply Brief on Appeal (Appendix J:212) and 4th Amended Petition (Appendix K:241) filed below, as they were E-filed.

[31] The games OB played with service upon Henrys and other matters were also outlined for the Magistrate, as summarized on App1:12, parts 6 and 7.

[32] Appendix B:16, 20, 25.

Brief on the Merits for this Court, OB made it clear from the beginning they would never issue those permits, stating reasons unfounded in the law. OB ultimately testified they will withhold permits for Henrys' PFCs: unless Henrys remove the pavers so OB can look underneath; because they create too much impervious area; because a 3' paver setback and a 20' inflexible conex setback is being applied; and because they don't meet OB's subjective aesthetic requirements. However, denying Henrys' PFCs permits for these reasons are unfounded in, and even contradictory to, the law - namely, the Constitutions, controlling state statutes, and even the LDC. In deliberating a takings issue, the US Supreme Court held "If it is law, it will be found in our books; if it is not to be found there, it is not law."[33] Thus, OB's ultra vires reasons for withholding permits for Henrys' PFCs also demonstrates their intent to single out the Henrys for selective enforcement.

So, is there a rational basis for this selectivity? One way to understand the intersection of our inherent property rights and our right to equal protection of the law is to understand the difference between ***malum in se*** and ***malum prohibitum***. ***Malum in se*** is "a crime or an act that is inherently immoral, such as murder, arson, or rape," whereas ***malum prohibitum*** is "an act that is a crime merely because it is prohibited by statute."[34] When you commit a ***malum in se*** offense, such as murder, arson or rape, there is harm to a victim that must be accounted for, even if another arsonist or rapist goes free. But there is no inherent "harm" of a ***malum prohibitum*** offense (and OB has never alleged Henrys' PFCs harm *anyone*).

Indeed, the LDC's purpose is to "protect and maintain a high quality of life for the citizenry."[35] And the alleged *permit* requirements here for fences, pavers, and accessory structures (like

[33] *Boyd v US*, 116 US at 627.
[34] Black's Law Dictionary, Deluxe Eighth Edition, p978.
[35] LDC 1-03.

conexes) are to ensure compliance with the design and aesthetic requirements of the LDC.[36] But how effective are design and aesthetic requirements if not equally enforced? They are not. That's why the LDC declares its regulations "shall be applied uniformly throughout the district."[37]

Henrys aren't alleging a mere few city residents have similar LDC violations. Rather, Henrys pointed to an astounding 810 Permit, Paver, Accessory Structure & Fence LDC violations plainly visible within just a 0.28-mile radius of their home - all of which receive a "free pass" from OB. At all stages below, Henrys included a map indicating with a teal star all of said properties,[38] along with a categorized spreadsheet showing the exact address and details of such similar violations,[39] and photos of several of said violations.[40] This teal star map shows *far more properties than not* with one or more of *these very kinds* of violations visible. This is not akin to an officer pulling over only one of two people speeding on a busy road. No, this map (and pictures) show how completely ineffective the cherry-picked enforcement of these LDC provisions is at maintaining the aesthetics of the entire neighborhood. There's no rational basis for this selectivity. Further, these 810 violations in just 0.28mi² (or 0.7% of the entire city) represent 115,714 similar violations *across OB*.

Likewise, there's no rational basis to enforce permitting and/or setback rules against Henrys when not enforcing those same paver/parking provisions on 99%, shed/structure provisions on 61%, or fence provisions at 20 other properties in Henrys' immediate neighborhood. (Keeping in mind, these only include those openly visible between November 2021 and February 2023.)

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[36] *See, e.g.,* LDC 2-17, providing regulations to ensure a "highly aesthetic setting."
[37] LDC 2-01(b)(2).
[38] App1:38, reproduced here at Appendix G:94.
[39] App1:39-55, reproduced here at Appendix G:95-111.
[40] App1:56-76, reproduced here at Appendix G:112-132.

These documented neighborhood violations result in a free pass for OBPD officers, VC Sheriff deputies, city employees, county council & city commission members, state law enforcement officers, official city properties and even the City Attorney's own office.[41] If *these* LDC provisions were so important for city-wide beautification, wouldn't our government officials be held to the highest standard of compliance with these provisions?

OB repeatedly denies Henrys Equal Protection of the law. Thus, even *if* the language of the specified LDC provisions is otherwise enforceable, OB's actions are nonetheless invalid. The lower tribunals didn't correctly apply the appropriate legal standard, thereby committing harmful errors adversely affecting Henrys' substantial rights. Therefore, this court must overturn Magistrate's orders in their entirety, and clarify for all Equal Protection class of one claims, distinct offenses may not be combined for purposes of defining the class of those similarly situated.

III. The Due Process Question About Forced Noncompliance Of The Law Warrants Review

A. The Due Process Question Is Important

Ordering a homeowner to take action that would force their property into noncompliance with local law violates the homeowner's right to Substantive Due Process (SDP). This issue involves compelling implications, as no person in our nation should ever be ordered into a legal Catch-22, where they are ordered to "correct" one law violation by committing another.

B. The Decision Below Is Wrong

In asking the Magistrate to find Henrys in noncompliance with the LDC, OB asked the Magistrate to order Henrys to remove their PFCs, and to fine them daily until they did. Henrys

[41] App1:11, 13, 14, 59-60, 73-77, reproduced at Appendix G:67, 69-70 (descriptions), and 115-116, 129-132 (photos).

explained to the Magistrate he had no subject matter jurisdiction to order Henrys to remove the PFCs because they were required under the LDC to remain on the property (Appendix H:146-148), but he literally ignored Henrys' arguments by refusing to rule on their motion (App1:129). Henrys then raised this SDP issue with the Circuit Court on direct appeal (Appendix I:180), but the court summarily dismissed Henrys' SDP arguments without specifically addressing the merits of *any* of them (Appendix A:7-8).

In summarily dismissing Henrys' SDP arguments, the court said "As a threshold point, the Court notes that the constitutional right to substantive due process is one that protects against arbitrary legislative action, not arbitrary executive action." But the court is not alone on this misstatement of the law. Rather, the court accurately cited to *City of Pompano Beach v. Yardarm Rest., Inc.,* 834 So. 2d 861, 869 (Fla. 4th DCA 2002) in stating that "rule" of law.[42] This ruling by a state court of last resort directly conflicts with relevant decisions of this court, and of the US Courts of Appeal.

As the Circuit Court recognized, the underlying Magistrate Orders are executive actions.[43] However, contrary to the assertions of the Circuit Court and the Florida Court of Appeals, this Court has long ruled that "due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities."[44] After all, "the

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[42] Although this is a State Court of Appeals decision, please note as the 1980 Amendment Committee Note to FRAP 9.030 explains, the "district courts of appeal [] constitute the courts of last resort for the vast majority of litigants" per the Florida Constitution.

[43] *See also*, Order on Appeal (Appendix A:3), "This is an appeal brought pursuant to section 162.11 . . . of three Orders Finding Violation entered . . . by the Special Magistrate," and Fl. Stat. 162.11, which states "an aggrieved party . . . may appeal a final administrative order . . ."

[44] *County of Sacramento v Lewis*, 523 US 833, 846 (1998). That case dealt with a police officer's actions in the context of a 14th Amendment SDP claim. Such SDP claims against executive action have been recognized "for half a century now." *Id. See also*, *Daniels v Williams,* 474 US 327 (1986) (a SDP claim against a correctional deputy); *Rochin v California*, 342 US 165 (1952); *Young v Romeo*, 457 US 307 (1982) (a SDP claim against the director and

substantive due process guarantee protects against government power arbitrarily"[45] exercised, and how could there be such protection if one could not so challenge arbitrary executive action?

Although the Circuit Court did not expressly state that a homeowner may be ordered to take action that would force their property into noncompliance with local law, the ruling implicitly did so. The bulk of Henrys' arguments in their Brief on Appeal were in Section IV, including subsection B "OB May Not Deny Henrys Substantive Due Process," and its subpart 3 "OB Cannot Force Henrys into Noncompliance." These issues were properly before the court, and OB made *not one* argument to refute them. Indeed, the court did not state Henrys were inaccurate about any issues relating to the forced noncompliance. Merely, the court dismissed the SDP arguments entirely, claiming the orders forcing noncompliance were unchallengeable executive actions. This implicitly ruled that homeowners may be ordered to take action that would force their property into noncompliance with local law - which violates all notions of SDP and common sense. Such a ruling decided an important federal question that conflicts with relevant decisions of this Court.

Three quarters of a century ago, this Court determined "the cognizable level of executive abuse of power as that which shocks the conscience," or, in other words, "arbitrary, or conscience shocking, in a constitutional sense."[46] And it has been said of executive officers that "[t]heir duty is to restore and maintain lawful order, while not exacerbating disorder."[47] Certainly, ordering a homeowner to take action that would force their property into noncompliance would be arbitrary, or conscience shocking, in the constitutional sense, as it would exacerbate disorder.

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two supervisors at Pennhurst State School and Hospital); *Collins v Harker Heights*, 503 US 115 (1992); *Breithaupt v Abram*, 352 US 432 (1957); *Whitley v Albers*, 475 US 312 (1986); *US v Salerno*, 481 US 739 (1987).

[45] *Sacramento v Lewis* at 845, citing *Daniels v Williams* at 331.

[46] *Sacramento v Lewis* at 846-847.

[47] *Sacramento v Lewis* at 853.

Further, "[n]othing can destroy a government more quickly than its failure to observe its own laws."[48] Certainly, when an OB Magistrate orders a homeowner to "correct" one LDC violation by directly committing others, the municipality is failing to observe its own laws. Indeed, "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."[49] Therefore, not only are the OB employees who asked for the orders required to observe OB's own laws, but the Magistrate is also bound to obey OB's laws (i.e., the LDC). Thus, Magistrate cannot constitutionally issue orders that would disobey (or force Henrys to disobey) the LDC.

Additionally, Magistrate's Orders punish the Henrys with never-ending daily fines until they comply with the Orders. Yet, this Court has long ruled that "[o]bviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the [law]."[50] Therefore, Magistrate's Orders not only serve to compel Henry to take action that would force their homestead into noncompliance with the LDC, but they also serve to punish Henrys severely for not doing so.

This Court also held that even for judicial orders (which have a heightened requirement to follow, even when they "get it wrong"), citizens don't have to comply with court orders that are "transparently invalid." So, even the directive from the Circuit Court affirming the Magistrate's Orders is patently wrong, as it is transparently invalid (by affirming the Magistrate's Orders that require Henrys to take action that would force their homestead into noncompliance with the LDC).

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[48] *Mapp v Ohio*, 367 US 643, 659 (1961).
[49] *United States v Lee,* 106 US 196, 220 (1882).
[50] *Wright v Georgia*, 373 US 284, 291-292 (1963).

This Court has also acknowledged that orders issued by a court without subject matter jurisdiction (SMJ) are invalid on their face.[51] Henrys alerted each of the lower tribunals that Magistrate holds no SMJ to order removal of Henrys' pavers, as they are legally required to remain on Henrys' property. According to LDC 3-24(c)(3), the parking areas of "single dwelling and duplex uses" "shall be governed according to standards within section 3-26," which specifies "off-street parking requirements." Accordingly, LDC 3-26(c) requires Henrys' home to have a minimum of "2 parking spaces per dwelling unit," or 4 spaces if held to duplex standards.[52] Indeed, each of Henrys' 4 "[v]ehicles shall be parked on a paved surface"[53] such as asphalt, brick, or pavers.[54] Further, these paved parking spaces are *required* to be 9' wide.[55] But the two original driveways at Henrys' home are only 8' wide. Thus, Henrys were *required* to expand their paved areas in order to park *any* of their vehicles. However, pavers cannot be installed toward the center of the property, but must start "from the existing driveway [and extend] toward the side lot line."[56] With the red area (App1:515, reproduced at Appendix N:290) thus indicating where pavers may *not* be installed, this severely limits where pavers may be installed, and thus, vehicles parked. Undisputedly, Henrys complied with this requirement, installing their paver driveway extensions toward the side property lines. In fact, the paver extension on the South driveway brings the total width to 18', which is the minimum required for the Henrys' two vehicles regularly parked on that side of the property. App1:512, reproduced at Appendix N:289.

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[51] *Maness v Meyers*, 419 US 449, 459 (1975), citing *United States v Mine Workers,* 330 US 258, 293 (1947).

[52] Sarah Cushing testified that OB is holding Henrys to the duplex standards because their home was previously a duplex.

[53] LDC 3-24(c)(4).

[54] LDC 2-50(x)(4) and LDC 1-22 "driveway" and "paved area". Parking on grass, stone gravel or mulch is prohibited.

[55] Per LDC 3-28(a)(4), and as shown in yellow and orange at App1:515, reproduced at Appendix N:290; or 12' wide per LDC 3-25(c)(5) for duplexes.

[56] LDC 2-50(x)(4)(c).

In fact, without these paved "off-street parking requirements," Henrys' home would be a "noncomplying structure or site".[57] As Henrys own four vehicles, with one parked on the south driveway, one parked on the north driveway, and one parked on each of the two driveway paver extensions, removing Henrys' pavers would mean two of their vehicles would be parked on the sand/weeds, and two would be parked on spaces less than the required width, making it a "noncompliant structure." Magistrate lacks authority to force Henrys into such noncompliance.

Magistrate also holds no SMJ to order removal of Henrys' conexes, as they are legally required to remain on Henrys' property. LDC 2-50(o) *requires* all residential properties, like Henrys' homestead, to have a garage. Magistrate concluded Henrys' conexes constitute a garage,[58] as defined by LDC 2-50(bb)(3)(a), and "must meet the regulations pertaining to a garage." While it's true single family residences will not be required to *add* a garage, as Cushing testified,[59] once they have a garage, "*such garage* or carport *shall not be removed* or altered in any way."[60] Further, it's undisputed Henrys' conexes store personal property normally stored in a garage,[61] which Henrys are required to do for such personal property.[62] Accordingly, regardless of not having a permit at installation, Henrys' are bound to leave the conexes on the property "unless an additional garage or carport is constructed or presently exists on the subject property."[63] However, Henrys' modest 1,350sq.ft. home has no additional garage or carport. Thus, the LDC *requires* the conexes to stay on Henrys' homestead.

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[57] LDC 1-22.
[58] Appendix B:20. Magistrate came to this conclusion at the urging of OB employee Cushing's testimony. App1:347, 355.
[59] App1:359,361; *see also* LDC 2-59, 2-60, 2-42(d).
[60] LDC 2-42(d)(2).
[61] App1:314 (Bruce), 325 (Henrys), 336 (OB Attorney), 3 (Notice of Violation), 94 (Order).
[62] *See,* LDC 1-22 *Storage Area, Enclosed*; Code of Ordinances 14-94 through 14-96; and LDC 2-50(x)(1).
[63] LDC 2-50(o).

The LDC also requires Henrys to maintain a fence around their yard. In discussing private residential recreation areas, the LDC states "[a]ny structures, playground, and active play areas and lights shall be located and screened in a manner which will minimize noise and glare impacts on adjoining properties to the maximum extent feasible."[64] Additionally, in covering outdoor recreation areas, LDC 2-57(66)(a)(2) states they "shall be so located, walled, fenced or screened as to minimize noise and glare impacts to neighboring residential uses."[65] The Henry kids' soccer and volleyball areas and general play areas are located in their backyard, as is typical for most homes. Their 6' tall privacy fence serves not only to keep soccer balls out of neighbors' yards, but also to minimize the sound of their children playing in their backyard. So, with the LDC requiring Henrys' fence to remain, they cannot be ordered to remove it. App1:517, reproduced at Appendix N:292.

Furthermore, the LDC requires "Maximum possible privacy [to] be provided for each dwelling unit through the use of structural screening and landscaping and building orientation."[66] Also, Henrys' R4 "zoning district attempts to establish . . . the *maximum possible privacy* for each unit."[67] Placing the conexes along the neighbor's fence line, and installing their fence from the end of the conexes and running along the inside of the property line around the perimeter of the backyard, was the only way to use "structural screening and building orientation" to give Henrys and their neighbors "maximum possible privacy."

All in all, when Henrys purchased their homestead, being a typical beachside home built in 1949, it was in violation of several aspects of the LDC. It did not have the required parking spaces, a

[64] LDC 2-57(57)(b).
[65] Similar language appears in LDC 2-57(66)(b)(2).
[66] LDC 2-57(22)(h).
[67] LDC 2-17A.

garage, privacy screening, or proper fencing for outdoor play activities. This made it a "nonconforming structure." LDC 2-63(b) thus allowed Henrys to install their pavers, conexes and privacy fence as their nonconforming structure "may be altered as to *decrease* its nonconformity." However, nothing in the LDC, nor under the notions of due process, allows Magistrate to order Henrys to remove their pavers, conexes or privacy fence, thus *increasing* their home's nonconformity.

In other words, by the time the PFCs were installed and the Magistrate hearing was held, the Henrys' home was no longer a nonconforming structure. Indeed, the Magistrate made no findings of LDC noncompliance as against Henrys' *home.* Rather, he found merely that Henrys' act of installing their PFCs without a permit violated the LDC. However, as Henrys undeniably installed the PFCs to *decrease* their home's nonconformity with the LDC, requiring Henrys to remove their PFCs (and thus forcing their home into noncompliance with the LDC and returning it to a nonconforming structure) would undoubtedly shock the conscience. Thus, the Circuit Court erred by not setting aside the Magistrate's Orders as violative of SDP.

IV. Both Excessive Fines Questions Warrant Review

A. Preliminary 8th Amendment Procedural Issues

The Magistrate's orders imposing daily fines are excessive in violation of the 8th Amendment. The circuit court held Henrys did not raise this issue with Magistrate, thus "appellate review of this constitutional claim has been waived."[68] However, that holding departs from the essential requirements of the law in two respects.

[68] Appendix A:8.

First, the 2023 order *for fines* was prematurely issued, and issued without notice and opportunity to be heard as to *the fines*. Any order imposing fines *must* be *subsequent* to, and distinct from, the initial order commanding Henrys to take action.[69] "If the violator fails to comply with the section 162.07 order, a second order may be entered under section 162.09 imposing a continuing fine. This order, upon recording in the public records, becomes a lien on the property."[70] Indeed, FS 162.09(1) and OB Code of Ordinances 2-258(a) provide "upon notification by the code inspector that an [already existing] order of [Magistrate] has not been complied with," Magistrate "*may* order the violator to pay a fine."[71] Magistrate skipped these procedures, ordering fines/liens within the *same order* as finding violations.

Further, OB "must provide the property owner with notice and an opportunity to be heard concerning any factual determination necessary to impose a fine or create a lien."[72] Similarly, "162.09 would be interpreted to permit the presentment of defenses."[73] Here, it was not made clear Magistrate was going to issue orders imposing fines at *that* initial hearing until he stated such orders *at the end of the hearing*, at which time Henrys were *not* given any opportunity to present defenses nor object to the prematurely issued fines and the hearing was concluded.[74] Henrys raised this issue with Magistrate in their Motion for Relief filed 3/24/23,[75] which he

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[69] FS 162.07(4) states orders finding violation "may include ***a notice*** that it must be complied with by a specified date and ***that a fine may be imposed*** . . . if the order is not complied with by said date."

[70] *City of Tampa* at 1188 (Fla.2DCA 1998); *see also, Hardin* at 709-710 (Fla.3DCA 2011), *City of Plantation* at 393-394 (Fla.4DCA 1991), *Massey* at 143-146 (Fla.2DCA 2003) and *Jones v Seminole County*, at 96 (Fla.5DCA 1996) acknowledging two stages: a hearing finding "violation" and a subsequent "hearing to consider imposition of fines."

[71] That's why FS 162.08 allows Magistrate "to command" Henrys to take necessary steps, but does *not* yet allow for fines to be ordered.

[72] *Massey* at 147, and *Real Property* at 964.

[73] *Jones v Seminole County* at 96 (Fla.5DCA 1996).

[74] *See* Transcript at App1:396-401.

[75] App1:107, reproduced at Appendix H:153.

never ruled on, and in circuit court[76] which failed to address it. Thus, Henrys cannot be said to have waived an issue where it was prematurely addressed and Henrys were unlawfully prevented from addressing it.

Second, the circuit court cites to *Wilson* in its 8th Amendment analysis, but fails to acknowledge the important point made in *Wilson* in that

> We do not mean to imply that the Wilsons could not have raised their facial challenges in an appeal to the circuit court of the order imposing fines. Section 162.11, Florida Statutes, provides for an appeal of CEB final orders, which has been held to be the proper forum to address constitutional claims. *See Holiday Isle Resort & Marina Associates v Monroe County,* 582 So.2d 721, 721 (Fla. 3d DCA 1991) (holding that appeal under section 162.11 was proper forum to raise both facial and as applied constitutional challenges to code enforcement procedure). Accordingly, the Wilsons could have raised their constitutional challenges on appeal to the circuit court.[77]

Thus, the circuit court committed harmful error by holding Henrys waived their 8th Amendment claim.[78] However, this court need not remand as to this issue because it is in "a good position to make a determination" on the merits of this issue.[79] Moreover, despite the circuit court's holding on waiver, it continued to analyze the issue, albeit on additional erroneous legal standards.

B. The Importance of This Court Deciding These Two Excessive Fines Questions

As the cost of living (food, health care, housing, transportation, etc.) continues to grow, a large

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[76] App1:193-194,251, reproduced here at Appendix I:199-200, and Appendix J:221.

[77] *Wilson v County of Orange*, 881 So. 2d 625, 631-632 (Fla.5DCA 2004); *Wilson* at 633, citing *Key Haven* at 157 (Fla.1983), *superseded on other grounds as noted in Bowen* (Fla.2DCA 1984); *see also, Kirby v Archer* (Fla.1DCA 2001); *DJB Rentals v Largo* at 413-414 (Fla.2DCA 2023).

[78] The circuit court also erred in relying heavily on the **unpublished** *Moustakis* 11th Circuit case which bases its analysis on an erroneous interpretation of the *Riopelle* Fla. 1DCA case, discussed later herein.

[79] *State v Jones*, 180 So. 3d 1085, FN2 (Fla.4DCA 2015) "We need not remand to the county court to consider these factors since this court is in as good a position to make a determination, and regardless, the result would be the same. *See, e.g., Theophile* at 578 (Fla.4DCA 2011) (recognizing an appellate court is in an "equal position with the trial court" where a de novo standard of review applies and the issue is purely a question of law)."

number of Americans now find it challenging to pay their ordinary expenses. Additionally, each day, in every state in this great nation, many people are found guilty of civil or criminal offenses. For the vast majority of those offenses, fines are imposed (sometimes in addition to other penalties). Of course, if it's already challenging to pay your ordinary living expenses, paying fines becomes an even harsher financial burden. As many government employees tasked with enforcement of state and local law are more concerned with making sure citizens follow the "rules" rather than ensuring constitutional limits are observed, the questions posed here by the Henrys (about never-ending daily fines and fines/liens for "offenses" with no asserted harm) have a huge impact on a vast number of defendants nationwide.

Never-ending daily fines and fines/liens for "offenses" with no asserted harm are excessive fines in violation of the 8th Amendment to the US Constitution. As such, these are important *federal* questions. These specific questions have not yet been explicitly decided by this Court, but they now must be, as the 11th Circuit Court of Appeals has decided one of these issues in a manner conflicting with state courts of last resort and relevant decisions of this Court; and the other issue has been decided by a state court in a way that conflicts with relevant decisions of this Court.

C. The Decision(s) Below Are Wrong

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality."[80] Thus, "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id* at 337. This Court held that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for

[80] *United States v Bajakajian*, 524 US 321, 334 (1998).

commission of the same crime in other jurisdictions."[81]

The circuit court erred by failing to consider *any* of these factors, thus upholding daily fines/liens where there is no harm, and that are never-ending despite being grossly disproportionate to the malum prohibitum one-time act. The 11th Circuit did this as well, completely ignoring the gravity of the offense (or harm caused by the homeowner), and specifically holding that never-ending daily fines are constitutionally permissible.[82]

1. Fines (and liens) may not properly be imposed when there is no alleged harm caused by an offense

The first of these three criteria focuses on the gravity of the offense. In analyzing the gravity of the offense, the *Solem* Court stated that "[c]omparisons can be made in light of the harm caused . . . and the culpability of the offender." *Id* at 292; *see also, Bajakajian* at 339. The first logical comparison done in that case was between violent and nonviolent crimes. The Court said "as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Id*. The majority of offenses charged in our country, and certainly the offense of installing PFCs without a permit, are nonviolent offenses. Similarly, civil offenses (like Henrys') are less serious than criminal offenses, as evidenced by the fact that imprisonment is not allowed for the former while it is for the latter.

In assessing the harm caused, the courts then assess whether the defendant fits "into the class of

[81] *Solem v Helm,* 463 US 277, 292 (1983). Although this case concerned the excessiveness of a term of imprisonment, this Court "recognized that the Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments." *Id* at 289.

[82] The Circuit Court in this case relied entirely upon the 11th Circuit case it cited to conclude that Henrys' fine/lien was not disproportionate to the offense. That case was *Moustakis v City of Fort Lauderdale,* 338 F. App'x 820, 821 (11th Cir. 2009).

persons for whom the statute was principally designed."[83] Thus, since Henrys were charged with violating OB's Land *Development* Code, we must acknowledge the *authorizing statute's*[84] definition of "development." "Development" does ***not*** include "the use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling."[85] Consequently, as securing a homestead, enhancing and securing children's play areas, storing personal property, and parking are customarily incidental uses to enjoyment of a dwelling, Henrys' PFCs are *not,* by state law, "development" that can be prohibited/punished through the land *development* code.

The statute used against Henrys that specifically allows for fines is FS 162.09. FS 162.09(1) states that the Magistrate "may order the violator to pay a fine in an amount specified in this section for *each day the violation continues*." So, what is the violation? The violation sustained for each (pavers, fence, conexes) was only that of *installing* them.[86] That is it.[87] The violation of "installing" the PFCs only occurred on the date they were installed, as Henrys are not continuing to install them. So, the daily fine contemplated in the statute is not intended for people like the Henrys, whose violation was a one-time occurrence.

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[83] *Bajakajian* at 338.

[84] Per FS 163.3161(1), the set of laws pertaining to land development in Florida is known as the "Community Planning Act." The CPA is the authorizing statute for local land development regulations, per FS 163.3202.

[85] FS 163.3164(14) and 380.04; and as seen in these statutory provisions, Development also does *not* include a "change in use of land or structure from a use within a class specified in an ordinance or rule to another use in the same class."

[86] "Respondents installed a fence without" a permit. Appendix B:15 2, followed by p16 A. "Respondents installed two [conexes] onto their property without a permit." Appendix B:19 2, followed by p20 A. "Respondents installed pavers . . . altering the driveway structure and size, without a permit." Appendix B:24 2, followed by p25 A.

[87] For the pavers, Henrys were adjudged to have violated LDC 1-14(6)(a)(1), which states "no structure shall be moved, structurally altered or demolished" without a permit. For the conexes, Henrys were adjudged to have violated LDC 2-50(a)(9), which requires a permit for the conexes in accordance with the same LDC 1-14(6). For the fence, Henrys were adjudged to have violated LDC 2-50(n)(1)(a), that "all fences shall require a permit prior to installation." In all three, ***nothing*** makes it illegal to have the unpermitted installation ***remain*** on the property.

Instead, the common residential code violations intended for daily fines are offenses such as having overgrown grass or weeds; an accumulation of junk, trash or debris in the yard; broken or deteriorating fences, sheds or retaining walls; neglected exterior property maintenance; blocking sidewalks, driveways, or fire hydrants; having unsecured swimming pools. Overgrown weeds and accumulations of trash lead to infestations and other public health concerns. Blocked sidewalks and fire hydrants, broken or deteriorating fences and retaining walls, neglected exterior property maintenance, and unsecured swimming pools create safety issues within the community. Henrys' act of installing PFCs is neither a public health risk nor a safety concern, nor was it ever alleged to be.

Furthermore, in these aforementioned common residential code violations, the offending behavior is occurring day after day; in other words, by their very nature, they are repeated until they are corrected. The act of installing the PFCs has not been repeated, as the Henrys are not continuing to install them on a daily basis.

In assessing the harm caused, a "court, of course, is entitled to look at a defendant's motive in committing"[88] an offense. As discussed above, Henrys installed their PFCs to *decrease* their property's nonconformity with the LDC, so by the time the PFCs were installed and the Magistrate hearing was held, the Henrys' home was no longer a nonconforming structure. Indeed, the Magistrate made no findings of LDC noncompliance as against Henrys' *home.* Rather, he found merely that Henrys' act of installing their PFCs without a permit violated the LDC. Thus, Henrys' intent to bring their property into conformity with the LDC further demonstrates their offense caused no harm.

[88] *Solem v Helm,* 463 US 277, 293 (1983).

Moreover, as aforementioned (when discussing Equal Protection violations), OB testified to relying on several reasons - not founded in the law - for denying Henrys permits for their PFCs. Thus, Henrys cannot be attributed bad intent for not obtaining permits for the PFCs where OB openly admits they will never approve such permits without ultra vires requirements being imposed.

Also, Henrys' PFCs are reasonable and customary uses of their homestead. Not only that, but they are required to be on Henrys' property (see aforementioned discussion). Nonetheless, unreasonable and financially impossible burdens are imposed by the LDC for Henrys to apply for the permits. Specifically, to even *apply* for a permit, Henrys are required to:

- provide a recent survey of the lot *specifically certified to the city* (costing $750 or more),[89]
- obtain expensive and time-consuming variance approval regarding the garage requirement,[90]
- obtain engineer/architect final site plan approval,[91]
- meet a multitude of unidentified requirements - LDC 1-14(6)(b)'s "submittal requirements" include items *not even specified* in the LDC. However incredulous this may seem, OB confirmed[92] that you have to apply for a building permit in order to be given the information about what you can put on your own property![93]

All of this demonstrates Henrys did not have an intent to harm in not obtaining permits for their PFCs.

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[89] LDC 1-14(6)(b).

[90] No applicant may receive *any* permit without "[a]ll requirements of this [LDC being] met unless a variance is granted by the Board of Adjustment and Appeals." LDC 1-14(6)(a)(4)(iv). Henrys' 1949 home was built without a garage or sufficient off-street parking, and was thus noncompliant before the PFCs. Thus, they *cannot* apply for permits without first applying for (and receiving) a variance under LDC 1-16. *See* Cushing Testimony at App1:358-362.

[91] LDC 1-14 requires a building permit *and* an approved development order, but the "development order shall be issued only in conjunction with the approval of . . . a final site plan," which triggers extensive engineering fees and other expenses of site plans.

[92] Through their Attorney and Planning Department Supervisor.

[93] *See* Transcript at App1:357, line 11-25.

Furthermore, in the three years this case has been going, OB never alleged Henrys PFCs harm *anyone.* And there's nothing inherently harmful about the pavers, privacy fence or conexes that Henrys installed on their homestead. There is not even an "injury suffered by the Government," let alone "actual damages sustained by society," which is the lowest bar for asserting harm in the context of the 8th Amendment.[94]

Indeed, hundreds of Henrys' neighbors, in just a matter of days, signed a petition declaring that "Henrys' parking pavers, privacy fence & 2 backyard conexes don't harm me, my property or the community, so the Henrys should not be fined for those improvements."[95] Henrys' PFCs do not encroach on neighboring properties, do not increase water runoff, and are in good repair. Nor has it been alleged Henrys' use of their property infringes upon others' use of their own property. Indeed, they impact neighboring properties in *no* negative ways, but do reduce the amount of sandspurs and water runoff transferring to neighboring properties, help contain sound within their own property, keep soccer balls out of neighbor's yards, significantly mitigate wind and flood damage, and provide a place for Henrys' kids and neighbors to gather for a leisurely game of basketball, etc.

The *Solem* Court held that even the most minimal punishments may be unconstitutional under the circumstances.[96] Henrys thus urge this court to declare that when there has been no harm, as is the case here, even the most minimal punishment is unconstitutional. Even the statute authorizing fines for LDC violations agrees with this conclusion. FS 162.09(2)(b) requires the Magistrate, "in determining the amount of the fine, ***if any***," to consider "the gravity of the

[94] *See, Bajakajian* at 339 and *Austin,* 509 US at 621 (1993), respectively.
[95] *See* signature sheets App3: 54-63, admitted as evidence by Magistrate May 2024, reproduced here at Appendix P.
[96] *Solem* at 290, "As the Court noted in *Robinson v California*, 370 US at 667, a single day in prison may be unconstitutional in some circumstances."

violation" and other factors.[97]

2. A Never-Ending Daily Fine Is Grossly Disproportionate To A Malum Prohibitum One-Time Act

As we continue analyzing the remaining aforementioned *Solem* factors, it becomes clear that a never-ending daily fine (and liens) is grossly disproportionate to a malum prohibitum one-time act.

As a preliminary matter, neither the Circuit Court nor the 11th Circuit (the *Moustakis* case relied on by the Circuit Court) addressed *any* of the *Solem* factors. So, before we discuss how they got this 8th Amendment rule of law wrong in the context of this Court's relevant decisions, we must acknowledge the ways in which they decided this important question in a way that conflicts with a state court of last resort in at least two jurisdictions.

At the time *Moustakis* was decided, there was only one Florida Court of Appeals decision (and no Florida Supreme Court decisions) regarding the excessiveness of daily accruing fines. That Florida Court of Appeals case was *Riopelle* which, interestingly enough, was the case upon which *Moustakis* based its 8th Amendment holding, yet also one of the two decisions of a state court of last resort that it directly contradicts.[98] The *Moustakis* Court said

> The Moustakises argue that the court in Riopelle held that, when considering whether a fine is excessive, the cumulative fine, and not the amount accumulated per day, must be considered. We disagree. While the court in Riopelle did consider the cumulative fine in its analysis of whether the fine was excessive under the Florida Constitution, it broke the cumulative fine down into its

[97] FS 162.09(2)(b); reiterated in *Massey* at 145 (Fla.2DCA 2003). Indeed, FS 162.09(1) and OB Code of Ordinances 2-258(a) provide "upon notification by the code inspector that an order of [Magistrate] has not been complied with," Magistrate "*may* order the violator to pay a fine."

[98] Although this is a State Court of Appeals decision, please note as the 1980 Amendment Committee Note to FRAP 9.030 explains, the "district courts of appeal [] constitute the courts of last resort for the vast majority of litigants" per the Florida Constitution.

> constituent parts and analyzed whether the fine was grossly disproportionate to all of the conduct that gave rise to it. 907 So. 2d at 1222-23. *Id* at 821, n1.

However, *Riopelle* did *not* break down the cumulative fine into its constituent parts for purposes of analyzing whether it was grossly disproportionate. The *Riopelle* Court broke down the constituent parts of the cumulative fine because $20,000 of the total fine was attributable to FS 440.10(1)(f) - which Riopelle was *not* challenging on appeal - while $2,200 was attributable to FS 440.107(5) - which Riopelle *was* challenging on appeal. In other words, the court was explaining it was only analyzing $2,200 in daily fines because that's all that Riopelle was challenging. At that point, though, the court held that "Riopelle does not provide any argument that shows this court why $2,200 [or in other words, the *cumulative amount*] in penalties, as authorized by section 440.107, is disproportionate to her conduct." Thus, *Riopelle* held the *cumulative amount* must be reviewed for proportionality to the offense.

In citing to the *Moustakis* case to erroneously hold that the *aggregate* amount of the fine cannot be challenged as excessive, the Circuit Court failed to follow the 2023 binding precedent from the Florida Court of Appeals. In the DJB case involving a FS 162.09 order imposing fines, DJB alleged the "*aggregate* fines of over $550,000.00 violate the Excessive Fines Clause" and that the "*limitless* fines for all non-irreparable code violations" violated the Excessive Fines Clause.[99] However, the court held that "DJB waived any arguments regarding the amount of the fine by failing to appeal from the Board's order entered on September 24, 2015." *Id.* Indeed, the court recognized the right to "contest[] the total amount of the fine imposed," (*Id.*) but simply clarified that the time to raise such issues is in the direct appeal to the circuit court (pursuant to 162.11), and *not* in a collateral attack once the city has filed a foreclosure action on the liens imposed

[99] *DJB Rentals v City of Largo*, 373 So.3d 405, 413 (Fla. 2DCA 2023).

pursuant to the 162.09 order.[100] Thus, as the Circuit Court's Order recognizes, "[t]his is an appeal brought pursuant to section 162.11 . . . of three Orders Finding Violation entered . . . by the Special Magistrate," (Appendix A:3) Henrys' excessive fines challenges were properly raised. Furthermore, the Florida Supreme Court approved of this 2023 decision in the Court of Appeals allowing challenges to the aggregate amount of the fine, as long as the homeowner has properly appealed the Magistrate Orders to the Circuit Court pursuant to FS 162.11. Appendix S.

The Circuit Court also decided this issue in conflict with the Supreme Judicial Court of Massachusetts. In *Commonwealth v John G. Grant & Sons*, the defendant was found guilty of filling a fresh water wetland in violation of GLC 131 §40.[101] Just like FS 162.09 (the statute for fines here), §40 prescribes a fine "for its violation and provides that each day of continuing violation shall constitute a separate offense." *Id* at 154-155. However, as the court pointed out

> The Appeals Court concluded, by implication, that each day unauthorized fill remained on the premises warranted a separate fine. . . . The defendant properly had argued in the trial court and on appeal that it was charged with filling or altering a fresh water wetland and not with leaving fill on such a wetland. Indeed, it argues correctly that § 40 does not make a crime of leaving unauthorized fill in a wetland. Section 40 provides in its last paragraph that each day of continuing violation (e.g., each day of filling or altering) constitutes a separate offense. . . . This criminal statute cannot properly be construed, however, as making a daily criminal wrong of the continuing presence of fill unlawfully placed on particular premises. *Id* at 157.[102]

The court continued by explaining that

> One problem with making the continued presence of unlawfully placed fill either

[100] "Although DJB uses the phrase 'on its face' and 'as-applied' in Count 1, that claim involves a purely as-applied challenge that contests the total amount of the fine imposed on DJB. . . . This court expresses no opinion on the rectitude of the City's practices or DJB's claims impugning them because this is not the appeal in which answers to those questions should have been sought. Because DJB's counterclaims involve causes of action other than facial constitutional challenges, DJB was required to appeal from the City's order that provided a single daily fine for multiple violations within thirty days from the date that order was executed. *See* § 162.11, Fla. Stat." *Id* at 413-414.

[101] 403 Mass. 151, 152 (1988).

[102] *Conservation Commission of Norton v PESA* (Mass 2021) also addressed this §40, but that law has been changed as to now prohibit "leaving unauthorized fill" on a property.

> a separate daily offense or a continuing offense warranting a daily fine is that the removal of the material would also be a crime unless the owner complied with the permit provisions of § 40 and obtained permission to remove the material. *Id* at 162 n5.

Similarly, Magistrate adjudged Henrys as violating LDC 1-14(6)(a)(1), which states "no structure shall be moved, structurally altered or demolished" without a permit.[103] As explained above, it is all but impossible for Henrys to obtain a permit for the installation of their PFCs, yet Magistrate ordered them to remove their PFCs, which itself would require Henrys to obtain a permit. The permit requirements are the same whether you want to install items like the PFCs or remove items like the PFCs.

Not only did the Massachusetts court accept the defendant's challenge to the cumulative total of the fines imposed, but it went a step further and made clear that when imposing daily fines, courts must ensure the violation is actually one of a continuing nature. Although Henrys pointed out that they were only found to have installed the PFCs without permits - which is a one-time act - the Circuit Court dismissed that aspect as irrelevant, allowing the daily fines to accrue.

To fully understand the magnitude of error by the Circuit Court here, we must finish analyzing the *Solem* factors. We have already looked at the gravity of the offense, which is a *malum prohibitum*, non-violent, non-criminal, one-time offense that caused *no* harm. So, we must now look to the harshness of the penalty.

Pursuant to FS 162.09(3), a "certified copy of an order imposing a fine . . . may be recorded in the public records and thereafter shall constitute a lien [on Henrys' home] and upon any other real or personal property owned by [the Henrys]."[104] These fines imposed through real estate liens and levies on personal property are akin to *in personam* forfeitures. While the wrong done

[103] Appendix B:25 A..

[104] *See also*, page 4 of each Magistrate Order, and *City of Tampa* at 1188 (Fla.2DCA 1998).

by the Henrys was merely installing their PFCs without a permit, the fine is set to $75 per day for all eternity. This is the house the Henrys bought for their "forever home," and where they will spend the rest of their lives. Being only in their 40's, Henrys will likely live another 40 years, and 40 years of fines would be $1,095,000 ($75 x 365 x 40)![105] (Indeed, Magistrate's 5/29/24 orders declare Henrys already owe $31,425 as of 5/19/24.)[106] The totality of the Henrys' assets have never, nor will ever, equal even half of that lifetime amount. Indeed, this Court held that the "forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."[107]

In *Solem,* this Court noted the harshness of the penalty when saying "Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime." *Id* at 297. As this is a civil offense, no jail time is permitted. Thus, financial penalties are all that remain. Undoubtedly, a fine that never stops growing, and can be used as liens on the Henrys' homestead, as well as levies to take all of their personal property, "is the most severe punishment" that could be imposed upon them.

Of relevance to this harshness inquiry, we acknowledge that "[r]eviewing courts ... should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and <u>limits</u> of punishments for crimes."[108] Note it doesn't say "limits, *if any*" or "limits, *or lack thereof*." And, while deference should be shown for legislative decisions on limits for fines, there are *no* limits set for these fines in FS 162.09. Appendix A:9. Additionally, while

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[105] Of course, the fines do not cease simply because the Henrys have passed away. *See, DJB Rentals* at 413-414, where the 2DCA recently held that property owners can challenge the ultimate size of the fine (8th Amendment challenge) as long as the owner raises such claims in an appeal within 30 days of the original code enforcement order, per Chapter 162.

[106] Appendix C.

[107] *Austin v United States*, 509 US 602, 621 (1993).

[108] *Bajakajian* at 336, citing *Solem v Helm,* 463 US 277, 290 (1983).

Jones further recognizes that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature,"[109] it also declared that "[h]aving said all that, it is also true that when the legislature oversteps its authority, 'the Constitution requires judicial engagement, not judicial abdication.'"[110] Thus, deference must not be given to a statute with no limits on fines, and a statute without such limits is patently harsh.

Further, in reviewing the harshness of the penalty, "we must compare the amount of the forfeiture to the gravity of the defendant's offense."[111] Thus, we must look to *all* that will be forfeited pursuant to this statute's liens and levies. The liens and levies are not going to be placed for a one-time $75 fine. Rather, they are going to be placed on Henrys' property based on the cumulative amount due for the ever-growing fines. Thus, this cumulative amount must be the amount considered when determining the proportionality to Henrys' offense. As such, having all of their real and personal property liened and levied for a *malum prohibitum*, non-violent, non-criminal, one-time offense that caused *no* harm is patently harsh.

We must next look to other crimes and their legislatively prescribed penalties. Henrys' offense is merely ***malum prohibitum***. But what of the ***malum in se*** offenses? The **highest** fine for the **worst** typical ***malum in se*** offenses are $15,000 (for murder and rape) and $10,000 (for arson), and for many crimes, an offender "may be sentenced to pay [only] a fine in lieu of any [other] punishment.[112] Indeed, fines in general may not exceed:[113]

- $15,000 for a life felony

[109] *Jones* at 1088, *citing Bajakajian,* 524 US at 336.
[110] *Jones* at 1088, *citing Florida v Dep't.,* 648 F.3d at 1284 (11th Cir.2011).
[111] *Bajakajian* at 336-337.
[112] FS 775.083(1), which references FS 782.04(1)(a) and (b), FS 794.011(3), FS 806.01(1).
[113] FS 775.083(1); *see also* FS 775.02, fines for common law offenses shall not exceed $500.

- $10,000 for a first/second degree felony
- $5,000 for a third degree felony
- $1,000 for a first degree misdemeanor
- $500 for a second degree misdemeanor/ noncriminal violation

Indeed, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Solem* at 291. Certainly, ***malum in se*** offenses like murder, arson and rape are far more serious than Henrys' ***malum prohibitum*** offense which harms no one. Yet, Henrys fine will total more than **100 times** the amount of the **maximum** fine for those heinous offenses. Therefore, Henrys' fine is undoubtedly grossly disproportionate to the gravity of their offense, and, thus, unconstitutionally excessive.

The third *Solem* factor is not as helpful here, as many jurisdictions do not even require permits for PFCs like Henrys. All in all, though, courts "reviewing the proportionality determination de novo, must compare the amount of the [fine] to the gravity of the defendant's offense. If the amount of the [fine] is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."[114] Not only does everything point to Henrys' never-ending fines (that serve as liens on all their real and personal property) being grossly disproportionate to the offense of installing their PFCs, but it is clear that as a general rule, a never-ending daily fine is grossly disproportionate to a *malum prohibitum* one-time act.

CONCLUSION

The petition for a writ of certiorari should be granted.

[114] *Bajakajian* at 327 (US:1998); *see also, Jones*, at 1088 (Fla.4DCA 2015).

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