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# Supreme Court of New Jersey

DOCKET NO. 084365

STATE OF NEW JERSEY,

CIVIL ACTION

Plaintiff-Respondent,

ON *Petition for Certification*  
SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

v.

BENNIE ANDERSON,

DOCKET NO. A-4289-18T3

Defendant-Petitioner.

Sat below:  
Hon. Jack M. Sabatino  
Hon. Thomas W. Summers, Jr.  
Hon. Arnold L. Natali, Jr.

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**AMICUS CURIAE BRIEF OF THE INSTITUTE FOR JUSTICE  
IN SUPPORT OF NEITHER PARTY**

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### INTRODUCTORY STATEMENT

Amicus the Institute for Justice is a nonprofit public interest law firm. It wishes to inform the Court of the rapidly evolving case law around the country discussing the standard for determining what "excessive fines" the Eighth Amendment guarantees "shall not be . . . imposed." U.S. Const. amend. VIII.

Amicus has useful expertise. Amicus represented Tyson Timbs in the U.S. Supreme Court case holding that the Excessive Fines Clause applies to state and local authorities. See Timbs v. Indiana, 139 S. Ct. 682 (2019). It represented Timbs on remand, successfully urging the state high court to adopt the framework for deciding excessiveness challenges outlined below. See State v. Timbs, 134 N.E.3d 12 (Ind. 2019). It represents Timbs still. See State v. Timbs, No. 20S-MI-00289 (Ind. 2020) (oral argument Jan. 21, 2021) (appeal after judgment for Timbs). Amicus also represents property owners around the country who are challenging fines and forfeitures as excessive under the Eighth Amendment. See, e.g., Ingram v. County of Wayne, No. 2:20-cv-10288 (E.D. Mich., filed Feb. 4, 2020) (vehicle seizures); Richardson ex rel. 15th Jud. Cir. Drug Enf't Unit v. \$20,771.00, No. 2017-cp-26-07411 (S.C., oral argument Jan. 13, 2021) (cash forfeitures); Ficken v. City of Dunedin, No. 19-003181-CI (Fla. 6th Jud. Cir., filed May 7, 2019) (overgrown grass). Amicus has briefed and argued the meaning of

"excessive fine" at every level of the American court system. It hopes to be helpful to the Court here.

Amicus urges this Court to reject the Appellate Division's framework for deciding whether an economic penalty is excessive. Precedent, history, and the purposes of the Excessive Fines Clause require courts determining excessiveness to consider all the circumstances of a particular offense and particular offender, including the impact that the economic sanction will have on the offender's ability to provide for himself and others.

The Appellate Division's framework falls far short. The excessiveness analysis required by the Eighth Amendment does not defer to legislative policies designed for all types of offenses and offenders. The Eighth Amendment sets a constitutional minimum that depends on the connection (or nexus) between the property and the offense, the culpability of the property owner, the severity of the offense, and the harshness of the sanction under the individual's circumstances. One of the Clause's main concerns, overlooked by the Appellate Division, is the effect that an economic sanction will have on the property owner financially. This last consideration warrants special attention in this case, given the state retirement benefits at issue.

The Appellate Division's framework is not the law in any U.S. jurisdiction. If this Court reaches that issue, it should adopt a standard more consistent with cases discussed below.

## BACKGROUND

Bennie Anderson is an elderly retiree with several chronic health conditions. He worked for Jersey City in various capacities over 38 years, earning a vested pension of just over \$60,000 per year for his retirement. In 2017, Anderson pleaded guilty in federal court “after accepting a \$300 bribe” to “change the tax description of [a] property” from that of a two-unit to a three-unit dwelling. State v. Anderson, 463 N.J. Super. 168, 173-74 (App. Div. 2020). His offense was “unrelated to other illegal activities.” Id. at 185. He was sentenced “to a two-year probationary term, with five months of home confinement, and fined \$3,000.” Id. at 174. As a consequence, Jersey City reduced his pension by \$12,000 per year, leaving approximately \$48,000 for each year of Anderson’s retirement. Id.

The State took things a step further. Without charging Anderson with bribery under New Jersey law, see N.J.S.A. 2C:27-2, the State filed this civil action, seeking forfeiture of the remainder of his pension, see N.J.S.A. 43:1-3.1. The civil statute has two advantages: (1) it does not require observance of criminal procedures, which saves money, and (2) it provides for the mandatory forfeiture of the entirety of state pension distributions, which makes money.<sup>1</sup>

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<sup>1</sup> The State conceded below that the statute requires it to return any portion of Anderson’s pension attributable to his



Anderson argued that forfeiture of his entire pension would violate the prohibition on excessive fines under the Eighth Amendment and Article I ¶ 12 of the New Jersey Constitution.<sup>2</sup> The Appellate Division agreed with Anderson that he has a property interest in his vested pension and that its forfeiture is a “fine” within the meaning of the Eighth Amendment. 463 N.J. Super. at 172-73. But the Court also agreed with the State that forfeiting the remainder of Anderson’s pension would not be excessive. Id.

The Appellate Division based this determination on only three considerations: (1) “the Legislature deemed such a result to be an appropriate consequence”; (2) “the maximum punishment authorized for a single offense under [the interference with commerce statute to which Anderson pleaded guilty] is a fine or imprisonment of up to twenty years, or both”; and (3) when Anderson “took the \$300 bribe, he significantly and materially breached the public’s trust . . . with respect to zoning decisions which necessarily affect the health and safety of the tenants and owners of the affected properties.” Id. at 184-86.

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contributions. Anderson, 463 N.J. Super. at 184 n.4. However, nothing in the Appellate Division’s reasoning would necessitate that outcome as a constitutional matter.

<sup>2</sup> For purposes of this brief, amicus does not distinguish between the Excessive Fines Clause of the Eighth Amendment and Article I ¶ 12 of the New Jersey Constitution. Cf. Davanne Realty v. Edison Township, 408 N.J. Super. 16, 22-23 (App. Div. 2009) (finding “no reason to conclude” that Article I ¶ 12 provides greater protection than the Eighth Amendment) (citing Doe v. Poritz, 142 N.J. 1, 40-42 (1995)).

This Court granted Anderson's petition and the State's cross-petition to decide whether the forfeiture of Anderson's pension is a fine and, if so, how to assess whether it is excessive.

#### **SUMMARY OF ARGUMENT**

Amicus readily agrees that Anderson "significantly and materially breached the public's trust," Anderson, 463 N.J. Super. at 185, and his serious crime deserves appropriate punishment. Amicus also takes no position on whether the forfeiture of a government pension is a "fine" within the meaning of the Eighth Amendment. However, amicus takes issue with how the Appellate Division determined excessiveness. If this Court reaches that issue, it should reverse the decision below and restate the law regardless of the appropriate punishment in this case.

The U.S. Supreme Court has emphasized that the "touchstone" of excessiveness is "the principle of proportionality." United States v. Bajakajian, 524 U.S. 321, 334 (1998). That principle, together with the history, purposes, and precedents addressing the Excessive Fines Clause, requires a contextual analysis of the circumstances of the particular offense and particular offender. See State v. Timbs, 134 N.E.3d 12, 25-26 (Ind. 2019). In this case, a contextual analysis would require considering, for example, (1) the specific harm caused by Anderson's conduct; (2) the severity of his offense compared to other bribery offenses; (3) other punishments imposed; and (4) the effect that forfeiture

would have on Anderson's ability to provide for himself and others. The Appellate Division considered none of these things. But all these considerations (and others discussed below) are essential under the circumstances of this case.

Amicus encourages the Court to adopt the excessiveness framework adopted by the high courts of Pennsylvania and Indiana. See Commonwealth v. 1997 Chevrolet, 160 A.3d 153 (Pa. 2017); State v. Timbs, 134 N.E.3d 12 (Ind. 2019). Those cases emphasize the following considerations:

*First*, as threshold matters, courts should assess the nexus between the property being forfeited and the offense committed, as well as the degree of the property owner's culpability in the offense.

*Second*, they should consider the severity of the harm caused by the property owner's particular offense—not, as suggested by the Appellate Division, the severity of the offense in the abstract or in its worst manifestations.

*Third*, they should account for the harshness of forfeiture under the totality of circumstances, including the source of the property, whether forfeiture would remedy the harm caused (or be purely punitive), and other punishments already imposed on the property owner. One important aspect of this inquiry is the effect that forfeiture would have on the property owner's livelihood and ability to provide for himself and any dependents. The history and

purposes of the Excessive Fines Clause make clear that fines and forfeitures that are economically ruinous are unconstitutionally excessive.

These considerations are incompatible with the Appellate Division's undue deference to legislative policy.

#### ARGUMENT

#### **I. The Appellate Division's excessiveness analysis conflicts with precedent and the history and purposes of the Excessive Fines Clause.**

The Excessive Fines Clause limits the power of state and local governments to impose economic punishments. Timbs v. Indiana, 139 S. Ct. 682 (2019). And it applies to in personam forfeitures and in rem forfeitures alike. United States v. Bajakajian, 524 U.S. 321, 331 & n.6 (1998) (citing Austin v. United States, 509 U.S. 602, 621-22 (1993)). "The touchstone of the constitutional inquiry . . . is the principle of proportionality." Bajakajian, 524 U.S. at 334; see also State v. \$3,000.00 in U.S. Currency, 292 N.J. Super. 205, 213 (App. Div. 1996) ("Excessiveness is, obviously, a matter of proportionality.").

Given the touchstone of proportionality, courts cannot assess the constitutionality of a punishment based on legislative determinations, as the Appellate Division did here. Instead, the U.S. Supreme Court, this Court, and others hold that courts must closely assess the totality of a property owner's actual circumstances in each case. E.g., Bajakajian, 524 U.S. at 336-37

& n.10 (courts “must compare the amount of the forfeiture to the gravity of *the defendant’s* offense,” and “the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to *the facts of a particular case*”) (emphases added).

This Court has held similarly. See Uricoli v. Bd. of Trustees, 91 N.J. 62, 77 (1982) (“We now hold that in all cases, even where there is a relationship between the particular misconduct at issue and the performance of employment duties, a balancing approach is required in order to determine whether forfeiture is justified under all of the circumstances.”); id. at 80 (Pashman, J., concurring) (“The Court’s decision . . . adopts this fact-oriented approach.”); Corvelli v. Bd. of Trustees, 130 N.J. 539, 551-52 (1992) (In Uricoli, “we declined to adopt an inflexible rule that would automatically mandate forfeiture on the commission of any misconduct relating to public employment. Instead, we fashioned a flexible balancing test, one that accommodates equitable considerations.”) (citations omitted).

Other state high courts have also held that proportionality depends on the particular offense and offender. Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 168 (Pa. 2017) (Bajakajian “plac[es] the primary emphasis on the culpability of the defendant, rather than on the severity of the crime in the abstract”); State v. Timbs, 134 N.E.3d 12, 35 (Ind. 2019) (proportionality is based on

“the totality of circumstances”); Colo. Dep’t of Labor & Emp. v. Dami Hospitality, LLC, 442 P.3d 94, 102 (Colo. 2019) (“[C]ourts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment.”).

Without addressing this contrary case law, the Appellate Division relied on stray statements in Bajakajian, see Anderson, 463 N.J. Super. at 184, leading it to give undue weight to two considerations: (1) the legislature’s determination that some offenses warrant forfeiture of the entirety of a state pension; and (2) the measure of excessiveness in this case must be the maximum penalties the legislature has authorized, id. at 184–86. This approach runs counter to the proportionality analysis described in Bajakajian and state high court cases since.

Bajakajian instructs courts to look beyond legislative policy and abstract notions of crimes. Like here, in Bajakajian, Congress had deemed the forfeiture of all a person’s money to be an appropriate punishment under some circumstances. That policy did not, however, control the Supreme Court’s decision-making. Indeed, the Court determined that Hosep Bajakajian did “not fit into the class of persons for whom the statute was principally designed” and deemed the government’s attempt to forfeit \$350,000 from him unconstitutional. The Court found it significant that, as his initial punishment, Bajakajian was fined 30 times less than what

the government was attempting to forfeit. 524 U.S. at 338-40. Similar considerations should have been made in this case.

Instead, the Appellate Division narrowed the excessiveness inquiry to essentially one question: Is this what the legislature wants? Such an approach would neuter the protections of the Excessive Fines Clause and entrust them to the mercy of the political branches. Cf. Bajakajian, 524 U.S. at 339 n.14 (government "cannot override the constitutional requirement of proportionality review"); State v. Taylor, 70 S.W.3d 717, 721 (Tenn. 2002) (similar); David Pimentel, Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures, 11 Harv. L. & Pol'y Rev. 541, 561 (2017) ("If the Court defers to Congress for the decision of what is proportional . . ., the Court may be failing to perform its constitutional duty, offending separation of powers principles in its failure to check congressional power."). This Court should reject the narrow focus on legislative policy that controlled the decision below. The Constitution commands that "excessive fines" "shall not be . . . imposed," and it is for the courts, not the legislature, to determine what "excessive fine" means in each case.

If this Court reaches the excessiveness question in this case, it should reaffirm its commitment to assessing the real-world circumstances and consequences of each case. See Uricoli, 91 N.J. at 77. Such a ruling would bring New Jersey into line with the

proportionality framework adopted by other states. And it would be consistent with the centuries-old judicial function of policing economic sanctions:

[T]he manner in which pecuniary sanctions were imposed, collected, and remitted in the colonies and early American states supports the conclusion that the ratifying generation would have called for judicial consideration of the seriousness or circumstances of the offense, the characteristics of the offender, and the effect of the fine on the offender and his family when assessing a fine's fairness or excessiveness. Further, the three pieces of historical evidence with clear constitutional import—the Magna Carta, Blackstone's interpretation of the English Bill of Rights, and the single sentence in the Framer[s'] debates—support an expansive understanding of proportionality that would prohibit the imposition of a fine that would deny the offender a meaningful opportunity to pay the fine and extricate himself from the punishment.

Beth Colgan, Reviving the Excessive Fines Clause, 102 Cal. L. Rev. 277, 336 (2014).

Judicial engagement remains urgently needed today. Nationwide, civil forfeiture "has led to egregious and well-chronicled abuses." Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). State and local lawmakers now "use economic sanctions as a tax substitute as well as a form of punishment, leading to the creation of more and greater sanctions, and in some jurisdictions to policing targeted at offenses from which revenue can be generated." Beth Colgan, The Excessive Fines Clause: Challenging the Modern Debtors' Prison, 65 UCLA L. Rev. 2, 12 (2018). These concerns are "scarcely



hypothetical,” and for good reason: Fines and forfeitures “may be employed ‘in a measure out of accord with the penal goals of retribution and deterrence,’ for ‘fines are a source of revenue,’ while other forms of punishment ‘cost a State money.’” Timbs v. Indiana, 139 S. Ct. at 689 (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)).

In this case, Anderson’s federal conviction resulted in home detention and a \$3,000 fine (i.e., 10 times the \$300 he took as a bribe). The State chose not to pursue criminal charges. Instead, it used the comparatively inexpensive and permissive civil-forfeiture procedures available to claw back some \$48,000 *per year* for the rest of Anderson’s life.<sup>3</sup> That effort warrants more in the way of constitutional scrutiny than the bare fact that the New Jersey Legislature authorized it.

This is not to say any amount of forfeiture would violate the Excessive Fines Clause under the circumstances of this case. A lesser forfeiture might pass muster. For example, the State could forfeit the amount of Anderson’s pension attributable to his official position from the point of his crime forward. The City’s reduction in Anderson’s pension by \$12,000 per year is likely designed to do just that. It may be that forfeiting \$12,000 per year in these circumstances comports with the Excessive Fines

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<sup>3</sup> This is in addition to the roughly \$12,000 per year that the City has already deducted from Anderson’s pension.

Clause, but if it does, it is not because the legislature authorized it; rather, it is because such a punishment is called for under all of the circumstances of this case and this particular offender.

Accordingly, if this Court deems the pension forfeiture in this case a "fine," it should correct the Appellate Division's misstatement of the excessiveness standard and adopt the considerations discussed in the sections below.

**II. Courts should assess several individualized considerations in determining proportionality.**

If this Court reviews the Appellate Division's excessiveness determination, it should adopt the kind of individualized considerations used in other jurisdictions. An individualized assessment of each case would be consistent with this Court's prior decisions, see Uricoli, 91 N.J. at 77, and consistent with U.S. Supreme Court and state high court decisions over the last generation.

**A. Nexus and culpability are threshold inquiries.**

In forfeiture cases like this, two threshold inquiries are required: (1) the nexus between the property to be forfeited and the offense committed and (2) the culpability of the property owner.

1. It is well established that, for civil in rem forfeitures, "the Eighth Amendment requires a threshold inquiry into whether

the specific property sought to be forfeited is an instrumentality of the underlying offense . . . . If not, the forfeiture cannot withstand Eighth Amendment scrutiny and the inquiry ends.” 1997 Chevrolet, 160 A.3d at 186; see also von Hofe v. United States, 492 F.3d 175, 185 (2d Cir. 2007) (“The extent of the relationship between the property and the offense thus enjoys appreciable relevance in our excessiveness inquiry.”); State v. Timbs, 134 N.E.3d at 28 (“A use-based fine is excessive if the property was not an instrumentality of the underlying crimes.”).<sup>4</sup>

The nexus (or lack thereof) between the property and the offense is also a well-established consideration for in personam forfeitures. Bajakajian, 524 U.S. at 337-38. And, while the lack of nexus in an in personam case is not dispositive (like it is for in rem cases), in personam forfeitures still run the risk of arbitrariness. For example, the State in this case did not seek to impose a criminal fine, which Anderson may not have the means of

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<sup>4</sup> This Court has similarly emphasized the importance of the required nexus between property and offense. See State v. Seven Thousand Dollars, 136 N.J. 223, 235 (1994). But its prior holding that no proportionality analysis is necessary where property is found to be the “instrumentality” of a crime should be overruled. That rule cannot be squared with the majority opinion in Austin (which rejected it) or the treatment of a finding of nexus as a non-dispositive consideration by Bajakajian, Timbs, and the Pennsylvania Supreme Court’s decision in 1997 Chevrolet, which has been described as “one of the most comprehensive excessive fines opinions of any court in the nation.” Louis S. Rulli, Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?, 19 U. Pa. J. Const. L. 1111, 1157 (2017).

paying. And, doubtless, if Anderson retired without a pension, the State would not be seeking to take \$48,000 per year from him for the rest of his days. The reason the State wants to forfeit the pension is not, then, that Anderson's crime warrants a \$48,000 fine; it is because Anderson has \$48,000 that the State knows is there and, under New Jersey law, it has a means of forfeiting. In other words, even if there is some nexus between Anderson's offense and the portion of his annual pension amount that accrued after he committed his crime, there is no nexus between Anderson's one-time offense and the entirety of his pension earned over 38 years. Therefore, this threshold inquiry counsels skepticism of the State's desire to forfeit an amount (\$48,000 per year for life) that, if imposed as a freestanding fine, would be obviously arbitrary and excessive.

2. For in rem forfeiture, forfeiting the property of an innocent owner (i.e., someone bearing no culpability for the offense) necessarily violates the Excessive Fines Clause. See County of Nassau v. Canavan, 802 N.E.2d 616, 622 (N.Y. 2003). In other words, it is always excessive to take property from someone who has done nothing wrong.

For in personam forfeitures, culpability is unlikely to be in dispute, because in personam forfeiture is imposed as an add-on to criminal proceedings and a judicial finding of wrongdoing. But even in criminal forfeiture cases and in personam civil forfeiture

cases, culpability comes into play when someone other than the offender owns the property, in full or in part. In such cases, the property owner's lack of culpability can be determinative. See Timbs, 134 N.E.3d at 34. At the very least, it must be considered. See Eyers v. State Bd., 91 N.J. 51, 58 (1982) ("The strong public policy in favor of providing for the dependents of public employees, who have been designated as beneficiaries, is fully applicable in this case. The total forfeiture of these pension benefits would be harsh and inequitable as to an innocent person and would not materially advance the purposes otherwise to be achieved by its application in other settings."); Corvelli, 130 N.J. at 549 ("In some situations . . . that consideration can assume great significance.").

The Appellate Division's method of evaluating excessiveness takes no account of a particular offender's culpability, contrary to both the lines of in rem and in personam cases.

**B. Courts should consider the severity of the harm caused by the particular offense.**

Anderson's conduct was contemptible and worthy of punishment. Official bribery is a vile breach of public trust. Bribery undermines the equal administration of law and victimizes those who play by the rules. It is a serious crime warranting appropriate consequences. Vile as it may be, however, the Constitution's excessiveness protections require courts to calibrate Anderson's

punishment to the real-world harms of *his* offense, rather than the harms caused by bribery in general, and to take account of the financial consequences of forfeiture for Anderson's livelihood. Legislative policy can play a role in determining the severity of a category of offense, but it is the person's particular offense that courts evaluate in calibrating a given fine or forfeiture to the Constitution.

The severity of a person's offense is an essential consideration in the excessiveness analysis. See State v. Timbs, 134 N.E.3d at 37 (outlining considerations relevant to the severity inquiry). And the severity of a person's offense is not determined based on generalizations. Id. What matters is the particular offense and the harm that it actually caused. Indeed, a "statutory maximum, designed as an outer limit on the punishment available, does not necessarily reflect an individual offender's culpability or the gravity of the actual offense giving rise to forfeiture." von Hofe, 492 F.3d at 187.

Rather than maximum punishments, courts should evaluate the punishments already imposed. The "sentence actually imposed may provide even more precise insight into the offense's severity, including whether the offender 'fit into the class of persons for whom the [criminal] statute was principally designed.'" State v. Timbs, 134 N.E.3d at 37 (quoting Bajakajian, 524 U.S. at 338). In Anderson's case, the punishments already imposed are his federal

sentence (two years of probation, with five months of home confinement, and a \$3,000 fine) and the \$12,000 per year deduction that the City took from his pension for life. What this consideration does not do is what the Appellate Division did: ask how much worse the punishment could have been. That approach would expose every offender to the maximum potential punishment for every crime, and so it runs counter to the very purpose of individualized and proportional punishments.

Additionally, whether the offense was "unrelated to any other crime [is] highly relevant to the determination of the gravity of [the property owner's] offense." Bajakajian, 524 U.S. at 337 n.12. This "highly relevant" consideration would weigh in favor of Anderson, given that his act of bribery was "unrelated to other illegal activities." See Anderson, 463 N.J. Super. at 185. Having recognized this fact, however, the Appellate Division disregarded its constitutional significance based on a legislative penalty designed to address the spectrum of potential bribery offenses, sweeping in everything from accepting a free cup of coffee while on official business to the very worst corruption schemes imaginable. Surely, the seriousness of Anderson's offense falls somewhere between those extremes.

Finally, "a court must take into account the harm resulting from the crime charged . . . . [G]eneric considerations of harm [are] largely unhelpful in this regard, as all crimes have a

negative impact in some general way to society.” 1997 Chevrolet, 160 A.3d at 190; compare Bajakajian, 524 U.S. at 339 (assessing real-world harms), with Anderson, 463 N.J. Super. at 185–86 (giving substantial weight to hypothetical harms). Again, this consideration could weigh in favor of Anderson because, although official bribery is a serious offense, one isolated breach of the public trust is less serious, and therefore warrants less punishment, than pervasive acts of corruption. But neither the statute nor the Appellate Division’s analysis accounts for those differences. Nor do they ask what material harms, if any, a particular offender’s conduct has caused.

Amicus believes that it is right and good that Anderson has been punished for accepting a \$300 bribe, but the Appellate Division should have asked whether his offense was as serious as other potential bribery offenses, including in the degree of real-world harm it caused. Because the Appellate Division took no account of these issues, its analytical framework should not become the law.

**C. Courts should consider the harshness of forfeiture under the totality of circumstances, including effects on the property owner’s livelihood and ability to provide for himself and others.**

Even where the offense is serious, the “factually intensive” excessiveness inquiry may result in forfeiture being deemed disproportionately harsh. See State v. Timbs, 134 N.E.3d at 35–36



(outlining considerations relevant to the harshness inquiry). This is because "the severity of the problem 'cannot excuse the need for scrupulous adherence to our constitutional principles.'" von Hofe, 492 F.3d at 191 (quoting Grady v. Corbin, 495 U.S. 508, 524 (1990)). And harshness depends on the facts and circumstances of an individual case:

As the Supreme Court has recognized, "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." Robinson v. California, 370 U.S. 660, 667 (1962). The inquiry, however, could not end there, as "the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Id.

Id. at 189 n.4.

The most important consideration in the harshness inquiry is the "effects the forfeiture will have on the claimant." State v. Timbs, 134 N.E.3d at 36. Indeed, "Magna Carta treated a fine that would impoverish a defendant as per se disproportionate." Colgan, *supra*, 102 Cal. L. Rev. at 321. To hold otherwise "would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally." State v. Timbs, 134 N.E.3d at 36.<sup>5</sup>

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<sup>5</sup> Sometimes, based on the weight of other considerations, a property owner can demonstrate excessiveness without presenting evidence regarding income or deprivation of livelihood. See Bajakajian, 524 U.S. at 339-40, 340 n.15.

This Court has recognized that a property owner's financial circumstances are relevant to proportionality. Corvelli, 130 N.J. at 549 ("the circumstances of the [property owner's] beneficiaries, their age, their means, and their reliance and dependency on continued receipt of payments [are] relevant factors to be weighed in the forfeiture decision"); see also United States v. 6380 Little Canyon Rd., 59 F.3d 974, 985 (9th Cir. 1995) (considering fair market value, subjective value of family residence, and hardship to the property owner, and effect on the owner's family and their financial condition).

That conclusion is consistent with those of several other state high courts that have addressed this issue. In addition to Indiana, at least seven other state high courts have held that economic circumstances are a relevant (if not essential) consideration. See 1997 Chevrolet, 160 A.3d at 189-90 (Pennsylvania); Colo. Dep't of Labor & Emp., 442 P.3d at 101-02 (Colorado); County of Nassau, 802 N.E.2d at 622 (New York); State v. Yang, 452 P.3d 897, 905 (Mont. 2019); State v. Rewitzer, 617 N.W.2d 407, 415 (Minn. 2000); State v. Real Property at 633 East 640 North, 994 P.2d 1254, 1260 (Utah 2000); Stuart v. State Dep't of Safety, 963 S.W.2d 28, 36 (Tenn. 1998). The Appellate Division's framework, however, allows for no consideration of a person's economic circumstances.

While the U.S. Supreme Court has not yet clearly adopted livelihood as a consideration, it recently suggested that preserving a person's livelihood is central to the purposes of the Excessive Fines Clause. See Timbs v. Indiana, 139 S. Ct. at 688 (noting that for centuries, Anglo-American law has required that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear") (quoting 4 William Blackstone, Commentaries \*372).<sup>6</sup> Since Magna Carta in 1215, the excessiveness standard has included whether a given penalty would cause significant economic hardship for the individual penalized. See United States v. Levesque, 546 F.3d 78, 84 (1st Cir. 2008) (one of the "great object[s]" of provisions like the Excessive Fines Clause is to guarantee that "[i]n no case could the offender be pushed absolutely to the wall") (quoting William McKechnie, Magna Carta: A Commentary on the Great Charter of King John 287 (2d ed. 1914)); see also State v. Timbs, 134 N.E.3d at 37 (noting that Magna Carta, Blackstone, the English Bill of Rights, and the Eighth Amendment all "specifically contemplated an economic sanction's effect on the wrongdoer" and preservation of his "livelihood").

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<sup>6</sup> See Timbs v. Indiana, 139 S. Ct. at 688 n.2 (explaining that "[a]mercements were payments to the Crown").

Under these principles, Anderson's financial wellbeing should factor into the excessiveness inquiry. But the Appellate Division did not address it.

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The Appellate Division's method of determining excessiveness is out of step with precedent and the history and purposes of the Excessive Fines Clause. Assuming this Court determines that forfeiture of the remainder of Anderson's pension is a "fine" within the meaning of the Clause, it should adopt the considerations outlined above for all excessive-fines claims. Moreover, it should make clear "that these factors are not meant to be exhaustive, and that additional factors, when relevant, may be considered by a court, depending upon the particular circumstances at issue." 1997 Chevrolet, 160 A.3d at 191.

**CONCLUSION**

If the Court determines that the forfeiture of Anderson's pension is a "fine," it should reject the Appellate Division's framework for deciding excessiveness and adopt, instead, the framework outlined above.

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Respectfully submitted,

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