

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 129 MAL 2022

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

v.

RAHSAAN O. MAY,

Petitioner.

**BRIEF OF AMICI CURIAE PUBLIC JUSTICE, THE FINES AND FEES
JUSTICE CENTER, AND THE NATIONAL CENTER FOR LAW AND
ECONOMIC JUSTICE IN SUPPORT OF PETITIONER RAHSAAN MAY'S
PETITION FOR ALLOWANCE OF APPEAL**

Petition for Allowance of Appeal from the February 15, 2022 Order of the Superior Court of Pennsylvania at No. 139 EDA 2021, Affirming the Judgment of Sentence Entered at No. CP-23-CR-0004281-2018

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***This memorandum of law is filed in the individual capacity of the author and in no way reflects, or is meant to reflect, the views of Penn State Law or Penn State University. The institution is attached for affiliation purposes only.

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STATEMENT OF AMICUS CURIAE

Public Justice is a national legal advocacy organization that effects systemic change by combining impact litigation with education, outreach, and policy advocacy. Through its Debtors’ Prison Project, Public Justice uses strategic litigation—including damages class actions, constitutional claims, and consumer protection laws—to combat the criminalization of poverty. Public Justice currently represents hundreds of people who were unconstitutionally jailed for failure to pay fines and fees without counsel and with no determination that they had the means to pay. Public Justice’s Debtors’ Prison Project seeks to obtain financial compensation for victims whose rights were violated, establish key protections against the financial exploitation and incarceration of indigent criminal defendants trapped in a cycle of debt and poverty, and create incentives to compel governments and their for-profit partners to abandon predatory practices.

The Fines and Fees Justice Center (“FFJC”) is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local courts. FFJC’s mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably. As a national hub for information, resources, and technical assistance on fines and fees, FFJC works with impacted communities, researchers, advocates, legislators, justice system stakeholders, and

media across the nation. We also provide amicus curiae assistance at the state and federal level in cases where issues of economic justice intersect with state and constitutional law.

The National Center for Law and Economic Justice (“NCLEJ”) advances economic justice for low-income individuals and communities across the country through impact litigation, policy advocacy, and support of grassroots organizing. NCLEJ has worked extensively to challenge unfair and disproportionate debt collection practices that perpetuate inequality, criminalize poverty, and harm marginalized communities.

No entity or individual participated in the drafting of this brief other than the individuals named on the cover of this brief, and pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), no other person or entity has paid for the preparation of, or authored this brief in whole or in part.

INTRODUCTION

The Excessive Fines Clauses of the United States and Pennsylvania Constitutions prohibit imposing excessive fines. *See* U.S. Const. amend. VIII; Pa. Const. art. I, § 13. “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality.” *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Under this principle, a fine “violates the

Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334.

When evaluating the severity of a fine, courts must consider the subjective financial circumstances of the defendant—including, most significantly, whether the defendant has the ability to pay the fine. *See Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 188 (Pa. 2017). This approach makes sense. As the Indiana Supreme Court has recognized, “to hold the opposite 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 12, 36 (Ind. 2019).

The Superior Court made this very error. In rejecting Rahsaan May's Excessive Fines Clause claim, the court below failed to consider whether the fine imposed was unduly severe given Mr. May's own financial circumstances. This decision implicates a critical question of first impression and conflicts with reasoning by this Court, the U.S. Supreme Court, and courts across the country. We urge this Court to grant Mr. May's petition and ensure that the Excessive Fines Clause provides meaningful protections for all Pennsylvanians.

ARGUMENT

Although this Court has held a mandatory fine unconstitutional under the Excessive Fines Clause, *see Commonwealth v. Eisenberg*, 98 A.3d 1268, 1287 (Pa.

2014), it has never addressed the question presented here—whether courts should consider a defendant’s ability to pay when determining whether a mandatory fine¹ would violate the Clause. The Court should do so here.

In *Eisenberg*, this Court concluded that a \$75,000 fine for a theft of \$200 from a casino “clearly, palpably and plainly violate[d] the Pennsylvania Constitution.” *Id.* In the decision below, the Superior Court relied heavily on *Eisenberg* and reasoned that because the fine imposed on Mr. May was “seventy-five times less impactful than the one at issue in *Eisenberg*,” it was not unconstitutionally excessive. *Commonwealth v. May*, ___ A.3d ___, 2022 WL 453581, at *8 (Pa. Super. Ct. Feb. 15, 2022). But *Eisenberg* had no reason to address whether the Excessive Fines Clause requires consideration of a defendant’s ability to pay. As *Eisenberg* explained, the fine imposed there, \$75,000, was “by any common measure, . . . a considerable amount of money.” 98 A.3d at 1285. In other words, there was no need to measure the fine’s severity against the defendant’s ability to pay, because all agreed that the fine was harsh.

But not all fines are so plainly severe. A \$1,000 fine like the one here that may be only an inconvenience for wealthier individuals may be extremely severe

¹ As this Court has implicitly recognized, the term “mandatory fine” is somewhat of a misnomer. Because both the United States and Pennsylvania Constitutions prohibit excessive fines, there can be no fine that is truly “mandatory” in every situation. Instead, fines are “mandatory” only when they do not violate the state and federal Excessive Fines Clauses. *See Eisenberg*, 98 A.3d at 1279–80.

for a poorer person. If the Excessive Fines Clause were violated only by fines as severe as the one in *Eisenberg*, the Clause would offer little protection to the poorest Pennsylvanians, who could be “effectively pauperize[d],” *id.* at 1286, by much less than a \$75,000 fine.

Contrary to the Superior Court’s reasoning, this Court has recognized that a claim under the Excessive Fines Clause must be measured against a defendant’s personal financial circumstances. In *Commonwealth v. 1997 Chevrolet*, this Court held that, in Excessive Fines Clause claims challenging property forfeiture, courts must consider not only the “objective pecuniary” value of the property forfeited (i.e., the dollar value of the property) but also the “subjective non-pecuniary valuation”—that is, the importance of this particular property to the owner. 160 A.3d at 188. As *1997 Chevrolet* explained:

[C]ertain property—such as a residence, a vehicle, or other similar necessities in our daily life—carry additional value to the owner and possibly others, and, thus, call for a subjective non-pecuniary evaluation of the property sought to be forfeited. Such a valuation would consider whether the property is a family residence, or is essential to the owner.

Id.

Although *1997 Chevrolet* dealt only with forfeiture, not a fine, this Court’s reasoning recognized that the severity of a penalty does not depend on the dollar value of a fine considered in the abstract. Instead, severity is measured against the impact that the sanction will have on an individual defendant. When this principle

is applied to a mandatory fine, as here, a court’s inquiry necessarily requires consideration of the defendant’s ability to pay.

This common-sense conclusion has been echoed by nearly every other state supreme court to address the question. *See, e.g., City of Seattle v. Long*, 493 P.3d 94, 114 (Wash. 2021); *Colo. Dep’t of Labor & Emp. v. Dami Hosp., LLC*, 442 P.3d 94, 102 (Colo. 2019); *State v. Yang*, 452 P.3d 897, 904 (Mont. 2019); *Timbs*, 134 N.E.3d at 37; *State v. Rewitzer*, 617 N.W.2d 407, 415 (Minn. 2000); *County of Nassau v. Canavan*, 802 N.E.2d 616, 622 (N.Y. 2003); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420–21 (Cal. 2005); *State v. Taylor*, 70 S.W.3d 717, 723 (Tenn. 2002); *State v. Real Prop. at 633 E. 640 N., Orem, Utah*, 994 P.2d 1254, 1260 (Utah 2000).

Requiring sentencing courts to consider a defendant’s ability to pay under the Excessive Fines Clause also reflects the U.S. Supreme Court’s cases interpreting the Eighth Amendment. As the Supreme Court has cautioned, “fines are a source of revenue,” so “[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence.” *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (plurality opinion). “It makes sense to scrutinize governmental action more closely when the State stands to benefit.” *Id.* And as the Court more recently noted, “[t]his concern is scarcely hypothetical.” *Timbs v. Indiana*, 139 S.

Ct. 682, 689 (2019). Indeed, “[p]erhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.” *Id.* (citation omitted).

To determine whether a fine violates the Eighth Amendment, the Court in *United States v. Bajakajian* held that a fine “violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”² 524 U.S. at 334. But because “[t]he text and history of the Excessive Fines Clause . . . provide[d] little guidance as to how disproportional a punitive [fine] must be to the gravity of an offense in order to be ‘excessive,’” the *Bajakajian* Court adopted the more familiar “standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents.” *Id.* at 335–36; *see also Eisenberg*, 98 A.3d at 1281.

Critically, under the Punishments Clause’s “standard of gross disproportionality,” *Bajakajian*, 524 U.S. at 336, courts must weigh both the gravity of the offense and the severity of the punishment based on a defendant’s

² *Bajakajian* remains the Supreme Court’s only decision interpreting the meaning of “excessive” under the Excessive Fines Clause. The Court has interpreted the Excessive Fines Clause only three other times: First, in *Browning-Ferris Industries of Vermont v. Kelco Disposal*, 492 U.S. 257 (1989), the Court held that the Clause does not apply to punitive damages in civil cases. *Id.* at 260. Second, in *Austin v. United States*, 509 U.S. 602 (1993), the Court held that forfeiture is a “fine” for purposes of the Clause. *Id.* at 604. Third and finally, in *Timbs v. Indiana*, the Court held that the Clause is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Id.* at 687.

circumstances. This approach stems from the Supreme Court’s recognition that, in “determin[ing] whether a sentence is unconstitutionally excessive” under the Punishments Clause, courts must “consider[] *all* of the circumstances of the case,” including those of the defendant. *Graham v. Florida*, 560 U.S. 48, 59 (2010); *see also Miller v. Alabama*, 567 U.S. 460, 475 (2012).

Indeed, as the Court has recognized, it can be impossible to determine how severe a penalty is without consideration of a defendant’s personal circumstances. Only after an individualized assessment can a court determine whether a particular sanction is “especially harsh punishment.” *Miller*, 567 U.S. at 475 (quoting *Graham*, 560 U.S. at 70). In *Miller*, for example, the Court held that accounting for a defendant’s youth is necessary when weighing the excessiveness of a life-without-parole sentence. Such a sentence “is an ‘especially harsh punishment for a juvenile,’ because he will almost inevitably serve ‘more years and a greater percentage of his life in prison than an adult offender.’” *Id.* at 475 (quoting *Graham*, 560 U.S. at 70). “A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.” *Graham*, 560 U.S. at 70; *see also Commonwealth v. Felder*, ___ A.3d ___, 2022 WL 529338, at *8 (Pa. Feb. 23, 2022) (noting that, given this difference in severity, “a State’s discretionary sentencing system is . . . constitutionally necessary” for juvenile cases).

Such a stark disparity can exist for financial punishments as well. The \$1,000 fine imposed against Mr. May would likely be difficult for a large swath of everyday Pennsylvanians to pay. A recent report by the Federal Reserve found that 35% of adults would be unable to immediately cover an unexpected \$400 expense. Bd. Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2020*, at 21 (2021), <https://www.federalreserve.gov/publications/files/2020-report-economic-well-being-us-households-202105.pdf>. What’s more, for poorer individuals, fines lead to greater financial repercussions than the dollar amount set by the sentencing court. As a Dartmouth University researcher recently noted in a study of Florida traffic fines, “[f]or individuals lacking financial slack, coping mechanisms such as forgoing basic needs, missing bills, or borrowing at high interest rates may impact future financial stability.” Steven Mello, *Speed Trap or Poverty Trap?: Fines, Fees, and Financial Wellbeing 2* (2018), <https://mello.github.io/files/jmp.pdf>. That study found that drivers who are poor “exhibit increases in financial distress observationally similar to a \$950 income loss following a \$175 ticket” simply because of their financial instability. *Id.* at 5.

A fine imposed beyond a defendant’s ability to pay can also have nonpecuniary harms, even if the court never collects an actual payment. Under Pennsylvania law, if a defendant fails to pay a fine, “the common pleas court judge

may issue a bench warrant for the collection of the fine.” Pa. R. Crim. 706 cmt. If a bench warrant is issued, law enforcement may jail the person for several days, even if the court later accepts the person’s explanation that the failure to pay was justified. *See* Pa. R. Crim. P. 150 (A)(5)(b) (allowing incarceration for “72 hours, or the close of the next business day if the 72 hours expires on a non-business day” until the person can be brought before a judge). Criminal debt can also lead to civil harms, such as the suspension of a driver’s license, the loss of public benefits, and the deprivation of important civil rights. Jeffrey T. Ward, et al., Am. C.L. Union of Pa., *Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts 2* (2020), https://www.aclupa.org/sites/default/files/field_documents/fines_and_costs_report_12.18.2020_0.pdf. A person with financial resources who can immediately pay whatever fine is imposed never suffers any of these attendant harms.³

Moreover, along with proscribing grossly disproportionate fines, the Excessive Fines Clause prohibits any fine that deprives a defendant of the ability to pay for the necessities of life. As this Court recognized in *1997 Chevrolet*, “the Eighth Amendment Excessive Fines Clause arose from the English constitutional

³ This inequity raises not only concerns under the Excessive Fines Clause, but under the Equal Protection Clause of the Fourteenth Amendment as well. *See Williams v. Illinois*, 399 U.S. 235, 242 (1970) (reasoning that even if a challenged law facially applied to all criminal defendants, if it worked an “invidious discrimination” on a designated class of defendants who were unable to satisfy their financial obligations, it can violate the federal Constitution).

tradition including Magna Carta,” which “required that a fine ‘should not deprive a wrongdoer of his livelihood.’” 160 A.3d at 188 (quoting *Bajakajian*, 524 U.S. at 335). “These English roots, and the concomitant hostility to such onerous fines that would deprive one of his or her means of living, became ‘deeply rooted’ in Anglo-American constitutional thought and played a significant role in shaping the Eighth Amendment.” *Id.*; see also *Timbs*, 139 S. Ct. at 687 (confirming this history).

As a leading scholar on the Excessive Fines Clause has noted, the Magna Carta recognized that this principle—that a fine should not financially ruin a defendant—“is a separate and distinct consideration from the proportionality between the harm caused and the penalty imposed.” Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Calif. L. Rev. 277, 321 (2014). “[T]he Magna Carta treated a fine that would impoverish a defendant as per se disproportionate,” no matter how serious the offense. *Id.* Whether a fine violates this principle necessarily requires consideration of a defendant’s financial circumstances.

And the possibility that a fine might deprive a Pennsylvanian of his or her livelihood is not merely hypothetical. According to one recent study, “[o]ne in four Pennsylvania households—over 846,000—lack enough income to cover just the necessities, such as food, shelter, health care, and child care.” Diana M. Pearce, PathWays PA, *Overlooked & Undercounted 2019 Brief: Struggling to Make Ends Meet in Pennsylvania* 3 (2019), <https://pathwayspa.org/wp->

content/uploads/2020/01/PA2019_OverlookedUndercounted_Web.pdf. That study compared Pennsylvanians' household incomes against a "Self-Sufficiency Standard," which "measures how much income is needed to meet families' basic needs at a minimally adequate level, including the essential costs of working, but without any public or private assistance." *Id.* Researchers found that many Pennsylvania households are presently unable to meet those needs. *See id.* It is thus plausible that a fine might unconstitutionally "deprive a wrongdoer of his livelihood," *1997 Chevrolet*, 160 A.3d at 188 (quoting *Bajakajian*, 524 U.S. at 335), unless Pennsylvania courts weigh defendants' financial circumstances.

In refusing to consider Mr. May's ability to pay and upholding the fine against him, the Superior Court rejected not only this Court's approach in *1997 Chevrolet*, but also decisions by the U.S. Supreme Court and other state supreme courts throughout the country. This Court should grant Mr. May's petition and make clear to Pennsylvania courts that the Excessive Fines Clause requires consideration of a defendant's ability to pay for *all* fines.

CONCLUSION

For the reasons discussed, Rahsaan May's petition for allowance of appeal presents critical questions of first impression that are of substantial public importance. The imposition of fines with no consideration to an individual's ability to pay throughout Pennsylvania exhibits in stark terms the devastating impacts that

criminal debt can have on individuals, as well as their families and communities.

Amici, through counsel, respectfully request that this court grant Mr. May's petition.

Date: March 17, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pennsylvania Rule of Appellate Procedure 531 that this brief does not exceed 4,500 words.

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I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties via PACFile.

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