Case No. 21-3755

In the United States Court of Appeals for the Sixth Circuit

ANDREW H. STEVENS, et al.,
Plaintiff-Appellants,

v.

CITY OF COLUMBUS, et al.
Defendant-Appellees.

On Appeal from the United States District Court
For the Southern District of Ohio

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE

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INTERESTS OF THE *AMICUS CURIAE*

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The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. In this case, that government overreach comes in the form of excessive and punitive fines imposed by the City government for the Appellants' failure to meet the City's ambiguous aesthetic criteria.

SUMMARY OF THE ARGUMENT

The U.S. Constitution's Eighth Amendment guarantees that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

These sixteen words "have their roots in England's Glorious Revolution of 1688-89" and the English Bill of Rights. John D. Bessler, *A Century in the Making: The Glorious Revolution, the Am. Revolution, & the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 990 (2019). But the concepts represented by those words stretch back to Magna Carta, which articulated the complementary principles of proportionality in financial punishments and *salvo contenemento*—a safeguard against fines that would deprive the accused of their entire estate or livelihood.

Following abuses throughout the seventeenth century, most notably those of the Stuart monarchs, the Glorious Revolution codified those ancient principles in the English Bill of Rights. The American colonists, in turn, counted these protections among the fundamental rights of Englishmen to which they were entitled and incorporated them into their jurisprudence and colonial documents like the Virginia Declaration of Rights. The Framers relied on this English tradition, incorporating the protections nearly verbatim into the Eighth Amendment, but infused it with new

philosophical justification from contemporary Enlightenment thinkers such as Montesquieu and Cesare Beccaria.

In interpreting the Eighth Amendment, and particularly the Excessive Fines Clause, the U.S. Supreme Court has looked to this history for guidance. Indeed, beginning in *Weems v. United States*, 217 U.S. 349 (1910), and followed by *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989), *United States v. Bajakajian*, 524 U.S. 321, 336, 118 S.Ct. 2028, 2037, 141 L.Ed.2d 314 (1998), and *Timbs v. Indiana*, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019), the Court has recounted that history detail.

The historical record shows that the Eighth Amendment's three prohibitions have been necessary to protect against the government's perennial temptations to punish political rivals and to pervert the machinery of the criminal justice system to raise revenue. Writing for the Court in *Timbs v. Indiana*, Justice Ginsburg recognized the corrosive effect excessive fines have in a free society, observing that "[e]xorbitant tolls undermine other constitutional liberties." *Id.* at 689. Justice Ginsburg pointed to the Stuart experience, with which the Framers would have been well-acquainted, as an example of the government's use of excessive fines "to retaliate against or chill the speech of political enemies," but also noted that "[e]ven absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue . . .

." *Id.*, citing *Harmelin* v. *Michigan*, 501 U.S. 957, 979, n. 9 (1991) (opinion of Scalia, J.).

Reduced to its simplest iteration, the Excessive Fines Clause—along with the Eighth Amendment's other protections—exists because the Framers "believed that power might be tempted to cruelty." *Weems*, 217 U.S. at 373. Because that temptation is perennial, so too must be the protections set against it. Those protections are as necessary today in Columbus, Ohio, as they were to the barons at Runnymede, the opponents of the Stuart dynasty, and the Framers of the U.S. Constitution.

ARGUMENT

I. Freedom from Excessive Fines was Well-established in English Law

In the relatively few U.S. Supreme Court cases addressing the Excessive Fines Clause, the Court has treated "historical analysis as the touchstone of understanding the clause." Nathaniel Amann, *Restitution and the Excessive Fines Clause*, 58 AM. CRIM. LAW REV. 205, 206 (2020). In opinions heavy with history, the Justices have documented the near-verbatim transmission of the clause from the field of Runnymede to the English Declaration of Rights, the English Bill of Rights, The Virginia Declaration of Rights, and ultimately the Eighth Amendment. *See Weems*, 217 U.S. at 349; *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal,*

Inc., 492 U.S. 257 (1989); *Bajakajian*, 524 U.S. at 321, 336; *Timbs*, 139 S.Ct. at 687–88.

That history is instructive here. It shows that although the right to be free of excessive fines is ancient, governments—whether through king or court or legislature—have often yielded to the temptation to abuse their power to levy fines as criminal punishments. Whether to raise revenue, punish political enemies, chill dissent, or any combination thereof, the government's imposition of excessive fines tugs at liberty's looser threads, fraying the whole of the garment. *Timbs*, 139 S.Ct. at 689. The guarantee against excessive fines has provided a check against governmental overreach for forty generations. *See Id*. (observing "the protection against excessive fines has been a constant shield throughout Anglo-American history").

The Appellants here are the living heirs to that legacy; and the fundamental principles of fairness regarding excessive fines and government power that have been bequeathed to them merit consideration.

A. Magna Carta

Justice Ginsburg began her history of the Excessive Fines Clause by stating that "[t]he Excessive Fines Clause traces its venerable lineage back to at least 1215 . . . ." *Id.* at 687. She, along with her colleagues and constitutional historians, have

pointed to Magna Carta's Amercement's Clause as the first written protection against excessive financial penalties:

> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage.

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

Nineteenth-century English legal historian F.W. Maitland emphasized the Clause's significance to King John's subjects, writing, "very likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L. Q. 833, 854 (2013) (internal citations omitted). Justice Blackmun, writing for the Court in *Browning-Ferris*, expanded on this theme, highlighting the specific manner in which Magna Carta safeguarded English liberties:

> The barons who forced John to agree to Magna Carta sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown.
>
> The Amercements Clause of Magna Carta limited these abuses in four ways: by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; by requiring that the amercement not be so large as to deprive him of his livelihood; and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount.

Browning-Ferris, 492 U.S. at 270–71.

An amercement was a type of fine peculiar to feudal England; "a financial penalty assessed at the discretion of the party's peers for a wide variety for illegal conduct, both civil and criminal" and "payable to the crown or its representative, the feudal lord." Calvin R. Massey, *The Excessive Fines Clause & Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1251-52 (1987).

The legal theory of amercements was that "having committed some wrong, the offender was at the mercy of the crown" or "*in misericordia*." *Id*. at 1260. Thus, "the crown theoretically was permitted to deal with the offender in any fashion the crown desired." *Id.* at 1260-61; *see also*, John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 928-29 (2011) ("Theoretically, the king could demand all that the offender owned.").

Originally, amercements—which were involuntary assessments—were distinguished at law from "fines," which were negotiated voluntary payments to the crown to resolve a common-law crime. As Massey explains, "[t]he thirteenth-century judge could not impose a fine but could bargain with the culprit by accepting payment, or security for payment, of a sum sufficient to settle the matter." *Massey, supra* at 1261-62.

From its beginnings in Magna Carta, however, the protection from excessive fines evolved in fits and starts, with government abusing its power and the law responding to reassert the ancient right. For example, in the 14th century, the crown and its jurists routinely exploited the distinction between fines and amercements as a loophole to avoid Magna Carta's proportionality requirements. Stinneford, *supra* at 930. Thus, although a "fine" was nominally a negotiated settlement, because the king could order a person imprisoned and refuse to release him until he had paid some specified fine," there was—to put it mildly—an imbalance in bargaining power. *Id.* at 930-31. Fines therefore "ceased to be voluntary and replaced amercements as the predominant form of criminal punishment." *Id.* But as fines supplanted amercements, English law adjusted, recognizing that the line that had existed between fines and amercements had largely dissolved. Amman, *supra* at 213 (citing 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (17th Ed., London 1817) at 126b).

Still, from its inception in 1215, the protection from excessive fines embraced two complementary ideas, both still vital today. The first is that a financial punishment must be proportional to the wrong it purports to punish. *See Timbs*, 139 S.Ct. at 688 ("Magna Carta required that economic sanctions be proportioned to the wrong"); *see also* Stinneford, *supra* at 931 ("Magna Carta's prohibition against excessive amercements came to embody the broader principle that governmental

power to punish should be limited by customary notions of proportionality.") Second, under the principle of *salvo contenemento*, no fine should be so great as to deprive a person of their livelihood or ability to support themselves. *See Id. at* 688. (Magna Carta required that economic sanctions "'not be so large as to deprive [an offender] of his livelihood.'") (quoting *Browning-Ferris*, 492 U.S.at 271); *see also*, Massey, *supra* at 1259-1260. Yet despite its canonical status in English law, later royal abuses, most notably throughout the seventeenth century required Englishmen to continue to reassert their right to freedom from excessive fines against government overreach.

B. The Star Chamber

The Court of the Star Chamber looms large in Anglo-American jurisprudence as an example of "brutality, abuse of power, oppressive state might overpowering the helpless individual, and persecution." Frank Riebli, *The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence*, 29 HASTINGS CONST. L.Q. 807, 808 (2002). Although historians have, in part, debunked the Star Chamber's brutal reputation, pointing out that this view largely grew out of its abuse at the hands of Charles I, the Star Chamber has nevertheless "become a synonym for secrecy, severity, and extreme injustice." Daniel L. Vande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326 (2010).

Whatever virtues the Star Chamber may have possessed in its early years, Charles I's abuses and Parliament's reaction to them figure into the history of the Excessive Fines Clause. Beginning in 1629, Charles I sought to govern without convening Parliament, and thus without Parliamentary appropriations. The Star Chamber therefore provided a convenient means for Charles I to fund his government without seeking appropriations from Parliament. The Star Chamber's jurisdiction was "often extended . . . often on the Court's own initiative." *Id.* at 333. Moreover, "the Star Chamber was consistently comprised of the king's closest advisors" and was "therefore always subject to direct rule by the reigning monarch." *Id.* The predictable result was that the Star Chamber "'imposed heavy fines on the king's enemies' in disregard 'of the provision of the Great Charter'" and that "'[t]he strong interest of [the Star Chamber] in these fines . . . had tendency to aggravate the punishment.'" *Timbs*, 139 S. Ct. at 694 (internal citations omitted).

Parliament responded by abolishing the Star Chamber in 1641 and "specifically prohibit[ing] any court thereafter from . . . levying . . . excessive fines." *Id.*; *see also*, Massey, *supra* at 1253 ("Courts were specifically forbidden from following [the Star Chamber's] practices—including the levying of excessive fines."). Parliament's leader, Oliver Cromwell, ultimately responded by launching a Civil War that would cost Charles I his head. In the decades following the Star Chamber's abolition, some common law courts had recognized the applicability

of Magna Carta's amercement provisions to fines imposed by courts. *See, e.g.*, *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C.P. 1677) (North, C.J.) ("In cases of fines for criminal matters, a man is to be fined by Magna Charta with a *salvo contenemento suo*; and no fine is to be imposed greater than he is able to pay[.]").

But despite Parliament's injunction, court acceptance of Magna Carta's principles, and Charles I's cautionary tale, following the Restoration, "Charles II's judges ignored the limitations and imposed 'ruinous fines' on the King's critics." *Id.* The fines were so severe that in 1680, the House of Commons charged a committee with examining "the transcripts of all the fines imposed in King's Bench since 1677." *Timbs*, 138 S. Ct. 694; *see also* Massey, *supra* at 1253. The committee found that "the judges had acted 'arbitrarily, illegally, and partially' in imposing fines." Massey, *supra* at 1253-54. The committee's findings, however, did not deter these abuses and "[d]uring the final years of Charles II's reign, the situation deteriorated further" and "fines became even more excessive and partisan." *Id.*; *Timbs*, 139 S. Ct. at 694. "Judicial rulings that the Magna Charta provided no protection against fines imposed for offenses against the king" made matters even worse. Massey, *supra* at 1254. Most notably, the infamous Judge George Jeffreys held that "Magna Carta did not apply to fines for offenses against the Crown." *Browning-Ferris*, 492 U.S. at 290 (O'Connor, J., concurring in part and dissenting

in part). Thus, "[b]y the Glorious Revolution, James II's judges had determined that the Magna Charta afforded no protection whatsoever from fines, whether imposed for official misconduct or otherwise." Massey, *supra* at 1263. These rulings further enflamed existing religious and civil strife and set the stage for the larger legal and political revolution to come. *Id.* at 1254, 1263.

C. The Glorious Revolution and the English Bill of Rights.

The tumultuous reign and eventual abdication of James II took place against the backdrop of the religious enmity between Protestants and Catholics. England's largely Protestant subjects feared "Catholic tyranny or 'popery,' then identified with . . . [France's] Louis XIV." Bessler, *supra* at 1000-04. In 1688, seven Protestant nobles invited William, Prince of Orange, to leave his native Holland and invade England in order to restore "the Lawes and Liberties of England." *Id*. at 1002. The invitation stated that "the people are generally dissatisfied with the present conduct of the government, in relation to their religion, their liberties and properties (all of which have been greatly invaded.)" *Id*. William accepted the invitation with a declaration recognizing that James II's "evil counsellors" had acted in violation of Magna Carta and had subjected the subjects of the realm to 'despotic power' and 'arbitrary government.'" *Id*. at 1004. When William landed in England, James II's army deserted, and James fled to France. *Id.* A special Convention Parliament convened to address the crisis and "draft articles concerning essential laws and

liberties that would be presented to William of Orange." *Browning-Ferris*, 492 U.S. at 290-91 (O'Connor, J., concurring in part and dissenting in part).

That Convention Parliament accepted William and his Queen, Mary, as their new monarchs, but spelled out its conditions and expectations of the new monarchy in the English Declaration of Rights. Once again, the ancient right to be free from excessive fines figured prominently, with the "final version of the Declaration of Rights—the one presented to Prince William and Princess Mary on February 13 [1689]—listed, among [its] thirteen grievances, that 'excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects'; 'excessive fines have been imposed'; and 'illegal and cruel punishments inflicted.'" Bessler, *supra* at 1008. By accepting the crown, William formally acknowledged the rights set forth in the Declaration. Massey, *supra* at 1244.

In the months that followed, cognizant of how prior governments had avoided or ignored Magna Carta's guarantee against excessive fines, Parliament worked to codify its Declaration, enacting The English Bill of Rights on December 16, 1689. Like the Declaration of Rights, the English Bill of Rights recited the citizenry's grievances against James II and his ministers, noting that "excessive Fines have been imposed." *Id.* at 1010. The English Bill of Rights then set forth its guarantee against excessive fines in now familiar language: "Excessive Bail ought not to be required,

nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689).

D. Colonial America and the Early Republic

As Justice Ginsburg explains, "[a]cross the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" *Timbs*, 139 at 688; *see also*, *Browning-Ferris*, 492 U.S. at 266–68 ("As we have noted in other cases, it is clear that the Eighth Amendment was 'based directly on Art. I, § 9, of the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.'") (internal citations omitted).

The American colonists were not strangers to financial penalties for criminal acts, fines being "among the most prevalent forms of punishment in colonial America." Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 303 (2014). In fact, because of their ubiquity and potential for abuse, the colonists had already incorporated protections against excessive fines in their colonial documents and early constitutions. *See*, *e.g.*, Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682), in 5 Federal and State Constitutions 3061 (F. Thorpe ed. 1909) ("[A]ll fines shall be moderate, and saving men's contenements, merchandize, or wainage.").

The most influential of these colonial proclamations was the Virginia Declaration of Rights, drafted in 1776 by George Mason. In that year of crisis, Mason was clear that Virginians were asserting the rights that Englishmen had guarded across the centuries: "We have received the ancient constitutional and common-law rights of Englishmen from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity." Massey, *supra* at 1242 (quoting 1 The Papers of George Mason 288 (R. Rutland ed. 1970) at 65). His view of the colonists' birthright was nothing new. A decade earlier, in 1766, Mason had asserted that the colonists "claim Nothing but the Liberty & Privileges of Englishmen, in the same degree, as if we had still continued amount our brethren in Great Britain." *Id.*

Consistent with his aim of securing the long-acknowledged rights of Englishman for Virginians, Mason adopted the English Bill of Right's excessive fines clause verbatim. Other states followed Virginia's example, and "by 1787, the constitutions of eight States—accounting for 70% of the U.S. population—forbade excessive fines." *Timbs*, 139 S. Ct. at 688 (citing Steven G. Calabresi, Sarah E. Agudo, & Kathyrn L. Dore, *State Bills of Rights in 1787 and 1791*, 85 S. CAL. L. REV. 1451, 1517 (2012)). Further, the confederation government included the protection from excessive fines in the 1787 Northwest Ordinance. Massey, *supra* at 1241.

When the Eighth Amendment was considered, "there was little debate over the excessive fines clause in the First Congress," suggesting "an uncritical attitude by the congressional authors toward the excessive fines clause." *Id.* The Framers, however, in creating a new nation, did not rely solely on the reassertion of hereditary privileges. Scholars have noted that while "the American Revolution was in origin a protest against English oppression, the Bill of Rights has a much broader scope; it is in essence 'a criticism of general feudal arbitrariness.'" Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 806 (1975). Thus, the Framers drew from "the political and social ideas of the European Enlightenment, together with the American experience" to form "the underlying rationale for the Bill of Rights—the protection of the private realm against governmental power." *Id.*

Particularly, the Framers looked to the works of Montesquieu and Cesare Beccaria. Montesquieu and Beccaria both argued "that any punishment not derived" from "necessity" (or "absolute necessity," as Beccaria put it) is "tyrannical." Bessler, *supra* at 999. These ideas "materially shaped Anglo-American views in the decades to come." *Id.* For example, in his treatise *On Crimes and Punishments* Beccaria laid out the philosophical framework that would be eventually adopted in the Supreme Court's Eighth Amendment jurisprudence:

> Beccarria began by analyzing the origin of penalties and the right of punishment. Employing Rousseau's social contract theory, Beccaria agreed that men, in forming their society, yielded the least possible portion of their individual liberty in exchange for peace and security. Therefore, "[p]unishments that exceed what is necessary to preserve the deposit of the public safety are in their nature unjust." A consequence of this principle was that if it were possible to prove that the severity of a punishment did not add to its utility, it would be contrary to justice and the social contract to retain such a punishment.

Schwartz & Wishingrad, *supra* at 809; *see, e.g.*, *Ullmann v. United States*, 350 U.S. 422, 452–53 (1956) (acknowledging Beccaria's influence).

In Beccaria's words, "[f]or a punishment to attain its end, the evil which it inflicts has only to exceed the advantage derivable from the crime . . . . All beyond this is superfluous and for that reason tyrannical." *Id.* (citing C. BECCARIA, ON CRIMES AND PUNISHMENTS (W. Paolucci transl. 1963). This principle of proportionality—the commonsense notion that the punishment ought to fit the crime—is the same principle that the barons included in Magna Carta's Amercements Clause. It is also the same principle that has guided the Supreme Court's Eighth Amendment jurisprudence. *See Bajakajian,* 524 U.S. at 333 ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality"); *Solem v. Helm*, 463 U.S. 277, 289 (1983) (noting all punishments subject to proportionality analysis); *Timbs*, 139 S. Ct. at 690 ("all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality.").

II. The Excessive Fines Clause is Relevant Here

History records the clashes of kings and parliaments, suppression of dissenting religious sects, secretive court proceedings not bound by law, the tyranny of the Stuart monarchs, and the Framers' attempt to meld established English rights and Enlightenment ideas to create a new nation. This case, in contrast, involves a dispute over landscaping. But "a principle, to be vital, must be capable of wider application than the mischief which gave it birth." *Weems*, 217 U.S. at 373.

Writing for the Court in *Weems*, Justice McKenna explained why the Eighth Amendment principles born at Runnymede must apply with equal or greater force today. His eloquent discussion merits quoting at length:

> But surely [the Framers] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history.
>
> We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty,' because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.

Weems, 217 U.S. at 371–73.

A. *Salvo Contenemento*

Here, the City of Columbus' purpose may well be an honest effort to maintain aesthetically pleasing and historically accurate neighborhoods. But regardless of its motives, the City, like any government, faces the perennial temptations to "correct" dissenters and raise revenue. It is unclear from the record exactly what fine the City might seek to impose. Deposition testimony indicates that it could range anywhere between $100 and $1,000 per day. (*See* Deposition of Heather Truesdale, 12/17/2020, ECF No. 46 at 22). It is the very ambiguity in this fine, however, and the City attorney's discretion to choose the fine to be assessed, that intrudes on the Appellants' liberty. A fine that can range between zero and $365,000 a year—up to nearly a million dollars may have already accrued—resembles the amercements of old that held a subject's entire estate at the mercy of the king. Here, the maximum fine would effectively rob the Appellants of their right to *salvo contenemento*—it would far exceed the value of the property. *See* McLean, *supra* at 863 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES, 372 (Univ. of Chi. Press ed. 1979) ("[*Salvo contenemento*] means only that no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear: saving to the landholder his contenement . . . .")).

Although the City has argued that it has not yet attempted to impose a fine, the potential for such a fine, as Justice Ginsburg noted, impairs Appellants' liberties. Simply put, when faced with the choice of complying with a government edict regarding landscaping or facing a potentially crippling fine by choosing to assert one's rights in court, most would accede to the government's demands. The threat of fines which could easily exceed the value of the underlying property creates a chilling effect. Indeed, the potential for the government to exact significant penalties for a trivial offense based on aesthetic preference is exactly the type of "coercive cruelty" that *Weems* warned of and speaks to the government's intrusion into the small, otherwise private aspects of citizens' lives.

B. The Proportionality Principle

The second principle transmitted from the Magna Carta to the Eighth Amendment is proportionality. "The "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. While courts typically "know it when they see it," scholars have set forth a commonsense test for proportionality based on the different theories of punishment:

> From a retributive point of view, a punishment is proportionate to the offense if it matches the offender's moral culpability or desert. From a deterrent point of view, a punishment is proportionate if the cost it imposes on the offender and on society is equal to or less than the cost it saves by deterring others from

> committing crime. Incapacitation is based upon the same basic calculus, but it compares the cost of punishment to the harm prevented by depriving the specific offender of the opportunity to commit crime. Finally, a punishment is proportionate as a matter of rehabilitation so long as it decreases the risk that the individual will reoffend once the punishment is finished.

Stinneford, *supra at* 916.

Courts have typically tested excessiveness (proportionality's opposite) "in relation to the characteristics of the offense, not in relation to the characteristics of the offender." *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1311 (11th Cir.1999) (relying on *Bajakajian*). Here, the proportionality of the potential fine—whether imposed under a retributive, deterrent, incapacitative, or rehabilitative rationale—is not apparent. There is no principle for retributive justice that would justify crippling fines for the failure to obtain the proper permit. The garden has harmed no one, and there is no element of restitution here. The garden is not an eyesore or contributing to blight. Indeed, reasonable people might view the terraced garden as an improvement of the muddy hill that preceded it. There is no element of restitution here, as no one has suffered any harm. Yet the Appellants face ever-growing fines that could easily exceed the property's value simply because they installed a terraced garden on their own property without the government's prior approval. By any yardstick, the fines levied are vastly disproportional to the "crime" alleged.

Since the garden does no harm, the government's rationale in threatening massive fines seems to be deterrence. It seeks to dissuade others who might ignore or violate the City's ordinances governing neighborhood aesthetics. But the danger posed by the excessive fine in this case is that its disproportionality deters the exercise of other liberties. *See Timbs*, 139 S.Ct. at 689. The disproportionality allows the government to wield nearly complete power over the small, the private, and the seemingly trivial aspects of people's lives. The effect is even more pernicious where—as here—the government purports to impose an ongoing daily penalty on citizens while they seek redress in the courts. The message conveyed by the "potential fine" is clear: If you challenge the government, you do so at significant financial peril.

Without doubt, the City has the authority to levy fines to compel compliance with its ordinances. But in this case, the Appellants have challenged the validity of the City's ordinance and the edict imposed under it. They have sought to vindicate their rights in court. Simply put, the ordinance's potential fines, the City's discretion in seeking those fines, and the resulting chilling effect on citizens' rights to challenge what they view as arbitrary government actions are out of proportion to any danger posed by a terraced garden. Likewise, it seems unlikely that the Appellants' choice to maintain their landscaping while challenging the ordinance in federal court will sow public disorder or disrespect for the law. On the contrary, their challenge to the

ordinance and the significant financial penalties it carries would place them in the company of the men and women who, since 1215, have preserved Anglo-American liberties by asserting their right to be free from excessive fines.

CONCLUSION

For all the foregoing reasons, the district court's decision should be REVERSED.

Respectfully submitted,

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November 5, 2021.

CERTIFICATE OF COMPLIANCE

Federal Rules of Appellate Procedure
Appendix 6

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Amicus Brief was served on all counsel of record via the Court's electronic filing system this 5th day of November, 2021.

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