CONFLICTING PARAMETERS OF CODE ENFORCEMENT FINES AND LIENS PURSUANT TO CHAPTER 162 OF THE FLORIDA STATUTES, *TIMBS*, AND THE EIGHTH AMENDMENT: HOW MUCH IS TOO MUCH?

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It's the Code Violation, Stupid.[1]

I. INTRODUCTION

Real property owners in violation of local government code provisions are strictly liable and are subject to fines and penalties on a per diem basis until compliance occurs.[2] Code violations "run with the land," making current owners responsible for bringing the property into compliance regardless of who caused the violation on the real property.[3] Once you become the owner of real property by transfer or sale, the new owner assumes the prior owner's benefits,

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1. "It's the economy stupid" was a phrase coined by James Carville in 1992, when he was advising Bill Clinton in his successful campaign for the Presidency. Since then, the phrase has served to highlight dissatisfaction with not only the economy, but also political matters, governance, and in efforts to find accountability and a framework in correcting problems. *It's the Economy Stupid*, POL. DICTIONARY, https://politicaldictionary.com/words/its-the-economy-stupid/ (last visited Jan. 28, 2023).

2. FLA. STAT. § 162.09 (2022); *see also* Harry M. Hipler, *Do Code Violations and Liens Run with the Land? Carving out a Changing Landscape to Section 162.09(3), Florida Statutes, with Enactment of Section 723.024, Florida Statutes, Mobile Home Park Lot Tenancies*, 22 BARRY L. REV. 157, 158 (2017).

3. Henley v. MacDonald, 971 So. 2d 998, 1000 (Fla. 4th Dist. Ct. App. 2008) (citing Monroe County v. Whispering Pines Assocs., 697 So. 2d 873, 875 (Fla. 3d Dist. Ct. App. 1997)); *see also* City of Gainesville Code Enf't Bd. v. Lewis, 536 So. 2d 1148, 1150 (Fla. 1st Dist. Ct. App. 1988).

as well as the burdens that require, including correcting any existing code violations.[4] These fundamental principles have been adopted by chapter 162 of the Florida Statutes and Florida case-law.[5]

Most code violations are ultimately concluded with voluntary compliance and payment by its owners of fines and liens that are imposed by local governments, yet local governments strive to collect millions of dollars in code enforcement fines and liens.[6] However, local government code violations resulting in fines have been known to substantially grow until compliance occurs, because imposing fines on a per diem basis is permitted by chapter 162 of the Florida Statutes until a real property owner complies and remedies code violation orders on his or her real property.[7] It is the current real property owner who is liable for the accrued fines until compliance has occurred and payment is made.[8]

Code violations take time to correct. There are financial costs sustained by the real property owner to obtain compliance. The main question after compliance occurs is how much is owed on account of the accrued and aggregated fines, and if that amount is substantial, may a real property owner ask for and receive a reduced fine?[9] If a reduction of a fine and lien may be requested,

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4. *See Whispering Pines Assocs.*, 697 So. 2d at 875.

5. *See generally* FLA. STAT. § 162; *see also* Harry M. Hipler, *Special Magistrates in Code Enforcement Proceedings: Local Government Agents or Arbiters of Fairness and Justice?*, 38 STETSON L. REV. 519, 520 (2009).

6. *See* Brian Ballou, *South Florida Cities Struggle to Collect Millions in Code Enforcement Fines*, S. FLA. SUN-SENTINEL (July 10, 2016), https://www.sun-sentinel.com/local/broward/fl-davie-lien-amnesty-program-20160710-story.html; Elizabeth Linos et al., *Nudging Early Reduces Administrative Burden: Three Field Experiments to Improve Code Enforcement*, 39 J. POL'Y ANALYSIS & MGMT. 243, 243–65 (2019).

7. *See* Harry M. Hipler, *Do Code Enforcement Violations Run with the Land? Competing Interests of Local Governments and Private Parties and Their Constitutional Considerations in Code Enforcement Proceedings*, 43 STETSON L. REV. 257, 264, 294 (2014); FLA. STAT. § 162.09(3) (providing that a certified copy of an order imposing a fine, once recorded, constitutes a lien "against the [real property] on which the violation exists and upon any other real and personal property owned by the violator"); *see also* FLA. STAT. § 162.10 (the duration of a lien is no more than twenty years after a certified copy of an order imposing fine and lien is recorded); Riviera Beach v. J & B Motel Corp., 213 So. 3d 1102, 1103 (Fla. 4th Dist. Ct. App. 2017).

8. *See supra* note 4. Mobile home park lot tenancies are the lone exception to strict liability of the owner since Florida Statutes section 723.024 bifurcates liability between a mobile homeowner and a mobile home park in specified circumstances. FLA. STAT. § 723.024(2) (2022).

9. *See* FLA. STAT. § 162.09(2)(c) (explaining there is no right for a reduction of a fine and lien, and unless the local government provides for a procedure, the owner remains strictly liable for the fines and lien); *see also* Hipler, *supra* note 7, at 264, 294–95. Yet many local governments have developed procedures where an owner may request a reduction of a

may a Special Magistrate or Code Enforcement Board consider whether a reduction of a fine and lien is appropriate?[10] Are local governments statutorily required to reduce fines and liens if requested by an owner, or is reduction discretionary with the local government? Are there state constitutional amendments that need to be considered to determine whether the fines and liens are excessive and oppressive that might result in a finding that the fines and liens run afoul of the Eighth Amendment Excessive Fines Clause of the United States Constitution, and article I, section 17, of the Florida Constitution? While federal and state constitutional provisions have adopted words and phrases that appear to clearly prohibit excessive fines,[11] has the question of the size of fines and liens been constitutionality determined, or has it been left to the legislature and local governments to decide what is and is not an excessive fine after considering uniform standards, a ratio, or a mathematical bright line?

The expression, "the devil is in the details"[12] does not apply to the Eighth Amendment Excessive Fines Clause of the United States Constitution or article I, section 17, Florida Constitution as there are no details provided in the wording of these constitutional amendments, nor has the Court in its latest ruling on the

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fine and lien that grants the Special Magistrate or Code Enforcement Board discretionary authority to reduce fines and liens pursuant to chapter 162 Florida Statutes. The reader may wish to google "reduction of code enforcement fines in Florida" or some such similar words to determine what procedure, if any, that each local government may have for a reduction of fines and lien process.

10. For purposes of determining code enforcement violations and an assessment of a fine and lien, it is a Special Magistrate or Code Enforcement Board that decides these issues in each local government after staff reviews a request and makes a recommendation. FLA. STAT. § 162.03(2). Most local governments use Special Magistrates; therefore, this Article will use quasi-judicial officer or body or Special Magistrate or Code Enforcement Board as the assigned quasi-judicial body that considers reductions of fines in quasi-judicial proceedings. *See* FLA. STAT. §§ 162.04–.05.

11. The Eighth Amendment of the United States Constitution provides that: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" and is a template for art. I, section 17, Florida Constitution, which similarly provides in pertinent part: "[e]xcessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden." U.S. CONST. amend. VIII; FLA. CONST. art. I, § 17. Florida's constitutional provision follows the exact wording of the Eighth Amendment of the Constitution and strictly prohibits "excessive fines." FLA. CONST. art. I, § 17.

12. There are numerous reports on the origin of "the devil is in the details." One comes from German poet and philosopher Friedrich Wilhelm Nietzsche (1844–1900). This phrase has been attributed to him. The philosopher penned the quote, "Der Teufel stecktim Detail." This phrase translates to English as, "the devil is in the details." Danielle McLeod, *The Devil Is in the Details – Origin & Meaning*, GRAMMARIST, https://grammarist.com/words/devil-is-in-the-details-vs-god-is-in-the-detail/ (last visited Feb. 26, 2023).

Excessive Fines Clause in *Timbs v. Indiana*[13] specifically provided uniformity, a ratio, or criteria on what may or may not be an Excessive Fines Clause violation. Instead, the United States Supreme Court in *Timbs* emphasized the importance of the Excessive Fines Clause, which is part of the Bill of Rights, that appears to leave it open to the legislature and ultimately the courts to decide how much is too much by having a fact-intensive analysis as to what may or may not constitute a violation of the Excessive Fines Clause.[14]

Chapter 162 of the Florida Statutes permits local governments the right to assess per diem fines in unlimited amounts by a Special Magistrate and Code Enforcement Board that is authorized to determine the amount of a per diem fine, and upon compliance with code violations, these quasi-judicial bodies may determine whether per diem fines that are merged into a cumulatively assessed fine should be sustained or reduced.[15] This is permitted on account of chapter 162 of the Florida Statutes, which permits per diem fines to accrue without any limit on a fine's ultimate size, no matter the actual damages, harm, and severity to the local government and its attendant neighborhood, without regard to fault or cause, or the actual violations' impact on third parties.[16]

The size of a fine that has substantially grown should matter in light of *Timbs v. Indiana*.[17] While some real property owners can pay any amount of an aggregated fine assessed upon compliance, many owners will find the amount aggregately assessed unaffordable and excessive to pay, even if that fine is substantially reduced, which should make the Eighth Amendment Excessive Fines Clause of the United States Constitution and article I,

13. *See* 139 S. Ct. 682, 686–87 (2019).

14. *See id.* at 698. Although *Timbs* has been hailed by some as a defining moment that would resist abusive fines, the decision fails to provide any precision on exactly how lower courts should determine whether a fine is "excessive," leaving that question for legislatures and lower courts to decide. *See id.*; Wesley Hottot, *What Is an Excessive Fine? Seven Questions to Ask After* Timbs, 72 ALA. L. REV. 581, 590 (2021); Matthew S. Krsacok, *Excessive to Whom?: Why Courts Should Adopt a Means-Based Proportionality Framework Under the Excessive Fines Clause*, OHIO ST. U. DEPC STUDENT PAPER SERIES, Mar. 2020, at 1,1; Daniel S. Harawa, *How Much Is Too Much?: A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 68 (2020).

15. *See* FLA. STAT. § 162.09(2)(c); Op. Att'y Gen. Fla. 2002-62 (2002); Op. Att'y Gen. Fla. 98-50 (1998); City of Miami v. Cortes, 995 So. 2d 604, 605 (Fla. 3d Dist. Ct. App. 2008).

16. FLA. STAT. § 162.09; *see supra* notes 2, 8.

17. *Timbs*, 139 S. Ct. at 682.

section 17 of the Florida Constitution applicable to control local governments from maintaining carte blanche authority to impose any fine they may deem appropriate.[18]

This Article discusses code enforcement fines and liens imposed in quasi-judicial code enforcement proceedings as it relates to the Excessive Fines Clause and article I, section 17 of the Florida Constitution. This Article also discusses the state of the law on whether a fine's aggregate size matters when local governments' Special Magistrates and Code Enforcement Boards impose fines and liens in light of decisions by the Court, lower federal courts, and Florida state court decisions before and after *Timbs*,[19] which ratified and incorporated the Excessive Fines Clause into the Fourteenth Amendment of the United States Constitution.[20] After discussing past and present federal and Florida state court decisions, this Article concludes with an epilogue of what the legislature, local governments, and ultimately the courts should do if they wish to comply with the Excessive Fines Clause and its state counterpart, article I, section 17 of the Florida Constitution in light of *Timbs*, which suggests that substantial aggregated fines and liens may constitute a violation of the Excessive Fines Clause if they are found to be out of accord with the penal goals of retribution and deterrence of future violations and if they act as punitive economic sanctions that include a substantial source of revenue and financing to local governments.[21]

II. HISTORY OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Eighth Amendment of the United States Constitution bans the federal government from imposing excessive bail, *excessive fines*, or cruel and unusual punishments.[22] This

18. *See* Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 202 (2016); Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 15–18 (2018); Nathaniel Sherman, *Hands off My* Timbs*: An Overview of the Methods and Misuses of Civil Forfeiture as a Tool of Law Enforcement*, 8 BELMONT L. REV 652, 665 (2021); Murat C. Mungan & Thomas J. Miceli, *Legislating for Profit and Optimal Eighth-Amendment Review*, 59 ECON. INQUIRY 1403, 1403–04 (2021).

19. *See infra* notes 157, 164, 198, 223, 250.

20. *See Timbs*, 139 S. Ct. at 687.

21. *Id.* at 689; *see also supra* note 17.

22. *Timbs*, 139 S. Ct. at 687.

amendment was adopted on December 15, 1791, along with the rest of the United States Bill of Rights. The phrases in this amendment originated in the English Bill of Rights of 1689.[23] The Excessive Fines Clause may also trace its heritage to the Magna Carta, which required that economic sanctions be proportioned to the violation.[24] For years, the Eighth Amendment applied solely to the power of those entrusted with criminal law to impose punishments, although that view has been questioned.[25] The Supreme Court has acknowledged that the Excessive Fines Clause not only applies to criminal proceedings but also applies to administrative and civil proceedings where fines and forfeitures have been assessed as punishment.[26]

The Eighth Amendment's use of the clause, "nor excessive fines imposed," has nearly become synonymous with the "cruel and unusual punishments" clause by some courts[27] in attempting to

23. *Id.* at 687–88; *see also* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 989 (2019) (explaining that the history of the Eighth Amendment dates back to England's Glorious Revolution of 1688–89 and section 10 of the English Bill of Rights, which became a model for similarly worded provisions in early American constitutions and declarations of rights that were linguistic forerunners of the Eighth Amendment that was ratified in 1791).

24. *See Timbs*, 139 S. Ct. at 687.

25. *See* Ingraham v. Wright, 430 U.S. 651, 666–67 (1977) (holding that the Eighth Amendment deals only with criminal punishment and has no application to civil processes). For an article about why *Ingraham* needed to be questioned, see Andrew M. Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987). Perhaps what may be accurate is that "cruel and unusual punishments" may be applicable to criminal violations, and on the other hand, "nor excessive fines imposed," may be applicable to criminal and civil violations. *See infra* notes 27–28.

26. As noted in Hudson v. United States, 522 U.S. 93 (1997), the Eighth Amendment also protects against excessive civil fines. In addition to monetary payments, the Excessive Fines clause applies to forfeitures of property. *See* Austin v. United States, 509 U.S. 602, 621 (1993); United States v. Bajakajian, 524 U.S. 321, 333–34 (1998); *Timbs*, 139 S. Ct. at 690. Thus, the Excessive Fines Clause applies to forfeitures of property as well as monetary payments. *See Bajakajian*, 524 U.S. at 328; *Timbs*, 139 S. Ct. at 690.

27. The clauses in the Eighth Amendment, "cruel and unusual punishments" and "nor excessive fines imposed," have been consolidated and lumped together collectively by some courts. *See* Cotton v. State, 198 So. 3d 737, 741–42 (Fla. 1st Dist. Ct. App. 2016) ("[A] statutorily authorized civil fine will not be deemed so excessive as to be cruel or unusual unless it is so great as to shock the conscience of reasonable men or is patently and unreasonably harsh or oppressive.") (citing Locklear v. Fla. Fish & Wildlife Conservation Comm'n, 886 So. 2d 326, 329 (Fla. 5th Dist. Ct. App. 2004). By lumping together both clauses of the Eighth Amendment, courts borrow principles used in criminal violations where they apply "cruel and unusual punishments" to noncriminal matters. Thus, when the phrase " cruel and unusual punishments" is applied to noncriminal violations rather than "nor excessive fines imposed" which should be applied to noncriminal violations, courts unfortunately blur the distinction between these two separate phrases involving different standards; this makes it more difficult for a civil fine to be found in violation of the Excessive

decide whether the Eighth Amendment limits the government's power to obtain excessive payments in cash or kind as punishment for an offense and under what circumstances.[28] In further support of the historical incorporation of the Eighth Amendment of the Constitution into the Fourteenth Amendment that was made applicable to the states in *Timbs*, nearly all states have a counterpart in their respective state constitutions that provides that excessive fines are constitutionally impermissible, including Florida.[29] The United States Constitution's Excessive Fines Clause became a template for Florida's Constitution by way of article I, section 17.[30]

Fines Clause involving a wrongdoer in a noncriminal matter, even though there should be less strict criteria applicable to noncriminal violations by the use of "nor excessive fines imposed." *See* Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture after* United States v. Bajakajian, 2000 U. ILL. L. REV. 461 (2000); Robert Brett Dunham, *The Cruel and Unusual Punishment and Excessive Fines Clauses*, 26 AM. CRIM. L. REV. 1617 (1989); Kathleen F. Brickey, *RICO Forfeitures as Excessive Fines or Cruel and Unusual Punishments*, 35 VILL. L. REV. 905 (1990).

28. *Timbs*, 139 S. Ct. at 687.

29. *Id.* at 688; Browning v. Angelfish Swim Sch., Inc., 1 So. 3d 355, 359–60 (Fla. 3d Dist. Ct. App. 2009).

30. The Eighth Amendment is a template for article I, section 17 of the Florida Constitution, and it similarly provides in pertinent part: "Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden." Florida's constitutional provision follows the wording of the Eighth Amendment of the Constitution and strictly prohibits "excessive fines." *See Browning*, 1 So. 3d at 360. Before *Timbs*, Florida state courts have taken the position that as long as the fine does not "shock the conscience" and it fell within the range of fines provided by statute, then it would pass constitutional muster. *See* Resort Timeshare Resales, Inc. v. Off. of Att'y Gen., 766 So. 2d 382 (Fla. 4th Dist. Ct. App. 2000); *Locklear*, 886 So. 2d 326. Language used by Florida courts—"shocking the conscience"—is a vague and ambiguous standard that leaves almost total discretion in the hands of the decision maker, which is the legislature. Ultimately the courts upon judicial review should make judicially independent decisions as it is a co-equal branch of government that is charged with determining the constitutionality of government action, *see* Marbury v. Madison, 5 U.S. 137 (1803), but courts have steadfastly deferred to the legislature on these matters, *see* State v. Jones, 180 So. 3d 1085 (Fla. 4th Dist. Ct. App. 2015); State v. Cotton, 198 So. 3d 737 (Fla. 2d Dist. Ct. App. 2016). Regardless, some Florida courts have decided to actually consider whether a fine is a violation of the Excessive Fines Clause and have suggested that a fine which is "grossly disproportional" to the wrongful misconduct is suspect and may be excessive, whereas those fines which are not "grossly disproportional" are constitutional. *See* Riopelle v. Dep't of Fin. Servs., Div. of Workers' Comp., 907 So. 2d 1220, 1223 (Fla. 1st Dist. Ct. App. 2005). The "grossly disproportional" standard has been presented without strict criteria, a formula, uniform standards, or a mathematical bright line leaving a violator subject to the whims of the legislature and ultimately the courts which have undermined meaningful judicial review of forfeitures and fines under the Excessive Fines Clause by deferring to the legislature. James J. Brennan, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551 (2004).

III. EVOLUTION OF UNITED STATES SUPREME COURT DECISIONS ON THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

In *Austin v. United States*,[31] a state court sentenced the petitioner on his guilty plea to one count of possessing cocaine with intent to distribute in violation of South Dakota law.[32] The United States filed an *in rem* proceeding in the district court against his mobile home and auto body shop under 21 U.S.C. § 881(a)(4) and (a)(7), which provided for the forfeiture of vehicles and real property used, or intended to be used, to facilitate the commission of certain drug-related crimes.[33] After losing in the lower federal courts, the Court held that civil forfeiture under § 881(a)(4) and (a)(7) is a monetary punishment and, as such, is subject to limitations imposed by the Excessive Fines Clause.[34] The Court stated that civil forfeiture of property is not restricted to criminal cases, but rather the Eighth Amendment applies to criminal and civil proceedings.[35] *Austin* emphasized that the central question is whether civil forfeiture is monetary punishment, with which the Excessive Fines Clause is concerned.[36] The Court stated that sanctions and penalties frequently serve more than one purpose, and if a civil *in rem* forfeiture serves remedial goals, then that will not exclude it from the Excessive Fines Clause if its objective in part is used to punish, which existed in *Austin*.[37] The Court did not rule out the possibility that the connection between the property and the offense may be pertinent to the measure of an *in rem* forfeiture's excessiveness, but it still concluded that the ruling did not limit the lower courts from considering other relevant factors in determining whether the forfeiture of the property was excessive and that a fact-intensive analysis was in order.[38]

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31. 509 U.S. 602 (1993).
32. *Id.* at 604.
33. *Id.* at 604–05.
34. *Id.* at 619–21.
35. *Id.* at 609–10
36. *Id.* at 610.
37. *Id.* at 621–22.
38. *Id.* at 622; *see* United States v. One Single Fam. Residence, 13 F.3d 1493 (11th Cir. 1994). This was an appeal of an *in rem* forfeiture under 18 U.S.C. § 1955. *One Single Fam. Residence*, 13 F.3d at 1494. Pursuant to the statute, the government sought forfeiture of real property that was used in an alleged gambling operation. *Id.* The owner contended that the forfeiture of the home was worth $150,000.00 and was a penalty for the underlying

In *United States v. Bajakajian*,[39] an immigrant and his family tried to fly from Los Angeles to Cyprus by way of Italy with $357,144 in their luggage to pay a debt.[40] The federal government sought forfeiture of the entire sum under the Bank Secrecy Act, which requires that all international money transfers exceeding $10,000 in value must be reported on a Currency and Other Monetary Instruments Report.[41] The Bank Secrecy Act also permitted forfeiture of "any property, real or personal" in cases of violations.[42] None of the money was determined to be connected with any other criminal action of the defendant, who was charged initially with lying to customs, which was later dropped.[43] The defendant pleaded guilty to failure to report and was tried in a bench trial on the civil forfeiture of the $357,144.00. The district court concluded that the forfeiture of the entire $357,144.00 was grossly disproportionate and in violation of the Eighth Amendment.[44] The court ordered forfeiture of $15,000 in addition to the maximum fine of $5,000 and three years of probation for failure to report the large amount of money in his possession.[45] The defendant could have been sentenced to a maximum time of six months of imprisonment, and a $5,000.00 fine by statute.[46] The Court, in a 5–4 majority opinion, decided that the asset forfeiture was unconstitutional as it was "grossly disproportional to the gravity of the defendant's offense" by relying on the Excessive Fines Clause.[47] *Bajakajian* was the first time the Court struck

gambling offense and was so grossly disproportionate that it violated the Excessive Fines Clause. *Id.* at 1498. The judgment of forfeiture against the owner was reversed, and the case was remanded for further proceedings to determine the proper proportionality of damages suffered by the government. *Id.* at 1499. "Examining this case through . . . *Austin*, and accepting the fact that [the owner] used his home for a gambling operation in violation of 18 U.S.C. § 1955, [the federal circuit court] conclude[d], under the particular facts of this case, that the forfeiture of his home, [with an estimated] value of $150,000.00, [constituted] a disproportionate penalty." *Id.* at 1498. The federal court suggested that the statute's history only applied to those who prey on others with syndicated operations of gambling and substantial sums of money on a continuous basis, not to sporadic incidents of gambling. *Id.* at 1498–99.

39. 524 U.S. 321 (1998).
40. *Id.* at 324–26.
41. *Id.* at 325.
42. *Id.*
43. *Id.* at 325–26.
44. *Id.*
45. *Id.* at 326.
46. *Id.* at 338.
47. *Id.* at 337–44.

down the federal government's disproportionate use of forfeiture,[48] and the only time it has held that a fine was unconstitutional under the Excessive Fines Clause.[49]

IV. PUNITIVE DAMAGES AND THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION: DOES IT APPLY?

The Eighth Amendment of the United States Constitution has been applied to criminal, civil, and administrative proceedings.[50] What about punitive damages awards in civil cases, which may be a form of a criminal/civil hybrid fine? In *Browning-Ferris Industries of Vermont., Inc. v. Kelco Disposal, Inc.*,[51] the Supreme Court held that the Excessive Fines Clause does not limit the award of punitive damages to a private party in a civil suit when the government has neither prosecuted the action nor has any right to receive a share of the damages.[52] The Court's opinion and Justice O'Connor's concurrence in part and dissent in part reviewed the history of the Excessive Fines Clause.[53] The Supreme Court concluded that both the Eighth Amendment and section 10 of the English Bill of Rights of 1689, from which it emanates, were intended to prevent the government from abusing its power to punish, and therefore the Excessive Fines Clause was intended to limit only those fines directly assessed by and payable to the government.[54]

While Supreme Court decisions after *Browning-Ferris Industries* have followed that decision, others have discussed punitive damages awards and the applicability of the Due Process Clause of the Fourteenth Amendment due to the Court's concern that violators of the private causes of actions are placed on notice of what may or may not be an excessive punishment that goes beyond the actual damages proved and awarded. In *BMW of North*

48. *See* Brent Skorup, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. CIV. RTS. L.J. 427, 430 (2012); Melissa A. Rolland, *Forfeiture Law, the Eight Amendment's Excessive Fines Clause and* United States v. Bajakajian, 74 NOTRE DAME L. REV. 1371, 1371 (1999).

49. *See* Rolland, *supra* note 49.

50. *See supra* notes 23–25.

51. 492 U.S. 257 (1989).

52. *Id.* at 264.

53. *See id.* at 264–75, 286–97.

54. *Id.* at 266–68.

America, Inc. v. Gore,[55] and *State Farm Mutual Automobile Insurance Co. v. Campbell*,[56] the Court considered whether punitive damages awards were "grossly excessive" in light of the compensatory damages award under the facts of each case.[57] In their respective rulings, the Court applied the Due Process Clause to the punitive damages award, but only if it can be reasonably characterized as "grossly excessive" in reference to the State's interest in punishing unlawful conduct and in deterring its recurrence.[58] The Court also discussed indicia of excessiveness and suggested that aggravating factors associated with a punitive damages award must be considered to determine if a punitive damages award is inexcusable as it relates to the violator's conduct, which includes the harm imposed on the economy, indifference or reckless disregard for the health, safety, and welfare of the public, and whether any nondisclosure of safety measures that needed to be used injured others.[59] The Court was also called upon to lay out criteria and a ratio between the compensatory and punitive damages, including costs incurred in making the condition satisfactory after an award is granted.[60] In its decisions, the Court suggested that there needs to be some uniformity and consideration of comparable misconduct by others before deciding whether a punitive damages award should be sustained or not.[61] The Court in *Gore* and *State Farm* accordingly set forth guidelines that should be considered in determining whether a punitive damages award was reasonable or excessive so that fundamental concepts of fairness are preserved under the Constitution and so that a violator is provided reasonable notice not only of the conduct that will subject a violator to punishment but also of the gravity of the penalty that a State may impose.[62] Yet, despite the Court's decision and its language, it refused to draw a constitutional bright line and provide a simple mathematical formula, when it stated "we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We

55. 517 U.S. 559 (1996).
56. 538 U.S. 408 (2003).
57. *Gore*, 517 U.S. at 562; *State Farm*, 538 U.S. at 416.
58. *See Gore*, 517 U.S. at 562; *State Farm*, 538 U.S. at 416.
59. *See Gore*, 517 U.S. at 575; *State Farm*, 538 U.S. at 418–19.
60. *Gore*, 517 U.S. at 575; *State Farm*, 538 U.S. at 418–19.
61. *Gore*, 517 U.S. at 575; *State Farm*, 538 U.S. at 418–19.
62. *Gore*, 517 U.S. at 575; *State Farm*, 538 U.S. at 418–19.

can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus."[63]

V. STATE COURT DECISIONS OF WHAT MAY CONSTITUTE A VIOLATION OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT: DOES IT MATTER IF THE UNDERLYING VIOLATION IS CRIMINAL OR CIVIL?

The Excessive Fines Clause has been applied to criminal and *in rem* civil forfeitures and fines, which are punitive and are used to obtain punishment even though the forfeitures are civil and remedial in purpose.[64] In *Department of Environmental Protection v. Zabielinski*,[65] the claimant "pled guilty to applying for title to a vessel using a false and fictitious name and a false and fictitious address in violation of section 328.05(3)(c), Florida Statutes (1995)."[66] "Thereafter, the Department of Environmental Protection brought a civil in rem forfeiture action seeking the forfeiture of the claimant's $60,000 vessel under section 932.701, Florida Statutes (1995), The Florida Contraband Forfeiture Act, and section 328.05(3)(c), Florida Statutes (1995)."[67] The question presented was "whether the forfeiture of the vessel valued at approximately $60,000, for violation of section 328.05(3)(c), Florida Statutes (1995), would violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution."[68] The district court of appeal found that the fine was a violation of the Excessive Fines Clause and, therefore, affirmed the circuit court's order granting summary judgment in favor of the claimant.[69] The district court of appeal discussed whether a civil forfeiture of the property valued at $60,000.00 was fine and concluded that it was, and then it determined that the fine was excessive and in violation of the Excessive Fines Clause.[70] The district court of appeal

63. *Gore*, 517 U.S. at 583.
64. *See supra* notes at 23–25.
65. 785 So. 2d 517 (Fla. 3d Dist. Ct. App. 2000).
66. *Id.* at 518.
67. *Id.* at 519.
68. *Id.*
69. *Id.*
70. *Id.* at 519–20. The district court of appeal further stated: "[I]n rem civil forfeitures which serve in part as punishment are subject to an Eighth Amendment excessive fines analysis." Town of Jupiter v. Garcia, 698 So. 2d 871, 871 (Fla. 4th Dist. Ct. App. 1997) (citing Austin v. United States, 509 U.S. 602, 610 (1993)); *see also* United States v. Bajakajian, 524 U.S. 321, 331 n.6 (1998) ("[M]odern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is

acknowledged that the legislative history provided little direction as to the legislature's intent after reviewing section 328.05(3), but found that it was at least partly punitive, thereby making it fall within the class of protected persons.[71] The district court of appeal discussed the policy of section 932.704(1), the Florida Contraband Forfeiture Act, which was to "deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners" and cited *Bajakajian*,[72] where the Supreme Court acknowledged that "[d]eterrence . . . has traditionally been viewed as a goal of punishment."[73] Therefore, because the forfeiture is punitive, the Excessive Fines Clause must be considered.[74]

The district court of appeal acknowledged that the State has an interest in ensuring that vessel registration records in the State of Florida are complete and truthful, but decided that forfeiture was not necessary to accomplish this deterrence goal and that forfeiture of a $60,000 vehicle was excessive.[75] The district court of appeal next considered whether the fine was excessive and relied upon the language used in *Bajakajian*, that a fine is considered excessive "if it is grossly disproportional to the gravity of a defendant's offense."[76] In light of the fine involved in *Zabielinski* was the forfeiture of a $60,000 vessel for violating section 328.05(3)(c), and that violating section 328.05(3)(c) was a third-degree felony that was punishable by imprisonment for less than five years and a maximum fine of $5,000, fraudulently registering

styled in rem or in personam."); *In re* One 1993 Dodge Intrepid, 645 So. 2d 551 (Fla. 2d Dist. Ct. App. 1994) ("[T]he Excessive Fines clause of the Eighth Amendment applies to forfeitures which are used to exact punishment notwithstanding the fact that the forfeitures are civil and remedial in purpose.") (citing *Austin*, 509 U.S. at 621–22); *see also In re* 1990 Chevrolet Blazer, 684 So. 2d 197 (Fla. 2d Dist. Ct. App. 1996), *review denied*, 695 So. 2d 699 (Fla. 1997) (applying the Excessive Fines Clause to civil forfeiture under the Florida Contraband Forfeiture Act).

71. *Zabielinski*, 785 So. 2d at 520.

72. *Id.*; *Bajakajian*, 524 U.S. at 329.

73. *Bajakajian*, 524 U.S. at 329.

74. *Zabielinski*, 785 So. 2d at 520.

75. *Id.* "There is no doubt that the State of Florida can accomplish its goal by temporarily seizing the vessel until the owner can establish that the vessel has been properly registered. Thus, this leads us to the conclusion that the forfeiture provision of section 328.05(3)(c) was enacted to either deter title fraud or to punish the vessel owner for the title fraud. As such, we find that section 328.05(3)(c) is not wholly remedial, but rather partly punitive and partly remedial in nature. Therefore, the Excessive Fines Clause is implicated." *Id.*

76. *Id.* at 520. In *Bajakajian*, the Court held that a fine is considered excessive "if it is grossly disproportional to the gravity of a defendant's offense." 524 U.S. at 334.

a vessel is not as serious of an offense as other offenses. Further, the vessel was valued at $60,000, which is more than eleven times the maximum fine that could have been imposed by statute for $5,000.00, and therefore, under the facts and circumstances of this case, the fine was excessive.[77]

In *Agresta v. City of Maitland*,[78] the Personal Representative ("PR") of the Estate of Joseph Farley questioned the forfeiture of a parcel of real property on constitutional claims by arguing that the forfeiture violated the Excessive Fines Clause.[79] Farley was convicted of growing cannabis, stealing electricity, and misdemeanor possession of cannabis, all of which occurred in his home.[80] The City brought a civil forfeiture suit against the home associated with the underlying marijuana operation under the Florida Contraband Forfeiture Act.[81] The circuit court granted final summary judgment in favor of the City and found that the property was both an instrumentality of the crime and that forfeiture was proportional to the offenses for which the owner was convicted.[82] The PR did not challenge the trial court's findings on the instrumentality test, but rather the PR only challenged the issue of proportionality.[83] The district court of appeal discussed Supreme Court decisions, especially *Austin*,[84] by analyzing whether the forfeiture was proportional or excessive to the violation, does the person fall into the class of persons to whom the violations are directed, whether there are other penalties, and any harm caused by the defendant's violations to the public at large.[85] The district court of appeal found that the forfeiture was excessive because Farley faced an eleven-year maximum sentence and an $11,000.00 maximum fine, while the value of the home that was sought to be forfeited was valued between $238,000 and $295,000.[86] Especially worth noting is that the district court of appeal had great difficulty in placing a monetary value on the harm that was done by Farley, and that there was no evidence that

77. *Zabielinski*, 785 So. 2d at 520.
78. 159 So. 3d 876 (Fla. 5th Dist. Ct. App. 2015).
79. *Id.* at 877.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 878.

Farley caused harm beyond the offenses underlying the defendant's convictions.[87] Of importance as well was that the legislature provided a maximum pecuniary value that might be imposed against a violator and which society places on harmful conduct.[88] While *Agresta* suggests that there should be evidence of any harmful effect a violation may cause to the public, if it is within the range of fines set by the legislature, there is a strong presumption that the fine or forfeiture is constitutional and not excessive.[89] While the district court of appeal admits that there is no bright line rule for what may be excessive, the decision suggests that there is a strong presumption that a fine or forfeiture is constitutional and not excessive if it falls within the fines set by the legislature that places it within the confines of the deferential doctrine.[90] While the result here is legally correct, it is an aberration to suggest that any legislatively imposed fine should be sustained no matter its size when the Constitution requires judicial engagement, not judicial abdication to the legislature. By mainly considering the maximum fines that could have been imposed against Farley, the district court of appeal found the forfeiture, in this case, violated the Excessive Fines Clause, and therefore reversed and remanded the matter to the trial court to establish a forfeiture amount that does not violate the Excessive Fines Clause.[91]

In *Gordon v. State*,[92] the defendant was charged with possession, conspiracy, and trafficking of oxycodone, twenty-eight grams to thirty kilograms.[93] Gordon was found guilty of trafficking fourteen grams to twenty-eight grams of oxycodone, a lesser-included offense, and guilty as charged on the conspiracy count, and she was sentenced to 30 years in prison on each count to run concurrently with a mandatory term of fifteen years on the trafficking charge and a mandatory twenty-five years on the conspiracy charge.[94] She was also fined $100,000 plus costs on the trafficking charge and $500,000 plus costs on the conspiracy

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. 139 So. 3d 958 (Fla. 2d Dist. Ct. App. 2014).
93. *Id.* at 959.
94. *Id.* at 959–60.

charge.[95] The district court of appeal affirmed the judgment and sentence and found that the fines did not violate the Excessive Fines Clause.[96] The district court of appeal analyzed whether the fine was "grossly disproportional to the gravity of the defendant's offense,"[97] and concluded that it was constitutional and not excessive because it was within the legislature's prerogative to punish such a violator for actual and potential harm caused by the defendant in committing such crimes, including any deterrent effect that the punishment and fines have.[98] The district court of appeal emphasized that Gordon and her codefendant conspired to commit their crimes by obtaining prescriptions for controlled substances through fraudulent means to sell them illegally to people for further use and distribution without a prescription had they not been arrested.[99] In this case, Gordon's conviction was for conspiracy to traffic oxycodone, 28 grams to 30 kilograms, based on the 360 pills at the rate of $10.00 per pill as an estimated street value, which was four-to-twelve times as much as the majority of traffickers of oxycodone and hydrocodone possess, which fits within their roles as a middleman and a dealer.[100] The district court of appeal concluded that the legislative intent and punishment, including fines, was meant to strictly punish middlemen and kingpins, which was within the legislature's prerogative, and that the punishment and fines goal was to deter the significant harm caused to others by the defendant.[101] While the penalty may be large—a $500,000.00 fine in addition to a $100,000.00 fine according to section 893.135(5)[102]—the conviction and fines were affirmed as the fines were found not to be excessive within the proscriptions of the Eighth Amendment to the Constitution and section 17 of article 1 of the Florida Constitution as they were not grossly disproportionate.[103]

All criminal and noncriminal violations are not equal under the law, nor should they be treated equally. Fraudulently registering a vessel, cultivating and growing cannabis for one's

95. *Id.* at 962–64.
96. *Id.* at 960, 964.
97. *Id.*; *see also* United States v. Bajakajian, 524 U.S. 321, 333 (1998).
98. *Gordon*, 139 So. 3d at 962–64.
99. *Id.* at 961–64.
100. *Id.* at 961–62.
101. *Id.*
102. *Id.*
103. *Id.* at 964.

personal use, stealing electricity, and misdemeanor possession of cannabis that has occurred in a home are far less serious criminal offenses than drug-related crimes that are condemned in *Gordon* on account of the harm that severe crimes may cause the public. For conviction of serious crimes involving drugs and substantial governmental fraud that is harmful to the public, there should be no question that the legislature has the prerogative to punish criminal defendants harshly, yet what about less serious felony and misdemeanor crimes?

In *State v. Jones*,[104] the state appealed a county court order finding a mandatory $5,000 civil penalty imposed under section 796.07(6) to be unconstitutionally excessive in a solicitation of prostitution in violation of section 796.07(2)(f).[105] The trial court found the statute unconstitutional, determining that the $5,000 civil penalty was "excessive, unduly oppressive, and unreasonably harsh, such that it shocks the conscience of reasonable persons."[106] The county court found the statute unconstitutionally excessive and in violation of the Excessive Fines Clause, and article I, section 17 of the Florida Constitution.[107] The question for determination was whether the civil penalty authorized by this statute violated the Excessive Fines Clause of the United States Constitution and Florida Constitution.[108] The district court of appeal stated that a remedial civil fine or penalty may be subject to the Excessive Fines Clause if it serves in part to punish and penalize and is so great as to shock the conscience of reasonable persons, or patently and unreasonably harsh and oppressive as a penalty.[109] The only exception to that is that if the fine reimburses the government for a loss, then it is less likely to be subject to the Excessive Fines Clause; however, even a remedial civil fine or penalty may be subject to the Excessive Fines Clause if it serves in part to punish and penalize.[110] The district court of appeal found that the $5,000.00 fine was not oppressive and not in violation of the Excessive Fines Clause and article I, section 17 of the Florida Constitution.[111]

104. 180 So. 3d 1085 (Fla. 4th Dist. Ct. App. 2015).
105. *Id.* at 1087.
106. *Id.* at 1087–88.
107. *Id.* at 1087–90.
108. *Id.*; U.S. CONST. amend. VIII; FLA. CONST. art. I, § 17.
109. *Jones*, 180 So. 3d at 1087–89.
110. *Id.*
111. *Id.* at 1087–90.

Similarly, in *State v. Cotton*,[112] the defendant was charged with and convicted of a violation of section 796.07, including offering another person for prostitution, engaging in prostitution, soliciting another to commit prostitution, purchasing the services of a person engaged in prostitution, and aiding or participating in any of the prohibited acts enumerated within the statute, and section 796.07(2)(f), prohibiting solicitation, inducement, enticement, or procurement of another person to commit prostitution, lewdness, or assignation regardless of the degree of the offense must be assessed the $5,000 fine whether the defendant committed a third-degree felony or second-degree misdemeanor solicitation violation, and the county court took issue with the mandatory fine.[113] The district court of appeal considered the general criteria at the time—a fine must "shock the conscience of reasonable men"[114] before it can be declared as excessive, along with the principle of proportionality in its determination of whether the fine "is plainly and undoubtedly in excess of any reasonable requirements for redressing the wrong,"[115] and also whether it "is reasonably and uniformly proportionate to the gravity of the offense, and therefore constitutionally sound."[116] The district court of appeal acknowledged that there was no bright-line ratio to determine whether a fine is excessive and that the only standard was that of proportionality that applied.[117] Under the proportionality analysis, the district court of appeal stated that it must consider the nature of the criminal offense being punished and whether the $5,000 fine exceeds "any reasonable requirements for redressing the wrong."[118] The district court of appeal ruled that the defendant failed to establish that the fine, as applied to him, was unconstitutionally excessive, and stated:

> Solicitation of prostitution, lewdness, public indecency, and other sexual vice crimes of the types' material to the subject litigation may impact adversely the health, safety, welfare, and morals of the affected neighborhood and the larger community. The legislature has determined that a $5000 fine is appropriate,

112. 198 So. 3d 737 (Fla. 2d Dist. Ct. App. 2016).
113. *Id.* at 739–40.
114. *Id.* at 739.
115. *Id.* at 742.
116. *Id.*
117. *Id.* at 743.
118. *Id.*

> and we give substantial deference to that determination. We do not view the $5000 fine as patently oppressive or grossly disproportionate as applied to Cotton.[119]

The district court of appeal also found that the State's assessment was a "relatively modest amount by today's standards."[120] Will this last finding that a $5,000 fine is relatively modest without any basis other than its own opinion be enough for a future litigant to claim that a fine is constitutionally excessive after considering its size? That remains to be seen.

Jones and *Cotton* analyzed whether the $5,000 fine for prostitution and its related crimes constituted a violation of the Excessive Fines Clause. In *Cotton*, the district court of appeal blurred separate phrases contained in the Eighth Amendment, that is, "nor excessive fines imposed" and "nor cruel and unusual punishments inflicted."[121] When courts blur these clauses and make them synonymous,[122] courts incorrectly set up similar, if not identical standards in attempting to determine whether the Excessive Fines Clause limits the government's power to obtain payments in cash or kind as punishment for violations involving criminal, civil, and administrative violations, including civil forfeiture cases, and such an analysis needs to be differentiated as criminal, civil, and administrative violations are not identical, nor should they be treated as such.[123]

VI. FLORIDA'S LOCAL GOVERNMENT CODE ENFORCEMENT BOARDS ACT: REASONABLE OR EXCESSIVE FINES AND LIENS, AND HOW DEFERENTIAL SHOULD THE JUDICIARY BE IN CONSIDERING THEIR SIZE?

Florida's Local Government Code Enforcement Boards Act was created to promote the health and safety of citizens of the state by creating administrative boards to impose administrative fines and other noncriminal penalties by an effective and inexpensive method of enforcing county and municipal code violations.[124] A

119. *Id.* at 743–44 (quoting Ross v. Duggan, 402 F.3d 575, 589 (6th Cir. 2004)).
120. *Id.* at 744.
121. *Id.* at 741–42.
122. *Id.*
123. *See id.* at 740–42.
124. FLA. STAT. § 162.02 (2022); *see also* Hipler, *supra* note 5.

Special Magistrate has the same status as a Code Enforcement Board. If a violation exists and continues, the code inspector notifies the quasi-judicial body and requests a hearing,[125] where the Special Magistrate or Code Enforcement Board takes testimony from the code inspector and the alleged violator without applying the formal rules of evidence.[126] The Special Magistrate or Code Enforcement Board after hearing the evidence will enter a Final Order containing findings of fact, conclusions of law, and an order affording relief including a time-definite when compliance must occur, or face a per diem fine of up to $250.00 per day if the violation continues beyond the compliance date.[127] A repeat violator may be assessed up to $500.00 per day from the date of the violation to the date of compliance.[128] If there is a finding that the violation was irreparable or irreversible, the local government Special Magistrate or Code Enforcement Board may impose a fine not to exceed $5,000 per violation.[129] A certified copy of the order filed and recorded in the public records constitutes a lien upon the property involved, and the local government attorney may foreclose the lien unless it involves real property that is a homestead under the Florida Constitution.[130] An appeal of the final administrative order may be taken within thirty days to the state circuit court, which limits the appellate review of the record that is created before the special magistrate.[131]

When a court is asked to decide if fines and a lien violate the Excessive Fines Clause, two fundamental points of inquiry must be considered: are the statutory requirements *per se* unlawful, and if not, then is the fine *as applied* to the real property owner excessive and a violation of the Excessive Fines Clause?[132] The constitutionality of chapter 162 of the Florida Statutes has been

125. FLA. STAT. § 162.06(2).
126. FLA. STAT. § 162.07(3).
127. FLA. STAT. § 162.07(4); FLA. STAT. § 162.09(1)–(2)(a).
128. FLA. STAT. § 162.09(2)(a).
129. *Id.*
130. FLA. STAT. § 162.09(3); Kirby v. City of Archer, 790 So. 2d 1214 (Fla. 1st Dist. Ct. App. 2001); Miskin v. City of Fort Lauderdale, 661 So. 2d 415, 415–16 (Fla. 4th Dist. Ct. App. 1995).
131. FLA. STAT. § 162.11; *see Miskin*, 661 So. 2d at 415; City of Plantation v. Vermut, 583 So. 2d 393, 394 (Fla. 4th Dist. Ct. App. 1991).
132. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657 (2010)

challenged and upheld on a *per se* basis.[133] There have also been challenges to the statute "as applied" to the facts of a particular case, which has been sustained.[134] Yet as always, "the Constitution requires judicial engagement, not judicial abdication" as to decisions made by the legislature.[135]

Courts tended to defer to the legislature's range of fines and penalty provisions, and as such, this provides a basis for courts to uphold and permit local governments' Special Magistrates or Code Enforcement Boards to impose fines within the range allowed by a state statute. Unfortunately, such deference by the judiciary to the legislature and ultimately to the Special Magistrate and Code Enforcement Board in code enforcement proceedings seems to assume that almost any sum imposed against an owner's real property that falls within the range of fines of chapter 162 of the Florida Statutes will not constitute an excessive fine when it has accrued and accumulated into a substantial fine and lien as long as it does not "shock the conscience" before *Timbs* and as long as it is not "grossly disproportionate" to the wrongdoer's misconduct.[136]

While judicial decisions before *Timbs* suggested that a fine and lien imposed against a real property owner's property do not violate the Excessive Fines Clause and article I, section 17 of the Florida Constitution as long as the fines fall within the statutory

133. *See* Michael D. Jones, P.A. v. Seminole County, 670 So. 2d 95, 95–96 (Fla. 5th Dist. Ct. App. 1996) ("The powers given by the Legislature to code enforcement boards by chapter 162 do not appear to us as having crossed the line between 'quasi-judicial' and 'judicial.' Such boards may impose fines for code violations but they cannot impose criminal penalties. Although boards can assert a lien against real or personal property, presumably section 162.09 would be interpreted to permit the presentment of defenses prior to enforcement of any lien."); Verdi v. Metropolitan Dade County, 684 So. 2d 870, 873–74 (Fla. 3d Dist. Ct. App. 1996) (finding the county was authorized to enact chapter 8CC of the Code of Metropolitan Dade County to provide administrative hearings before hearing officers for contested code violations). The constitutionality of a challenged statute is reviewed *de novo*. *See* Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1308 (11th Cir. 2009). A facial challenge submits that a law always operates unconstitutionally, and an as-applied challenge claims that a law is unconstitutional on the facts of the particular case or to a particular party. *Id.*

134. *See Harris*, 564 F.3d at 1309; Moustakis v. City of Fort Lauderdale, 338 F. App'x 820, 820 (11th Cir. 2009); Ficken v. City of Dunedin, No. 21-11773, slip op. at 2, 5 (11th Cir. filed July 14, 2022); Robson 200, LLC v. City of Lakeland, 593 F. Supp. 3d 1110, 1110–11 (M.D. Fla. 2022).

135. Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Hum. Servs., 648 F.3d 1235, 1284 (11th Cir. 2011); State v. Jones, 180 So. 3d 1085, 1088 (Fla. 4th Dist. Ct. App. 2015).

136. State v. Cotton, 198 So. 3d 737, 737–42 (Fla. 2d Dist. Ct. App. 2016) (quoting Locklear v. Fla. Fish & Wildlife Conservation Comm'n, 886 So. 2d 326, 329 (Fla. 5th Dist. Ct. App. 2004)); *see* Timbs v. Indiana, 139 S. Ct. 682, 684 (2019); *supra* notes 2, 29.

range,[137] it appears that after *Timbs*, courts need to reconsider this premise as to whether per diem code enforcement fines and liens in the aggregate an Excessive Fines Clause violation due to their size and whether it is "grossly disproportionate to the severity of the offense" of the real property owner's violations; the reason is that such per diem fines and liens are limitless when a real property owner is assessed up to $250.00 per diem for an initial violation and $500.00 per diem for a repeat violation.[138] Code enforcement fines and liens that fall within the range of fines permitted in chapter 162 of the Florida Statutes may become crushing debts against real property owners whether the fines and liens apply to homestead or non-homestead real property, making it difficult and virtually impossible for many real property owners to afford fines absent a reduction of the fines by the Special Magistrate, Code Enforcement Board, or ultimately the court.[139] Reasonable and practical fines should be the goal of chapter 162 of the Florida Statutes rather than the assessment of arbitrary and capricious fines in these noncriminal quasi-judicial proceedings. Upon conviction and compliance, local governments should be open to an abatement proceeding for the reduction of any aggregated fines and a lien. The ultimate imposition of fines needs to maintain a standard that should emphasize reasonableness and not fines that are arbitrary and capricious if fines become substantial, then courts should have no qualms in considering whether the aggregated fines and liens are violations of the Excessive Fines Clause after *Timbs*.[140] While a number of the court decisions seem to disregard the clear language of the Excessive Fines Clause, as it stands now the goal of local governments' quasi-judicial proceedings should be obtaining compliance with code violations after conviction and the assessment of reasonable and practical fines that should not undermine the Excessive Fines Clause which if allowed to stand may also impact economic liberties' of owners.[141]

137. *Cotton*, 198 So. 3d at 741.

138. *See* FLA. STAT. § 162.09(2)(a) (2022).

139. *See* Atkinson, *supra* note 18, at 191–202; Harawa, *supra* note 14, at 77.

140. *See* Hottot, *supra* note 14, at 583; Justin T. Redeen, State v. Yang*: Excessive Fine or Unconstitutional Tax?*, 82 MONT. L. REV., 467, 467 (2021). *See generally* Harawa, *supra* note 14 (explaining the standards courts should use to determine whether fines are excessive).

141. In Timbs v. Indiana, 139 S. Ct. 683, 688 (2019), where the Supreme Court cited and quoted to an earlier decision and stated that economic sanctions must be "proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." *See* Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc., 592 U.S. 257, 271 (1989); *see also* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines*

VII. AMERICAN SYMMETRY AND THE IMPORTANCE OF REAL PROPERTY OWNERSHIP IN THE CREATION OF WEALTH, PROSPERITY, TRADE, AND INDEPENDENCE AS PART OF ECONOMIC LIBERTY: IMPACT OF EXCESSIVE FINES CLAUSE VIOLATIONS ON REAL PROPERTY OWNERSHIP

From its foundation, the ownership of private property in the United States was a fundamental part of the pursuit of life, liberty, and the pursuit of happiness. Property rights were the cornerstone of individual liberty and economic vitality. As a linchpin of liberty, ownership of property was expected to lay the groundwork for prosperity and governmental stability that included the right to make a living and to own and accumulate property that included land. The right to acquire, use, and dispose of property freely and without excessive interference by the government became the established order of the United States.[142] John Adams wrote, "Property must be secured or liberty cannot exist."[143] The American symmetry and equilibrium emphasized that the ownership of property was part of liberty, individuals have a right to own and trade property, and that by owning property rights an individual has the opportunity to create wealth, prosperity, and independence, which are prerequisites for successful self-government and freedom and stability that were part and parcel to one's right to economic liberty.[144]

This important view was more directly codified in the Fifth Amendment, which protects property rights and provides in part: "nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[145] This right to property does not grant ownership rights without restrictions and limitations and is not an unconditional right; in the case of the ownership of real property, such rights, and obligations must include consideration of the

Clause, 40 HASTINGS CONST. L.Q. 833, 833–902 (2013); 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 (2017).

142. *See* Brad Galbraith, *Land and Prosperity: A Primer on Land Use Law and Policy*, 1889 INST., Feb. 2021, at 1, 1; Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENV'T. L. REV. 75 (2010).

143. *See* Freyfogle, *supra* note 142, at 75–76; Harvey M. Jacobs, *Fighting over Land: America's Legacy . . . America's Future?*, 65 J. AM. PLAN. ASS'N 141, 143 (1999).

144. Jacobs, *supra* note 143, at 143.

145. U.S. CONST. amends. V, XIV.

benefits and burdens of ownership, and there needs to be a balance between the right to own property and any limitations placed upon the ownership and use of real property.[146]

In attempting to find a balance between a substantial accrued fine that may be appropriate and the actual assessment of an accrued fine that may be excessive, there should be no question that substantial aggregated fines and a lien imposed by a local government can be challenging for a real property owner on its face; even if aggregated fines are reduced, they can still remain problematic and even overwhelming as applied to an owner's right to own real property, making it virtually impossible to satisfy absent refinancing or sale.[147] Accumulated fines permit the imposition of a lien to encumber the real property until it expires.[148] Upon foreclosure of real property, the local government becomes the owner and eliminates the owner's interest in the real property.[149] Until payment is made under findings of a violation and an assessment of fines and imposition of a lien that attaches to the real property, the owner may lose ownership in the real property or at a minimum be restricted in his or her ability to sell not only the subject real property but also in making other real property transactions.[150] Whether this course of conduct may violate the American symmetry that has emphasized the importance of ownership of real property and the right to trade as part of one's economic liberty needs to be considered when determining the size of code enforcement fines and liens and whether the size may violate the Excessive Fines Clause.[151]

While local governments have legitimately argued that per diem and accrued fines serve as a deterrent against those who fail to correct code violations under chapter 162 of the Florida Statutes,[152] the ultimate punishment to real property owners occurs when an owner fails to timely comply, resulting in

146. *See* Galbraith, *supra* note 142, at 2; Freyfogle, *supra* note 142, at 112; Jacobs, *supra* note 143, at 143; Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 701 (1973).

147. *See* Hipler, *supra* note 7, at 298–302; Sara E. Brown, Code Enforcement, Tax Delinquency, and Strategic Management of Problematic Properties (June 19, 2014) (Master's thesis, Massachusetts Institute of Technology) (on file with DSpace@MIT).

148. FLA. STAT. § 162.10 (2022).

149. *Id.* §§ 162.09–.10; *see also* Freyfogle, *supra* note 142, at 86.

150. *See* Hipler, *supra* note 7, at 286–91.

151. *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (2d ed. 2006); Galbraith, *supra* note 142, at 2; Freyfogle, *supra* note 142, at 77.

152. *See* Freyfogle, *supra* note 142, at 97.

punishment that will result in a substantial diminution of the value and net equity of the real property.[153] This unquestionably hinders control in the real property owner's interest and his or her net equity through the diminution of the real property's value, and should the local government be successful in a foreclosure action and receive title to an illiquid asset, there may be an increase in the local government's real property inventory that subjects the local government to a loss of tax revenue and expenditure of costs to place the real property in code compliant condition before a future sale.[154] Failure to assess reasonable fines and liens or to work out a negotiated settlement for a reduction of the fines and liens between the real property owner and the local government is both a sword and shield to the local government as well as the owner of real property and makes this a losing proposition for both if substantial aggregated fines and liens are not substantially reduced so that the owner makes payment to the local government so that both parties get closure and go their separate ways.

VIII. MOUSTAKIS V. CITY OF FORT LAUDERDALE*: UNPUBLISHED, NON-PRECEDENTIAL OPINION AND ITS IMPACT ON CODE ENFORCEMENT FINES AND LIENS IN LIGHT OF THE EIGHTH AMENDMENT EXCESSIVE FINES CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF FLORIDA CONSTITUTION*

There is very little literature that has been written by legal scholars about the propriety of imposing per diem code enforcement fines and liens against real property owners and whether the size may violate the Excessive Fines Clause.[155] An often-cited case may help attempt to determine how courts have scrutinized whether fines and liens may or may not violate the

153. *See id.* at 77; *see also* U.S. CONST. amends. V, XIV; *supra* note 151.

154. *See* Margaret Dewar, *Disposition of Publicly Owned Land in Cities: Learning from Cleveland and Detroit* (Univ. of Mich. Ctr. for Loc., State, & Urb. Pol'y, Working Paper No. 10, 2009); Brown, *supra* note 147, at 13; David E. Mischiu, Banking on Land: A Critical Review of Land Banking in the United States (2019) (Master of Urban Planning thesis, University of Illinois) (on file with Illinois Library IDEALS); Shelly Cavalieri, *Linchpin Approaches to Salvaging Neighborhoods in the Legacy Cities of the Midwest*, 92 CHI.-KENT L. REV., 475, 475–76 (2017); Frank S. Alexander & Leslie A. Powell, *Neighborhood Stabilization Strategies for Vacant and Abandoned Properties*, 34 ZONING & PLAN. L. REP. 1, 3 (2011).

155. *See* David M. Lawrence, *Are There Limits on the Size of Penalties to Enforce Local Government Ordinances?*, U. OF N.C. SCH. OF GOV'T: LOC. GOV. L. BULL., July 1, 2012, at 1, 1.

Excessive Fines Clause, even though some legal scholars have suggested that applying statutorily imposed fines needs safeguards against arbitrary and capricious assessments in lieu of strictly following the deferential doctrine by courts.[156]

An often-cited case is the unpublished opinion[157] of *Moustakis v. City of Fort Lauderdale*,[158] where the City of Fort Lauderdale filed a lien on the house on account of the owners' failure to comply with a code enforcement violation. In 2008, the owners sued the City of Fort Lauderdale in the district court, alleging that the City had filed a lien of over $700,000 on a house that was worth only about $200,000.[159] The owners requested to have the lien and underlying fines eliminated or reduced based on the argument that the lien and fines were excessive under the Florida Constitution, article I, section 17, and the Excessive Fines Clause.[160] The Eleventh Circuit upheld the district court and sustained the fine and lien and stated that the $150 per day fine that accrued for fourteen years and totaled $700,000 was within the range of fines prescribed by the Florida legislature, and accordingly, the USDC gave the lien imposed by the local government substantial deference.[161] The federal circuit court stated: "Section 162.09(2)(a) of the Florida Statutes provides a cap on the amount of fines that can accrue from daily code violations but limits the application of the cap to irreparable code violations. Under the statutory construction principle of *inclusio unius est exclusion alterius* ("the inclusion of one is the exclusion of another"), the Florida Legislature's provision for a cap on irreparable code violations is a clear indication that it intentionally omitted a cap for reparable code violations."[162] As concerns the owners' claim that the fine's aggregate effect was excessive, the federal circuit court stated that

156. *See* Harawa, *supra* note 14, at 68; Hottot, *supra* note 14, at 590; Rachel J. Weiss, *The Forfeiture Forecast After* Timbs*: Cloudy with a Chance of Offender Ability to Pay*, 61 B.C. L. REV., 3073, 3099 (2020); Brendan M. Conner, *Fine-Tuning: The Emergent Order-Maintenance Architecture of Local Civil Enforcement*, 42 PACE L. REV. 138, 166 (2021).

157. Unpublished opinions lack precedential value. In the context of federal appellate opinions, the term "unpublished" is synonymous with "non-precedential." *See* FED R. APP. P. 32.1; Merritt E. McAlister, *Downright Indifference: Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2019); Scott E. Gant, *Unpublished Opinions in Federal Litigation*, PRAC. L.J., Apr./May 2015, at 70, 70.

158. Moustakis v. City of Fort Lauderdale, No. 08-60124-Civ, 2008 WL 2222101, at *2 (S.D. Fla. May 27, 2008), *aff'd*, 338 Fed. App'x 830 (11th Cir. 2009).

159. *Id.*

160. *Id.* *1–2.

161. *Id.* at *2.

162. *Id.* at *1.

the aggregate fine of $700,000.00 was directly proportionate to the offense.[163] The federal circuit court concluded that the size of the fine was a function of the daily recurrence of the violations by the owners of the offense over fourteen years, not merely a single offense that occurred in *Bajakajian*, which involved forfeiture of $357,144 for a single offense with a maximum fine of $5,000.[164]

Moustakis has been relied upon by Florida state and federal courts,[165] yet this decision suggests that each per diem violation is a separate violation, and therefore there is no basis to find that the total cumulative fine is excessive under the Eighth Amendment of the Constitution and article I, section 17 of the Florida Constitution.[166] This analysis neglects to consider the effect of a per diem fine that has merged into one aggregate fine and lien. When fines are merged into a lien and recorded, there is one cumulative fine and lien that is imposed against the real property,

163. "We disagree with the Moustakises that the fine imposed on them is as excessive as the fine (or, more precisely, forfeiture) at issue in *Bajakajian*. In this case, the fine is properly characterized as a $150 per day fine for each day their house was not in compliance with the Fort Lauderdale Code. The Moustakises do not allege in their Complaint that a $150 per day fine for violating the Code is excessive, only that the cumulative fine of $700,000, which is more than the value of the house violating the Code, is excessive. But the $700,000 fine was created by the Moustakises' failure to bring the house into compliance with the Code each day for 14 years. Rather than being grossly disproportionate to the offense, the $700,000 fine is directly proportionate to the offense. The Moustakises have not alleged any facts that demonstrate that the lien and underlying fines are excessive under either the Florida Constitution or the United States Constitution." *Id.* at *2.

164. See United States v. Bajakajian, 524 U.S. 321, 339–44 (1998), where defendant failed to report that he was carrying more than $10,000 of currency when he was leaving the country, and the Supreme Court noted that the single failure to report the currency was the defendant's only offense permitting a maximum penalty under the Sentencing Guidelines for the offense of less than one year in prison and a $5,000 fine. The Supreme Court therefore held that a $357,144 fine for a single offense of failing to report more than $10,000 of currency was excessive, even though there was conflicting evidence of why the defendant had such a large amount of funds without disclosing them to authorities. *See supra* notes 38–48.

165. *See* Conley v. City of Dunedin, No. 8: 08-cv-01793-T-24-AEP, 2010 WL 146861, at *5 (M.D. Fla. Jan. 11, 2010); State v. Cotton, 198 So. 3d 737 (Fla. 2d Dist. Ct. App. 2016); Browning v. Angelfish Swim Sch., Inc., 1 So. 3d 355 (Fla. 3d Dist. Ct. App. 2009).

166. Arguments that a per diem fine shields a local government from an Excessive Fines Clause claim should be rejected. When suit is filed, it is the aggregate fine that provides a basis for a suit against a violator, not a single per diem fine or default that would require a multi-count complaint for each and every per diem fine or default. *See* Hardin v. Monroe County, 64 So. 3d 707, 711 (Fla. 3d Dist. Ct. App. 2011); Sarasota County v. Andrews, 573 So. 2d 113, 115 (Fla. 2d Dist. Ct. App. 1991); Maple Manor, Inc. v. City of Sarasota, 813 So. 2d 204, 206–07 (Fla. 2d Dist. Ct. App. 2002). Any other method used for collection purposes would encourage excess judicial labor and run counter to judicial economy Florida Statutes sections 162.09 and 162.10 also follow the same procedure as does a suit for a debt and non-payment of a mortgage after a lien is filed and recorded, which allows the local government to file suit for the accumulated amount.

and this may make the fine and lien excessive due to its size.[167] In attempting to distinguish *Bajakajian* from *Moustakis* on this basis, the *Moustakis* decision mistakenly fails to take into account the effect of aggregated fines and imposition of a lien once compliance occurs, which may involve the assessment of substantial aggregated fines and a lien that is "grossly disproportional" to the actual offense. A better view is that once compliance occurs, the existing cumulative fines become a single fine and lien requiring an intensive facts analysis to determine if the cumulative fines and lien are excessive. If the Special Magistrate or Code Enforcement Board fails to reduce the substantial fine and lien in an abatement proceeding and provide findings of facts and conclusions of law to support its reasons, then upon appeal the case should be remanded by the lower court for reconsideration and ultimately to the local government Special Magistrate or Code Enforcement Board to readdress why the cumulative fines and a lien are constitutionally permissible or impermissible in light of a "grossly disproportional" test after considering size in light of findings of fact and conclusions of law.[168] In essence, the *Moustakis* decision leaves intact the per diem fine rather than acknowledging that the cumulative fines may be "grossly disproportional to the gravity of the defendant's offense"[169] when the violation has grown to a substantial amount. Thus, after further consideration by a fact-intensive analysis conducted by the Special Magistrate or Code Enforcement Board along with findings of facts and conclusions of law, the quasi-judicial body should make findings why the cumulative fines and lien may or may not be "grossly disproportional" as distinguished from why the cumulative fines and lien are or are not arbitrary and capricious. Such a process is far more consistent with an Excessive Fines Clause analysis and fundamental due process to avoid a one size fits all decision.[170]

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167. *Maple Manor*, 813 So. 2d at 206.

168. *See* Hayes v. Monroe County, 337 So. 3d 442, 445 (Fla. 3d Dist. Ct. App. 2022). *Hayes* is not inconsistent with a handful of legal decisions which suggests that Special Magistrates have authority to consider equitable defenses to code enforcement prosecutions of violations, which should include procedural and substantive due process claims among others. *See also* Siegle v. Lee County, 198 So. 3d 773, 778 (Fla 2d Dist. Ct. App. 2016); Monroe County v. Carter, 41 So. 3d 954, 957 (Fla. 3d Dist. Ct. App. 2010); Castro v. Mia.-Dade Cnty. Code Enf't, 967 So. 2d 230, 233–34 (Fla. 3d Dist. Ct. App. 2007).

169. *Bajakajian*, 524 U.S. at 337.

170. For a version of suggested facts and circumstances that should be considered, see *infra* pt.IX. However, the reader should keep in mind that local governments should remain

IX. WHAT DID THE SUPREME COURT SAY ABOUT THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE OF THE UNITED STATES CONSTITUTION IN TIMBS V. INDIANA*?*

Timbs v. Indiana[171] has made the question of what constitutes an excessive fine constitutionally applicable to the states as the Supreme Court ruled that states on account of the Fourteenth Amendment's Due Process Clause are bound by the Excessive Fines Clause due to its clear and plain language in prohibiting unconstitutionally excessive fines.[172] In *Timbs*,[173] the Court concluded that the Excessive Fines Clause is incorporated into the Due Process Clause,[174] and therefore applies to the States, which includes not only its application to criminal penalties, but also civil *in rem* forfeitures, civil fines, and penalties, and state and local code enforcement fines for purposes of the Excessive Fines Clause when they are at least partially punitive.[175] In *Timbs*, the Court ruled that fines, when used in a manner that is out of the realm of

free to set forth their own factors and criteria in determining whether the size of the fine is excessive upon a request by the real property owner for an abatement of fines after compliance.

171. 139 S. Ct. 682 (2019).

172. *Id.* at 688.

173. *Id.* at 687.

174. In Cooper Industries, Inc., v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), the United States Supreme Court appeared to hold that the Excessive Fines Clause applied to the states through the Fourteenth Amendment. This was due to the opinion by Justice John Stevens, who stated: "the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on the States'] discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Id.* at 433–34. The discrepancy between these two views was resolved in *Timbs*, where the United States Supreme Court ruled that the Eighth Amendment's prohibition of excessive fines is an incorporated protection applicable to the states under the Fourteenth Amendment.

175. "Tyson Timbs ple[d] guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs' arrest, the police seized a Land Rover SUV Timbs had purchased for $42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction, the trial court denied the State's request. The vehicle's forfeiture, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Excessive Fines Clause. The Court of Appeals of Indiana affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions." *Timbs,* 139 S. Ct. at 684. In a unanimous decision, the Supreme Court held that the Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. *Id.* at 686–87.

penal goals of retribution and deterrence, and when used as a source of revenue by local governments, are subject to the Excessive Fines Clause examination and scrutiny and apply to federal, state, and local governments and their respective code provisions.[176]

After *Timbs*, there can be no legitimate argument that the Excessive Fines Clause does not apply to state and local government action, and as such, code provisions and the size of fines and liens will be subject to scrutiny under the Excessive Fines Clause of the Constitution.[177] The language in *Timbs* is all-encompassing, and accordingly, there should be no question that courts need to scrutinize fines "out of accord with the penal goals of retribution and deterrence" as "fines are a source of revenue" that need to be scrutinized to determine whether fines and liens are reasonable.[178] Because the Excessive Fines Clause is "fundamental to our scheme of ordered liberty," and "deeply rooted in this Nation's history and tradition,"[179] it should not be one of the least followed Bill of Rights protections as lower courts take on whether fines and civil forfeitures are financially excessive after considering the facts and circumstances of violations and any fines imposed.[180] Such personal liberty against excessive fines exists to

176. "Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Id.* at 687. Acts by all branches of government "by whatever instruments or in whatever modes that action may be taken" can result in a finding of "state action." *Ex parte* Virginia, 100 U.S. 339, 346–47 (1879). "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Id.*

177. "There is no daylight between the federal and state conduct it prohibits or requires." *Timbs*, 139 S. Ct. at 687.

178. *Id.* at 689.

179. *Id.* The *Timbs* decision provided that the Excessive Fines Clause carries forward invariable safeguards found in sources from the Magna Carta to the English Bill of Rights to state constitutions from the colonial era to the present day. *See id.* at 693, 696.

180. *See* Hottot, *supra* note 14, at 590–91; Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After Timbs*, 129 YALE L.J. 430, 448 (2020); Nora V. Demleitner, *Will the Supreme Court Rein in Excessive Fines and Forfeitures?: Don't Rely on* Timbs v. Indiana, 32 FED. SENT'G REP. 8, 9 (2019). Some legal scholars believe that *Timbs* is significant and has marked a new day on what may constitute an Excessive Fines Clause violation, while one questions whether *Timbs* will have an effect on the size of fines and civil forfeitures; however, the fact that there are legal scholars who have authored articles about the impact

deter the government from retaliation against an individual for disproportionate penal purposes and as a source of revenue to make up shortfalls in code enforcement financing, making scrutiny necessary and proper after *Timbs*.[181]

While the Excessive Fines Clause is incorporated into the Fourteenth Amendment and applies to the states after *Timbs*, there is no guarantee that a disputable fine will be found to violate the Excessive Fines Clause, but such fines must be scrutinized to determine whether the fine is excessive. Yet in *Timbs*, the Court suggested in its language that fines imposed by legislative bodies should be reviewed and scrutinized to determine whether fines are excessive or arbitrary.[182] The language in *Timbs* stated that the Excessive Fines Clause was enacted as a safeguard and curb on the power of government to impose overly punitive sanctions on its citizens and residents and that it serves as a fundamental and necessary check on the government's imposition of a fine; it also protects against governmental and prosecutorial overreaching and revenue-generating upon imposition of an economic sanction of a fine or possible seizure of assets in civil proceedings that are determined to be excessive.[183]

After *Timbs*, the federal constitutional standard that incorporated the Excessive Fines Clause into the Fourteenth Amendment overrides any lesser state standard that is less restrictive. Florida courts that have used the words that a fine violated the Excessive Fines Clause and article I, section 17 of the Florida Constitution if it meets a "shocking the conscience" standard should no longer apply this standard due to its subjectivity and vagueness. Based on *Timbs'* language, the opinion had to have done away with a "shocks the conscience" standard in

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of *Timbs* suggests that *Timbs* may already have had an impact on the size of fines and forfeitures and will continue to do so as states and lower federal courts around the nation are called upon to further develop the Excessive Fines Clause doctrine. *See, e.g.*, Hottot, *supra* note 14, at 590; Colgan & McLean, *supra* note 180, at 448–49, Demleitner, *supra* note 180, at 12; *see also* Brian Kelly, *An Empirical Assessment of Asset Forfeiture in* Timbs v. Indiana, 72 ALA. L. REV. 613, 623 (2020); Krsacok, *supra* note 14, at 1; Harawa, *supra* note 14, at 68; Redeen, *supra* note 140; Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869 (2018); Mary Pattillo & Gabriela Kirk, *Pay unto Caesar: Breaches of Justice in the Monetary Sanctions Regime*, 4 UCLA CRIM. JUST. L. REV. 49 (2020).

181. *Timbs*, 139 S. Ct. at 687–89.

182. *See id.* at 689–91.

183. *Id.* at 686–89; *see also* Pimentel, *supra* note 141, at 554.

Florida on account of its vagueness and ambiguity.[184] *Timbs* may also be seen as a call to arms for legislatures and ultimately lower courts to provide criteria and standards that will enforce the Excessive Fines Clause so that there is "protection against excessive punitive economic sanctions secured by the Clause."[185]

While the legislature should consider the importance of *Timbs,* if that political body fails to do so, it will fall upon the courts to determine whether a fine or forfeiture is a punitive, excessive, and disproportionate sanction and whether it may constitute a violation of the Excessive Fines Clause. Criteria in any determination of whether the fine or forfeiture is a violation of the Excessive Fines Clause should primarily include: (1) the size of the cumulative fines; (2) the value of the real property and any mortgage balances on the subject real property; (3) is the fine disproportionately large after considering the offense's level of severity and the impact of the violation on the neighborhood and community; (4) financial circumstances of the owner and whether there is any undue financial hardship placed on the violator and his or her family by the fine's size and its effect on the owner; (5) government's motivation in seeking what may be a substantial fine in light of the benefit to the government upon receipt of the revenue; and (6) any other unique facts and circumstances that may show whether the fines are excessive. The focus as always should be on the facts and circumstances of the violation and the involvement of the particular offender. Lower courts should be free to elaborate on a case-by-case basis after a fact-intensive analysis of whether the fines are excessive or reasonable. There should be no hesitancy by courts to determine whether a lesser percentage or ratio of the size of the aggregated fines and liens if they are found to be substantial after considering whether the fines and liens are disproportionately large in light of the criteria.[186]

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184. *See Timbs*, 139 S. Ct. at 689; Colgan & McLean, *supra* note 180; *see also* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAPMAN L. REV. 307, 347 (2010) ("Shocking the conscience" is vague and imprecise and flawed as it makes it more difficult to challenge a fine.); Jency Megan Butler, *Shocking the Eighth Amendment's Conscience: Applying a Substantive Due Process Test to the Evolving Cruel and Unusual Punishments Clause*, 43 HASTINGS CONST. L.Q. 861 (2016); Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961 (2020).

185. *Timbs*, 139 S. Ct. at 689.

186. *See id.* What *Timbs* signals is its alarm of profit-driven enforcement by government which may tread on a cluster of constitutional liberties. Thus, the factors and criteria mentioned in this Article as to whether the fines and lien are or are not excessive are not

There is no guidance or criteria provided by the Court in *Timbs,* or the lower federal courts, as to what is "grossly disproportional to the gravity of a defendant's offense"[187] other than what courts may decide on a piecemeal basis. Courts have suggested that there is substantial deference granted to the legislature as to legislatively enacted fines, yet without guidance, criteria, and ratios signifying what is a violation of the Excessive Fines Clause, courts have sought to follow the deferential doctrine and have underestimated their autonomy as an independent body to act in this very important area. Courts need to step up to their status as an equal branch of government and their obligation to determine whether the size of a fine and lien or forfeiture is excessive. In failing to do so, courts have abdicated their power to the legislature in a one size fits all paradigm as fines and liens that are now determined by the legislature as to the size of legally enforceable fines and liens, which grants nearly unfettered discretion to the legislature in deciding what amount should be assessed as long as it falls within the range of fines of the statute.

Before *Timbs*, many courts assumed that the legislature decided what was and was not an Excessive Fines Clause violation. This suggests that courts were not the only leading cause of deference by allowing the legislature unfettered discretion to determine what was and was not an Excessive Fine; yet in the post-*Timbs* era, the courts have the liberty to be part of the solution in considering aggrieved parties' claims that substantial accumulated fines and liens imposed by state and local governments are Excessive Fines Clause violations.[188] Although it appears that courts have yet to reject that pre-*Timbs* doctrine, and have failed to carve out exceptions to the deference doctrine that allows legislatures to decide what is not an Excessive Fines Clause

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all inclusive. However, a straightforward approach should be considered if the Excessive Fines Clause will not continue be one of the Bill of Rights least followed protections, even though it was enacted to curb governments' abusive fines, is for the legislature, local governments, and ultimately the courts to consider whether an Excessive Fines Clause violation exists. This approach should also grant lower courts latitude in deciding how much is too much if aggregated fines are assessed rather than merely following the deferential doctrine which allows the legislature to decide the size of a fine without independent judicial review. *See* Conner, *supra* note 156, 141 (2021); *see also* Caitlin Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1 (2009).

187. *See* United States v. Bajakajian, 524 U.S. 321, 3344 (1998). *Timbs* mentions *Bajakajian*, yet it fails to provide guidance and any criteria whatsoever to clarify what "grossly disproportional to the gravity of a defendant's offense" may mean.

188. *See* Demleitner, *supra* note 180, at 12.

violation under their statutes, in the post-*Timbs* era they now have the authority to do so. This is on account of *Timbs*' opinion that the Excessive Fines Clause is now one of the Bill of Rights that has been incorporated into the Due Process Clause.

The language in *Timbs* signaled an alarm by the Court that legislatures and the courts need to be on guard for profit-driven enforcement by the government, which treads on a cluster of constitutional liberties. Yet questions still exist whether the Court provided mere lip service in *Timbs* that may become hollow words about the significance of the Excessive Fines Clause or whether will *Timbs* be followed by legislatures and ultimately the courts by adopting guidelines and criteria on how much is too much. Will *Timbs* become a focal point that supports lower courts' decisions for the development of criteria and guidelines, or will it be disavowed or simply ignored? The reader should keep in mind that the language in *Timbs* suggests that excessive fines have been prohibited since the days of the Magna Carta and the English Bill of Rights to more contemporary times by the enactment of state constitutions from the colonial era to the present day.[189] The historical evidence provides that the Eighth Amendment has been a shield and safeguard throughout Anglo-American history against government intrusion by the imposition of excessive fines, as it is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[190] While every amendment of the Bill of Rights that has been incorporated into the Fourteenth is not absolute there must be a balance and an equilibrium set forth between the rights of the individual and the government without *carte blanche* power and authority remaining within the government.[191] Any unequivocal deference to the legislature on the amount and assessment of substantial fines without independent judicial review grants nearly absolute power to federal and state governments' legislatures to determine the size of a fine and forfeiture in civil and administrative proceedings. The deference doctrine is not supposed to impede the judiciary's role as interpreter of the Constitution, which takes priority over arbitrary

189. *Timbs*, 139 S. Ct. at 688–89.

190. *Id.* at 689.

191. *See generally* RALPH A. ROSSUM ET AL., AMERICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS (11th ed. 2020); Iddo Porat, *Mapping the American Debate over Balancing*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 397 (Gregoire Weber et al. eds., 2013).

reliance on a legislative body's political enactment of laws in determining whether the size of fines may violate the Excessive Fines Clause.[192]

Despite *Timbs*' warning that excessive fines undermine a considerable number of constitutional liberties, there is little assurance that *Timbs* will immediately broaden protection from possible governmental overreach, although excessive fines are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition of ordered liberty."[193] *Timbs* should be more than a law school Socratic give-and-take discussion between a professor and law students. There is nothing contradictory or imprecise to understand about the language in *Timbs*. It is still necessary for courts to consider that the Constitution requires judicial action, not judicial abdication,[194] as courts should not relinquish their role as an equal branch of government by simply deferring such matters in code enforcement fines and liens, which allows local governments' legislatures and their duly appointed quasi-judicial bodies to have nearly absolute authority on the assessment and size of fines.[195] Courts should consider questioning statutes and local government quasi-judicial body decisions for plausible claims that substantial fines imposed may be arbitrary and capricious. Courts need to scrutinize these claims on the size of fines to determine if a state and federal statute's imposed fines are "grossly disproportional" to the offense under specific criteria and guidelines and whether such fines are genuinely used to deter future violations or imposed to punish-for-profit.[196] When those facts are presented, courts should be willing to consider challenges to governmental decisions where fines are

192. *See* Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 42–43 (2016); Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839 (2017); *see also* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, GEO. J.L. & PUB. POL'Y (2018); Harawa, *supra* note 14, at 84; Marian R. Williams, Timbs v. Indiana *on Excessive Fines and Civil Forfeitures*, *in* SCOTUS 2019: MAJOR DECISIONS AND DEVELOPMENTS OF THE U.S. SUPREME COURT 123–31 (David Klein & Morgan Marietta eds., 2020).

193. *See Timbs*, 139 S. Ct. at 686–87; *see also* Conner, *supra* note 156, at 140.

194. Florida v. U.S. Dep't of Health & Hum. Servs., 648 F.3d 1235, 1284 (11th Cir. 2011).

195. *See* William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315 (2018); Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643 (2015); Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452 (2010).

196. *See* United States v. Bajakajian, 524 U.S. 321 334, 350 (1998).

shown to be disproportionate to the offense and plausibly excessive and therefore arbitrary and capricious.[197]

X. THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT AND ITS IMPACT ON LOCAL GOVERNMENTS' CODE ENFORCEMENT FINES AND LIENS AFTER TIMBS V. INDIANA

The Excessive Fines Clause applies to the states as part of the Due Process Clause. Several cases have discussed the Excessive Fines Clause's applicability to local government quasi-judicial proceedings after *Timbs*. As the impact of *Timbs* is considered and more legal scholars discuss its potential effect and ramifications,[198] it is expected that the Excessive Fines Clause should be able to be used to constrain fines that are imposed by local governments and their quasi-judicial bodies whether by legislative enactments, local government code enforcement policies, or the courts.

In *Pimentel v. City of Los Angeles*,[199] the city imposed a fine of $63 for overstaying parking time. After fifty-eight days of nonpayment, the city issues a second late payment penalty of $25.00; then after eighty days, the driver is subjected to a $3.00 Department of Motor Vehicles registration hold fee, as well as a $27 collection fee. In sum, a person who overstays a metered parking space faces a fine of anywhere from $63 to $181, depending on how timely the fine is paid. Approximately $12.50 to $17.50 of the initial $63 is reserved for the County and State. The remainder is distributed to the city's treasury.[200] The federal appellate court found that the driver was culpable because there was no factual dispute that they violated the local municipal code for failing to pay for the overtime use of the metered space, but that the underlying parking violation was minor.[201] The federal appellate court also found that the nature and extent of the driver's violations were marginal but not *de minimis*,[202] and while the parking violation was not a serious offense, the fine was not so

197. *Id.* at 336–37.

198. *See, e.g.*, Harawa, *supra* note 14, at 65; Hottot, *supra* note 14; Tia Lee Kerkhof, *Small Fines and Fees, Large Impacts: Ability-to-Pay Hearings*, 95 S. CAL. L. REV. 447 (2021); Krsacok, *supra* note 14; Weiss, *supra* note 156, at 3073.

199. Pimentel v. City of Los Angeles, 974 F.3d 917 (9th Cir. 2020).

200. *Id.* at 920.

201. *Id.* at 922–23.

202. *Id.* at 923.

large to be excessive, and it legitimately deterred violations.[203] In its analysis, the federal appellate court rejected the argument that violations did not cause the government any actual loss from the violation even though the harm was not readily calculable.[204] Still, the federal appellate court stated that "there is no real dispute that the City is harmed because overstaying parking meters leads to increased congestion and impedes traffic flow and constitutes a public safety issue."[205] Therefore, the federal appellate court affirmed summary judgment in favor of the city as to the $63.00 fine but did not decide whether the late payment penalty was grossly disproportional to the offense of failing to pay the initial fine within twenty-one days under the Excessive Fines Clause.[206]

While the Excessive Fines Clause prohibits governmental overreach, *Pimentel* considered several factors before concluding that the fines were not a violation of the Excessive Fines Clause, which is under an appellate court's duty and obligation.[207] It did not *carte blanche* conclude that it would defer to the local government's code provisions to sustain what is a constitutional fine, but rather it analyzed whether the fines might be considered a violation of the Excessive Fines Clause after considering factors laid out in *Bajakajian*, including whether the underlying violation was reckless, benign, or minimal; the fine's size as compared to the violation's severity; whether the underlying offense related to other illegal activities; was the attendant fine the only one, or were there other penalties imposed for the violation; financial harm or actual loss from the violation; and any readily measurable harm to the community and local government, and if none is shown, whether overstaying parking meters lead to increased congestion and potential harm to drivers and shoppers.[208] In sum, the federal circuit court did not provide an abstract view of the violation without a thoughtful analysis of the effect of the parking violation and the size of the actual fine and therefore concluded that the evidence supported the imposition of the amount of the fine which was not excessive.[209] Of importance was the federal circuit court's

203. *Id.* at 924.
204. *Id.*
205. *Id.*
206. *Id.* at 924–25.
207. *Id.* at 925.
208. *Id.* at 923–24.
209. *Id.* at 924–25.

statement in *Pimentel* that without material evidence provided by violators to the contrary, the court will afford "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments,"[210] which will constantly be part of any analysis, but it is only one factor and is a starting point, not an absolute rule of law without judicial oversight.[211] The federal appellate court further cautioned against "requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense."[212] Instead, the "amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[213] The federal appellate court noted that while a parking violation is not a serious offense, the size of the fine is not so large as compared to the gravity of the offense, and the amount imposed for a violation will likely deter violations without being excessive to the violator and third parties; therefore, no Excessive Fines Clause violation was found to exist. The reader should keep in mind that while the federal circuit court discussed several factors that may be considered, what seems apropos in addition to factors was the actual size of the fine and its connection to the gravity of the violation under these circumstances.[214]

Do courts have the right to analyze facts and circumstances to determine if a fine is excessive without regard to what the legislature has enacted? The answer is absolutely as *Timbs* has expressed the significance of the Excessive Fines Clause which is now subject to Eighth Amendment scrutiny, and therefore courts not only have the right to rein in on the size of fines and forfeitures, they have the legal obligation to do so under criteria and ratios in considering the size of fines and forfeitures in future cases.[215] It is incumbent on courts to consider the severity of violations and the size of fines, which are now subject to Eighth Amendment scrutiny in light of *Timbs*, and therefore courts need to set up criteria for

210. *Id.* at 924; United States v. Bajakajian, 524 U.S. 321, 336 (1998) (quoting Solem v. Helm, 463 U.S. 277, 290 (1983)).

211. *See* Pimentel, *supra* note 141, at 553–54; *see also Pimentel*, 974 F.3d at 924.

212. *Bajakajian*, 524 U.S. at 336.

213. *Id.* at 334.

214. *Pimentel*, 974 F.3d at 924–25. While a purpose of a fine is deterrence of present and future violations and to seek to obtain compliance with a violation, courts need to consider whether the amount of the fine is disproportionate to the offense and if there is some degree of proportionality to the violation. *Id.* at 922–24.

215. *See id.* at 922, 924–25; *see also* discussion *supra* pt, X.

consideration of future cases if the legislature fails to do so.[216] *Pimentel* mentions *Timbs* in passing, but it does not spend much time discussing *Timbs*' importance; yet *Timbs* cannot be overlooked or ignored as its language emphasizes the historic importance of limiting possible governmental overreach in the area of fines, including local governmental penalty-for-profit fines.[217]

In *Pimentel*, the violator argued that an Excessive Fines Clause analysis should incorporate means-testing to assess a violator's ability to pay.[218] No decision was made about whether financial circumstances and the ability to pay a fine should be considered, and to date, there has been no determination whether it should have a bearing on whether one can pay as the Supreme Court has expressly declined to address this question in *Bajakajian*.[219] The Court in *Timbs* likewise left the question of the violator's ability to pay open.[220] For now, it appears that consideration of a violator's ability to pay is not a mandatory factor, but local governments should not rule out consideration of an individual's ability to pay.[221] In a future case, if the amount of the fine is sufficiently large and out of proportion to the activity the local government seeks to deter, a court may find that the fine is excessive to a violator as applied to individuals who do not have the financial ability to make payment.[222]

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216. *Pimentel*, 974 F.3d at 922, 924–25.

217. "Today, we extend *Bajakajian*'s four-factor analysis to govern municipal fines. We do so because the final link in the chain connecting the Eighth Amendment to municipal fines is forged by the Supreme Court's recent *Timbs* decision. The Supreme Court in *Timbs* incorporated the Excessive Fines Clause to the states through the Fourteenth Amendment. We hold that the *Timbs* decision affirmatively opens the door for Eighth Amendment challenges to fines imposed by state and local authorities." *Id.* at 922 (citations omitted).

218. *Id.* at 925.

219. *Id.*; *see* United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998); Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

220. *See generally Timbs*, 139 S. Ct. at 688.

221. *See* Tia L. Kerkhof, *Small Fines and Fees, Large Impacts: Ability-to-Pay Hearings*, S. CAL. L. REV. 447, 470 (2021) (discussing how a person's ability to pay fines should be a consideration); Dana A. Waterman, *A Defendant's Ability to Pay: The Key to Unlocking the Door of Restitution Debt*, 106 IA. L. REV. 455, 458 (2020) (discussing how courts should consider defendants ability to pay when assessing fines); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 847 (2012); Phyllis Altrogge & William F. Shughart II, *The Regressive Nature of Civil Penalties*, 4 INT'L REV. L. & ECON., 55 (1984); Krsacok, *supra* note 14, at 10; Weiss, *supra* note 156, at 3108.

222. Krsacok, *supra* note 14, at 8.

After it ruled on the merits, the federal circuit court remanded the question of whether the late payment penalty of $63.00 was grossly disproportional to the offense of failing to pay the initial fine within twenty-one days, because the district court did not do so under *Bajakajian* and ordered that the USDC consider whether the penalty payment was a violation of the Excessive Fines Clause under the factors mentioned in *Bajakajian*.[223]

In *Ficken v. City of Dunedin*,[224] the district court was called upon to consider whether code enforcement fines were a violation of the Excessive Fines Clause. The ultimate decision under the facts and circumstances was that no Excessive Fines Clause violation existed. A fact-intensive discussion of this case was made by the district court and is made here so that future litigants may consider whether an Eighth Amendment challenge to a fine should be made.

In March 2015, a city code enforcement officer issued a notice of violation concerning grass overgrowth at the property when the owner was out of the state attending to his elderly mother.[225] The owner, upon learning of the code violation, sent an email to the code inspector requesting an extension of the compliance date. No extension of time was granted, and the case was presented to the Code Enforcement Board with a caveat that if the case would be presented to the board at a future overgrown grass violation hearing, the city would subject the owner to a $500.00 per diem fine as a repeat offender, and a lien would be placed and recorded on the subject real property.[226] The owner shortly thereafter and well before the hearing date complied with the grass overgrowth; however, the hearing occurred with a finding that the owner was not in compliance by the compliance date, but that the owner complied by the date of the hearing.[227] While the code enforcement

223. *See Pimentel*, 974 F.3d at 924.

224. Ficken v. City of Dunedin, No. 8:19-cv-1210-CEH-SPF, 2021 WL 1610408, at *1 (M.D. Fla. Apr. 26, 2021), *aff'd*, No. 21-11773, 2022 WL 2734429 (11th Cir. July 14, 2022).

225. *Id.* at *2.

226. *Id.* The purpose of a repeat violation is to encourage the owner to maintain the property regularly with no future violations so that code enforcement does not have to be involved. These proceedings can proceed to a hearing on an initial violation and make a finding that a violation occurred, so that if a subsequent violation occurs within five years the local government may assess $500.00 per diem as a repeat violation. *See* FLA. STAT. § 162.06(2)–(4) (2022).

227. *Ficken*, 2021 WL 1610408, at *3. Florida Statute section 162.06(2)–(4) provides that if the violation is not corrected by the time specified by the correction date, the case may be presented to the code enforcement board or Special Magistrate, regardless if the violation

officer had the authority to cancel the hearing in light of compliance, the city chose to proceed and obtain a final order with no fine initially imposed.[228]

In July 2018, which was slightly more than three years later, the city's code enforcement officer noted that the grass was longer than ten inches on the subject real property, constituting a recurring violation.[229] At the hearing in early September 2018, the city's board found that non-compliance was proved by the entry of two separate orders and that the owner was a repeat offender. The board voted to fine the owner the maximum daily fine of $500.00 per diem totaling $28,500.00 for the days of non-compliance as a repeat offender based upon the adjudication imposed by the 2015 violation.[230] This is so, even though the owner claimed that he had to help his ailing mother in South Carolina who he was caring for, that he had difficulty clipping the grass due to lawn mower issues, and that a third party who regularly cut the grass in the past had died.[231] The owner failed to contest this violation was a repeat offender, and he failed to appear at the hearing, thereby allowing the board to enter a final order that a repeat violation occurred. The board considered the owner's request for reconsideration or rehearing in November 2018, which the owner attended, but the board denied the owner's request for rehearing.[232] The owner failed to pay the fines, and the city recorded the code enforcement fines that became liens against the subject real property.[233] The city also advised the owner that absent payment, the city would start foreclosure proceedings against the subject real property for the

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has been corrected before the board hearing. This statute specifically lays a predicate for the local government to show that the violator is a repeat offender for an assessment of $500.00 per diem relating back to the initial date of the pending violation and also permits an assessment of $500.00 per diem where the violation presents a serious threat to public health, safety, and welfare:" or the violation is irreversible or irreparable. FLA. STAT. § 162.06(4). Repeat violation means a violation of a provision of a code or ordinance by a person who has been previously found through a code enforcement board or any other quasi-judicial or judicial process, to have violated or who has admitted violating the same provision 5 years prior to the violation, notwithstanding the violations occur at different locations. *Id.* § 162.04(5).

228. *Ficken*, 2021 WL 1610408, at *3.

229. *Id.* The size of the excess growth of the vegetation was not provided in the court's decision, but code enforcement officers have broad discretion to determine what is and is not a violation. *See* FLA. STAT. § 162.06(1)–(4).

230. *Ficken*, 2021 WL 1610408, at *4.

231. *Id.* at *2.

232. *Id.* at *4.

233. *Id.* at *9–10.

total amount of the fines.[234] Ultimately, the owner and Suncoast First Trust filed an action in the district court in a multi-count complaint and contended that the city's imposed fines and liens constituted "a violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution (Count I), in which [Plaintiffs'] alleged that, as applied, the City's daily fines of $500" and cumulative fines of more than $29,000 were "disproportionate to the offense of having tall grass."[235] "They also allege[d] in this [suit] that, as applied, the 'ultimate penalty' imposed by the City, which is foreclosure, was disproportionate to the "offense of having tall grass.'[236] Finally, the Plaintiffs' "allege[d] that on its face and as applied, the 'City's system of limitless fines for all non-irreparable code violations' violated the Excessive Fines Clause of the Eighth Amendment."[237] Thus, based upon the Plaintiffs' claims, they requested that the city be enjoined from collecting fines and foreclosing the liens on the subject real property.[238]

The opinion in *Ficken* presented a thorough analysis of whether code enforcement fines and foreclosure of liens upon the owner's failure to comply violated the federal and state constitution, and after examining the relevant language of chapter 162 of the Florida Statutes, chapter 22, Dunedin Code of Ordinances ("DCO"), Due Process claims Excessive Fines Clause claims, and section 17 of article I of the Florida Constitution, the district court found that none of those constitutional provisions applied, and therefore granted summary judgment in favor of the local government.[239]

234. *Id.* at *13.
235. *Id.* at *5.
236. *Id.*
237. *Id.*
238. *Id.* at *5. Plaintiffs also claimed a "violation of the Excessive Fines Clause of [s]ection 17 of [a]rticle I of the Florida Constitution (Count II), which mirror[ed] Count I, except that the Plaintiffs also allege[d] that, as applied, the City's daily fines of $500 and aggregate fines of over $29,000, as well as the foreclosure of [the owner's property] as a result of tall grass, shock[ed] the conscience." *Id.* Florida law provided that if a fine "shocked the conscience," then such a fine was a violation of the Excessive Fines Clause and section 17 of article I of the Florida Constitution. This standard was promulgated by Florida courts well before *Timbs* was decided and in essence constituted a narrower standard than the standard after *Timbs* and after the application of the Bill of Rights by incorporation of the Excess Fines Clause into the Fourteenth Amendment, which prohibits less restrictive treatments of violations by the states than under federal constitutional law. *See supra* notes 30, 136, 179–81.
239. *Ficken*, 2021 WL 1610408, at *9–10, *20, *25.

While the opinion in *Ficken* is that of a district court, it is worth examining so that future litigants may consider whether an Excessive Fines Clause challenge should be made when fines and liens are imposed. The court examined chapter 162 of the Florida Statutes,[240] and the intent of the Local Government Enforcement Act, which is to promote, protect, and enhance the health, safety, and welfare of the citizens of the counties and municipalities of this state, and that the quasi-judicial body was provided with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive method of enforcing local government code provisions in force in counties and municipalities, where a pending initial or repeat violation continues to exist.[241] The plaintiffs claimed that daily fines of $500 and a total fine of nearly $30,000 for tall grass were unconstitutional under the Excessive Fines Clause and the Excessive Fines Clause of section 17 of article I of the Florida Constitution.[242] In seeking summary judgment on the Excessive Fines Clause claim under the United States Constitution, the Plaintiffs emphasized the principle of proportionality to claim that the fines were grossly disproportional to the gravity of the offense.[243]

The city argued that the fines fell within the range of fines that may be imposed for original or repeat violations under chapter 162 of the Florida Statutes.[244] The city also argued that any reliance upon cases concerning forfeiture, restitution, and other criminal fines was distinguishable because those concepts do not apply in noncriminal code enforcement matters.[245] The city finally

240. *Id.* The court also referenced chapter 22, DCO as a basis for code enforcement proceedings, as it largely mirrors the language of chapter 162; therefore, it should be assumed that this city's authority to file for and impose fines and liens flows from enforcement of chapter 162, Florida Statutes, as well as from its own local government code provisions. *See* FLA. STAT. §§ 162.01–.02 (2022).

241. *See id.*

242. *Ficken*, 2021 WL 1610408, at *9–10, *20, *25.

243. *Id.*

244. *Id.*

245. Many of these factors were argued and rejected by the district court and depending on the facts and circumstances of a future case, counsel should consider arguing such factors in favor of and as applied to limiting substantial code enforcement fines and liens that will result in foreclosure on account of the breadth of opinion in *Timbs*. Local governments have grown increasingly dependent on fines as a supplement to their budgets that are in excess of administrative costs of the local government, and that is a major concern mentioned in *Timbs* that should bring in Excessive Fines Clause scrutiny to such fines. *See* Michael Makowsky, *A Proposal to End Regressive Taxation Through Law Enforcement*, *in* MITALI NAGRECHA ET AL., FEES, FINES, AND THE FUNDING OF PUBLIC SERVICES: A CURRICULUM FOR

argued that foreclosure did not fall within the realm of the Eighth Amendment prohibitions against Excessive Fines Clause violations, because it serves to remediate, not punish, and is part and parcel to the underlying nonpayment of the fine and lien resulting in foreclosure.[246]

After considering the arguments by both sides, the district court found in favor of the City. It did state that such code enforcement fines fall within the Excessive Fines Clause, which prohibits the government from assessing and obtaining payments whether in cash or kind because such fines are punitive and constitute a fine for Eighth Amendment purposes. It then stated that since there is a strong presumption that the amount of a fine is not unconstitutionally excessive if it lies within the range of fines prescribed by the legislature,[247] in the absence of evidence that it is grossly disproportional to the gravity of a defendant's offense, there is no Excessive Fines Clause violation.[248] In strictly following the deference doctrine, the court then stated: "Well-settled Florida decisional authority provides that a statutorily authorized civil fine will not be deemed so excessive as to be cruel or unusual unless it is so great as to shock the conscience of reasonable men or is patently and unreasonably harsh or oppressive."[249]

REFORM 1, 13 (Brian Highsmith ed., 2020); Min Su, *Taxation by Citation? Exploring Local Governments' Revenue Motive for Traffic Fines*, PUB. ADMIN. REV. 36 (2020); Conner, *supra* note 156, at 139. However, when a city claims that the Excessive Fines Clause does not apply to code enforcement fines that have no connection to past, present, or future crimes as was argued in *Ficken*, that should be helpful to petitioners' claims against noncriminal fines as local code violations that are substantial are less likely to harm the local community, because such noncriminal fines may be a method by local governments to tax local residents in lieu of imposing legal taxes that might suggest that such fines are disproportionate to the gravity of an offense and constitute fines-for-profit. There should also be greater leeway for the courts to support a finding that the Excessive Fines Clause applies to such noncriminal violations, because such noncriminal violations that result in fines and liens as penalties are not as grave and severe as criminal violations, which are far more damaging to the public's health, safety, and welfare. The city's acknowledgment that noncriminal violations are substantially different than criminal violations suggests that such violations are entirely different, and they need to be treated differently than those fines and penalties resulting from a criminal violation. *See* Colgan, *supra* note 18, at 27; Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 979 (2018).

246. *Ficken*, 2021 WL 1610408, at *21.

247. *Id.* ("A fine within the permissible range otherwise authorized by the legislature is presumptively constitutional.") (quoting *State v. Cotton*, 198 So. 3d 737, 743 (Fla. 2d Dist. Ct. App. 2016)).

248. *Id.*

249. *Id.*; *see also* Locklear v. Fla. Fish & Wildlife Conservation Comm'n, 886 So. 2d 326, 329 (Fla. 5th Dist. Ct. App. 2004) (citing Amos v. Gunn, 94 So. 615 (1922)). The reader should keep in mind that the "shocking the conscience" standard no longer exists after *Timbs* as it held that the Excessive Fines Clause has been incorporated into the Fourteenth

Although Plaintiffs' arguments were rejected, in future cases where a local government code fine appears to be disproportionate and excessive, factors such as the size of the imposed fines need to be considered along with the severity of the violations (tall grass of the subject real property did not necessarily cause harm to neighbors or the local government); reasons why remedying the violation were untimely complied (Plaintiff's mother's health and welfare had to be prioritized); owner's responsibility and oversight in remedying the violation and why they could not meet the deadline (owner's mother was in South Carolina which had to be prioritized along with the death of the yard keeper); violation was not so harmful or injurious and was remedied albeit late (size of the fine has no relation to the gravity of the offense as there was no evidence of vermin during a relatively short time of noncompliance); the size amount of the fine for a *de minimus* violation without proof that the violation was detrimental to the health, safety, and welfare of the community (no proven damage to the local community or owner by noncompliance other than claims made by code enforcement personnel); the remedy was unreasonably harsh and oppressive and could result in a harsh sanction of foreclosure that would place the owner and his or her family at risk of losing his or her home without payment of an excessive fine (adverse effect if foreclosure occurred on the family and where they resided); and that the fines are disproportionate to the gravity of the offense. ($30,000 fine for tall grass is excessive in light of the gravity of the offense and the facts and the circumstances).[250]

In *Robson 200, LLC v. City of Lakeland, Florida, Lakeland Code Enforcement Board*,[251] the district court considered whether the fine that accrued for failing to satisfactorily repair a fence constituted an Excessive Fine.[252] After several attempts to repair a fence, the code officer prepared an affidavit of noncompliance and

Amendment that requires federal, state, and local governments to comply with the Fourteenth Amendment. Yet it appears that this language is still being used by courts. *See supra* note 184.

250. *See* supra notes 223–49.

251. Robson 200, LLC v. City of Lakeland, 593 F. Supp. 3d 1110 (M.D. Fla. 2022).

252. *Id.* at 1115. The USDC also mentioned in passing that upon compliance, Robson 200 could request that the total accrued fine be reduced to 10% of the total, plus administrative costs according to the city's local government regulations. *Id.* at 1118. This might also have been a suggestion by the district court judge that violators who comply should exhaust their administrative remedies and ask for a reduction before filing a suit in district court.

concluded that a violation existed and an order was entered imposing a $50.00 per day fine after a Board hearing.[253] The fines imposed on the failure of the owner to repair the fence continued to grow without satisfactorily being repaired, and ultimately Robson 200 filed suit in district court that included Counts that the fines imposed were a violation of the Excessive Fines Clause and article I, section 14 of the Florida Constitution.[254] The district court analyzed prior case-law including *Bajakajian* and *Timbs*, and stated that the touchstone of the Excessive Fines Clause was "proportionality,"[255] and stated that a fine is excessive if it is "grossly disproportional to the gravity of a defendant's offense."[256] It also discussed other non-restrictive factors, including whether the violator was in the class of persons to whom the statute was directed, how the imposed penalties compared to other penalties sanctioned by the legislature, and the harm or damage caused by the violator to the public.[257] Of importance to its analysis is the court's rejection of any "strong presumption" of the constitutionality of a statute's punishments and fines, while the court fully acknowledged that while the legislature exercises its political judgment by enacting such punishments and fines, it is up to the judiciary to be the ultimate arbiters of legislation and that the courts are required to interpret, explain, and ultimately determine the constitutionality of legislation.[258] By suggesting that the "strong presumption" accorded statutorily authorized fines is an outlier, the district court further commented that, "If modern federal courts presume that the fines of the political branches [Executive and Congress] are lawful, they turn that lesson upon its head, eliminating much of the check that law—whether it be the English or American Bill of Rights—is meant to have upon the power to fine the People."[259]

Although the district court found that $50.00 per diem was within the range of fines allowed by the legislature, it stated that

253. *Id.*

254. *Id.* Plaintiff also contended that the fence citation language was unconstitutionally vague under the Federal and State Constitutions because the violations were not clearly defined where the city claimed that "sound condition" did not adequately place plaintiff on notice of what needed repair, which was rejected. *Id.*

255. *Id.* at 1120.

256. *Id.*; *see also* United States v. Bajakajian, 524 U.S. 321, 334 (1998).

257. *Robson 200, LLC*, 593 F. Supp. 3d at 1120.

258. *Id.* at 1121; *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803).

259. *Robson 200, LLC*, 593 F. Supp. 3d at 1121.

the fines were modest,[260] and ultimately rejected the *Robson 200* position that the total accumulated amount must be applied rather than the per diem fine.[261] The district found that the amount of the fines was only twenty percent of the maximum amount allowed by section 162.09(2)(a).[262] The district court also referenced deposition evidence, which suggested that the purpose of code enforcement was to maintain property values, gradually keep real estate increases in value, sustain the livability of neighborhoods, and defend against nuisances that may occur in neighborhoods along with blight, which is consistent with the best interests of the health, safety, and welfare of the community.[263]

XI. *ANALYSIS OF* JAMES FICKEN AND SUNCOAST FIRST TRUST V. CITY OF DUNEDIN, FLORIDA, ET AL*, AND* ROBSON 200, LLC V. CITY OF LAKELAND, FLORIDA, ET AL.*, IN LIGHT OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT*

The district court's decisions and analysis in *Ficken* and *Robson 200* are thorough, but the decisions fail to follow *Timbs* and consider its broad language in support of a comprehensive application of the Excessive Fines Clause. Once an Article in the Bill of Rights is incorporated into the Fourteenth Amendment of the Constitution, the rights between the individual and the government need to be balanced. In light of *Timbs*, that balance should include whether the size of accumulated fines imposed by a Special Magistrate or Code Enforcement Board must be adopted or modified in light of their size and the importance the Constitution places on an owner's real property,[264] in light of the Excessive

260. *Id.* at 1124.

261. *Id.* at 1122. "Moustakis is unpublished and the Court has been unable to locate (and the Defendants do not cite) published Eleventh Circuit opinions addressing how the Excessive Fines Clause applies to the accumulation of fines based on the same underlying conduct." *Id.* at 1123.

262. *Id.* at 1124.

263. *Id.*

264. *See* U.S. CONST. amend. V; *see also* Kelo v. City of New London, 545 U.S. 469, 489–90 (2005); Mary M. Ross & Kristen Tolan, *Legislative Responses to* Kelo v. City of New London *and Subsequent Court Decisions—One Year Later*, 16 J. OF AFFORDABLE HOUS. 52, 52–53 (2006); FLA. STAT. §§ 73.013–.014 (2022). As a result of *Kelo* and the fear that "blighted area" was insufficiently defined in the statutes, the Florida Legislature passed statutory amendments contained in Florida Statutes sections 73.013–.014, that severely restricted a condemning authorities' power to take private property for economic development. This law amended Florida Statutes chapter 73 and created a prohibition

Fines Clause and article I, section 17 of the Florida Constitution. By relying on *Moustakis*, which emphasized that a code enforcement fine is properly categorized as a per diem amount, not a total accumulated fine, the district courts followed the deference doctrine rather than finding that it is an accumulated fine and that the size of the fine and lien should matter. It is the size of the fines as accumulated and its proportionality to the severity of the violation that should be determinative as to whether the size of the fines and the possibility of a future forfeiture is excessive and disproportionate in light of the severity of the violations. Both district court decisions discuss federal and state court rulings before *Timbs*, where courts have stated that there is a strong presumption in favor of the constitutionality of a statute and its fines and that substantial deference should be given to legislative statutes. *Robson 200* rightfully questions this premise and states that the substantial presumption premise that is accorded statutorily authorized fines is an outlier in constitutional interpretation and needs to be rejected or modified.[265] Yet, the district court did what it claimed it should not do: find a way to support the legislative enactment and the range of fines imposed by the statute, as long as the fines fell within the range of fines permitted by chapter 162 of the Florida Statutes by relying on what the district court called an outlier no matter the size.[266] Both decisions seem to question whether an unpublished opinion that has no precedential value should be followed, yet *Ficken* and *Robson 200* cited and followed the unpublished opinion in *Moustakis*, even though it was decided well before *Timbs*. In *Robson 200*, while questioning *Moustakis* as a precedent, the court acknowledged that the judicial power to interpret and apply the law requires a court to exercise its independent judgment in interpreting and expounding the laws.[267] *Robson 200* also specifically conceded that a legislative enactment will not relieve courts of their responsibility to independently decide what the Constitution requires,[268] yet the court violated that fundamental

against the transfer of property to a private entity or natural person that can be taken through eminent domain. Local governments are restricted to taking private property for uses that have historically had a public purpose, i.e., roads, utilities, public infrastructure, transportation related services, parks, civic buildings, and so forth.

265. *Robson 200, LLC*, 593 F. Supp. 3d at 1121.

266. *Id.* at 1122.

267. *Id.* at 1122–23.

268. *Id.* at 1121.

principle by relying on the deferential doctrine that runs contrary to the judiciary's independence.[269] *Robson 200* acknowledged the broad language in *Timbs* that courts need to scrutinize fines "out of accord with the penal goals of retribution and deterrence" for "fines are a source of revenue,"[270] and that the Excessive Fines Clause is "fundamental to our scheme of ordered liberty," and "deeply rooted in this Nation's history and tradition,"[271] yet after back and forth dialogues, *Ficken* and *Robson 200* follow pre-*Timbs* decisions, including the vague and tenuous "shock the conscience of reasonable men"[272] standard nowhere defined and which should no longer exist after *Timbs*. The district court decisions are also disappointing because there is no way to compare penalties and fines imposed on violators who have been found criminally responsible and who are fined for criminal violations, as distinguished from violators who violate noncriminal code provisions and which have no connection to past, present, or future criminal matters, and the unquestionable fact that noncriminal code violations having no connection to criminal violations are far less severe in light of the proportionality to the severity standard that has existed since *Bajakajian*.

Both district court decisions, which were decided after *Timbs*, fail to consider the significance of *Timbs*, which incorporated the Eighth Amendment into the Fourteenth Amendment, making the Eighth Amendment provision a significant Article of the Bill of Rights that is now applicable to the states and local governments.[273] This sort of reasoning suggests that the decisions are anything but a deep-seated analysis by the courts of the impact of the Excessive Fines Clause into what has been universally called

269. *Id.* at 1124.

270. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) (quoting Harmelin v. Michigan, 501 U.S. 957, 979, n.9 (1991)).

271. *Id. (*quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)) (providing that the Excessive Fines Clause carries forward invariable safeguards found in sources from Magna Carta to the English Bill of Rights to state constitutions from the colonial era to the present day).

272. *See Robson 200, LLC*, 593 F. Supp. 3d at 1122; *see also* Ficken v. City of Dunedin, No. 8:19-cv-1210-CEH-SPF, 2021 WL 1610408, at *21 (M.D. Fla. Apr. 26, 2021) (citing Locklear v. Fla. Fish & Wildlife Conservation Comm'n, 886 So. 2d 326, 329 (Fla. 5th Dist. Ct. App. 2004)) (referencing pre-*Timbs* law, which should no longer be applicable to any analysis of whether a substantial fine or forfeiture violates the Excessive Fines Clause).

273. *See Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring).

"fundamental to our scheme of ordered liberty" and that has become incorporated into the Bill of Rights.[274]

Legal scholars have suggested that *Timbs* calls for a reconsideration of the impact of the Excessive Fines Clause, so that courts may reconsider the question of what constitutes a violation of the Excessive Fines Clause if legislatures fail to do so and maintain the status quo.[275] Most decisions relied upon by the district courts were decided before *Timbs*, and they concern civil forfeiture of property fines emanating from criminal prosecutions and violations, not exclusively civil and administrative fines imposed by a quasi-judicial body that only decides noncriminal violations and that has no connection to criminal violations; the lone exception is the unpublished decision of *Moustakis* that pertains to code enforcement violations and fines that accrued and was decided many years before *Timbs*. When courts lump together both portions of the Eighth Amendment—"nor excessive fines imposed, nor cruel and unusual punishments inflicted"—in any single analysis of the size of a fine, they set up an analysis that is set up to fail when an excessive fine has been imposed, as the former applies to civil and criminal penalties and fines, whereas the latter applies to criminal fines and penalties.[276] While some decisions have lumped together, "nor excessive fines imposed," with "nor cruel and unusual punishments inflicted," such an analysis is tantamount to comparing apples to oranges as they are separate provisions of the Eighth Amendment and need to be kept separate and apart. When both phrases are used interchangeably, the result imposes an undue burden on the property owner as the courts co-mingle and apply separate and independent clauses of the Eighth Amendment.[277]

Civil and quasi-judicial fines are noncriminal violations and have no relation to criminal conduct or proceedings. Code enforcement proceedings are one of those areas that have emerged as a force in claims by individuals who fear the government's "power to extract payments, whether in cash or kind," as punishment for some offense.[278] Budget pressures are part of what drives state and local governments to rely on monetary sanctions.

274. *Id.* at 686 (majority opinion).
275. *See* Hottot, *supra* note 14, at 585–87.
276. *See* U.S. CONST. amend. VIII.
277. *Id.*
278. *Timbs*, 139 S. Ct. at 687.

While local governments endeavor to maintain the health, safety, and welfare of the community, some argue that state and local governments seek streams of income generated by budget pressures as they assess legal economic assessments against violators, including their need for monetary sanctions to generate income.[279] Thus, the language used in *Timbs* is directed to the legislature and lower courts to consider the legitimacy of legislative fines that must not be "out of accord with the penal goals of retribution and deterrence" for "fines are a source of revenue" and that those fines need to be scrutinized.[280]

The district court's statement in *Ficken* correctly stated that fines and a lien can result in foreclosure from the same uncorrected cumulative violations according to chapter 162.[281] However, the court's suggestion that the size of the fine for a future foreclosure is a function of the daily repetition by the owner of the offense over a period of time fails to acknowledge that the per diem fines are daily chunks of a cumulative fine.[282] Each daily offense, when combined into one cumulative fine and lien whether foreclosure occurs, constitutes a merger into one single cumulative fine which has merged into a total sum due, and that cumulative fine should be scrutinized in light of the Excessive Fines Clause.[283] Yet, when a fine grows and becomes an accumulated fine and lien, there is no basis to suggest that each per diem fine is separate from the total accumulated fine; it is the size of the fine that needs to be scrutinized under the Excessive Fines Clause and article I, section 17, Florida Constitution, as each daily fine has merged into one accumulated fine and loses its status as a separate and distinct fine by subjecting the owner of the real property to one

279. *Id.* at 689 (citing Harmelin v. Michigan, 501 U.S. 957, 979, n.9 (1991)); *see* NAGRECHA ET AL., *supra* note 245, at 5; *see also* Alexes Harris et al., *Studying the System of Monetary Sanctions*, 8 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI. 1, 1 (2022); Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837 (2015); Shannon R. Graham & Michael D. Makowsky, *Local Government Dependence on Criminal Justice Revenue and Emerging Constraints*, 4 ANN. REV. CRIMINOLOGY 311 (2021).

280. *Timbs*, 139 S. Ct. at 689 (quoting *Harmelin*, 501 U.S. at 979 n.9).

281. Ficken v. City of Dunedin, No. 8:19-cv-1210-CEH-SPF, 2021 WL 1610408, at *25 (M.D. Fla. Apr. 26, 2021).

282. *See* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 181 (1995).

283. *See* Austin v. United States, 509 U.S. 602, 604 (1993); *see also* United States v. Bajakajian, 524 U.S. 321, 324 (1998) (involving a single violation rather than a per diem fine accumulated fines' over a period of time but still suggests that it is the size of fine that matters); *Timbs*, 139 S. Ct. at 686.

judgment.[284] Any analysis to the contrary is misleading because when accumulated fines become one fine and lien and are ultimately recorded in the public records, there is one fine and lien imposed against the owner's real property.[285] In attempting to distinguish *Bajakajian* from *Moustakises*, courts mistakenly fail to take into account the ultimate effect of a merger of fines and a lien for the entirety of the days of noncompliance, subject to enforcement by the courts when a suit is filed and one judgment is obtained.[286] The cumulative fines and lien constitute a forest rather than separate free-standing trees.

The deferential doctrine has been superimposed on decisions before and after *Timbs*, which is precisely what the court criticized in *Robson 200*.[287] Regardless of the statements in *Ficken* and *Robson 200*—there is substantial deference given to legislative enactments—it is apparent that fines and liens have been sustained no matter their size in most cases without regard to whether the fines were grossly disproportional to the gravity of the offense. Size, according to these decisions, does not matter. In essence, this makes the legislature the final arbiter of any fine whether or not the Excessive Fines Clause is implicated and seriously considered. When courts defer to the legislature, which exercises its political judgment when enacting laws, often without regard to their constitutionality, the judiciary loses its independent judgment in interpreting the laws and their application to the facts and circumstances at hand. In instances where courts indiscriminately follow the deferential doctrine, courts bow to the legislature, not the Excessive Fines Clause after *Timbs*. Those decisions constitute overwhelming reliance upon legislative enactments that statutorily authorize any sized fines and that will be sustained if they fall within the range of fines

284. *See* Mathieu v. City of Lauderdale Lakes, 961 So. 2d 363, 365 (Fla. 4th Dist. Ct. App. 2007).

285. *Id.*; *see* FLA. STAT. § 162.09 (2022).

286. Florida Statutes section 162.09(3) specifically provides: "A fine imposed pursuant to this part shall continue to accrue until the violator comes into compliance or until judgment is rendered in a suit filed pursuant to this section, whichever occurs first. A lien arising from a fine imposed pursuant to this section runs in favor of the local governing body, and the local governing body may execute a satisfaction or release of lien entered pursuant to this section. After 3 months from the filing of any such lien which remains unpaid, the enforcement board may authorize the local governing body attorney to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest."

287. *See* Robson 200 LLC v. City of Lakeland, 593 F. Supp. 3d 1110, 1120–21 (M.D. Fla. 2022).

prescribed by the legislature no matter their size. If that view is adopted verbatim no matter the size of the fines and regardless of their proportionality to the offense, fines will rarely if ever be successfully challenged. Such decisions have the potential to undermine meaningful judicial review of forfeitures and other civil fines under the Excessive Fines Clause on account of the deference doctrine making the legislature the ultimate decider as it exercises its political judgment. There will be no other remedy by a property owner to challenge a substantial accumulated fine that has been applied to a *de minimus* violation along with assessed fines on account of judicial resignation that the legislature can do no wrong and must be followed.[288] While no one should excuse the behavior of violators who deliberately refuse to comply with local government code violations, most violators need time to comply with violations so that per diem fines cease and then seek to obtain a reduction of the fines and lien, which may require funding to pay accrued fines and a lien. Many private entrepreneurs knowingly purchase real property already containing code violations that are ultimately remedied, which should have the effect of enhancing the subject real property's value; this should result in not only enhancing the aesthetics of the subject real property, but it may also enhance the entire neighborhood's appearance and value, including a not forgotten result of an increase in the tax base of the subject real property and the entire neighborhood of the local government.[289]

288. *See* Jonathan S. Masur & Lisa L. Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV., 643, 645 (2015); *see also* Johnson, *supra* note 27; Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. UNIV. L. REV. 1, 1–2 (2010); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 374 (1988).

289. *See* Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 137 (2009); Kermit Lind & Joe Schilling, *Abating Neighborhood Blight with Collaborative Policy Networks-Where Have We Been, Where Are We Going*, 46 U. MEM. L. REV. 803, 819–22 (2016).

XII. CONCLUSIONS AND EPILOGUE: WHAT SHOULD THE LEGISLATURE AND LOCAL GOVERNMENTS DO TO ENSURE COMPLIANCE WITH THE EIGHTH AMENDMENT EXCESSIVE FINES CLAUSE AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION WHEN DETERMINING WHETHER THE SIZE OF FINES AND LIENS ARE IN VIOLATION OF THE EXCESSIVE FINES CLAUSE AFTER TIMBS V. INDIANA*?*

The Supreme Court's decision in *Timbs* is significant on account of its incorporation of the Excessive Fines Clause by way of the Due Process Clause and is applicable to the states, which are now prohibited from narrowing the protection provided by the Excessive Fines Clause. *Timbs* broadens the applicability of the Excessive Fines Clause to include excessive civil fines and forfeitures and local government code enforcement fines and liens. If the legislature and local governments fail or refuse to consider the impact of *Timbs*, the courts should reconsider how far a legislature may go in enacting fines that assess substantial cumulative fines that are disproportionate to the severity of a violation. Whether or not a fine is ultimately determined to violate the Excessive Fines Clause and article I, section 17 of the Florida Constitution, the legislature and local governments need to seriously consider *Timbs*' impact on the assessment of cumulative fines that grow exponentially and become substantial. Unless the legislature acts, it now rests with local governments to be proactive in considering a reduction of accumulated fines that have increased exponentially depending on the severity of the violations and their size; and if the size of fines is substantial, they should consider reducing such cumulative fines. If local governments fail to act, then it is left to the courts to decide this question after looking at the facts and circumstances of each case before deciding whether substantial cumulative fines violate the Excessive Fines Clause.

Timbs strongly suggests that a new day has come on account of the incorporation of the Excessive Fines Clause into the Due Process Clause and its applicability to state and local governments. The general principles discussed by Supreme Court decisions and lower courts on the parameters of the Excessive Fines Clause and proportionality to the gravity of the offense as discussed in *Bajakajian* strongly suggest that there should be

criteria, factors, and a ratio set by the legislature and local governments and ultimately the courts if the legislative branch of government or local governments fails to act. *Timbs* emphasized the importance of the Excessive Fines Clause, which acknowledged the Eighth Amendment's importance in prohibiting excessive fines, where it stated: "fundamental to our scheme of ordered liberty," and "deeply rooted in this Nation's history and tradition."[290] When Indiana confiscated Timbs' $42,000 Land Rover, which he had bought with the proceeds of his father's life insurance policy, claiming that he had used it to commit crimes, the Court in *Timbs* had grave misgivings that such a large civil forfeiture for such a relatively minor drug conviction and which would subject him to a maximum $10,000.00 monetary fine for his drug conviction, was a violation of the Excessive Fines Clause.[291] In *Timbs,* the size of the fine for purposes of civil forfeiture mattered. For too long, the Excessive Fines Clause has been one of the Bill of Rights' least followed protections, even though it was enacted to curb governments from imposing abusive fines. Whether the direction suggested by *Timbs* is followed remains to be seen; however, the importance of *Timbs* should not be overlooked and needs to be acknowledged, because the size of a fine matters. Local governments at this time by statute have the authority to impose fines that fall within the range of fines permitted by statute, but they should also recognize that they do not have *carte blanche* authority to impose unlimited fines that grow and become excessive and overreaching in a one size fits all standard if those violations are marginal in light of *Timbs*.

Some local governments have enacted code provisions identifying specific criteria and factors that need to be considered in proceedings upon compliance after violators request a reduction of cumulative fines. This proactive approach by local governments constitutes an affirmative step by local governments' commissions, staff, and counsel to ensure that there is no violation of the Excessive Fines Clause once compliance occurs and as fines are ultimately assessed and reduced, as local governments in these

290. The opinion of the Supreme Court makes sense as fines are politically easier to impose than applicable taxes; state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue, so they need to be scrutinized more closely when the State stands to benefit. *See* Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) (internal quotation marks omitted).

291. *Id.* at 686.

instances may serve as enforcers to obtain compliance, not to operate as local government tax collectors or as a way for a local government to help finance local government operations to make up shortfalls.[292] In most instances, local governments ought to be considerate and even supportive of violators' requests for reductions of accumulated fines and liens after considering the size of the cumulative fines and liens and the facts and circumstances of the case, because the goal of code enforcement proceedings is to obtain compliance.[293]

One such approach which allows local governments to reduce accumulated fines and liens is by setting a flat percentage reduction of fines and liens to allow the violator to comply and obtain closure. Some local governments absent egregious and irrevocable circumstances, reduce the aggregate fines for violations by as much as 85% to 90%.[294] Some local governments

292. *See* FLA. STAT. § 162.02 (2022); Hottot, *supra* note 14, at 609.

293. Hottot, *supra* note 14, at 608–09.

294. *See* CORAL SPRINGS, FLA., LAND DEV. CODE § 184(c)(3) (2022). Fines and Liens criteria, which include new evidence, extraordinary hardship, whether the applicant was the property owner when the fine and lien was imposed, the number days violation existed, whether respondent was a repeat violator, whether the subject real property is homestead or non-homestead, whether the lien interfered with the restoration of the property, condition of the property before and after the lien, abandonment and if the property provides avenues for criminal activity or public safety concerns, restoration needed to place the real property into code compliant condition, environmental concerns, and any other relevant facts and circumstances in favor of or against a reduction of the fine and lien. Also, Hallandale Beach, Florida Code of Ordinances section 9-46 (2022) and City of Hallandale Beach, Florida, Administrative Policy No. 2014.002/R7 (revised Nov. 13, 2014) grants the City Manager authorization to mitigate code enforcement fines and liens for up to 90% of the total assessed amount for non-homestead properties in accordance with specific criteria. In accordance with Hallandale Beach, Florida Code of Ordinances section 9-6, the Special Magistrate is then entitled to reconsider prior orders enacted in order to determine if the recommendation by the City Manager is appropriate, or if a further reduction is warranted. At least one local government has allowed owners to apply to have 100% of their code-related fines and liens forgiven as part of the county's lien amnesty program. *See* Hannah Morse, *Got Code Violation Fines or Liens? Palm Beach County Offers Some Property Owners Fresh Start*, PALM BEACH POST (Oct. 4, 2021, 7:00 AM), https://www.palmbeachpost.com/story/news/local/2021/10/04/palm-beach-county-lien-amnesty-program-fresh-start-code-fines/5937040001/. Another has offered affected parties the opportunity to reduce the code enforcement lien amount through a settlement with the local government for 15% of the face amount of the fine and lien. *See Town of Davie Code Enforcement Lien Reduction Amnesty Program*, TOWN OF DAVIE, FLA. (Dec. 17, 2021, 4:27 PM), https://www.davie-fl.gov/CivicAlerts.aspx?AID=936&ARC=1665. Still another has offered affected parties the lesser of (a) payment of $1,000.00; or (2) payment of an amount equal to five percent (5%) of the outstanding accrued fine(s); (3) administrative and prosecutorial costs must also be paid. City of Winter Haven, *City of Winter Haven Code Enforcement Lien Amnesty Summary and Eligibility Requirements*, MY WINTER HAVEN, https://www.mywinterhaven.com/wp-content/uploads/Code-Enforcement-Lien-Amnesty-Program.pdf (last visited Feb. 3, 2023). Amnesty programs require code compliance inspection of the entire real property in order to settle outstanding fines and liens.

will even consider granting a further reduction if the Special Magistrate or Code Enforcement Board concludes that there should be a further reduction based on the nature and severity of the violations,[295] including but not limited to the time it may have taken to obtain compliance, costs expended by the owner to comply, the actual enhancement of real property and its impact on the local community after compliance has occurred, whether the real property is homestead or non-homestead, the financial ability of the real property owner, the severity of the violation, whether the code violations were negligent or intentional, was the current owner the violator or did he or she purchase the real property not knowing about attendant code violations, and perhaps a catch-all factor to include other facts and circumstances to obtain payment and closure.[296] After specified factors are considered, the owner and the local government may avoid future legal proceedings and seek to avoid the possibility of a foreclosure of the subject real property if a resolution occurs so that the local government does not become the owner of the real property upon foreclosure if prosecution occurs in court proceedings and the owner obtains closure.

An 85% or 90% reduction is substantial; however, based upon the size of the fines and liens and their exponential growth, a substantial reduction of 85% to 90% that accrued to $300,000.00 or $400,000.00 before compliance occurred may still require the owner to pay a local government a whopping $30,000.00 or $40,000.00 or more, plus administrative costs, which may be an insurmountable burden for some real property owners to pay and satisfy the lien. While objective criteria are necessary to place the public on notice of what to expect in a fine and lien reduction

295. *See* HALLANDALE BEACH, FLA., CODE OF ORDINANCES § 9-6; *see also* FLA. STAT. § 162.09(2)(c); *see also* Code Enf't Bd., Reduction of Fine, AGO 2002-62 Op. Fla. Att'y Gen (Sept. 11, 2002); Op. Att'y Gen. Fla .98-50 (1998); Op. Att'y Gen. Fla. 93-91 (1993). Florida Statutes section 162.09(2)(c) generally provides that a quasi-judicial body may consider a reduction of a fine, but this statute fails to set forth any criteria or guidelines that should be followed by local governments, which leaves it up to local governments to state what factors and criteria may be considered. Criteria and factors for consideration are essential. Length of time, past conduct and violations, the nature of the violations and how egregious violations may have been, whether the fines are disproportional to the violations, among other factors are basic criteria, subject to a list of factors that need to be expressly stated and ultimately considered.

296. *See supra* notes 292–93 and accompanying text; *see also supra* pt. IX, which are suggestions by the author of this Article for criteria and factors that should be considered, subject to additional factors and criteria provided by local governments.

proceeding and to provide violators with an opportunity to achieve a reduction, there should also be objective criteria provided to the public to comply with fundamental due process on whether fines are grossly disproportionate to the offense.[297] While this David vs. Goliath match favors local governments, a Special Magistrate or Code Enforcement Board listening to evidence and arguments in a reduction proceeding should have broad discretion in a second look to decide what amount is acceptable after an 85% or 90% reduction is recommended by local government staff and counsel, even if that percentage reduction is greater than any standard percentage reduction and ratio provided by the local government. By allowing an owner to plead his or her case in person at a local government's quasi-judicial proceeding upon compliance, a staff recommendation for a reduction should be a starting point that allows the Special Magistrate or Code Enforcement Board to take a second look at further reduction before deciding whether the local government ratio is adequate or excessive.[298] Of course, it will be

297. *See* FLA. STAT. § 162.07(3) (requiring fundamental due process in code enforcement proceedings.

298. In Palm Beach Polo, Inc., v. Village of Wellington, No. 50-2020-CA-002893-XXXX-MB, FLWSUPP 30021PAL (Fla. 15th Cir. Ct. Apr. 18, 2022), the appellate court ruled that the "Order Reducing Penalty/Lien" was void and reasoned that the Special Magistrate lacked subject matter jurisdiction as conversion of the fines to a lien divested the Special Magistrate of subject matter jurisdiction, because the Special Magistrate could only reduce fines. See FLA. STAT. § 162.09(3) and WELLINGTON, FLA., CODE OF ORDINANCES § 2-199 (2022), which was silent on this issue, as only the Village of Wellington's village council had authority to compromise liens after they have been recorded. There are ways to alleviate concerns about the results of this appeal. First, it only binds the parties involved in the case; second, the Village of Wellington merely incorporated section 162.09(3), Florida Statutes, without enacting a Resolution or specific code provision stating that a Special Magistrate may abate and mitigate fines and liens, which exists in many local governments and which authorizes Special Magistrates the right to abate and mitigate fines; third, even if no specific provision authorizes Special Magistrates the right to abate or mitigate fines and liens, a local government will usually approve a settlement by the Special Magistrate and the real property owner if a further reduction is made at a hearing by ultimately having the local government execute a Release of Lien in order to modify and approve the Special Magistrate's suggestion so as to ensure closure; fourth, this unintended consequence may be easily remedied by the legislature in amending and adding "liens" to "fines" in section 162.09(3), Florida Statutes. In another situation, it has been held that local governments may sell and assign code enforcement liens at arm's length to a third party so that the third party is a legal owner of the lien, but the local government must sign off on a release upon resolution of collection efforts. *See* Ismael v. Certain Lands Upon Which Special Assessments Are Delinquent, 51 So. 3d 583, 585–86 (Fla. 3d Dist. Ct. App. 2010); FLA. STAT. § 162.09(3); Op. Att'y Gen. Fla. 2001-09 (2001); Op. Att'y Gen. Fla. 99-03 (1999). If a local government may assign foreclosure of liens litigation, then it should be able to authorize Special Magistrates to consider abatement and mitigation proceedings, and upon payment, then the local government may execute a release of the fine and lien at a reduced fine and lien. *See also* Harry M. Hipler, *Developments in the Law on Local Government Code*

incumbent on the owner to present facts and circumstances suggesting why a further reduction is necessary. There should be no *carte blanche* policy or expectation of any entitlement to a reduction that has been recommended by the local government if egregious or irrevocable circumstances are shown after a fact-intensive analysis is considered, although the local government's position is important and a starting point.

No real property owner wants to pay a fine to comply with real property code violations assessed by local government Special Magistrates or Code Enforcement Boards in addition to any administrative fees necessary to place the real property into compliance. It would be contrary to the purpose of chapter 162 of the Florida Statutes, and the health, safety, and welfare of the community to allow violators to evade responsibility for code violations by neglecting to comply with code violations as that course would render local governments powerless. Deterrence of violations is necessary and proper so that real property owners are placed on notice that fines and imposition of a lien as provided by law will be obtained should owners fail to comply with code violations. If owners decide not to comply and refuse to pay fines that have accumulated for long periods that have been cumulatively assessed, then the entire purpose of chapter 162 of the Florida Statutes would render code enforcement compliance meaningless. Chapter 162 of the Florida Statutes is a necessary method for local governments to ensure compliance with code violations and aggregated fines, and it is necessary to ensure compliance with code provisions so that the health, safety, and welfare of the community are maintained. If a local government did not have the authority to impose fines and liens against real property owners who can comply but fail or refuse to do so, it is questionable whether code violations would be remedied, except when it was convenient to the real property owner to refinance or sell their real property. Worse yet, the subject real property's value and that of surrounding neighborhoods would be adversely affected, resulting in a reduction in the value of the subject real property and nearby neighborhoods due to deteriorating conditions where nuisance and blight might be next on the horizon for that

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Enforcement Proceedings: Quasi-Judicial Proceedings Pursuant to Chapter 162, Florida Statutes, 42 STETSON L. REV. 681, 709–11 (2013).

neighborhood if failure to comply does not timely occur. A logical conclusion to such a *laissez-faire* policy if local governments looked the other way and did not have the power to maintain the health, safety, and welfare of the community is the deterioration of real property values and a reduction of attendant taxes that local governments need to help sustain themselves with much-needed funding.

Neighborhoods and structures require maintenance to stay in good condition as they age. Inevitably, structures and neighborhoods that are not properly maintained deteriorate. Abandoned or boarded-up buildings nearby other real property can reduce the value of a home by 13%. The trash in a neighborhood can reduce values by 15%. Neighborhood conditions affect the ultimate sales price of real property.[299] Consequently, code enforcement officials are first responders whose goal is to stop real property values from falling, to mitigate vandalism, crime, and potential blight which occurs more frequently in deteriorating neighborhoods, and to help residents of neighborhoods feel comfortable by enjoying their real property whether it is homestead or investment real property.[300] All violations impact a neighborhood's health, safety, and welfare. That includes common violations that have been referred to as run-of-the-mill violations, as these violations can still result in an adverse effect on the subject of real property and surrounding neighborhoods if they exist over long periods.[301] Sometimes the only way to obtain compliance is to prosecute and obtain convictions for violations, assess fines, and impose fines and liens that will compel compliance so that fines and liens against violators' real property are sustained with the hope and expectation that real property owners' violations are corrected and that payment of fines is forthcoming with a caveat that fines and liens need to comply with the Excessive Fines Clause.

299. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-34, VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES 45–46 (2011); Jill Krasny, *The Neighbors from Hell Who Will Trash Your Home's Value*, BUS. INSIDER (Sept. 16, 2011, 9:34 AM), https://www.businessinsider.com/neighbor-trash-home-value-2011-9; *see also* Wonseok Seo, *Does Neighborhood Condition Create a Discount Effect on House List Prices? Evidence from Physical Disorder*, 40 J. REAL EST. RSCH. 69, 69 (2018); Hye-Sung Han, *The Impact of Abandoned Properties on Nearby Property Values*, 24 HOUS. POL'Y DEBATE 311, 311 (2014).

300. *See* Schilling, *supra* note 289.

301. *See* Hipler, *supra* note 298, at 682–83; Hipler, supra note 7, at 272–77.

The legislature, local governments, and the courts need to acknowledge *Timbs*' incorporation of the Excessive Fines Clause into the Fourteenth Amendment. Code violations' fines and liens are noncriminal, and they are not related to criminal proceedings, and as such, they need to be treated as noncriminal violations when it comes to imposing fines and liens. Requests for reduction of fines and liens are always a persistent problem that code violators and stakeholders of a local government are concerned with because no one wants to pay off the entirety of substantial fines and a lien owed to a local government much less than a reduced amount that may be unaffordable after spending substantial funds on their real property to become code compliant. The Excessive Fines Clause now controls whether a fine is excessive, and the Excessive Fines Clause as decided by *Timbs* applies to state and local governments' impositions of code enforcement fines and liens. The question as always is how much is too much.