



# Texas Criminal Defense Lawyers Educational Institute

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April 23, 2019

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*Re: Protections against excessive fines under the U.S. and Texas Constitutions  
(RQ-0277-KP)*

Dear Madam Chair and Members of the Opinion Committee:

On March 25, 2019, the Attorney General issued a notice regarding Representative James White's request for an opinion, designated as Request Number RQ-0277-KP. Representative White has propounded a series of questions upon the Attorney General regarding how Texas deals with the issue of excessive fines in the wake of the U.S. Supreme Court's ruling in *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019).

The Attorney General, in turn, was gracious enough to favor several entities with notice of Representative White's request and with solicitation of briefing in response to his concerns. The Texas Criminal Defense Lawyers Association was one of those organizations.<sup>1</sup> This letter brief addresses the questions presented by Representative White.

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<sup>1</sup> The Texas Criminal Defense Lawyers Association (TCDLA) is a non-profit, voluntary, membership organization. It is dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership approaching 3,500 and offers a statewide forum for criminal defense counsel. It provides a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases. TCDLA also seeks to assist the courts by acting as *amicus curiae* in appropriate cases. Neither TCDLA nor any attorney representing TCDLA have received any fee or other compensation for preparing this letter brief.

## **I. RELEVANT LAWS**

### **A. *Timbs v. Indiana* and the Eighth Amendment**

In *Timbs v. Indiana*, the Supreme Court held the Eighth Amendment's Excessive Fines Clause is an "incorporated" protection. 139 S.Ct. at 687. This means the Clause applies to the States under the Due Process Clause of the Federal Constitution's Fourteenth Amendment. Specifically, the Clause now applicable to all states says "[e]xcessive bail shall not be required, nor excessive fines imposed . . ." U.S. CONST. amend. XIII. This "protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority." *Id.* at 686.

### **B. Article I, § 13 of the Texas Constitution**

The Texas Constitution has long addressed the issue of excessive fines. In Article I, § 13, our Constitution says "[e]xcessive bail shall not be required, nor excessive fines imposed . . ." Clearly, the language of the Excessive Fines Clause of both the federal and state constitutions is identical.

## **II. PROPOUNDED QUESTIONS**

Representative White asks eight questions of the Attorney General. As detailed below, the answer to most of the questions is straightforward. Other questions require more guesswork, but an educated guess based on the state of Texas caselaw is nevertheless possible. Each question and discussion are detailed in separate headings below.

### **A. "Would our Texas courts, local, county, or state, interpret Section 13 of the Texas Constitution as a constitutional guarantee that protects from excessive fines? If not, explain."**

Yes. All courts in Texas must interpret Article I, § 13 of the Texas Constitution as a constitutional guarantee protecting our citizens from excessive fines. The language of the constitutional provision undeniably prohibits the government from imposing excessive fines. TEX. CONST. art. I, § 13. The Texas Supreme Court, in fact, recently reiterated Article I, § 13 "prohibits excessive fines" and is a "constitutional constraint[] on excessive penalties." *See In re Xerox Corp.*, 555 S.W.3d 518, 527 n. 53 (Tex. 2018).

**B. “[W]ould a Texas court rule that under the Fourteenth Amendment’s Due Process Clause that there is an incorporation of the Eighth Amendment’s Excessive Fines Clause against Texas?”**

Yes. All Texas courts would rule the Due Process Clause of the federal constitution’s Fourteenth Amendment incorporates the Eighth Amendment’s Excessive Fines Clause in Texas. The United States Supreme Court has held the Amendment is incorporated. *Timbs*, 139 S.Ct. at 687. Under the principle of stare decisis, therefore, every other court in America is constrained by that ruling. That question is no longer up for debate.

**C. “[C]ould a court adopt and interpret ‘that the right to be free from excessive fines is one of the ‘privileges of immunities of citizens of the United States’ protected by the Fourteenth Amendment’”**

No. From a federal viewpoint, the Excessive Fines Clause stands on its own in the Eighth Amendment to the federal constitution. The only way the Privileges and Immunities Clause could possibly be implicated alongside the Excessive Fines Clause would be for imposition of the Eighth Amendment onto the States. *See* Matthew J. Hegreness, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance and the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1834-35, 1838-39 (2011) (discussing the genesis of the Privileges and Immunities Clause and how it was meant to embrace those laws that define and establish America as a whole).

The Supreme Court in *Timbs* expressly incorporated the Excessive Fines Clause to the states under the Due Process Clause of the Fourteenth Amendment. While Justice Thomas wrote a concurring opinion that the provision would be better incorporated under the Privileges and Immunities Clause, he was the only member of the Court advancing such a theory. Stated differently, the highest court in America has considered and declined incorporation via the Privileges and Immunities Clause. The Excessive Fines Clause is incorporated to the states under the Due Process Clause, and at this point, the only court that could conclude otherwise would be the U.S. Supreme Court itself.

**D. “How would a court likely interpret a law that mandates the executive branch to enforce a statute accompanied with an excessive fine?”**

If the law violates the Excessive Fines Clause, the court would find it unconstitutional and unenforceable. It would strike the law down. That said, the Texas Supreme Court has noted, “‘prescribing fines is a matter within the discretion of the legislature.’ We will ‘not override the legislature’s discretion, ‘except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind.’” *State v. Morello*, 547 S.W.3d 881, 889 (Tex. 2018), reh’g denied (June 22, 2018), cert. denied, 139 S. Ct. 575, 202 L.Ed.2d 405 (2018) (quoting *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980)).

The question, however, assumes the law is unconstitutional, i.e. if the statute in question imposes excessive fines, it is by definition unconstitutional. In that case, the courts will strike down that law regardless of which branch of government is the actor. If a law violates the Eighth Amendment or Article I, § 13 of the Texas Constitution, it will not be favorably interpreted by any court.

**E. “What amounts to an excessive fine?”**

There is no brightline number or percentage that constitutes an excessive fine. The question, which is entirely dependent on the unique facts of any given case, is whether the fine is proportional to the offense. *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 2036, 141 L.Ed.2d 314 (1998). If the fine is not proportional, it is excessive in violation of the Eighth Amendment. *Id.*, 118 S.Ct. at 2036. If the fine is proportional, it is not excessive. *Id.*, 118 S.Ct. at 2036. The question remains, however, how does a court determine whether a fine is proportional to the offense. The Supreme Court offers very little direct guidance on the question.

Texas courts had adopted *Bajakajian* long before the *Timbs* ruling. *Bennett v. Grant*, 525 S.W.3d 642, 651 n. 34 (Tex. 2017), reh’g denied (Sept. 22, 2017), cert. denied, 138 S. Ct. 1264, 200 L.Ed.2d 417 (2018); *\$165,524.78 v. State*, 47 S.W.3d 632, 639 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *1992 BMW VIN WBABF4313NEK00963/Brandon Lee Thompson v. State*, 04-07-00116-CV, 2007 WL 2608364, at \*1 (Tex. App.—San Antonio Sept. 12, 2007, no pet.). Despite the adoption over a decade ago of *Bajakajian*, there is still a dearth of caselaw offering guidance on when a fine is excessive, i.e. when it is disproportional to the offense.

There are, however, recurring themes in the few cases discussing this issue. Oftentimes, the nature of the offense, the relationship of the offense to other illegal activities, whether the defendant fits the class of persons for whom the statute was designed, and the harm caused are considered. See *2007 Infiniti G35X Motor Vehicle, Vin JNKBV61E17M708556 v. State*, 06-13-00057-CV, 2014 WL 991970, at \*1 (Tex. App.—Texarkana Mar. 13, 2014, no pet.). Some courts additionally consider the maximum sentence and fine that could be assessed for the offense and how much culpability the penalties reflect. *One (1) 1998 Blue Chevrolet Camaro v. State*, 02-10-00252-CV, 2011 WL 3426263, at \*3 (Tex. App.—Fort Worth Aug. 4, 2011, no pet.). Most Texas courts performing an Excessive Fines Clause analysis have considered some variation of these factors. See *One Car, 1996 Dodge X-Cab Truck White in Color 5YC-T17 VIN 3B7HC13Z5TG163723 v. State*, 122 S.W.3d 422, 425 (Tex. App.—Beaumont 2003, no pet.); *1992 BMW VIN WBABF4313NEK00963/Brandon Lee Thompson v. State*, 04-07-00116-CV, 2007 WL 2608364, at \*1 (Tex. App.—San Antonio Sept. 12, 2007, no pet.); *Vasquez v. State*, 01-04-01221-CV, 2006 WL 2506965, at \*6 (Tex. App.—Houston [1st Dist.] Aug. 31, 2006, pet. denied).

Therefore, what constitutes an “excessive fine” is a determination that varies depending upon the unique facts of each case.

**F. “How is a court likely to rule when faced with fines, and associated fees and surcharges, that are disproportionate to the offense, target political opposition, raise revenue, or exact hostility on minority groups? How would a court likely identify such fines, fees, surcharges? Is there a legal metric that courts use to derive at such findings?”**

No one can ever guarantee how a court will rule on any given issue. That said, if confronted with any statute in violation of the Excessive Fines Clause of the federal or state constitutions, the court ought to deem the law invalid. And as the Supreme Court recognized in *Timbs*, fines that are disproportionate to the offense, target political enemies, and serve as a source of revenue will all fall under the umbrella of the Excessive Fines Clause. *Timbs*, 139 S.Ct. at 688.

Research does not reveal any cases in Texas state court (other than forfeiture cases and few miscellaneous tort cases) directly implicating the Excessive Fines Clause. Therefore, one is left to speculate as to how, precisely, a court would conclude a statute *itself* violates the Excessive Fines Clause. The only legal metrics currently in place for evaluation of Excessive Fines Clause violations are those discussed in section E above, which are only related to forfeiture cases.

Another potential consideration is that most laws targeting political opposition or showing hostility towards minority groups will run afoul of the constitutions in other, very serious ways. These types of laws are almost always unconstitutional, first and foremost, under the Equal Protection Clause or Due Process Clause of both constitutions. *See Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967) (prohibitions on interracial marriage violate both the Due Process and Equal Protection Clauses); *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 706, 7 L. Ed. 2d 663 (1962) (a claim of unequal representation in legislative districting schemes falls under the federal Equal Protection Clause).

**G. “How would a court recognize a disproportionate fine?”**

The test for proportionality is the same as the test for excessiveness. *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 2036, 141 L. Ed. 2d 314 (1998) (“the excessiveness of a punitive forfeiture involves solely a proportionality determination.”). Please refer to Section E above.

**H. “Does Texas and the American colonies share a similar constitutional legacy with the English tradition regarding the prohibition on excessive fines? If not, please explain; however, if so, how would 21 century jurisprudence balance that assessment of a court-involved’s individual financial worth and the degree of the offense?”**

Yes as to the first part. Caselaw offers no clear answer as to the second part.

## 1. *The History of Texas's Excessive Fines Clause*

Texas is founded upon the same overarching principles that guided America's Founding Fathers. One of these principles is the prohibition against excessive fines. That particular principle dates at least as far back as the 1215 passage of Magna Carta.<sup>2</sup> As the Supreme Court of Texas has noted, "Colonists brought to America and then to Texas their belief in the historic rights guaranteed by Magna Carta." *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986).

The Supreme Court in *Timbs* details how this principle found its way into the Eighth Amendment of the federal constitution. 139 S.Ct. at 688. That same principle has deep roots in Texas as well. The clause first appears in Article 14 of the General Provisions of the Texas Constitution of 1833: "Excessive bail shall not be required, nor excessive fines imposed..." TEX. CONST. art. XIV (1833, amended 1836). That exact clause was then repeated in Texas's first formal Bill of Rights in 1836. TEX. CONST. art. XI (1836, amended 1845). During the Constitutional Convention of 1845 (immediately prior to Texas joining the Union), it was again included, without alteration, in the Bill of Rights. TEX. CONST. art. I, § 11 (1845, amended 1861). It has appeared in every iteration of the Texas Bill of Rights from 1836 to the present day—its wording untouched over the years. *See* TEX. CONST. art. I, § 13.

As to the specific question about *why* the Texas Constitution's Excessive Fines Clause was included in the first place, one need only understand Texas's Founding Fathers, who originally crafted the provision.

The Texan of the 1830's . . . was imbued with the ideas and ideals of Jacksonian democracy. Generally, then, the constitutions of the 1830's in Texas were built upon a framework of traditional Anglo-American ideas modified by the advanced thinking of the Jacksonian period and further modified by the traditions of Spanish law and custom.

The bills of rights of 1833 and 1836 were built in the same way. The basic framework was composed of the customary English and colonial precedents, the Declaration of Independence (1776), the bills of early state constitutions, especially those drafted before 1787, and the first eight amendments to the federal constitution . . .

The cores of these declarations of the 1830's were the customary guarantees based on English common law practices.

J.E. Ericson, *Origins of the Texas Bill of Rights*, 62 THE SW. HISTORICAL QUARTERLY 457, 458 (1959).

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<sup>2</sup> Specifically, Magna Carta mandated the Crown could only fine a man in proportion to the degree of his offense. § 20, 9 Hen. III, ch. 14, in 1 Eng Stat. at Large 5 (1225) ("Liber homo non amercietur pro parvo delicto, nisi secundum modum delicti" or "[a] free man shall not be amerced for a slight offense, but after the manner of the fault").

## **2. *The Validity of Potential Income-Based Fines Given Federal and State Excessive Fines Clauses***

The only consideration Magna Carta gave to a person's financial worth was to say a fine cannot deprive him of his livelihood. This very basic consideration—that a fine ought not deprive one of his livelihood—seems to still be alive and well in modern-day jurisprudence, although no court has expressly said so.

### **a. *U.S. Supreme Court Jurisprudence***

The Supreme Court has never ruled on whether a person's financial worth is relevant in an Excessive Fines Clause analysis. The only standard crafted by the the Court is that “[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” *Bajakajian*, 524 U.S. at 334, 118 S.Ct. at 2036. In *Bajakajian*, the Court (referencing Magna Carta) noted “[r]espondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood . . .”

Consequently, because the issue has never been squarely before the Court, it has never ruled on the matter.

### **b. *Other federal jurisprudence***

The Court's language in *Bajakajian* and its reference to Magna Carta's “livelihood” language has left many questioning where the fulcrum of proportionality lies. Is it proportional solely to the offense or is it proportional to both the offense and the person's ability to pay any resulting fine. See Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1896 (2018).

In the absence of any further guidance from the Supreme Court, a split has developed among the federal circuit courts. Most confine their analyses to the offense itself. See *United States v. Castello*, 611 F.3d 116, 120 (2d Cir. 2010); *United States v. Machy*, 339 F.3d 1013, 1016 (9th Cir. 2003). The defendant's ability to pay is not a relevant consideration. The First Circuit, however, *does* expressly consider the defendant's ability to pay in all Excessive Fine Clause cases. See *United States v. Levesque*, 546 F.3d 78, 83 (1st Cir. 2008) (holding “a court should also consider whether forfeiture would deprive the defendant of his or her livelihood”); see Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 834-35 (2013).

Therefore, there is a split among federal circuit courts as to whether a person's net worth is a relevant inquiry in cases implicating the Excessive Fines Clause.

*c. Texas Jurisprudence*

In Texas, the jurisprudence regarding the import of a person's net worth in the imposition of fines has developed in a very scattered and ad hoc way. There are, again, no clear-cut rules.

One line of cases, for example, deals with instances when a probationer ordered to pay fines or restitution finds himself financially unable to do so. When that happens, caselaw instructs a court to not revoke his probation. *See Martinez v. State*, 563 S.W.3d 503, 511 (Tex. App.—Corpus Christi 2018, no pet.); *Greathouse v. State*, 33 S.W.3d 455, 459 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd); *Trevino v. State*, 08-13-00234-CR, 2015 WL 181657, at \*3 (Tex. App.—El Paso Jan. 14, 2015, no pet.). This rule, however, is not based on the Excessive Fines Clause but rather on the Due Process Clause. *Greathouse*, 33 S.W.3d at 459 (“Revocation of probation for failure to pay fees and restitution when an appellant is unable to pay the total amount denies due process of law”); *see Bearden v. Georgia*, 461 U.S. 660, 667, 106 S.Ct. 2064, 2069, 79 L.Ed.2d 221 (1983).

An entirely separate jurisprudence exists for forfeiture cases. In those cases, which all cite back to *Bajakajian*, courts have never considered the net worth of the person from whom the property was seized. *See \$27,877.00 Current Money of U.S. v. State*, 331 S.W.3d 110, 122 (Tex. App.—Fort Worth 2010, pet. denied); *One Car, 1996 Dodge X-Cab Truck White in Color 5YC-T17 VIN 3B7HC13Z5TG163723 v. State*, 122 S.W.3d 422, 424 (Tex. App.—Beaumont 2003, no pet.).

Consequently, there is much uncertainty as to how, or even if, modern-day courts would consider an individual's net worth in imposing fines.

### **III. CONCLUSION**

The *Timbs* decision changes very little inasmuch as Texas jurisprudence is concerned because the provision incorporated into the states by that decision was already in place in Texas. That said, there is a dearth of caselaw interpreting the Excessive Fines Clause, and courts have not yet addressed many questions implicated by the Clause.



Respectfully submitted,

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