EXPLORING THE "EXCESS" IN EXCESSIVE: REIMAGINING THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE IN THE WAKE OF *STARS INTERACTIVE*

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Since its inception, the U.S. Supreme Court has only heard a total of five cases interpreting the Excessive Fines Clause of the Eighth Amendment. While the Eighth Amendment's other clauses—such as the constitutional bar on excessive bail and the ban on cruel and unusual punishment—have been well-litigated and studied, the Excessive Fines Clause has been largely neglected by practitioners and scholars alike. Instead, fines are typically analyzed through a Due Process Clause lens.

Throughout the Supreme Court's Excessive Fines Clause jurisprudence, the Court has always adopted a proportionality approach—analyzing cases in the same ratio-like manner as cases involving cruel and unusual punishment. This approach has shortcomings because what has resulted is an imprecise and unpredictable application of ratio analyses leading to vastly disparate results across the country.

In 2021, uncertainty surrounding the Excessive Fines Clause was finally on the cusp of being resolved when Stars Interactive, owner of an online gaming website called PokerStars, petitioned the Supreme Court for certiorari, challenging a judgment of the Kentucky Supreme Court as violative of the Excessive Fines Clause. Prior to a response brief being filed, however, the parties settled, leaving unresolved the question of when a penalty violates the Eighth Amendment. At the intersection of gaming law and constitutional law and in the Supreme Court's absence, this Article proposes an answer to when a fine becomes excessive within the meaning of the Eighth Amendment.

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INTRODUCTION

The Commonwealth of Kentucky is currently $28.6 billion short of meeting its future pension obligations.[1] And remarkably, Kentucky's pension deficit has actually shrunk since 2009.[2] How does a state in such dire economic straits solve an economic crisis this vast? In 2011, Kentucky's then-Governor Steve Beshear had a solution: online poker. To be clear, Kentucky did not plan to legalize, regulate, or

1. Grant Suneson, *Retirement Warning Signs? Pension Crisis Hits States. Here's the Biggest, Smallest Funding Shortfalls*, USA TODAY (Dec. 11, 2020, 7:01 AM), https://www.usatoday.com/story/money/2020/12/11/every-states-pension-crisisranked/115099952/ [https://perma.cc/9Q63-TX4N].

2. *The State Pension Funding Gap: Plans Have Stabilized in Wake of Pandemic*, PEW CHARITABLE TRS. (Sep. 14, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/09/the-state-pension-funding-gap-plans-have-stabilized-in-wake-of-pandemic [https://perma.cc/HHT2-PANB].

tax online poker. Instead, the Commonwealth was going to sue an online poker company.[3]

In 2010, the Commonwealth of Kentucky sued PokerStars—a company that operated a very popular online poker site attracting tens of thousands of customers at any given time from around the world—alleging that it operated illegally in the Commonwealth.[4] After a ten year court battle, Kentucky was unsuccessful in its efforts to prosecute the PokerStars site's owners.[5] Indeed, after a decade-long battle, PokerStars founder Isai Scheinberg surrendered to federal authorities and only paid a $30,000 fine for his role in operating an illegal gambling business.[6] The inability to effectuate a criminal case against PokerStars did not deter Kentucky authorities, who went back to the drawing board with a creative means of going after the poker site.[7] Specifically, for the first time in the Commonwealth's history, Kentucky brought suit in its own name under a gambling loss recovery statute.[8]

Under Kentucky's loss recovery statute, first enacted in 1798, the loser of a poker game can recover his or her losses if they exceed five dollars within a 24-hour period.[9] Also, if the gambler does not act to recoup these losses within six months by receiving payment from the winner or suing the winner, Kentucky law allows "any other person [to] sue the winner, and recover *treble* the value of the money or thing lost."[10] Using the treble damages loophole created by the statute, the Commonwealth determined that it could pursue a claim against PokerStars on behalf of every poker player who was in Kentucky and played on the site over a five-year period.[11]

Indeed, in 2010 the Commonwealth of Kentucky filed suit in Franklin Circuit Court, naming PokerStars as a defendant, suing in the amount of $290,230,077.94, and seeking to have the damages trebled.[12] The trial court awarded

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3. Tim Brenner, *PPA Wants to Join Kentucky Lawsuit Against PokerStars – Here's Why*, POKER*US* (Dec. 24, 2015), https://pokerus.com/2015/12/24/ppa-wants-to-join-kentucky-lawsuit-against-pokerstars-heres-why [https://perma.cc/Q34T-8BGA].

4. Dylan Lovan, *Kentucky Supreme Court: Online Poker Site Must Pay State $1B*, ABC NEWS (Dec. 17, 2020, 5:24 PM), https://abcnews.go.com/US/wireStory/ky-high-court-online-poker-site-pay-state-74791250 [http://web.archive.org/web/20210218075550/https://abcnews.go.com/US/wireStory/ky-high-court-online-poker-site-pay-state-74791250].

5. *See* Michael Gentile, *PokerStars Founder Isai Scheinberg Sentenced to Time Served in Final Chapter of the Black Friday Saga*, POKERFUSE (Sept. 24, 2020), https://pokerfuse.com/news/law-and-regulation/211731-pokerstars-founder-isai-scheinberg-sentenced-time-served/ [https://perma.cc/4UJQ-NLGP].

6. *Id.*

7. *See generally* Petition for Writ of Certiorari, Stars Interactive Holdings (IOM) Ltd. v. Kentucky *ex rel.* Brown, 142 S. Ct. 330 (2021) (No. 21-275), 2021 WL 3799052 [hereinafter *Stars Interactive* Petition].

8. *Id.* at *2.

9. KY. REV. STAT. ANN. § 372.020 (West 2022).

10. KY. REV. STAT. ANN. § 372.040 (West 2022) (emphasis added).

11. *Stars Interactive* Petition, *supra* note 7, at *2–*3.

12. Commonwealth *ex rel.* Brown v. Stars Interactive Holdings (IOM) Ltd., 617 S.W.3d 792, 796–97 (Ky. 2020).

the Commonwealth the entirety of the amount sought and trebled the award.[13] The court of appeals, however, held that the Commonwealth did not qualify as "any other person" capable of bringing the suit.[14] The court of appeals reversed the trial court's decision and remanded with instructions to dismiss the case.[15] The Kentucky Supreme Court then reversed the court of appeals, reinstating the trial court's damages award.[16] The damages calculation included in the complaint did not account for corresponding winnings; the gross losses suffered in Kentucky totaled approximately $290 million.[17] The trebling effect brought the damages to roughly $870 million, a figure that increased again after the court imposed the then-effective 12% statutory interest rate, bringing the total damages to $1.3 billion.[18]

Ultimately, the award issued by the Franklin Circuit Court and reinstated by the Kentucky Supreme Court was completely unconnected to PokerStars's revenues as, even without interest, the award was nearly 50 times greater than the $18 million in revenue PokerStars had earned in Kentucky.[19] Moreover, the award did not bear any meaningful connection to the tabulated harms suffered by the Commonwealth or its residents.[20] Following the Kentucky Supreme Court's verdict, the Governor announced that the proceeds would be used to shore up the Commonwealth's pension obligations—a plan bearing so little connection to the underlying case that it seemed possible the Commonwealth's motivation in pursuing the case was more about funding its pension plans than redressing the harms allegedly caused by PokerStars.[21] The judgment, as well as the purported use of the funds, raised substantial questions about whether the decision violated due process and the Eighth Amendment prohibition against excessive fines.[22] Unfortunately, after petitioning for certiorari, the Commonwealth and Stars Interactive,

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13. *Id.* at 797–98.

14. *Id.* at 798.

15. Stars Interactive Holdings (IOM) Ltd. v. Commonwealth *ex rel.* Tilley, 2016-CA-000221-MR, 2018 WL 6712631, at *12 (Ky. Ct. App. Dec. 21, 2018), *rev'd sub nom.* Commonwealth *ex rel.* Brown v. Stars Interactive Holdings (IOM) Ltd., 617 S.W.3d 792 (Ky. 2020).

16. *Stars Interactive*, 617 S.W.3d at 810.

17. *Stars Interactive*, 2018 WL 6712631, at *3.

18. *Id.*

19. *See* Lovan, *supra* note 4.

20. *Compare* John Holden, *Flutter Reaches $300M Settlement with Commonwealth of Kentucky in PokerStars Case*, ONLINE POKER REP. (Sept. 22, 2021, 11:58 PM), https://www.onlinepokerreport.com/54939/flutter-kentucky-settlement/ [https://web.archive.org/web/20220520034927/https://www.onlinepokerreport.com/54939/flutter-kentucky-settlement/] ("[P]layers in Kentucky never lost $870 million on PokerStars. In fact, they did not even really lose $290 million . . . . [T]he Kentucky courts looked at the gross losses in PokerStars' records, without ever deducting player winnings. A player who won $100, then lost $100, then won an additional $100 would end the day with $100 in net winnings. However, the court's accounting would consider only the $100 loss."), *with* Brown, 617 S.W.3d at 810 ("The Commonwealth's recovery in this case is certainly not a windfall . . . rather, it is a recoupment of some portion of the countless dollars the criminal syndicate has cost Kentucky collectively and Kentuckians individually.").

21. Holden, *supra* note 20.

22. *Stars Interactive* Petition, *supra* note 7, at *4.

PokerStars's parent company, settled the matter, leaving these important Eighth Amendment questions unanswered.[23]

In the more than 200 years since Congress ratified the Eighth Amendment, the Supreme Court has never addressed the precise question of when a fine becomes excessive within the meaning of the Eighth Amendment.[24] *Stars Interactive Holdings v. Kentucky* highlighted the differing approaches that lower courts have taken when analyzing the Eighth Amendment's Excessive Fines Clause—with most choosing to employ a due process analysis.[25] Unfortunately, without a Supreme Court decision on the merits, the question of how excessive a fine must be to violate constitutional norms remains unanswered.

Using *Stars Interactive* as a lens, this Article seeks to explore an alternative to the status quo in determining when a fine becomes constitutionally excessive under the Eighth Amendment. In doing so, this Article proceeds in four substantive parts. Part I provides an overview of the PokerStars litigation that brought this question to the steps of the Supreme Court. Part II discusses the history of the Excessive Fines Clause and its relationship to due process. Part III analyzes the different approaches that courts around the country have taken when analyzing suspect fines. Finally, Part IV proposes solutions for determining when a fine becomes excessive.

I. KENTUCKY V. ONLINE POKER

The saga that led to Stars Interactive petitioning the Supreme Court to challenge the Kentucky Supreme Court's verdict started years earlier.[26] In order to understand how online poker became the Commonwealth's target, however, it is necessary to examine poker's complicated history in the United States.[27] According to gaming law professor Nelson Rose, the author of dozens of academic articles on gambling regulation and policy, the acceptance of poker and gambling more broadly has gone through waves in the United States,[28] beginning with Puritan roots and

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23. *See generally* Joint Stipulation to Dismiss, Stars Interactive Holdings (IOM) Ltd. v. Kentucky *ex rel.* Brown, 142 S. Ct. 330 (2021) (No. 21-275) [hereinafter Joint Stipulation to Dismiss].

24. The Supreme Court most recently confirmed that the Eighth Amendment's Excessive Fines Clause is incorporated to the states and *in rem* forfeitures by the Fourteenth Amendment's Due Process Clause. *See* Timbs v. Indiana, 139 S. Ct. 682, 690–91 (2019).

25. Commonwealth *ex rel.* Brown v. Stars Interactive Holdings (IOM) Ltd., 617 S.W.3d 792 (Ky. 2020).

26. *See generally* Leo Giosuè, *10 Facts About Poker and Its History You Should Know*, JERUSALEM POST, https://www.jpost.com/special-content/10-facts-about-poker-and-its-history-you-should-know-671289 [https://perma.cc/XJ4M-BPJH] (June 17, 2021, 12:34 PM) (noting that January 1, 1998, is regarded as the emergence of the start of a new era for online poker as "[m]oney was able to change hands" online).

27. *See* Steve Bittenbender, *Flutter Says Lengthy PokerStars Kentucky Lawsuit Settled for $300 Million*, CTR. SQUARE (Ky.) (Sept. 22, 2021), https://www.thecentersquare.com/Kentucky/flutter-says-lengthy-pokerstars-kentucky-lawsuit-settled-for-300-million/article_dfb4eb6e-1bd0-11ec-a451-a76f96669f3c.html [https://perma.cc/MY9C-3AKD] (noting that the litigation pursuing PokerStars lasted more than 10 years).

28. *See* I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 365–68 (2010).

evolving to the present day, when many forms of legal gambling are widespread.[29] This Part briefly reviews the history of poker in the United States before addressing the emergence, growth, and cultural phenomenon of Texas Hold'em poker and finally discussing the history of the *Stars Interactive* case.

A. Poker in the United States

Poker anecdotes have long been associated with many of the United States' most prominent figures; both George Washington and Andrew Jackson were noted card players and gamblers, though Jackson was in his old age before the creation of modern poker.[30] Poker is a derivative of the French parlor game *poque*, brought to New Orleans by French settlers.[31] Reports date poker in the United States to 1829, but the game *poque* can be traced to 1441 Strasbourg, in what is now Austria.[32] The game spread up the Mississippi River on steamboats, and its name eventually evolved from *poque* to poker.[33] By the 1850s, historian James McManus noted that poker was the game of choice for gamblers "in nearly every state and territory, and most politicians were playing it."[34]

Presidents from Abraham Lincoln to Theodore Roosevelt played and regularly used poker as a means to analogize strategic decisions.[35] President Warren G. Harding was reported to have played poker once a week while president.[36] While poker and cards were discussed openly before the turn of the twentieth century in the United States, many of the Country's laws had not evolved from their British roots, which had largely banned gambling games for centuries.[37] Specifically, in 1657, influenced by Puritanism, England enacted a statute that allowed the loser of a gambling contest to recover twice the amount lost from the winner.[38] England's gambling loss recovery statute served as a model for similar statutes that materialized across the British Empire—including in the American colonies.[39] During the Protestant Reformation era, these gambling loss recovery statutes were supplemented by the Statute of Anne, which introduced the ability for third parties to recover triple a gambler's losses—though at its introduction, half the recovery was reserved for the plaintiff and half the money would go to the poor.[40] These statutes set the stage for future gambling loss recovery statutes, such as the law enacted by the Commonwealth of Kentucky.

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29. *Id.* at 367.

30. JAMES MCMANUS, COWBOYS FULL: THE STORY OF POKER 8 (2009).

31. Kat Martin, *The History of Poker*, POKER.ORG, https://www.poker.org/the-origins-of-poker/ [https://perma.cc/SJ77-P4CV] (July 19, 2022, 3:33 PM).

32. *Id.* There is an argument to be made that the game *poque* was a descendent of the Persian game *as nas*. *See* MCMANUS, *supra* note 30, at 50.

33. MCMANUS, *supra* note 30, at 50.

34. *Id.*

35. *Id.* at 9.

36. *Id.* at 10.

37. *See* G. Robert Blakey, *Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, 16 RUTGERS L.J. 211, 215–16 (1985).

38. *Id.* at 217–18.

39. *Id.*

40. *Id.* at 224.

As early as 1823, the Louisiana legislature began allowing New Orleans citizens to play poker and engage in many other forms of gambling as long as these citizens made annual donations to a charity hospital and the College of Orleans.[41] By the mid-1800s, poker had gained a reputation as a game that attracted cheaters.[42] As the money in poker increased, with some games having six-figure pots, the cheaters' cunning and skill increased.[43] When the Gold Rush took hold in California and the western United States, San Francisco soon replaced New Orleans as the hotbed of gambling.[44] In the West, poker games became infamous for ending in shootouts; many Western icons like Doc Holliday and Wild Bill Hickok became associated with violence at the poker table.[45] By the turn of the century, due to the dramatic increase in the popularity of poker and gambling more generally, cities and states across America began considering taxing the revenues of gambling houses.[46]

As the West developed and cities emerged, gambling became less desirable, and states began to ban it entirely.[47] The rise of Prohibition during the 1920s created an opportunity for organized crime figures to double their spheres of influence, and they often mixed gambling and alcohol in cities like New York, Cleveland, and Chicago.[48] Despite being one of the first western states to ban gambling, Nevada reversed course and permitted casinos beginning in 1931, ushering in an era of regulated gambling that included poker.[49] While Nevada legalized and regulated gambling beginning in the 1930s, other states lagged much further behind, leaving poker primarily in backrooms and private residences for much of the country.[50] Despite poker's widespread illegality, the game has been openly discussed and enjoyed by many of the nation's top jurists, including former Chief Justice William Rehnquist, who organized a monthly poker game during his time on the Court.[51]

B. The Rise of Texas Hold'em

The origins of Texas Hold'em poker—one of the most popular variants of poker and the type most frequently played on PokerStars—can be traced to the early 1900s.[52] Texas Hold'em involves players receiving two cards, followed by three

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41. MCMANUS, *supra* note 30, at 62–63.
42. *Id.* at 70.
43. *Id.* at 73, 78–81.
44. Kathy Alexander, *Gambling in the Old West*, LEGENDS AM., https://www.legendsofamerica.com/we-poker/ [https://perma.cc/E36G-EYTS] (Oct. 2023).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *See* Tony Mauro, *Rehnquist Papers: The Monthly Poker Game*, BLT: BLOG LEGAL TIMES (Aug. 21, 2009, 11:58 AM), https://legaltimes.typepad.com/blt/2009/08/missing-rehnquist-at-the-monthly-poker-game-.html [https://perma.cc/P9HA-5D2H] (further noting that Justice Antonin Scalia also joined in on poker games).
52. H.R. Con. Res. No. 109, 8th Leg., Reg. Sess. (Tex. 2007), https://capitol.texas.gov/tlodocs/80R/billtext/html/HC00109H.htm [https://perma.cc/YB35-YS7L].

rounds of community cards—first three and then one at a time—and betting between each round.[53] The fast-paced action and high stakes make the game attractive and easy to understand, which has helped it achieve widespread popularity.[54]

Although popular since its inception in the United States in the early 1900s, the growth of Texas Hold'em poker went into overdrive with the rise of household internet access later in the century.[55] The first online poker game was played in 1994, but the first game on a site that allowed players to directly send and receive money took place on January 1, 1998, with the launch of Planet Poker.[56] Throughout the 1990s, numerous other online poker platforms emerged, and Congress began to take note.[57] Indeed, beginning in 1997, Congress initiated a near decade-long quest to ban online gambling.[58] Congress's failure to successfully pass legislation banning online gambling resulted in the online gambling industry generating an estimated $800 million in revenue in its first year.[59] In 2000, online poker tournaments began to emerge,[60] and by 2001, various poker sites had become mainstream names, even advertising on television.[61]

Texas Hold'em arguably hit its peak in popularity in 2003 when Chris Moneymaker, an accountant from Tennessee, won the World Series of Poker and a prize of $2.5 million after qualifying in an online tournament.[62] In the years following Moneymaker's windfall, online gambling sites centered around poker—Texas Hold'em in particular—saw a massive influx of new online poker players.[63] Unfortunately, this success dissipated in 2006 when Congress passed the Unlawful Internet Gambling Enforcement Act ("UIGEA").[64] Although UIGEA does not ban online gambling outright, it targets banks and payment processors that enable online

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53. *How to Play Texas Hold'em Poker: Holdem Rules & Hands*, POKERNEWS, https://www.pokernews.com/poker-rules/texas-holdem.htm [https://perma.cc/2JLL-ZSK9] (last visited Oct. 26, 2023).

54. Ivan Potocki, *History Of Poker – From The Wild West To The Best Known Game*, MY POKER COACHING, https://www.mypokercoaching.com/history-of-poker/ [https://perma.cc/U4XJ-8VN3] (Sept. 16, 2021).

55. *See* Johannes Turunen, *The Memorable Online Poker History (1998–2021)*, BEASTS POKER (Aug. 30, 2021), https://beastsofpoker.com/online-poker-history/ [https://perma.cc/DA96-2SZX].

56. *Id.*

57. *See id.*

58. *See generally* John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS SPORT 97, 103–12 (2018) [hereinafter Holden, *Unlawful Internet Gambling Enforcement Act*] (describing the legislative history of the Unlawful Internet Gambling Enforcement Act).

59. Turunen, *supra* note 55.

60. *Id.*

61. *See id.*

62. *Id.*

63. *Id.*

64. Holden, *Unlawful Internet Gambling Enforcement Act*, *supra* note 58, at 101–02.

gambling operators to exist.[65] UIGEA's passage had a chilling effect on many companies' willingness to accept customers based in the United States and thus stymied the rapid rise in online gaming.[66]

Despite UIGEA's prohibitions, which caused other industry players to shut down their sites, several companies, including PokerStars, Absolute Poker, and Full Tilt Poker, remained in business—these companies' successes were short-lived.[67] Indeed, on Friday, April 15, 2011, the Department of Justice pulled the plug on almost all of the remaining major poker companies serving American customers—a day that became known as Black Friday.[68] On Black Friday, the Department of Justice seized the domains of the three largest online poker sites—shutting down these sites for good.[69]

While the federal government was cracking down on online poker, however, state legislatures were beginning to craft laws that would legalize it.[70] For example, in 2012, Delaware became the first state to legalize online poker, followed by Nevada and then New Jersey.[71] In February 2014, the governors of Delaware and Nevada signed a compact allowing operators to share liquidity between the two states, though the funds generated by each state's players would stay within that player's state.[72] In 2017 New Jersey joined the multi-state compact.[73] Since New Jersey entered the compact, various other states have begun legalizing online

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65. 31 U.S.C. § 5363 (2006) ("No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling . . . ."); *see generally* §§ 5361–67 (omitting an outright ban on online gambling).

66. Turunen, *supra* note 55.

67. *See id.*

68. *Id.*

69. *Id.*

70. *See generally* Jennifer Newell, *Legal Online Poker in the US: Can I Play in My State?*, LEGAL U.S. POKER SITES, https://www.legaluspokersites.com/state-laws [https://perma.cc/9VBH-7Z3Q] (Oct. 23, 2023).

71. Alex Weldon, *Multi-State Legal Online Poker – Legal Online Poker with Shared Liquidity Pools*, BONUS.COM, https://www.onlinepokerreport.com/multi-state-poker/ [https://perma.cc/BVT9-JB5U] (July 4, 2023).

72. Chris Grove, *Nevada and Delaware Agree to Compact for Online Poker. Who Wins and What's Next*, ONLINE POKER REP. (Feb. 25, 2014, 09:05 PST), https://www.onlinepokerreport.com/11124/nevada-online-poker-deal-with-delaware/ [http://web.archive.org/web/20140302032457/https://www.onlinepokerreport.com/11124/nevada-online-poker-deal-with-delaware/].

73. Steve Ruddock, *New Jersey, Nevada and Delaware Will Share Online Poker Player Pools After Gov. Christie Signs Deal*, ONLINE POKER REP. (Oct. 13, 2017, 11:05 PDT), https://www.onlinepokerreport.com/26921/new-jersey-interstate-nevada-delaware/ [http://web.archive.org/web/20171016223732/https://www.onlinepokerreport.com/26921/newjersey-interstate-nevada-delaware/].

poker,[74] and the activity that was once shunned, though discussed openly, has become a popular source of state revenue generation.[75]

C. PokerStars in the Bluegrass State

Despite the expansion of legal online poker in some states and its mainstream acceptance via broadcasts of the World Series of Poker on ESPN, in 2010, the Commonwealth of Kentucky was still less than enthusiastic about its residents playing the game.[76] Indeed, Kentucky Governor Steve Beshear may have been ahead of his time, or at least ahead of the Department of Justice, as the then-Governor launched his campaign against online gambling operators about a year before the Black Friday domain seizures.[77] Despite criticism from some expert commentators that the suit seemed hypocritical given the existence of the Kentucky state lottery and the Commonwealth's role as host of one of the world's largest gambling events, the Kentucky Derby, the Commonwealth went forward with its efforts to recover damages from online gambling operators.[78]

1. County Court Proceedings

Between October 12, 2006, and Black Friday—April 15, 2011—the Commonwealth of Kentucky sued PokerStars and a variety of other poker operators to recover the losses purportedly suffered by players located in Kentucky.[79] Specifically, the Commonwealth filed suit in Franklin County Circuit Court, bringing its claim under Kentucky's loss recovery statute, which states:

> If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the value of the money

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74. *See e.g.*, Jessica Welman, *Say Yes to Michigan Online Poker; Governor Signs Gambling Bills into Law*, ONLINE POKER REP. (Dec. 20, 2019, 07:52 PST), https://www.onlinepokerreport.com/39227/michigan-online-gambling-legalized/ [http://web.archive.org/web/20191220212151/https://www.onlinepokerreport.com/39227/michigan-online-gambling-legalized/] (noting Michigan joined New Jersey, Delaware, Pennsylvania, and Nevada in offering online poker in 2019).

75. John Brennan, *Partnership with Pennsylvania Could Boost Online Poker in N.J.*, NORTHJERSEY.COM (Bergen, N.J.) (Aug. 15, 2016, 6:23 PM), https://www.northjersey.com/story/news/2016/08/15/partnership-with-pennsylvania-could-boost-online-poker-in-nj/92944062/ [https://perma.cc/ME4G-C5JY].

76. *See Kentucky Gov Rolls Dice in Gambling Lawsuit*, ABC NEWS (Apr. 9, 2010, 11:22 AM), https://abcnews.go.com/TheLaw/Technology/kentucky-sues-online-gambling-operators/story?id=10333045 [https://perma.cc/7R7H-QNWZ].

77. *Id.*

78. *See* I. Nelson Rose, *Kentucky Sues to Recover Poker Losses*, GAMBLING & LAW, https://www.gamblingandthelaw.com/column/-sues-to-recover-poker-losses-2/ [https://perma.cc/DDN5-MGUH] (last visited Oct. 26, 2023) (suggesting facetiously that perhaps Governor Beshear could sue the Kentucky lottery or the Kentucky Derby next).

79. Commonwealth *ex rel.* Brown v. Pocket Kings, Ltd., No. 10-CI-00505, App. F, 157a (Ky. Cir. Ct. Div. 2 Aug. 11, 2015) [hereinafter *Pocket Kings Aug. 2015*], http://www.supremecourt.gov/DocketPDF/21/21275/188328/20210823153749534_PokerStars%20Petition%20Appendix.pdf [https://perma.cc/FC9Z-PLGM].

> or thing lost, if suit is brought within five (5) years from the delivery or payment.[80]

Based on PokerStars' parent company's admission that it accepted wagers placed by players located in Kentucky, the Franklin County Circuit Court concluded that PokerStars was liable under Kentucky law.[81] Subsequently, the court denied the defendants' motions for reconsideration and awarded damages to the Commonwealth.[82] In its motion for partial summary judgment, the Commonwealth submitted a claim for estimated damages of $535,951,020.00 (before trebling the damages).[83] However, after PokerStars released its gaming data, the Commonwealth revised its pre-trebling estimate to $290,230,077.94.[84] In coming to the $290 million figure, the court dismissed the defendants' argument that the Commonwealth could only recover the actual loss, as opposed to recovering the gross loss, which did not account for player winnings.[85] The court viewed the requested calculation adjustment as the equivalent of the defendants seeking to offset gambling losses.[86] Citing the defendants' years of operating illegal gambling websites in Kentucky, the Franklin County Circuit Court was unmoved by the request to reconsider the calculation of damages, even though PokerStars predicated the request on the fact that as an operator, it never would have received the $290 million but only a rake on each wager.[87]

In the third motion before Judge Thomas Wingate of the Franklin County Circuit Court, the defendants sought recalculation of damages and challenged the plaintiff's motion for summary judgment on the award of trebled damages and interest at the statutory rate of 12%.[88] The defendants argued that the plaintiff should have been entitled to the net losses of all players who lost more money than they won, a sum of $26,195,308.20.[89] Judge Wingate stated that three factors determined damages calculations: "(1) the identity of the parties, (2) the relationship of the parties to the illegal gaming, and (3) the purpose or purposes to be served by the statute."[90] The Franklin County Court found that none of the parties had actually won or lost anything, as neither party participated in the games themselves.[91] While the defendants were not winners per se, Judge Wingate held that "[r]ather, it is the Defendants' 'community of interest' with the actual winners of the Kentucky players

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80. *Id.* at 162a–63a n.4; KY. REV. STAT. ANN. § 372.040 (West 2022).

81. *Pocket Kings Aug. 2015*, *supra* note 79, at 164a.

82. *Id.*

83. *Id.* at 137a.

84. *Id.* at 152a

85. *Id.* It is worth noting that the court observed that the defendants did not provide an adjusted net figure to be considered. *Id.* at 152a n.11.

86. *Id.* at 154a.

87. *Id.* at 155a–56a. A "rake" is the commission that the operator takes for facilitating the game. *See id.* at 158a.

88. Commonwealth *ex rel.* Brown v. Pocket Kings, Ltd., No. 10-CI-00505, App. D 107a, 136a (Ky. Cir. Ct. Div. 2 Dec. 23, 2015) [hereinafter *Pocket Kings Dec. 2015*] https://www.supremecourt.gov/DocketPDF/21/21275/188328/20210823153749534_PokerStars%20Petition%20Appendix.pdf [https://perma.cc/FC9Z-PLGM].

89. *Id.* at 112a.

90. *Id.* at 124a.

91. *Id.* at 124a–25a.

[who prevailed against the players located in Kentucky] that makes them jointly liable with the winners for the entire amount of the Kentucky players' losses."[92] The Franklin County Circuit Court found that the purpose of the statute was to "suppress the evil of illegal gambling" and should be construed broadly.[93] Judge Wingate then concluded that the plaintiff met all necessary conditions for trebling damages, thus awarding the Commonwealth of Kentucky $870,690,233.82.[94] In dismissing the defendants' late challenge to the trebled award under the Eighth Amendment's Excessive Fines Clause, Judge Wingate curtly dismissed the argument by citing the statute's allowance of the trebling of damages and did not find persuasive that the fine was "grossly disproportionate to the gravity of the Defendant[s'] offense."[95] The Franklin County Circuit Court used the subsequent sale of PokerStars' parent company for $4.9 billion to justify the judgment because Kentucky players helped the defendants earn money and raise the company's value over four-and-a-half years.[96]

2. Court of Appeals Proceedings

Following the denial of their motion to vacate the final judgment of the Franklin County Circuit Court, the *PokerStars* defendants appealed to the Kentucky Court of Appeals.[97] The court of appeals homed in on the defendants' motion to dismiss for lack of standing, which the county court had denied.[98] The Commonwealth contended that it fell within the scope of the statutory phrase "any other person," but the court of appeals found that there was thin precedent for such a conclusion.[99] In looking at the statute that preceded Kentucky's Loss Recovery Act, the court of appeals found that a third-party claimant was required to split his or her recovery with the Commonwealth.[100] The court of appeals found that it was "probable" that the Loss Recovery Act was intended only to provide private citizens with a right to recover.[101] The court of appeals reversed the county court, finding not only that the Commonwealth was not a person under the statute but also that the plaintiff's third amended complaint had failed to state a claim.[102]

3. Supreme Court of Kentucky

The appellate court's decision left the Commonwealth unsatisfied and lacking the damages award that it had already earmarked for future projects. The

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92. *Id.* at 126a.
93. *Id.* at 126a–28a.
94. *Id.* at 129a–30a.
95. *Id.* at 133a (quoting United States v. Bajakajian, 524 U.S. 321, 337 (1998)) (cleaned up).
96. *Id.* at 134a.
97. *See* Stars Interactive Holdings (IOM) Ltd. v. Commonwealth *ex rel.* Tilley, No. 2016-CA-000221-MR, 2018 WL 6712631 (Ky. Ct. App. Dec. 21, 2018), *rev'd*, Commonwealth *ex rel.* Brown v. Stars Interactive Holdings (IOM) Ltd., 617 S.W.3d 792 (Ky. 2020), *cert. dismissed per stipulation*, Stars Interactive v. Kentucky *ex rel.* Brown, 142 S. Ct. 330 (2021).
98. *Tilley*, 2018 WL 6712631, at *4.
99. *Id.* at *5–*8.
100. *Id.* at *7.
101. *Id.*
102. *Id.* at *10–12.

parties petitioned the Supreme Court of Kentucky for discretionary review, which was granted.[103] Justice Wright authored the opinion, which provided a background that referred to PokerStars as a "criminal syndicate" and to the $290 million judgment as reflecting only a fraction of the money that Kentuckians had lost over PokerStars' whole existence.[104] The Court highlighted that the Commonwealth began investigating online gambling in 2007 and sought an in rem action to seize the domain names of gambling sites in 2008, but neither action proved fruitful.[105] Undeterred, the Commonwealth elected to sue the online gambling sites via its loss recover statute, effectively using a civil remedy when its criminal powers failed.[106] The Kentucky Supreme Court began by reversing the court of appeals, finding the Commonwealth qualified as a "person" under the Act's plain meaning.[107] The Court also considered and affirmed the earlier conclusion that PokerStars was a "winner" within the statute, allowing the Commonwealth to recover.[108] According to Justice Wright: "This is a widely recognized fact—casinos and online poker sites like PokerStars would not exist if they were not 'winners.'"[109] The Court cited an 1890 case finding a gaming house to be a winner for the purposes of the Kentucky Loss Recovery Act to support the contention that PokerStars was the modern equivalent.[110]

The Kentucky Supreme Court, echoing the county court, argued that civil penalties that are not disproportionate do not offend the Excessive Fines Clause, justifying the proportionality of the fine by citing the gross amounts lost.[111] The Court similarly dismissed the related due process question, arguing that PokerStars was aware it faced liability in Kentucky. The Court also avoided addressing the Commonwealth's illogical damages calculation.[112] The Court dispensed with the defendants' argument that it was unjust to allow the Commonwealth to proceed by making claims in the aggregate without pleading specific losses.[113] The Court again justified the fine as not disproportionate, stating:

> The Commonwealth of Kentucky suffered financial losses along with the tragic damage to its citizens. Mental and physical healthcare systems that care for the citizens harmed by the illegal gambling are supported in part by the state. Money sent to offshore gambling accounts is lost and the state deprived of the taxes to which it is entitled.[114]

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103. *Stars Interactive*, 617 S.W.3d at 796.
104. *Id.* at 795–97.
105. *Id.* at 797.
106. *Id.* at 796–97.
107. *Id.* at 798–99.
108. *Id.* at 805–07.
109. *Id.* at 806.
110. *Id.* at 807 (citing Triplett v. Seelbach, 14 S.W. 948, 949 (Ky. App. 1890)).
111. *Id.* at 808 (citing United States v. Bajakajian, 524 U.S. 321, 334 (1998)).
112. *Id.*
113. *Id.* at 809.
114. *Id.* at 810.

The Kentucky Supreme Court ruled in a split decision for the Commonwealth.[115] The decision awarded not only trebled damages based on Kentucky's calculation but also millions in accrued interest.[116] Out of arrows in state court, Stars Interactive petitioned the U.S. Supreme Court for certiorari.[117]

4. The United States Supreme Court

On August 23, 2021, Stars Interactive filed its petition for certiorari, challenging the judgment of the Kentucky Supreme Court.[118] The petition asked the Court to resolve two questions: first, "[w]hether an award of statutory damages violates due process when it exceeds by a factor of more than 30 any conceivable harm,"[119] and second, "[w]hether the Excessive Fines Clause prohibits a State from punishing a defendant by imposing a penalty 50 times in excess of the defendant's revenue earned from the prohibited conduct."[120] These two questions are inextricably linked.[121]

Stars Interactive framed the case by observing that while nearly half the states have a gambling loss recovery statute, the Kentucky statute allowing for third-party recovery by nonrelatives is an outlier.[122] Despite the provision allowing anyone to recover treble damages after a gambler fails to act within the permitted six months, Stars Interactive emphasized that those suits have been exceedingly rare throughout history.[123] Instead, most third-party suits have been filed by relatives seeking to recover their family member's losses.[124] In fact, it appears the rationale for the statute's encompassing language was fear of excluding an injured party, intending that the family would litigate losses.[125] In characterizing the Kentucky Supreme Court's decision, which paved the way for the largest civil judgment in Kentucky history, Stars Interactive stated:

> The Kentucky Supreme Court allowed the State to bring a novel claim under an antediluvian state law that resulted in a staggering judgment far out of proportion to any real-world injuries. Along the way, the Kentucky court felled every possible barrier that might have slowed the runaway damages. It allowed Kentucky to aggregate all lost

115. *Id.*
116. *Id.* at 803, 808.
117. *Stars Interactive* Petition, *supra* note 7, at *1.
118. *Id.* at *32.
119. *Id.* at *1.
120. *Id.*
121. The Eighth Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment against the states; however, as both constitutional limitations have developed separately, they have separate standards. The Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments . . . ." CHARLES DOYLE, CONG. RSCH. SERV., LSB10196, ARE EXCESSIVE FINES FUNDAMENTALLY UNFAIR? 2 (2019), https://fas.org/sgp/crs/misc/LSB10196.pdf [https://perma.cc/42NG-L9BU]. Whereas the Eighth Amendment's Excessive Fines Clause applies the same standard as that used for determining whether punishment is cruel and unusual: gross disproportionality. *Id.* at 1.
122. *Stars Interactive* Petition, *supra* note 7, at *5–6.
123. *Id.*
124. *Id.*
125. *See id.* at *7 (citing Salonen v. Farley, 82 F. Supp. 25, 27–28 (E.D. Ky. 1949)).

> wagers by Kentucky citizens into a single action. It calculated the State's damages solely by reference to losing hands without factoring in the winning hands or petitioners' revenue. On its own, that award surpassed any previous civil judgment in the State's history. But the Kentucky court then trebled the damages to create a Frankenstein's monster of an award.[126]

In its brief, Stars Interactive argued that despite the statutory scheme permitting treble damages, the Kentucky Supreme Court departed from a careful analysis and instead imposed an excessive punishment without consideration for actual harm.[127]

Specifically, Stars Interactive highlighted the split between the related concepts of due process and the Excessive Fines Clause.[128] Stars Interactive asserted that the fine imposed by the Kentucky Supreme Court was "grossly excessive" because punitive damages are inherently suspect if they exceed compensatory damages by more than a single-digit ratio under a due process analysis.[129] In the present case, the pre-trebling amount exceeded the players' net losses by *a factor of more than 11* and exceeded Stars Interactive's Kentucky-based revenue by *a factor of more than 16*.[130]

Stars Interactive further argued the judgment handed down by the Kentucky Supreme Court offended "basic notions of fairness," as it was disconnected from any cognizable real-world harms.[131] In addition to the fairness questions surrounding the judgment itself, Stars Interactive challenged the interest rate stipulated by Kentucky statute, noting the 12% rate resulted in an additional *$400 million in damages*. And even without including interest, the award would be the largest civil judgment in Kentucky history and exceed actual player losses by a factor of nearly 15.[132] Despite Stars Interactive's illegal activity, there are no allegations in the record that indicate citizens of Kentucky were defrauded or deceived into betting. In fact, all the money wagered was paid voluntarily.[133]

The Supreme Court applies a proportionality analysis to the Eighth Amendment's Excessive Fines Clause.[134] Relying on the Eighth Amendment in making its arguments, Stars Interactive cited *United States v. Bajakajian* for the proposition that "[t]he amount of the forfeiture [must] bear some relationship to the gravity of the offense that it is designed to punish."[135] The punitive sanction issued

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126. *Id.* at *11.
127. *Id.* at *12.
128. *See id.* at *13–17, *20–24.
129. *Id.* at *13 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)).
130. *Id.*
131. *Id.* at *14.
132. *See id.* at *14–15 ("To date, the interest that has accrued on the [$870 million] award—$400 million and counting—itself surpasses any previous judgment in Kentucky history.").
133. *Id.* at *19.
134. *Id.* at *25.
135. *Id.* (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998)) (cleaned up).

by the Kentucky Supreme Court must be weighed against the act, which for Stars Interactive was facilitating online poker games.[136] Stars Interactive noted that the Kentucky attorney general found a windfall workaround to obtain a forfeiture after failing to seek a criminal conviction.[137] Under Kentucky's criminal statutes, the Commonwealth would have been limited to seizing Stars Interactive's revenue, an estimated $18 million.[138] Instead of ever filing charges, however, the Commonwealth used the Loss Recovery Act in an effort to obtain an outsized payout.[139] According to Stars Interactive, Kentucky's conduct was outrageous in part because the Commonwealth had never taken such an action but also because for the first time in history, a plaintiff had sought to aggregate all losses.[140]

While the *Stars Interactive* case appeared to be the perfect vehicle to address unresolved constitutional questions regarding fines—which rarely come before the Court because they are so infrequently entangled with other constitutional issues—the case settled before the Commonwealth ever filed a brief.[141] The questions left unresolved, however, are likely to reappear and thus merit further discussion. Part II of this Article discusses the origins of the Excessive Fines Clause and its relationship to the Due Process Clause.

II. THE ORIGINS OF THE EXCESSIVE FINES CLAUSE

The Excessive Fines Clause of the Eighth Amendment is something of a constitutional enigma. Prohibitions on excessive fines are known to pre-date the discovery of the United States.[142] Indeed, the principle was so well-entrenched that debate was not deemed necessary when the Amendment was brought to the floor of Congress.[143] At the time the Eighth Amendment was drafted, most state constitutions already contained a prohibition on excessive fines.[144] This Part first examines the early history of the ban on excessive fines and then explores the emergence of excessive fines jurisprudence in the United States. Next, this Part discusses the current state of Eighth Amendment doctrine before concluding with a discussion of the interplay between the due process protections of the Fourteenth Amendment and the Excessive Fines Clause.

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136. *Id.*

137. *See id.* at *26.

138. *Id.*

139. *Id.*

140. *Id.* at *27.

141. *See* Joint Stipulation to Dismiss, *supra* note 23 (citing SUP. CT. R. 46.1) ("At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed . . . the Clerk, without further reference to the Court, will enter an order of dismissal.").

142. *See* Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 420–21 (1998) (describing the history of the Excessive Fines Clause).

143. THE HERITAGE GUIDE TO THE CONSTITUTION 470 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

144. *Id.*

A. The Excessive Fines Clause in England

As UCLA law professor Beth Colgan, likely the foremost expert on the Excessive Fines Clause, notes, it is crucial to understand that the historical ban on excessive fines is limited to fines payable to a sovereign as a form of punishment.[145] While the exact origin of the prohibition against excessive fines has likely been lost to history, we can trace the embodiment of the rule to at least 1215 and the Magna Carta.[146] The Magna Carta states that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contentment [sic]."[147] The Supreme Court has interpreted the Magna Carta's prohibition as meaning "[n]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear."[148] Despite the existence of the prohibition on excessive fines in England, large fines were used for centuries, including for tyrannical purposes like punishing political enemies and imposing indefinite sentences on those who could not pay.[149]

B. The Excessive Fines Clause in the United States

In the United States, the Excessive Fines Clause was first codified in the Virginia Declaration of Rights.[150] The Declaration was a model of sorts for early state constitutions and served as an early guidepost for both the Declaration of Independence and the Bill of Rights.[151] Indeed, the drafters of the Bill of Rights used verbatim the language of the Virginia Declaration of Rights' prohibitions on excess bail, cruel and unusual punishment, and excessive fines and renamed it the Eighth Amendment.[152] The adoption of the Eighth Amendment is argued to have been a response to criticisms that the Constitution in its initial form did not provide sufficient protection to those convicted of crimes.[153] Early interpretations of the American prohibition on excessive fines required a proportionality test, balancing the degree of the offender's fault against the value of their assets.[154]

The lack of congressional debate over the Excessive Fines Clause prior to the adoption of the Eighth Amendment has primarily left academics to fill in the

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145. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 295 (2014) [hereinafter Colgan, *Reviving the Excessive Fines Clause*].

146. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

147. *Id.* at 687–88 (quoting 9 Hen. 3, c. 14 § 20 (Magna Carta) (1225), 1 S.L. 5) (internal quotations omitted).

148. *Id.* at 688.

149. *Id.* ("The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay.").

150. *Id.*

151. John R. Vile, *Virginia Declaration of Rights*, FREE SPEECH CTR. MIDDLE TENN. STATE UNIV., https://firstamendment.mtsu.edu/article/virginia-declaration-of-rights/ [https://perma.cc/Z5JA-SF2M] (Sept. 19, 2023).

152. Andrew M. Kenefick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1717 (1987).

153. *Id.*

154. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 870 (2013) (citing Jones v. Commonwealth, 5 Va. (1 Call) 555, 556–57 (1799)).

gaps as to how the Clause was intended to be used.[155] Early American criminal statutes often imposed fines for petty offenses like theft; however, unlike their English predecessors, American statutes typically allowed collected fines to be directed to third parties as opposed to a sovereign.[156] The American criminal system introduced restitution as an analogous form of punitive sanction into a system that had only allowed for payments to the Crown.[157] Many states imposed a multiplier on the value of the goods stolen; for instance, Pennsylvania statutes declared that a victim was entitled to four times the value of goods stolen by the wrongdoer.[158]

Like the nonexistent debate on the congressional floor before the adoption of the Bill of Rights, early Supreme Court jurisprudence contains virtually no mention of the Excessive Fines Clause.[159] The limited mentions include an 1846 case, *Spalding v. New York*,[160] where a fine was deemed excessive and a cruel punishment because the debtor could not pay.[161] While the Supreme Court's discussion of the Excessive Fines Clause was exceedingly rare in the early Republic, state courts did occasionally interpret state iterations of prohibitions against excessive fines.[162] It may seem ironic, more than 200 years later, that the Kentucky Court of Appeals was one of the first state courts to weigh in on what constitutes an excessive fine.[163] In 1819, the Kentucky Court of Appeals held that:

> No definite criterion is furnished by the constitution or bill of rights by which to ascertain what fine would or would not be excessive within the provision above quoted. The fine imposed should bear a just proportion to the offense committed, the situation, circumstances and character of the offender.[164]

The jurisprudence around the Eighth Amendment's Excessive Fines Clause is significantly underdeveloped.[165] The Excessive Fines Clause appears to have been based on a concept so widely understood and a belief so ubiquitous that there was

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155. *See* Nathaniel Amann, Note, *Restitution and the Excessive Fines Clause*, 58 AM. CRIM. L. REV. 205, 216 (2021) (describing the dearth of debate over the Eighth Amendment generally and noting the only objection to the Amendment's inclusion in the Bill of Rights was prescient, as it argued that the phrase "cruel and unusual punishment" was too "indefinite").

156. *Id.* at 217.

157. *Id.* at 218.

158. *Id.*

159. McLean, *supra* note 154, at 870.

160. 45 U.S. 21 (1846).

161. *Id.* at 30; *see also* McLean, *supra* note 154, at 870. Professor Nicholas McLean cites another instance from 1833, where Justice Joseph Story references an argument from a litigant that mentions the Excessive Fines Clause, but the case contains no analysis. *Id.* (citing *Ex parte Watkins*, 32 U.S. 568, 573 (1833)).

162. McLean, *supra* note 154, at 871.

163. *Id.*

164. Commonwealth v. Morrison, 9 Ky. 75, 99 (1819).

165. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 11 (2018).

little discussion necessary to articulate an objective definition of excessive.[166] Even the contemporary Court has failed to put contours on the boundaries of the Excessive Fines Clause, choosing instead to apply limits to the Clause's application as opposed to providing guideposts beyond disproportionality.[167]

C. The Contemporary Eighth Amendment and the Supreme Court

The Supreme Court has never drawn a bright-line rule for when a fine is constitutionally excessive—instead resting on an ill-defined proportionality measure.[168] Indeed, the Court has only sparingly acknowledged the existence of the "nor excessive fines imposed" language of the Eighth Amendment.[169] The Supreme Court has only examined the scope of the Excessive Fines Clause five times in history, most recently in *Timbs v. Indiana* in 2019.[170] This Section discusses the five cases where the Supreme Court has shed light, albeit limited, on the scope of the Excessive Fines Clause. Understanding how the Supreme Court analyzed the Excessive Fines Clause in these five cases is instructive because it illustrates the course the Court may have charted had it granted a writ of certiorari in the *Stars Interactive* case.

1. Browning-Ferris v. Kelco

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[171] a case from 1989, the Supreme Court was tasked with answering one of the most basic questions regarding the Eighth Amendment: does the Excessive Fines Clause apply to civil jury awards of punitive damages?[172] Browning-Ferris Industries of Vermont began collecting commercial trash in the Burlington area of Vermont in 1973.[173] In 1976, the Company began offering roll-off collection services and enjoyed something of a monopoly in the area.[174] In 1980, Browning-Ferris's local district manager decided to leave the Company and start a competitor, Kelco.[175] Within a year, Kelco controlled 40% of the Burlington market.[176] Browning-Ferris

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166. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264–65 (1989) (discussing the lack of attention paid to the Excessive Fines Clause at the time the Bill of Rights was passed).

167. *See, e.g.*, *id.* at 273 (holding that the Framers did not intend for the Eighth Amendment's Excessive Fines Clause to apply to civil jury awards).

168. 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, 8 (2019).

169. *See* Colgan, *Reviving the Excessive Fines Clause*, *supra* note 145, at 282.

170. *Protections Against Excessive Fines Date back to Magna Carta. Why Is This Still an Issue?*, APPEAL (Feb. 22, 2019), https://theappeal.org/protections-against-excessive-fines-date-back-to-magna-carta-why-is-this-still-an-issue/ [https://perma.cc/8U6E-JL3X].

171. 492 U.S. 257 (1989).

172. *Id.* at 259.

173. *Id.* at 260.

174. *Id.* Roll-off services are a type of dumpster that arrives on the back of a truck and rolls off. *What Is a Roll-Off Driver*?, STEELSMITH (Sept. 20, 2018, 2:31 AM), https://steelsmithrecycling.com/what-is-a-roll-off-driver/ [https://perma.cc/7YZM-RT7F]. Typically, these dumpsters can hold a large volume of trash. *Id.* Roll-off services are common in industrial settings but may also be used in a variety of other settings. *Id.*

175. *Browning-Ferris*, 492 U.S. at 260.

176. *Id.*

responded by cutting its prices by 40% for new customers; the Company was so determined to "squish [Kelco] like a bug" that it resolved to give services away for free if it meant keeping business from Kelco.[177]

Browning-Ferris's campaign was successful, and Kelco's revenues fell 30%.[178] Despite threats from Kelco's lawyers that the Company would bring legal action if Browning-Ferris did not cease its anticompetitive tactics, Browning-Ferris continued its campaign for several more months.[179] By 1985, however, Kelco had regained ground and controlled 56% of the market, causing Browning-Ferris to sell its Vermont operation and leave the area.[180] Nonetheless, Kelco had filed suit the previous year alleging violations of § 2 of the Sherman Act and Vermont law.[181] After a brief trial, the jury was instructed that it could award punitive damages for the violations of Vermont law.[182] The jury returned a verdict of just over $51,000 in compensatory damages and $6 million in punitive damages.[183] The Sherman Act damages were trebled, and Kelco was awarded its attorney fees.[184] The district court denied various motions to set aside the judgment, and the Second Circuit concurred.[185]

The Supreme Court granted certiorari and seemingly teased the confusion surrounding the limits of the Eighth Amendment's Excessive Fines Clause, stating:

> Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.[186]

The Court articulated that the framers of the Constitution "did not expressly intend" for the Eighth Amendment to apply to civil jury awards.[187] The majority noted, however, that the lack of express intention did not complete the inquiry, as punitive damages are "a strictly modern creation."[188] Nonetheless, the Court concluded that the Eighth Amendment applies only to actions taken by the

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177. *Id.* at 260–61.
178. *Id.* at 261.
179. *Id.*
180. *Id.*
181. *Id.* "Section 2 of the Sherman Act makes it unlawful for any person to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . .'" U.S. DEP'T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT: CHAPTER 1 (citing 15 U.S.C. § 2 (2000) (report withdrawn May 11, 2009)), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_1_[https://perma.cc/XX8R-QN3Y] (Mar. 18, 2022).
182. *Browning-Ferris*, 492 U.S. at 261.
183. *Id.* at 262.
184. *Id.*
185. *Id.*
186. *Id.* at 263–64.
187. *Id.* at 264, 266–73.
188. *Id.* at 274.

government against the individual, as opposed to actions between private parties.[189] The Court's conclusion avoided defining the boundaries of the Excessive Fines Clause, instead deciding only that it does not apply to nongovernmental action, leaving for another case to determine what is constitutionally excessive.

2. Austin v. United States

Four years after *Browning-Ferris*, the Supreme Court had a second opportunity to examine the Eighth Amendment's Excessive Fines Clause in *Austin v. United States*.[190] This second chance, however, left similar questions about the Eighth Amendment's limits unanswered, as the Court examined whether a civil property forfeiture constituted a "fine" for the purposes of the Eighth Amendment.[191] The petitioner, Richard Austin, pled guilty to one count of cocaine possession with the intent to distribute.[192] The Department of Justice then initiated an in rem proceeding to take Austin's home and auto body shop under a related statutory provision that allowed for seizures associated with an underlying drug offense.[193] While upholding the District of South Dakota's rejection of Mr. Austin's Eighth Amendment arguments, the Eighth Circuit acknowledged that the government's seizure was grossly disproportionate to the crime committed.[194] However, operating on the belief that the Eighth Amendment did not apply to in rem seizures, the Eighth Circuit affirmed the district court.[195]

At the Supreme Court level, the government argued that the Eighth Amendment can only apply to civil cases where the punishment is so punitive that it would be considered a criminal type of sanction.[196] The Court, which in *Browning-Ferris* had avoided addressing whether the Excessive Fines Clause applied to both civil and criminal cases involving the government, was now tasked with addressing this very question.[197] In concluding the forfeiture of Austin's property was punitive because it constituted "payment to a sovereign as punishment for some offense," the Court held that government seizures of property were subject to the Eighth Amendment's Excessive Fines Clause.[198] The Court did not, however, establish the "multifactor test for determining whether a forfeiture is constitutionally 'excessive'" that Austin requested, leaving unanswered, for the second time, the question of when a fine exceeds constitutional limits.[199]

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189. *Id.* at 275.
190. 509 U.S. 602 (1993).
191. *Id.* at 604.
192. *Id.*
193. *Id.* at 604–05.
194. United States v. One Parcel of Prop. Located at 508 Depot St., Garretson, Minnehaha Cnty., S.D., 964 F.2d 814, 818 (8th Cir. 1992), *rev'd sub nom.* Austin v. United States, 509 U.S. 602 (1993).
195. *Austin*, 509 U.S. at 606.
196. *Id.* at 607.
197. *Id.*
198. *Id.* at 622.
199. *Id.* at 622–23.

3. Alexander v. United States

The same year the Court decided *Austin*, it heard a second Excessive Fines Clause case—*Alexander v. United States*.[200] The District of Minnesota convicted Ferris Alexander of 17 obscenity counts and 3 counts of violating the Racketeer Influenced and Corrupt Organizations ("RICO") Act.[201] After his conviction, the government held a forfeiture proceeding in front of the jury that found Alexander guilty and sought to seize ten of Alexander's commercial properties and businesses that were connected to the crimes.[202] The district court eventually ordered Alexander to forfeit those properties and pay a sum of $9 million.[203] Alexander appealed to the Eight Circuit, alleging the seizures violated his First Amendment and Eighth Amendment rights.[204] The court of appeals disposed of both claims but, in addressing Alexander's Eighth Amendment claims, concluded: "[T]he forfeiture order does not violate the Eighth Amendment's prohibition against 'cruel and unusual punishments' and 'excessive fines.'"[205] In so ruling, however, the court did not consider whether the forfeiture in this case was grossly disproportionate or excessive, believing that the Eighth Amendment did not "require a proportionality review of any sentence less than life imprisonment without the possibility of parole."[206]

The Supreme Court granted certiorari and articulated that the lower court's Eighth Amendment ruling was true only to the cruel and unusual punishment aspect of Alexander's appeal.[207] Instead, the Eighth Amendment's Excessive Fines Clause should have been analyzed as a forfeiture, which is a form of monetary punishment subject to constitutional review.[208] Again, however, the Supreme Court remanded for analysis as to whether the punishment was excessive as opposed to conducting its own analysis of whether the sanction violated constitutional norms.[209]

4. United States v. Bajakajian

In 1998, the Supreme Court encountered a question about the Excessive Fines Clause for the fourth time in a decade.[210] In *Bajakajian*, the Court came as close to articulating the bounds of the Eighth Amendment's Excessive Fines Clause as at any point in its history.[211] Hosep Bajakajian was arrested on June 9, 1994, after currency-sniffing dogs at the Los Angeles International Airport alerted the authorities to his checked baggage.[212] Upon inspection, Customs officials found

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200. 509 U.S. 544 (1993).
201. *Id.* at 546.
202. *Id.* at 548.
203. *Id.*
204. *Id.*
205. *Id.* at 549 (citation omitted).
206. *Id.*
207. *Id.* at 558.
208. *Id.* at 558–59.
209. *Id.*
210. United States v. Bajakajian, 524 U.S. 321, 324 (1998).
211. *See id.* (noting that the full forfeiture of currency that Bajakajian was carrying in violation of federal law would be "grossly disproportional to the gravity of his offense").
212. *Id.* at 324–25.

$230,000 in cash in his luggage.[213] After discovering the cash, Customs investigators approached Bajakajian and his wife and informed them that U.S. law required them to declare all cash exceeding $10,000 in their possession when entering or exiting the country.[214] The Bajakajian family replied to Customs officials that they were carrying a total of $15,000 between the four family members.[215] After a search of their carry-on bags and personal items, Customs officials discovered $357,144.[216] Bajakajian faced three charges, but in exchange for pleading guilty to failure to report an amount in excess of $10,000, the government dropped the charge of making a false statement to a federal officer.[217] The two sides agreed to proceed to trial on the third charge, a forfeiture action to seize the $357,144.[218]

The statute in question authorized the complete forfeiture of all funds; however, the district court determined that seizing the entirety of the amount would be "grossly disproportionate to the offense in question."[219] The federal government appealed, but the Ninth Circuit affirmed the lower court's holding that "to satisfy the Excessive Fines Clause, a forfeiture must fulfill two conditions: The property forfeited must be an 'instrumentality' of the crime committed, and the value of the property must be proportional to the culpability of the owner."[220] The Supreme Court granted certiorari.[221]

The Court began its analysis by discussing the historical separation of forfeitures (a punishment against property that was the result of the proceeds of crime) and fines (a punishment of an individual for the commission of a crime).[222] The Court, however, ultimately concluded that the statute in question's forfeiture provision was not in rem in nature, but instead in personam and thus a fine-type sanction.[223] Concluding the sanction was a fine, the Court analyzed the question of whether it was excessive.[224]

The Court framed its analysis by focusing on the proportionality of the fine to the underlying offense.[225] Recognizing that the Court had historically avoided articulating a bright-line rule for proportionality or excessiveness, Justice Thomas sought an appropriate historical analog; he ultimately used the gross disproportionality standard used in Cruel and Unusual Punishment Clause jurisprudence.[226] In evaluating Bajakajian's offense against the forfeiture, Justice Thomas concluded that forfeiture of the entire $357,144 was grossly disproportionate to the offense, which simply required reporting the amount of

213. *Id.* at 324.
214. *Id.*
215. *Id.* at 324–25.
216. *Id.* at 325.
217. *Id.*
218. *Id.*
219. *Id.* at 326.
220. *Id.*
221. *Id.* at 327.
222. *Id.* at 330–32.
223. *Id.* at 332.
224. *Id.* at 334.
225. *Id.*
226. *Id.* at 336.

money in excess of $10,000 being carried across the border.[227] By statute, the legislature did not include a prohibition on removing amounts in excess of $10,000 from the country, only requiring that they be reported.[228] Indeed, unlike those typically targeted by forfeiture statutes, Bajakajian's money had been obtained lawfully.[229] In contemplating the harm the government suffered, Justice Thomas effectively concluded that there was no correlation between the forfeiture of $357,144 and the removal of that money from the country.[230] Justice Thomas noted that, under the government's theory, the disproportionate punishment for Bajakajian would be permissible even though it was 30 times the punishment for a drug dealer who illegally takes $12,000 out of the country to purchase narcotics.[231] The *Bajakajian* case established that the Supreme Court views fines that are grossly disproportionate to be constitutionally excessive, but the decision left a great deal of room for judicial discretion as to when a fine reaches that level.[232]

5. Timbs v. Indiana

The Supreme Court's most recent opportunity to define the scope of the Excessive Fines Clause took place in a 2019 decision, *Timbs v. Indiana*.[233] Tyson Timbs pled guilty to distribution of a controlled substance and conspiracy to commit theft.[234] When Timbs was arrested, the police seized a $42,000 SUV that Timbs had purchased with money he received when his father died.[235] Indiana moved to have the vehicle seized, as it had been used to transport heroin—a crime subject to a $10,000 fine.[236] The trial court, however, rejected the government's argument because it determined the forfeiture "would be grossly disproportionate to the gravity of Timbs's offense."[237] On appeal, the Indiana Court of Appeals agreed with Timbs that the forfeiture violated the Excessive Fines Clause.[238] However, the Indiana Supreme Court reversed, holding that the Excessive Fines Clause had not been incorporated by the Fourteenth Amendment and therefore did not bind the states.[239]

The Supreme Court granted certiorari,[240] noting that Indiana did not challenge the incorporation of the Excessive Fines Clause so much as it sought to

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227. *Id.* at 337.
228. *See id.*
229. *Id.* at 338.
230. *Id.* at 339.
231. *Id.*
232. *See id.* at 344.
233. 139 S. Ct. 682 (2019).
234. *Id.* at 686.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *See id.* State courts disputed the Clause's applicability before the *Timbs* case; while fourteen state courts found it had been incorporated, three state courts disagreed, setting the stage for Timbs's petition for certiorari. *See* Eugene Volokh, *Does the Excessive Fines*

have the Clause not apply to civil in rem forfeitures.[241] The Supreme Court disagreed on both fronts, finding the Clause both applicable to civil in rem forfeitures and incorporated against the states.[242] The majority's opinion did not, however, address the question of whether the seizure, valued at four times the maximum fine, was constitutionally excessive.[243]

The *Timbs* decision, like the four that preceded it, leaves a great deal of uncertainty surrounding what constitutes an excessive fine or when a fine becomes grossly disproportionate.[244] Overall, one of the key areas of confusion surrounding the Excessive Fines Clause is its relationship to the Due Process Clause, a relationship first recognized by the Court in *Browning-Ferris*.[245]

D. Due Process and Excessive Fines

The Due Process Clause and the Excessive Fines Clause have been linked since at least the *Browning-Ferris* decision in 1989.[246] While the Supreme Court has noted the relationship between the two limits on fines, it has failed to consistently articulate the exact manner in which the two constitutional clauses interact.[247] In fact, the Court itself has disagreed over the limits of the Excessive Fines Clause, particularly with respect to the Clause's application to punitive damages.[248] During the same term as the *Austin* and *Alexander* cases, the Supreme Court examined a third case that seemed to involve excessive fines; however, *TXO Production Corp. v. Alliance Resources Corp*[249] challenged a punitive damages award on Due Process Clause grounds instead of Eighth Amendment grounds.[250] In *TXO*, the Court addressed a slander of title claim that resulted in a judgment of $19,000 in actual damages and $10 million in punitive damages against the petitioner.[251]

Clause Apply to the States?, REASON: THE VOLOKH CONSPIRACY (Mar. 5, 2018, 12:32 PM), https://reason.com/volokh/2018/03/05/does-the-excessive-fines-clause-apply-to/ [https://perma.cc/7B24-4GU7].

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

242. *Id.* at 690–91.

243. Both Justices Gorsuch and Thomas agreed with the judgment but argued that the Excessive Fines Clause is not incorporated against the states by the Due Process Clause but instead by the Privileges and Immunities Clause. *Id.* at 691 (Gorsuch, J., concurring); *id.* at 691–98 (Thomas, J., concurring).

244. *See* Wesley Hottot, *What Is an Excessive Fine? Seven Questions to Ask After* Timbs, 72 ALA. L. REV. 581, 611 (2021).

245. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276–77 (1989).

246. *See id.*; *see also* Sheila B. Scheuerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L.J. 949, 949 (2008) (noting that *Browning-Ferris* determined that the Excessive Fines Clause did not limit punitive damages; however, the Court would later note that the Due Process Clause does limit punitive damages).

247. Scheuerman, *supra* note 246, at 950–51.

248. *See* Philip Morris USA v. Williams, 549 U.S. 346, 359 n.1 (2007) (Stevens, J., dissenting) (highlighting that Justice Stevens remains in opposition to finding that the Excessive Fines Clause is inapplicable to punitive damages awards).

249. 509 U.S. 443 (1993).

250. Scheuerman, *supra* note 246, at 958–59.

251. *TXO*, 509 U.S. at 446.

TXO asserted the punitive damages award was so excessive as to violate its due process rights.[252] The court of appeals upheld the award, suggesting it was necessary to deter future bad conduct.[253] TXO argued that the punitive award, which was more than 526 times the actual damages, constituted "an arbitrary deprivation of property without due process of law."[254] TXO highlighted that in *Pacific Mutual Life Insurance Co. v. Haslip*,[255] the Court had noted that damages awards that were four times greater than compensatory damages could be approaching a due process boundary.[256] The Court, however, rejected TXO's argument, noting that while the award was large, the purported potential harm of the scheme far exceeded the actual harm and that TXO had engaged in a "larger pattern of fraud, trickery and deceit."[257]

Just three years later, the Court would again address excessiveness in the due process context in *BMW of North America, Inc. v. Gore*.[258] In *BMW*, the Court identified several factors in evaluating the proportionality of damages.[259] The first factor was an ongoing pattern of illegal behavior.[260] Second, the Court evaluated economic harm versus the potential for physical harm.[261] Third, the Court sought to analyze the seriousness of harm to the plaintiff weighed against the amount of punitive damages.[262] Finally, the Court suggested that there should be an evaluation of statutory punishments to see how the damages award compares.[263] Under ten years later, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[264] the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[265] Due Process Clause cases have done much of the heavy lifting in determining excessiveness, but there are several small distinctions with Excessive Fines Clause jurisprudence.[266]

Professor Sheila B. Scheuerman of Suffolk University Law School has noted that both due process and excessive fines analyses first begin with a look at the blameworthiness of the defendant.[267] Both examine the severity of the harm and the nature of the conduct.[268] Both weigh the sanction against the harm.[269] The limited number of excessive fines cases addressing the ratio of damages to harm makes drawing many conclusions a challenge; however, it can be deduced from *Bajakajian*

252. *Id.* at 451.
253. *Id.* at 453.
254. *Id.*
255. 499 U.S. 1 (1991).
256. *TXO*, 509 U.S. at 459.
257. *Id.* at 462.
258. 517 U.S. 559 (1996).
259. Scheuerman, *supra* note 246, at 960–61.
260. *Id.*
261. *Id.* at 965–66.
262. *Id.*
263. *Id.* at 967.
264. 538 U.S. 408 (2003)
265. *Id.* at 425.
266. Scheuerman, *supra* note 246, at 965.
267. *Id.*
268. *Id.*
269. *Id.* at 966.

that a simple reporting offense should not result in a sanction of more than 30 times the statutory penalty.[270] Although the Supreme Court has expressed skepticism at punitive damages awards exceeding single digits, it has not provided clarity beyond that.[271] Both the Supreme Court's due process and excessive fines analyses examine related civil and criminal sanctions to determine proportionality.[272] Finally, the Court has recognized that these two constitutional protections are intertwined.[273]

In *Browning-Ferris*, the Court addressed the petitioner's claims that the punitive damages award was excessive under the Due Process Clause in addition to violating the Eighth Amendment.[274] The Court noted that, while the Due Process Clause does place an upper threshold on damages awards, the specifics on this upper bound had not been articulated.[275] While the Court did not provide guidance on due process limitations on damages absent procedural unfairness, the Court articulated in a footnote that the Eighth Amendment and the Due Process Clause may have some overlap between them.[276]

The Excessive Fines Clause is one of the least developed constitutional clauses, despite having a history that predates the Magna Carta.[277] The Excessive Fines Clause's historical roots in limiting a government's ability to act in a vengeful manner was deemed of such importance it was brought to the American colonies.[278] Throughout a history stretching nearly four hundred years in what is now the United States, the Clause has long been overshadowed by other components of the Eighth Amendment. The Supreme Court even adopted the gross disproportionality standard from the Amendment's Cruel and Unusual Punishment Clause instead of developing a separate standard.[279] Despite recent attention to the Excessive Fines Clause, the contours of what constitutes a grossly disproportionate fine remain elusive—a fact

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270. 524 U.S. at 338–39.

271. Scheuerman, *supra* note 246, at 967.

272. *Id.*

273. *Id.* at 968.

274. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989).

275. *See id.* at 259, 275–77 (mentioning the Petitioners failed to raise the Due Process Claims at the court of appeals, and as a result, the Supreme Court gave them only cursory attention).

276. *See id.* at 277 n.23 ("We shall not assume that a nonconstitutional argument also includes a constitutional one, and shall not stretch the specific claims made under the Eighth Amendment to cover those that might arise under the Due Process Clause as well.").

277. *See* 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. F. 430, 434–35 (2020) (discussing the Supreme Court's reverence for tracing the Excessive Fines Clause "at least to the Magna Carta in 1215," and noting that despite the history there has been no bright-line rule adopted).

278. Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 421–22 (1998).

279. *See* Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 39, 39 n.138 (2016) (discussing the use of the gross disproportionality standard in cruel and unusual punishment cases, while also noting that the evaluation of "excessiveness is inherently quantitative").

that remains true for the Due Process Clause, as well.[280] Part III of this Article discusses the differing approaches federal appellate courts have taken in determining when a fine is excessive and why those courts are now split, further demonstrating the need for Supreme Court guidance.

III. THE NATIONWIDE SPLIT

The Supreme Court's silence on a bright-line rule or ascertainable standard delineating when a fine becomes disproportionate has left courts throughout the country to their own devices.[281] The Supreme Court's repeated steps to avoid answering what measure of damages exceed Excessive Fines or Due Process Clause limits have resulted in disparate rules across the country.[282] As Stars Interactive highlighted in its petition, the federal circuit court split breaks down into two approaches. The Second, Sixth, Seventh, Eighth, and Tenth circuits rely on the actual damages figure to calculate punitive damages, and the Third and Ninth circuits lend some additional support to this approach.[283] Conversely, the Eleventh Circuit and various state courts require no connection between the actual damages suffered and the amount of punitive damages allowable.[284] The split creates different consequences across the country for the same sanction, engendering significant confusion for lawyers, academics, and defendants alike. This Part discusses the two prevailing approaches to damages caps—punitive damages based on actual damages and punitive damages unconnected to actual damages—and the application of these differing approaches to the *Stars Interactive* case.

A. The First Approach

The leading case articulating the Second Circuit's approach to the constitutional limits on punitive damages involved violations of various workplace anti-discrimination statutes, such as Title VII and the New York City Human Rights Law.[285] In *Thomas v. iStar Financial, Inc.*, a jury in the Southern District of New York awarded the plaintiff punitive damages of $1.6 million on top of $190,000 in actual damages.[286] The court overruled the jury award as a matter of law,[287] and the plaintiff appealed.[288] The court found that the maximum constitutional amount of punitive damages was $190,000, or an amount equal to the plaintiff's actual damages.[289] The Second Circuit disagreed, finding in a per curiam decision that the punitive damages award was excessive because the defendant's conduct did not cause physical injury to, or show a reckless disregard for, worker safety.[290] In reaching its conclusion, the Second Circuit highlighted the *Thomas* ratio of 5.7:1 as

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280. *Id.*
281. *See Stars Interactive* Petition, *supra* note 7, at *20.
282. *Id.*
283. *See* Colleen P. Murphy, *Reviewing Congressionally Created Remedies for Excessiveness*, 73 OHIO ST. L.J. 651, 706 n.296 (2012).
284. *Id.*
285. Thomas v. iStar Fin., Inc., 652 F.3d 141, 144 (2d Cir. 2011).
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 145.
290. *Id.* at 148.

"not *per se* unconstitutional" and cited the Supreme Court's precedent in *State Farm Mutual Insurance, Co. v. Campbell*, which found that a 4:1 ratio may be approaching a constitutional limit.[291] The Second Circuit noted that in *Campbell*, however, the plaintiff's compensatory damages were so substantial that the actual amounts at issue may have limited the punitive damages award and thus impacted the dicta regarding the 4:1 ratio.[292] Based on the "moderate level of reprehensibility" and the significant compensatory damages award, coupled with precedent, the Second Circuit held the $1.6 million in punitive damages was constitutionally excessive and endorsed the punitive award at a 1:1 ratio.[293] Another Second Circuit case also dealt with punitive damages when a plaintiff was awarded only nominal damages for their injury, finding the award as constitutionally excessive at $500,000.[294] The *Fabri v. United Technologies International* decision was remanded to the District of Connecticut to better assess the punitive award; in doing so, the panel highlighted that a 2:1 ratio would have been more in line with constitutional limits in a case involving more egregious conduct.[295]

The Third Circuit addressed the constitutionality of punitive damages in *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*[296] *EBI* involved an actual damages award of $500,000 and a punitive damages award of $50 million.[297] In evaluating the excessiveness of the punitive damages award, the court examined various mechanisms for assessing punishment via damages, including the statutory use of trebled damages; however, the panel noted that even trebling the actual damages would significantly reduce the award.[298] The Third Circuit ultimately concluded that a punitive damages award of no more than $1 million or a 2:1 ratio was the maximum permissible penalty.[299] The Third Circuit differentiated between cases where there is a very small compensatory damages award and where the

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291. *Id.* at 149 (citing State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).

292. *Id.* at 149.

293. *Id.* at 149–50; Thomas v. iStar Fin., Inc., 508 F. Supp. 2d 252, 264–65 (S.D.N.Y. 2007) (quoting TVT Recs. v. Island Def Jam Music Grp., 279 F. Supp. 2d 413, 461 (S.D.N.Y.2003)) ("[A] punitive sanction of $190,000 against iStar, reflecting both the relationship to the compensatory award of back pay [$190,000] and the Title VII statutory caps [of $85,950 in front pay,] 'would be maximally sufficient to serve the retributive and deterrent purposes of civil penalties without violating due process principles.'").

294. Fabri v. United Techs. Int'l, Inc., 387 F.3d 109, 117–18, 126–27 (2d Cir. 2004).

295. *Id.* at 126–27 (citing Advanced Fin. Servs. v. Associated Appraisal Servs., 830 A.2d 240, 246, 249–50 (2003)) ("However, *Advanced Financial* differs from this case in two significant respects. First, the court awarded compensatory damages in the amount of half the punitive damages award. Second, the Connecticut court found that defendants committed actual fraud, rather than the aggravated sharp dealing the jury in this case permissibly could have found.").

296. *See* 181 F.3d 446, 463, 465–70 (3d Cir. 1999).

297. *Id.* at 468.

298. *Id.*

299. *Id.* at 468–69; *see also id.* at 472 (Garth J., dissenting) (advocating that the appeals court instead accept the district court's remitter of damages in the amount of $50 million, a reduction from the jury's award of more than $100 million).

compensatory award is significant, noting that where compensatory damages are small, e.g., $5,000, a punitive award 37 times that may be constitutional.[300] Citing *Campbell*, the Third Circuit noted that substantial compensatory awards merit punitive damages in the neighborhood of a 1:1 ratio.[301] Indeed, in a case that involved indifferent, but not malicious, treatment by a mortgage lender, the court concluded that punitive damages should not exceed a 1:1 ratio.[302]

The Sixth Circuit has similarly looked to compensatory damages when evaluating the constitutionality of a punitive damages award.[303] For example, in *Clark v. Chrysler Corp.*, the Sixth Circuit Court of Appeals evaluated a damages award based on *Campbell*.[304] Looking at the three guideposts for punitive damages awards, the Sixth Circuit found that an award with a ratio of more than 12:1 would be constitutionally excessive; the court, however, stated that a 2:1 ratio would comport with due process limits.[305] *Bach v. First Union National Bank* involved a punitive damages ratio of 6.6:1, which the Sixth Circuit referenced as "alarming."[306] In *Bach*, the Sixth Circuit endorsed a near 1:1 ratio, even where the defendant was of substantial means.[307] In *Bridgeport Music, Inc. v. Justin Combs Publishing*, the Sixth Circuit found that a punitive damages award for copyright infringement by the publishers of Notorious B.I.G.'s hit song "Ready to Die" was constitutionally excessive.[308] The Sixth Circuit held that where only one of the reprehensibility factors from *Gore* is present, all the Constitution will permit are damages of a 1:1 or 2:1 ratio.[309] Even though the act was willful copyright infringement, the Sixth Circuit held that a 9.5:1 ratio was prohibited.[310] In 2009, the Sixth Circuit examined a $10 million punitive damages award against a $6 million actual damages award.[311] The court evaluated the award under the three guideposts.[312] In the case, which involved a highly compensated insurance company executive, the court found that

300. *Id.* at 1090.
301. *Id.*
302. *Id.*
303. *Stars Interactive* Petition, *supra* note 7, at *21.
304. 436 F.3d 594, 598, 600 (6th Cir. 2006).
305. *Id.* at 600, 606. The *Campbell* factors are adapted from *BMW v. Gore*; the Sixth Circuit summarizes them as: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 600 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996)).
306. Bach v. First Union Nat'l Bank, 486 F.3d 150, 154 (6th Cir. 2007).
307. *Id.* at 156.
308. Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470, 486 (6th Cir. 2007).
309. *Id.* at 486–87.
310. *Id.* at 488–89.
311. Morgan v. N.Y. Life Ins. Co., 559 F.3d 425, 443 (6th Cir. 2009).
312. *Id.* at 441.

due process favored a punitive damages award that did not exceed a 1:1 ratio with the amount of compensatory damages.[313]

As recently as 2019, the Seventh Circuit addressed a punitive damages award where the jury awarded $3 million in punitive damages against $82,000 in actual damages.[314] Before reaching the court of appeals, the Northern District of Illinois upheld the award to a ratio of roughly 5:1, which it "concluded was not unconstitutionally high given the reprehensibility of [the defendant]'s conduct."[315] The Seventh Circuit examined the original $3 million award under a due process lens.[316] The court said that "[a] federal court . . . can (and should) reduce a punitive damages award sometime before it reaches the outermost limits of due process."[317]

The Eighth Circuit addressed punitive damages awards ratios and due process in the context of litigation surrounding tobacco products.[318] In *Boerner v. Brown & Williamson Tobacco Co.*, the tobacco company argued that a punitive damages award was excessive under both Arkansas state law and federal due process limits.[319] The tobacco company argued that the award of $15 million was constitutionally excessive against the statutory damages penalty of $10,000 per violation of Arkansas's labeling act.[320] The Eighth Circuit argued the degree of reprehensibility is the most significant of *Gore*'s guideposts for determining the appropriate measure of punitive damages.[321] The Eighth Circuit noted that ratios of 4:1 and 6:1 may be constitutionally permissible where compensatory damages are for lesser amounts. However, where the aggregate damages totaled more than $4 million, only a ratio of 1:1 would comport with due process, even with documented reprehensible acts by the defendant.[322] In *JCB, Inc. v. Union Planters Bank, NA*, the court added clarity to the punitive damages awards standard in cases where compensatory awards are nominal, stating: "Punitive damages may withstand constitutional scrutiny when only nominal or a small amount of compensatory damages have been assigned, even though the ratio between the two will necessarily be large."[323] The court later slightly narrowed its definition of a small compensatory damages award, stating that even a relatively small award of $30,000 in actual damages would be sufficient to limit a punitive award to a single digit ratio.[324]

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313. *Id.* at 443 (vacating the award and remanding the case to the district court for an order of remittitur that will "set the punitive damages in an amount . . . compatible with due process, not to exceed the amount of compensatory damages").

314. Saccameno v. U.S. Bank Nat'l Ass'n, 943 F.3d 1071, 1081 (7th Cir. 2019).

315. *Id.* at 1078, 1081–12.

316. *Id.* at 1085–86.

317. *Id.* at 1086.

318. Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 601–02 (8th Cir. 2005).

319. *Id.* at 601–02.

320. *Id.* at 602.

321. *Id.*

322. *Id.* at 603.

323. 539 F.3d 862, 876 (8th Cir. 2008).

324. Wallace v. DTG Operations, Inc., 563 F.3d 357, 362–63 (8th Cir. 2009) (holding that in the case of an award of $30,000, a ratio of 4:1 was all that was constitutionally permissible).

The Ninth Circuit addressed the excessiveness of a punitive damages award in a breach of contract case featuring a claim of racial discrimination.[325] An economist, who served as an expert witness, estimated the plaintiff's lost profits at $576,000.[326] The jury delivered a special verdict that found the defendant liable to the plaintiff in the amount of $50,000 in compensatory damages on the breach of contract claim, nominal compensatory damages on the discrimination claim, and $5 million in punitive damages.[327] The Western District of Washington also awarded the plaintiff more than $400,000 in attorney fees and other costs.[328] The Ninth Circuit reviewed the punitive damages award, finding that while the defendant's behavior was repugnant, it scored low on the *Gore* factors.[329] The court concluded the case did not qualify for more than a single-digit ratio because the compensatory damages were not of a nominal nature.[330] Importantly, the Ninth Circuit cited *Campbell* as establishing a new standard for punitive damages, one confined to a single-digit ratio.[331] Two years later, in another case, the Ninth Circuit found a ratio of 6.49:1 punitive damages to compensatory damages to be constitutionally excessive and remanded the case with instructions that the punitive damages award could not exceed a 4:1 ratio.[332]

The Tenth Circuit examined the proportionality of a punitive damages award in the context of an employment law case featuring a retaliation claim in which the jury awarded the plaintiff $2 million in punitive damages at the district court level.[333] On appeal, the Tenth Circuit held that a $2 million punitive damages award against an award of $630,000 in actual damages was constitutionally excessive.[334] Following other circuits, the court held the substantial actual damages award was a limiting factor on the damages ratio.[335] The panel concluded that the maximum constitutionally permissible ratio in the case was 1:1.[336] In a second case, the Tenth Circuit continued to rely on other circuits for prior interpretations of permissible ratios, finding that, although most awards over $1 million have been considered substantial, so too have many awards significantly below the $1 million mark.[337] The court stated that a 1:1 ratio ensures a defendant's punishment is "reasonable and proportionate" to a plaintiff's harm.[338]

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325. Bains LLC v. Arco Prods. Co., 405 F.3d 764, 769 (9th Cir. 2005).
326. *Id.* at 768.
327. *Id.* at 769.
328. *Id.*
329. *Id.* at 775.
330. *Id.* at 776–77.
331. *Id.*
332. Bennett v. Am. Med. Response, Inc., 226 F. App'x 725, 728–29 (9th Cir. 2007).
333. Jones v. United Parcel Serv., Inc., 674 F.3d 1187, 1206–08 (10th Cir. 2012).
334. *Id.* at 1207.
335. *Id.* at 1208.
336. *Id.*
337. Lompe v. Sunridge Partners, LLC, 818 F.3d 1041, 1069–70 (10th Cir. 2016).
338. *Id.* at 1075.

Overall, a majority of the circuit courts have endorsed a 1:1 ratio as the constitutionally permissible line for punitive damages.[339] Even where a court has had an upward departure from the 1:1 ratio, such as in the Ninth Circuit, those ratios have stayed below a 5:1 ratio.[340] The 1:1 ratio, where non-nominal actual damages have been awarded, appears to be a widely adopted standard. However, all circuits, in accordance with *Campbell*, have allowed themselves room to adjust the ratio should a particularly egregious case present itself.[341] Despite the majority of courts adopting a seemingly consistent approach, the Eleventh Circuit and several state supreme courts have adopted different approaches.[342]

B. The Second Approach

The majority of federal circuit courts have adhered to the guidance set forth by the Supreme Court in *Gore* and *Campbell* and adopted, in most cases, a 1:1 ratio of compensatory damages to punitive damages.[343] Indeed, the circuit courts have made limited exceptions for cases where nominal compensatory damages are awarded or there are especially egregious actions by the defendant, meriting a higher ratio.[344] Despite the nearly uniform approach taken by other circuit courts, the Eleventh Circuit has charted a path entirely its own—choosing to view the Supreme Court's guidance regarding single-digit ratios as dicta.[345] In addition to the Eleventh Circuit, a small number of state supreme courts have also taken to rejecting the 1:1, or even single-digit, ratio cap.[346]

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339. *See supra* Section III.A.

340. *See* Bennett v. Am. Med. Response, Inc., 226 F. App'x 725, 728–29 (9th Cir. 2007).

341. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

342. *See Stars Interactive* Petition, *supra* note 7, at *22 ("The Eleventh Circuit and multiple state supreme courts take the exact opposite approach. These courts do not consider whether a large damages calculation requires a strict limit on the amount of punitive damages.").

343. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) ("[L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."). *See also Campbell*, 538 U.S. at 425 ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

344. *See supra* Section III.A.

345. *Stars Interactive* Petition, *supra* note 7, at *22. *See also* Cote v. Philip Morris USA, Inc., 985 F.3d 840, 849 (11th Cir. 2021) (characterizing the language relied on by Philip Morris as "dicta," and rejecting the guidance in *Campbell* that when compensatory damages are substantial, the outer limit of due process may be a 1:1 ratio).

346. *See Stars Interactive* Petition, *supra* note 7, at *23–24 (noting Nevada, Missouri, Arkansas, and Kentucky have all rejected the size of compensatory damages as a guide for capping punitive damages at 1:1).

The Eleventh Circuit conducted a detailed analysis of the *Gore* factors in a case involving a foreclosure, *McGinnis v. American Home Mortgage Servicing, Inc.*, which caused not only economic harm but also physical and emotional harm for the plaintiff.[347] While the damages ratio in *McGinnis* was only 5.9:1, the Eleventh Circuit latched onto the Supreme Court's choice of the word "instructive" in discussing damages ratios.[348] The court instead elected to follow the Supreme Court's guidance that each case is unique and the constitutional limits on damages should be assessed based on individualized facts and circumstances.[349] The *McGinnis* panel cited various other circuit decisions upholding damages awards above a 1:1 ratio, including an award with a 9.2:1 ratio.[350] The Eleventh Circuit went further in 2021 in *Cote v. Philip Morris USA, Inc.*, declaring the Supreme Court's discussion on punitive damages ratios mere dicta.[351] Despite the plaintiff receiving an actual damages award of $6.25 million, the Eleventh Circuit concluded that a punitive award of $20.7 million (a ratio of 3.3:1) did not offend constitutional limits.[352] Again in *Cote*, the Eleventh Circuit connected to the language in *Campbell* that allows room for each case to be examined on an individual basis.[353] The Eleventh Circuit even appeared to dispatch with the necessity of the third *Gore* prong (examining penalties in similar cases or related statutes); instead, the court looked at other tobacco-related litigation, stating: "The defendant's conduct and the harm to the plaintiffs in those cases do not dictate any outcome here."[354] The Eleventh Circuit, however, is not alone in its departure from the majority view; indeed, various state courts have also rejected the majority's approach.[355]

All of the state courts that have departed from the majority approach are located within federal circuits that have adopted the 1:1 ratio as a default.[356] In 2010, the Nevada Supreme Court, sitting en banc, examined a punitive damages award stemming from a jury verdict in a products liability case.[357] The jury returned a verdict of $35.1 million in compensatory damages and $99 million in punitive

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347. McGinnis v. Am. Home Mortg. Servicing, Inc., 901 F.3d 1282, 1288–89 (11th Cir. 2018).

348. *Id.* at 1290.

349. *Id.*

350. *Id.* (citing Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1283 (11th Cir. 2008)); *Goldsmith*, 513 F.3d at 1283 ("Bagby Elevator argues that the ratio of punitive damages to compensatory damages—9.2 to 1 (or $500,000 to $54,321)—is constitutionally impermissible, but we disagree. . . . Although the award for Goldsmith is at the high end of the range that is ordinarily constitutionally permissible, the award is not excessive.").

351. 985 F.3d 840, 849 (11th Cir. 2021).

352. *Id.*

353. *Id.*

354. *Id.* at 849–50.

355. *Stars Interactive* Petition, *supra* note 7, at *22–24.

356. Nevada is within the Ninth Circuit; Arkansas and Missouri are within the Eighth Circuit; and Kentucky is part of the Sixth Circuit. It is worth noting that some state supreme courts have departed from their federal circuit's guidance. *See, e.g.*, Schoeff v. R.J. Reynolds Tobacco Co., 232 So. 3d 294, 307–08 (Fla. 2017) (adopting the 1:1 ratio of *Campbell* but allowing an upward departure of 3:1 because of the extreme reprehensibility of the defendant).

357. Wyeth v. Rowatt, 244 P.3d 765, 769 (Nev. 2010).

damages.[358] The defendant moved for remittitur, and the trial court reduced the compensatory damages to $23 million and the punitive damages to just under $58 million.[359] In justifying the punitive award, the Nevada Supreme Court concluded that, regardless of the compensatory damages, because the ratio of punitive damages to compensatory was under 3:1, the damages award did not violate the defendant's due process rights.[360]

The Arkansas Supreme Court has taken a similar approach.[361] For example, in *Union Pacific Railroad Co. v. Barber*, the Arkansas Supreme Court upheld a $25 million punitive damages award against $5.1 million in compensatory damages.[362] In determining that the punitive damages award was not excessive, the Court compared the $25 million award to the value of the defendant corporation, which was worth $9.6 billion at the time.[363] The damages in the case, stemming from a train collision, were deemed appropriate under the *Gore* guideposts, and the Court ruled the resulting single-digit ratio was thus constitutionally permissible.[364] The Arkansas Supreme Court determined that the proper standard for determining a ratio unconstitutional was whether it was "breathtaking," and it found that a 5:1 ratio was not.[365] Importantly, the Arkansas Supreme Court did not consider the size of the compensatory damages award in its evaluation of the punitive award—instead choosing to look at the worth of the defendant corporation.[366]

The Missouri Court of Appeals addressed due process concerns for a punitive damages award of $4.14 billion.[367] In discussing the constitutional limits of punitive damages awards, the Missouri court stated: "No 'simple mathematical formula' exists to help us determine whether a punitive award is grossly excessive; 'the relevant constitutional line is "inherently imprecise."'"[368] Analyzing the ratio prong of the *Gore* guideposts, the court reasoned: "Because Defendants are large, multi-billion dollar corporations, we believe a large amount of punitive damages is necessary to have a deterrent effect in this case."[369] The Missouri Court of Appeals is joined by the Kentucky Supreme Court in justifying an outsized award against actual damages.[370]

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358. *Id.* at 775.
359. *Id.*
360. *See id.* at 785 (citing NEV. REV. STAT. § 42.005(1)(a) (2023) ("Regarding the ratio of the punitive damages awarded to the compensatory damages awards, the remitted punitive damages awards here are less than three times the compensatory awards. This is well within the accepted ratios.").
361. *Stars Interactive* Petition, *supra* note 7, at *23.
362. Union Pac. R.R. Co. v. Barber, 149 S.W.3d 325, 348 (Ark. 2004).
363. *Id.* at 347.
364. *Id.* at 347–50.
365. *Id.* at 348.
366. *Id.* at 347.
367. Ingham v. Johnson & Johnson, 608 S.W.3d 663, 719 (Mo. Ct. App. 2020).
368. *Id.* at 720 (citation omitted).
369. *Id.* at 723.
370. *Stars Interactive* Petition, *supra* note 7, at *24.

C. The Kentucky Approach

In *Kentucky v. Stars Interactive*, the Kentucky Supreme Court set out on a path of its own.[371] The Kentucky Supreme Court noted that fines do not violate the Eighth Amendment unless they are disproportionate; however, the Court took a novel approach to determining the proportionality of damages.[372] Instead of taking an approach previously adopted elsewhere, or calculating damages based on poker players' net losses, the Court determined the appropriate measure was to calculate losses based on the gross amount that players had wagered.[373] The Court explained that because the amount of damages was equal to the amount lost by gamblers, it was "the very definition of mathematically proportionate."[374] The Court also acknowledged that the defendant was not the winner of the proceeds of poker games; instead, the defendant's site took only a commission on each hand played.[375]

The Kentucky Supreme Court's rejection of both a calculation based on the money that PokerStars actually received and one based on the net winnings of Kentucky-based players meant that PokerStars was solely responsible for what essentially amounted to all money lost in the State in aggregate.[376] In opposing the damages calculation, which was then trebled, the defendants further highlighted the Supreme Court's statement in *Timbs* that government desires to raise revenue through forfeitures and fines may exceed what is constitutionally permitted in this case.[377] Kentucky abdicated any serious discussion of the constitutional limits on excessive fines or due process.[378] In determining that the award was proportionate, the Court stated only that there were mental and physical healthcare costs, lost taxes, and costs associated with prosecuting individuals who turn to crime to support a

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371. *See* Commonwealth *ex rel.* Brown v. Stars Interactive Holdings (IOM) Ltd., 617 S.W.3d 792, 808 (Ky. 2020).

372. *Id.*

373. *Id.* at 808–09.

374. *Id.* at 808.

375. *Id.* at 808–09. Other courts around the country have concluded that gambling loss recovery statutes, like that used in Kentucky, were inapplicable because the operator of the website was not a "winner." *See, e.g.*, Langone v. Kaiser, No. 12 C 2073, 2013 WL 5567587, at *6–7 (N.D. Ill. Oct. 9, 2013) (holding that daily fantasy sports website FanDuel was not a winner of players' losses and therefore fell outside of Illinois's gambling loss recovery act). It is worth noting, however, that the operator of a poker game had historically been found liable under the statute in the Commonwealth. *See* Triplett v. Seelbach, 14 S.W. 948, 949 (Ky. 1890).

376. *Stars Interactive*, 617 S.W.3d at 808–09. The Kentucky statute did exclude amounts under five dollars in 24 hours. *Id.* at 796.

377. *Id.* at 810. In the wake of the Supreme Court's ruling, Kentucky Governor Andy Beshear announced his intention to use the seizure to shore up the state's pension fund. *See* Max Jaeger, *PokerStars Asks High Court to Toss 'Monstrous' $1.3B Ruling*, LAW360 (Aug. 27, 2021, 4:50 PM), https://www.law360.com/articles/1416330/pokerstars-asks-high-court-to-toss-monstrous-1-3b-ruling [https://perma.cc/QC6N-W9SW].

378. *Stars Interactive*, 617 S.W.3d at 810.

gambling addiction.[379] While these costs may exist, it is beyond constitutionally permissible limits to simply take the Court's word for it without further evidence.[380]

Even under the most generous reading of the Kentucky Supreme Court's mathematical analysis, most federal circuits would find the trebling of damages constitutionally suspect.[381] The Court arrived at a figure of $290 million in damages that was then trebled to $870 million, creating a 3:1 ratio.[382] The 12% post-judgment interest raised the award above $1 billion.[383] While a 3:1 ratio has been found constitutionally suspect in punitive damages awards, it becomes even more constitutionally offensive when one considers that PokerStars' ill-gotten gains amounted to only $18 million in actual revenue received. Using that figure, the damages ratio is closer to 50:1 than 3:1.[384] In addition to the ratio with PokerStars' actual revenue, the final damages award exceeded the net losses of Kentucky-based players by a ratio of 34:1.[385] The Kentucky Supreme Court's judgment in *Stars Interactive* put it at odds with most federal circuits and effectively disregarded the guideposts from *Timbs*.[386]

The *Stars Interactive* case seemed like the perfect vehicle for the U.S. Supreme Court to rein in oversized judgments, particularly those aimed at patching state budget holes while neglecting actual harm.[387] Specifically, the case would have allowed the Court to establish clear guidelines on when a fine becomes disproportionate, beyond what can be deduced from *Bajakajian*. However, in early October 2021, after filing its petition for certiorari, Stars Interactive's parent company settled with the Commonwealth for $300 million.[388] The settlement allowed the Company to move on; however, it left important constitutional questions unanswered. In Part IV, this Article highlights potential approaches the Court might consider taking in the event it decides to hear another case allowing it to analyze the Eighth Amendment's Excessive Fines Clause.

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379. *Id.*

380. *See* United States v. Bajakajian, 524 U.S. 321, 337–40 (1998) (noting that forfeiture of $357,144 was constitutionally excessive as it was "grossly disproportional to the gravity of his offense . . . and it bears no articulable correlation to any injury suffered by the Government").

381. *See supra* Section III.A.

382. *Stars Interactive*, 617 S.W.3d at 803.

383. *Stars Interactive* Petition, *supra* note 7, at *10, *14.

384. *Id.* at *26.

385. *Id.* at *3–4.

386. *See Stars Interactive*, 617 S.W.3d at 810 ("We are mindful that *Timbs* reiterates the Supreme Court of the United States' stance that the Excessive Fines Clause is applicable to the states. However, as the fine was not disproportionate, there was no violation. Many of our statutes call for treble damages. This is not a disproportionate award.").

387. Indeed, the total financial cost of problem gambling in the Commonwealth of Kentucky has been estimated at $81 million by the Kentucky Council for Problem Gambling. *See Stars Interactive* Petition, *supra* note 7, at *17.

388. John Cheves, *Lawyers Who Helped Kentucky Collect $300 Million from Online Poker to Get $75 Million*, LEXINGTON HERALD-LEADER, https://www.kentucky.com /news/politics-government/article254808842.html [https://perma.cc/2G2E-HKSG] (Oct. 7, 2021, 10:43 AM).

IV. CONTOURING THE EXCESSIVE FINES CLAUSE

The Supreme Court seeks to avoid constitutional questions whenever possible, and it rarely articulates clear, bright-line rules even when it tackles constitutional issues head-on.[389] The decision to avoid articulating a clear benchmark for excessiveness under the Excessive Fines Clause —instead relying on the imprecise disproportionality standard—has resulted in significant uncertainty as to when a fine is unconstitutionally excessive.[390] While in its previous Excessive Fines Clause cases, the Court could have simply adopted its due process analyses that had previously found damages exceeding single-digit ratios suspect, the Court never adopted this approach. Instead, the Court has left the boundaries around excessive fines undefined. However, given the broad uniformity among federal circuit courts, it is reasonable to presume that where harm is substantial and restitution would be significant, a 1:1 ratio is the limit of constitutionality.

A. Defining Proportionality

Black's Law Dictionary defines "disproportionate" as "[h]aving too much or too little in relation to something else; not suitable in comparison with something else in size, amount, importance, etc."[391] In the case of fines, "disproportionate" references a sanction that is either too strong or too weak for the underlying offense. The dictionary provides an unhelpful definition for identifying the contours of proportionality in the context of the Excessive Fines Clause. Indeed, University of Minnesota criminal law professor Richard Frase reached a similar conclusion in examining the Supreme Court's jurisprudence surrounding proportionality, writing: "The Supreme Court has never made clear what it means by proportionality in the context of prison sentences."[392] The same holds true in the context of excessive fines.

Professor Frase examines several contexts in which a sanction may be disproportionate, beginning with when the costs of sanctions outweigh the benefits.[393] Second, a sanction could be disproportionate when there is an alternative, less-costly measure that could achieve the same ends.[394] The Supreme Court has often discussed proportionality in the context of retributive justice, effectively weighing the harm caused by the defendants' acts to the punishment afforded them.[395] The basis for this theory is that the punishment should be equal to harm caused by the defendant. In the context of the Excessive Fines Clause, this theory has meant that crimes with minimal harm should not receive a

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389. The canon of constitutional avoidance has been criticized extensively. *See, e.g.*, Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015).

390. The disproportionality analysis is borrowed from the Supreme Court's cruel and unusual punishment analysis. *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 600–03 (2005).

391. *Disproportionate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

392. Frase, *supra* note 389, at 588.

393. *Id.* at 592.

394. *Id.*

395. *Id.* at 588–590, 588 n.98.

disproportionate sanction, like the seizure of all of the $357,144 that the family was transporting in *Bajakajian*.[396] The seizure of the money, which had not been used in any crime besides the failure to report its existence at the airport, would generate a disproportionate sanction when compared to the harm, which was so minimal it would be hard to quantify.

The absence of Supreme Court guidance on proportionality has left lower courts to carry much of the load.[397] University of Texas law professor Susan Klein has said that most lower courts compare the value of the seized property or the size of the fine to the seriousness of the defendant's crime.[398] This should result in any fine against an innocent person being deemed disproportionate.[399] Lower courts have been similarly confused regarding how to measure proportionality: some circuits compare the fine against the defendant's conduct;[400] others combine a proportionality analysis with an instrumentality analysis by looking at how involved the seized property or money was with the offense; and a third group adopts a three-part instrumentality test.[401] Regrettably, there is no clear judicial definition of what constitutes a disproportionate fine; instead, courts have applied a patchwork of approaches. The remainder of this Part discusses two different approaches that have been suggested before proposing that the most desirable approach is actually the simplest.

B. The Austin *Plan*

In *Austin v. United States*, discussed in Section II.C.,[402] the petitioner suggested a two-pronged approach to determine whether a forfeiture related to a drug conviction violated the Eighth Amendment.[403] The *Austin* test argues that, as a threshold matter, courts should examine the value of seized property against the value of seized drugs to find whether the seizure is "excessive relative to the financial condition of the owner."[404] While the *Austin* test presupposes a drug-related seizure, the threshold question could be evaluated two-fold: first, by simply weighing the value of the property against the seriousness of the offense and then by comparing the property against the owner's financial means.

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396. *Id.* at 602.

397. *See* Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 475 (1997).

398. *Id.* at 475–76.

399. *Id.* at 476.

400. *See e.g.*, United States v. 427 & 429 Hall St., 74 F.3d 1165, 1170–72 (11th Cir. 1996).

401. *See e.g.*, United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994) ("[W]e now hold, in determining excessiveness of an *in rem* forfeiture under the Eighth Amendment, that a court must apply a three-part instrumentality test that considers: (1) the nexus between the offense and the property and the extent of the property's role in the offense; (2) the role and culpability of the owner; and (3) the possibility of separating offending property that can readily be separated from the remainder.").

402. *See supra* Section II.C.

403. Brief for Petitioner, Austin v. United States, 509 U.S. 602 (1993) (No. 92-6073), 1993 WL 347335, at *3, *46.

404. *Id.* at *47.

The *Austin* test the plaintiff advocated for suggests that where there is a vast disparity between the value associated with the offense (e.g., the value of the drugs seized) or where the seized property has only a minor connection to the offense, there is prima facie excessiveness, and the government must justify the seizure's proportionality. According to the plaintiff's proposed *Austin* test, courts should examine five factors when analyzing excessiveness: (1) whether the property constitutes the owner's means to earn a living or livelihood; (2) whether the property seized is the owner's home; (3) the involvement of the property in the underlying crime or whether the property was purchased with proceeds from the underlying crime; (4) whether the owner was convicted of a crime linked to the forfeiture and, if so, the seriousness of the crime and severity of any criminal sentence; and (5) whether the forfeiture serves as a deterrent against future conduct given the extent of the perpetrator's criminal behavior.[405]

The petitioner in *Austin* argued the proposed test is grounded in the Magna Carta as well as traditional conceptions of protected property.[406] Although the Supreme Court did not adopt the *Austin* test, the Court may have reached the same conclusion in finding excessiveness it would have had it applied the *Austin* test. The brief, however, highlights one of the downfalls of the proposed test, which is the difficulty for a district court in applying the various factors.[407] The petitioner, very reasonably, argued that simply because the Excessive Fines Clause does not come with a bright-line rule, it does not mean that a court can simply ignore the Eighth Amendment's existence.[408]

C. The Timbs *Proposal*

Wesley Hottot, Senior Attorney for the Institute for Justice who argued on behalf of Tyson Timbs in front of the Supreme Court, suggested yet another approach for determining whether a fine is excessive.[409] Hottot argued there are seven important questions for a court determining whether a forfeiture or fine is excessive: "Who committed what offense; when and where; what property is the government taking; how was that particular property involved in the offense; and why does the government want it?"[410] With regard to *who*, the question centers on whether the government is seeking to seize property or fine a defendant directly or whether the property owner that would suffer the loss is an innocent party.[411] The second inquiry asks *what* the offense was and *what* property was involved.[412] This inquiry explores how serious the crime was and to what extent the property was involved in the commission of the offense.[413] *Where* and *when* the fine is imposed

405. *Id.*
406. *Id.* at *19, *45–48.
407. *Id.* at *50.
408. *Id.* (quoting United States v. Busher, 817 F.2d 1409, 1416 (9th Cir. 1987)) ("[T]he Eighth Amendment does not provide a bright line separating punishment that is permissible from that which is not. But a court may not turn its back on a Constitutional constraint simply because it is difficult to apply.").
409. Hottot, *supra* note 243, at 582.
410. *Id.* at 595–97.
411. *Id.* at 595.
412. *Id.* at 601.
413. *Id.*

looks at what connection the property has to a person's ability to earn a livelihood or carry on with everyday life.[414] The *how* inquiry asks how the property was connected to the crime—was it integral to the commission of the offense, or was the property merely a possession of the defendant?[415] Lastly, Hottot suggests there should be an inquiry into *why* the government is seeking the forfeiture to punish the defendant—examining, for example, whether the government is imposing punishment to fill its coffers.[416] If it is a self-interested seizure, it would appear excessive on its face.[417] These inquiries would be used to evaluate whether the seizure serves a legitimate purpose or if it exceeds constitutional boundaries.[418]

As Hottot notes, civil forfeiture activity has increased dramatically in recent years.[419] Courts should view the explosion of seizures and states using fines for revenue generation with skepticism. Courts have various approaches available to evaluate when a fine is disproportionate to the offense and given the rise in the use of economic sanctions, the Supreme Court will likely continue to see cases seeking guidance on the Excessive Fines Clause until it adopts a clear and straightforward means of evaluation. A desirable solution, however, may be less elusive than has been speculated, and indeed, the answer may be as simple as considering what grossly disproportionate means both historically and in contemporary times.

D. Occam's Razor

The simplest solution is to apply a due process analysis to Excessive Fines Clause issues with an emphasis on the second prong: evaluation of the ratio.[420] The adoption of a default presumption that a fine exceeding a 1:1 ratio to the actual, substantial harm caused by a defendant is excessive and out of proportion to the harm done would simplify the analysis. Cases involving aggravating factors or especially reprehensible conduct, such as repeated behavior or failure to quell wrongful behavior following prior judgments, may warrant a departure from the presumed constitutional limit. Indeed, a 4:1 ratio could be constitutionally permissible if the defendant's conduct was particularly egregious. However, a ratio exceeding single digits should be presumptively excessive. The increased use of fines and forfeitures by states anxious to patch budget deficits should be viewed with increased scrutiny, and courts should not continue to allow penalties that outsize harms by double digit multipliers. While the Supreme Court may prioritize the canon of constitutional avoidance, doing so in a way that avoids a bright-line rule has come at the expense of the constitutional rights of many citizens. Many courts have freely departed from *Campbell* and *Gore* and have instead chosen to view the Court's instructions as mere "dicta."[421]

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414. *Id.* at 604.
415. *Id.* at 606–07.
416. *Id.* at 608–09.
417. *Id.* at 609.
418. *Id.* at 611.
419. *Id.* at 610.
420. State Farm Mut. Auto. Ins. Co., v. Campbell, 538 U.S. 408, 425 (2003).
421. Cote v. Philip Morris USA, Inc., 985 F.3d 840, 849 (11th Cir. 2021).

The de facto presumption should be that a fine is grossly disproportionate if it exceeds a 1:1 ratio without aggravating factors. Considering the plain language of "proportionality," courts are likely to find some similar variation of its definition, such as a "proper balance"[422] or "corresponding in size, degree, or intensity."[423] Even in mathematics, proportional relationships are described as representing the same correlation and can be reduced down to equivalents.[424] "Grossly," by contrast, refers to something that is "extreme"[425] or "flagrant."[426] While there is an extensive history of sentencing disparities that may seem to justify a virtually infinite upper limit, a strict textual reading would likely conclude that a sanction which is double the equivalent would be grossly disproportionate to an offense.[427] It is, literally, twice as harsh as the offense. An examination of the origins of prohibitions on excessive fines leads to a similar conclusion.

Despite excessiveness and proportionality having evaded bright-line classifications since before the Magna Carta, fines should not be so ruinous that they leave a person without means to care for themselves or their family.[428] Historically, this principle even extended to merchants, providing them with sufficient means for economic survival when courts assessed monetary sanctions.[429] The English history of the prohibition on excessive fines is based on the principle of *salvo contenemento*, or the idea that no fine should be so damaging that it amounts to a life sentence.[430] Fines that exceed ratios of 1:1 run an increased risk of depriving defendants of their livelihoods. The expectation of proportionality is so fundamental to the justice system that fines exceeding harm caused by an offense should be viewed as fundamentally unfair. The increased use of fines and civil forfeitures as windfalls for state entities should increase the scrutiny that courts place on these judgments. The Eighth Amendment's Excessive Fines Clause is meant to ensure that defendants are not unconstitutionally punished. If states are exacting fines as a means of

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422. *Proportionality*, DICTIONARY.COM, https://www.dictionary.com/browse/proportionality [https://perma.cc/4D98-PV66] (last visited Oct. 26, 2023).

423. *Proportional*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/proportional [https://perma.cc/UPX5-PFZS] (last visited Oct. 26, 2023).

424. *See, e.g.*, *How Do You Know if Two Ratios Are Proportional?*, VIRTUAL NERD, https://virtualnerd.com/pre-algebra/ratios-proportions/ratios/example-problems/reduce-to-check-proportionality [https://perma.cc/C5GD-CJU7] (last visited Oct. 26, 2023).

425. *Grossly*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/grossly [https://perma.cc/PS4N-UDYB] (last visited Oct. 26, 2023).

426. *Grossly*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/thesaurus/grossly [https://perma.cc/Y95R-CPXB] (last visited Oct. 26, 2023).

427. For example, in *Ewing v. California*, the Supreme Court found that a sentence of 25 years to life was not grossly disproportionate to the crime of stealing golf clubs when considered in totality with the defendant's prior convictions. Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. REV. 1667, 1674 n.25 (2021) (citing Ewing v. California, 538 U.S. 11, 28 (2003)).

428. McLean, *supra* note 154, at 854–55.

429. *Id.* at 855–56.

430. *Id.* at 862–63.

plastering over fiscal irresponsibility, fines that go beyond the amount of harm caused by the defendant should be presumptively constitutionally deficient.

Civil asset forfeiture has been widely condemned for its abuses; however, the practice remains commonplace across the country.[431] The practice has even been called unconstitutional,[432] but it has also been lucrative; some have even called it a necessary funding mechanism.[433] Many states, perhaps intentionally, do not track whether seized property comes from people who were convicted, or even charged with, a crime.[434] While many states have begun to reexamine their civil asset forfeiture programs, states have not ceased needing to create revenue mechanisms to avoid budget deficits.[435] States increasingly look for creative ways to raise revenue, leading some, like Kentucky, to find solutions that do not involve raising taxes. Seeking judgments to meet fiscal obligations, as opposed seeking them to punish or seek retribution from a defendant, should be viewed as constitutionally suspect.

CONCLUSION

No one disputes that PokerStars operated in Kentucky illegally.[436] Unfortunately for the next company targeted by an overzealous prosecutor seeking a recovery detached from any cognizable harm, there is no *Stars Interactive* decision to serve as precedent.[437] The *Stars Interactive* case represented a perfect vehicle for the U.S. Supreme Court to add contours to the Excessive Fines Clause, but the settlement agreement foreclosed that possibility. Nonetheless, moving forward, the Court should look to the actual harm caused by a defendant and the relationship between that harm and the proposed fine when considering this issue. The adoption of a definite baseline that fines exceeding a 1:1 ratio are presumptively disproportionate is a necessary starting point. A standard which requires extenuating circumstances to depart from the 1:1 ratio would provide much needed clarity to rein

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431. Malinda Harris & Stephen Silverman, *Civil Asset Forfeiture: I'm a Grandmother, Not a Drug Lord. Why Can Police Take My Property?*, USA TODAY (Mar. 10, 2021, 7:01 AM), https://www.usatoday.com/story/opinion/voices/2021/03/10/civil-asset-forfeiture-laws-justice-crimes-column/4633965001/ [https://perma.cc/P7BJ-UYKZ].

432. *See* Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2396–402 (2018).

433. Edgar Walters & Jolie McCullough, *Texas Police Made More than $50 Million in 2017 from Seizing People's Property. Not Everyone Was Guilty of a Crime*, TEX. TRIB. (Dec. 7, 2018, 12:00 AM), https://www.texastribune.org/2018/12/07/texas-civil-asset-forfeiture-legislature/ [https://perma.cc/9KY2-A6P3].

434. *Id.*

435. *See* Aallyah Wright, *Federal Loophole Thwarts State Efforts to Curb Civil Asset Forfeiture by Police*, USA TODAY (Aug. 19, 2021, 2:06 PM), https://www.usatoday.com/story/news/nation/2021/08/19/states-work-scale-back-civil-forfeiture-laws-amid-federal-loophole/8181774002/ [https://perma.cc/9EFT-38UR] (noting that more than 30 states have taken efforts to roll back civil asset forfeitures).

436. *See* Steve Bittenbender, *Kentucky Gets $300M from Flutter as PokerStars Lawsuit Finally Settled*, CASINO.ORG, https://www.casino.org/news/kentucky-gets-300m-as-pokerstars-lawsuit-settled-after-10-years/ [https://perma.cc/8LGL-NBK4] (Sept. 22, 2021, 2:10 AM).

437. *See* Joint Stipulation to Dismiss, *supra* note 23.

in rogue prosecutors and state courts, who have been abusing their discretion and supersizing judgments devoid of any relationship to real-world harms.

The Excessive Fines Clause is part of an extensive history of prohibitions on disproportionate fines dating to at least the Magna Carta. Despite more than 900 years as a legal principle, there is relatively little clarity as to when fines cross the boundary from acceptable to excessive. The Constitution's framers so thoroughly understood the concept that fines should not be so excessive that they are ruinous to a defendant that they required virtually no debate about the Clause's inclusion in the Eighth Amendment. Despite this, what has followed is a great deal of uncertainty. Until 1989, it was not at all clear when a fine was constitutionally excessive, because the Court had never addressed the issue. Since *Bajakajian*, the Court has only addressed the Excessive Fines Clause on the rarest of occasions. The increasing use of economic sanctions and law enforcement's seemingly uncontrolled use of civil forfeitures continue to raise the possibility that the Court will again encounter questions about the Excessive Fines Clause. Given this fact, it is time for the Supreme Court to move beyond mere guidance on when disproportionate fines are unconstitutional and adopt a useable standard for determining when a fine becomes disproportionate to the underlying offense.