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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 27 EAP 2021

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

ALEXIS LOPEZ,
Appellant

BRIEF OF *AMICI CURIAE* LAW PROFESSORS BETH A. COLGAN AND JEAN GALBRAITH IN SUPPORT OF APPELLANT

Appeal from the Judgment of the Superior Court dated March 23, 2021, in No. 1313 EDA 2018, affirming the Judgment of Sentence of April 27, 2018, issued by the Court of Common Pleas of Philadelphia County Criminal Division in No. CP-51-CR-0004377-2015

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STATEMENT OF INTEREST OF *AMICI*[1]

Amici are professors with expertise in constitutional law. They submit this brief because the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution has important implications for the interpretation of Rule 706(c).

Professor Beth A. Colgan is a Professor Law at the UCLA School of Law. She is one of the country's leading experts on constitutional and policy issues related to the use of economic sanctions as punishment, and particularly on the Eighth Amendment's Excessive Fines Clause. She has published numerous articles on these topics, including *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014), *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2 (2018), *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L. J. FORUM 430 (2020) (with Nicholas J. McLean), *Nor Excessive Fines Imposed*, in THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan Ryan & William Berry, eds. 2020), and *The Burdens of the Excessive Fines Clause*, 63 WILLIAM & MARY L. REV. __ (forthcoming 2021).

Professor Jean Galbraith is a Professor of Law at the University of

[1] Except as stated in this footnote, no person or entity other than the *amici curiae* or their counsel authored or paid for this *amicus* brief. Affiliations of *amici* are listed only for identification purposes. *Amici* note with appreciation that two University of Pennsylvania Carey Law School students, Tayler Daniels and Hannah Sachs, assisted in the preparation of this brief.

Pennsylvania Carey Law School. She is an expert in the constitutional separation of powers. From 2019-2021, she co-directed Penn Law's Appellate Advocacy Clinic, which litigated several cases involving economic sanctions imposed on poor defendants. She has published in numerous law journals, including the *Michigan Law Review*, the *New York University Law Review*, the *University of Chicago Law Review*, and the *Virginia Law Review*.

SUMMARY OF ARGUMENT

The Excessive Fines Clause of the U.S. Constitution's Eighth Amendment limits courts from imposing costs that defendants cannot foreseeably pay. As this Court recognized in its 2017 decision in *Commonwealth v. 1997 Chevrolet*, this Clause and its parallel in the Pennsylvania Constitution protect economically vulnerable defendants from crushing financial penalties. *See* 160 A.3d 153, 188-89 (Pa. 2017). This limitation on "such onerous fines that would deprive one of his or her means of living" dates back to Magna Carta – that "Great Charter which serves as the cornerstone of our own constitutional jurisprudence." *Id.* at 188.

While *1997 Chevrolet* involved civil forfeiture, the same principle applies to costs imposed in criminal cases. In *Austin v. United States*, the U.S. Supreme Court held that financial sanctions fall within the purview of the Excessive Fines Clause if they are paid to the government and "serv[e] in part to punish." 509 U.S. 602, 607,

610 (1993). Criminal costs readily satisfy this test. They are paid to the government, thus raising the risk that they can "be exercised … for raising revenue in unfair ways." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 272 (1989). And this Court's jurisprudence from as far back as 1818 makes clear that "a statute imposing costs is penal in its nature." *Commonwealth v. Tilghman*, 4 Serg. & Rawle 127, 129, 1818 WL 2213 (Pa. 1818). Understanding the Excessive Fines Clause to apply to criminal costs also comports with related case law and furthers the purposes that underlie the Clause.

This Court should interpret Rule 706(C) in a way that advances rather than thwarts the constitutional rights of poor defendants. "[I]f a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction." *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017). But the reading of Rule 706(C) adopted by the Superior Court poses serious Eighth Amendment concerns. It leaves trial courts with unchecked authority to impose substantial costs at sentencing irrespective of a defendant's ability to pay – even where this issue is squarely raised and the defendant is utterly indigent. Consistent with the Excessive Fines Clause, this Court should instead interpret Rule 706(C) to require trial courts to consider ability to pay when imposing costs at sentencing.

ARGUMENT

A. The Excessive Fines Clause Limits the Imposition of Financial Sanctions That a Person Cannot Afford to Pay

The Eighth Amendment of the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed." U.S. Const. amend. 8. The Pennsylvania Constitution has an identical clause, which this Court has interpreted as broadly co-extensive with the federal Excessive Fines Clause. Pa. Const. Art. I, § 13; *Commonwealth v. 5444 Spruce Street*, 832 A.2d 396, 399 (Pa. 2003); *1997 Chevrolet*, 160 A.3d at 167-68; *cf. Commonwealth v. Eisenberg*, 98 A.3d 1268, 1282-83 (2014) (taking this approach at a high level of generality but suggesting that proportionality might be measured slightly differently under the Pennsylvania Constitution's clause). The history of the Excessive Fines Clause shows that fines are "excessive" if imposed on people who cannot pay without sacrificing their means of livelihood. Drawing on this history, this Court held in 2017 that ability to pay is part of the "excessiveness analysis." *1997 Chevrolet*, 160 A.3d at 189. Several other state supreme courts have recently done the same. These decisions recognize that financial sanctions that might be easily affordable to rich people can be ruinous to the lives and livelihood of the poor. This is true as well of criminal costs, which can be devastating for the poor and especially the very poor.

1. Starting as Far Back as Magna Carta, the Prohibition Against the Imposition of Excessive Fines Has Encompassed Consideration of Ability to Pay

As early as Magna Carta, the English constitutional tradition protected defendants from the imposition of financial sanctions that would destroy their means of living. The Great Charter provided that:

> A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, *yet saving always his contenement;* and a merchant in the same way, saving his merchandise; and a villein shall be amerced in the same way, saving his wainage." MAGNA CARTA, ch. 20 (1215) (as translated) (emphasis added).

As historian William McKechnie later explained, "to save a man's 'contenement' was to leave him sufficient for the sustenance of himself and those dependent on him." WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 293 (2d ed. 1914).

In the centuries that followed Magna Carta, tensions abounded between its protections on the one hand and the practices of abusive monarchs on the other. Especially through the notorious Star Chamber, fines became a vehicle for revenue extraction and intimidation. As one commentator wrote of the unchecked fines imposed by the Star Chamber during the reign of Charles I, "those who inflicted the punishment reaped the gain, and sat, like famished birds of prey, with keen eyes and bended talons, eager to supply for a moment, by some wretch's ruin, the craving

emptiness of the exchequer." 2 HENRY HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND, HENRY VII TO GEORGE II 31 (London, J.M. Dent & Sons 1800). This occurred "[a]bsolutely regardless of the provisions of the Great Charter, that no man shall be amerced even to the full extent of his means." *Id*. The Star Chamber was abolished in 1641, but the judges of Charles II nonetheless "imposed ruinous fines on the King's critics." Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1253 (1987) (quotation marks omitted); *see also Timbs v. Indiana*, 139 S. Ct. 682, 693-95 (2019) (Thomas, J., concurring in the judgment) (recounting this history).

It was against this backdrop that William Penn sought to reiterate Magna Carta's crucial protection against unaffordable financial penalties. William Penn's 1682 Frame of Government for Pennsylvania stated "[t]hat all fines shall be moderate, *and saving men's contenements*, merchandise, or wainage." Pennsylvania Frame of Government § XVIII (1682) (emphasis added). The New York Charter of Liberties and Privileges of 1683 followed suit, reiterating that financial penalties should not intrude upon a person's freehold, wainage, or merchandise. N.Y. Charter of Liberties and Privileges (1683). Although practice did not always live up to these principles, concern about preservation of livelihood remained an ongoing and important theme in these and other colonies in the years leading up to American

independence. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 330-35 (2014).

Back in England, the reforms ushered in with the Glorious Revolution also hearkened back to the principles underlying Magna Carta. The English Bill of Rights of 1689 provided that "[t]hat excessive bail ought not to be required, nor excessive fines imposed." An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 W. & M. 2d Sess., c. 2 (1689). Although more condensed than Magna Carta, this language was understood to incorporate the centuries-old requirement that financial penalties should not deprive a person of his or her means of living. As William Blackstone later explained, "it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1769). Instead, "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear." *Id.* at 372.

The Excessive Fines Clause of the Eighth Amendment comes almost word-for-word from the English Bill of Rights. It is thus built on an English and colonial foundation that goes all the way back to Magna Carta – a foundation that incorporated consideration of ability to pay into the concept of "excessiveness." As an influential nineteenth century constitutional treatise explained, "[a] fine should have some reference to the party's ability to pay it." THOMAS M. COOLEY, A

TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF AMERICAN UNION 328 (Boston, Little, Brown, and Co. 1868).

Despite this powerful historical pedigree, the Excessive Fines Clause has received relatively little attention until recent times. There are several explanations for the dearth of litigation. As the U.S. Supreme Court has recognized, there have been periods in which officials designed systems to maximize revenue generation and wealth extraction in ways fundamentally incompatible with the Excessive Fines Clause. *Timbs*, 139 S. Ct. at 688-89 (regarding the use of the Black Codes in the post-emancipation South to extract money and labor). Though limited, appellate records suggest that attempts to challenge such practices as violative of the Clause were met with the very prejudices that undergirded those systems of abuse. *See State v. Manuel*, 4 Dev. & Bat. (Orig. Ed.) 20, 34-37 (N.C. 1838) (noting that "[w]hether a fine be reasonable or excessive, ought to depend on the nature of the offence, and the ability of the offender" but upholding a statute allowing free Black people's labor to be auctioned at the courthouse steps to pay for fines on the grounds that "[w]hat would be a slight inconvenience to a free negro, might fall upon a white man as intolerable degradation"). Litigation also was likely limited by the Court's 1866 determination that the Excessive Fines Clause did not apply to the states, *see Pervear v. Commonwealth*, 72 U.S. 475, 480 (1866), a decision the Court only reversed in

2019, *Timbs*, 139 S. Ct. at 689-90. Unsurprisingly, litigation funneled in other directions, most notably the Equal Protection and Due Process Clauses. *Williams v. Illinois*, 399 U.S. 235 (1970) (striking down the imposition of incarceration for the involuntary nonpayment of fines and court costs); *see also Tate v. Short*, 401 U.S. 395 (1971) (same); *Bearden v. Georgia*, 461 U.S. 660 (1983) (mandating an ability-to-pay analysis rather than automatic revocation of probation for failure to pay restitution and costs).

It was not until the late 1980s that the U.S. Supreme Court considered the scope of the Clause's protections. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (holding that the Clause did not extend to punitive damages in private civil cases); *Alexander v. United States*, 509 U.S. 544 (1993) (holding that the Clause applies to criminal forfeitures); *Austin v. United States*, 509 U.S. 602 (1993) (same regarding civil forfeitures); *United States v. Bajakajian*, 524 U.S. 321 (1998) (adopting the gross disproportionality test). Yet in none of those cases did the litigants ask the Court to address whether a defendant's financial circumstances were relevant to the excessiveness of a financial penalty. *Bajakajian*, 524 U.S. at 340 n. 15 (noting that this issue was not raised). The Court has, however, suggested that such an inquiry is relevant to excessiveness. *Timbs*, 139 S. Ct. at 688 (quoting historical sources as supporting the need to consider the defendant's financial resources but not resolving the issue).

As this Court has recognized, the question of whether a defendant's financial circumstances is relevant to excessiveness has been informed by recent research into the historical record. *1997 Chevrolet*, 160 A.3d at 188-89 (citing Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013)). This work has drawn a through-line from Magna Carta's guarantee that a person would be saved his or her "contenement" to the Excessive Fines Clause through the review of early English records, including the abuses of the Star Chamber noted above, through early indicators that Magna Carta's projections would have been understood by colonists to be their own—including the 1682 Pennsylvania Frame of Government—and through key treatises that would have informed legal interpretation and practice in England and America. McLean, *supra* at 855-70. This work has also examined colonial and early American statutes and court records, which included direct references to Magna Carta and other indicators that a person's financial circumstances was deemed relevant to the appropriate punishment. Colgan, *supra* at 330-35. These analyses support the conclusion that "the ratifying generation would have considered the fine's effect on the offender and his family when analyzing a sentence's fairness." *Id.* at 324.

2. *This Court's Precedent and Recent Decisions from Other State Supreme Courts Treat the Excessive Fines Clauses as Requiring Consideration of Ability To Pay*

In 2017, this Court held in *1997 Chevrolet* that the Excessive Fines Clause encompasses consideration of defendants' financial circumstances. 160 A.3d at 188-89. The question before this Court was how to measure the excessiveness of a civil *in rem* forfeiture. *See generally id.* Referencing Magna Carta, this Court recognized that "hostility to such onerous fines that would deprive one of his or her means of living[] became deeply rooted in Anglo-American constitutional thought and played a significant role in shaping the Eighth Amendment." *Id.* at 188 (citation and quotation marks omitted). *1997 Chevrolet* therefore held that, as a factor within the proportionality analysis, courts should consider "whether the forfeiture would deprive the property owner of his or her livelihood, i.e., his current or future ability to earn a living." *Id.* at 189 (citation and quotation marks omitted); *see also Commonwealth v. Eisenberg*, 98 A.3d 1268, 1286 (2014) (striking down a high mandatory minimum fine as constitutionally excessive when applied to "a twenty-six year old defendant who was … enrolled full-time as a student, living with his fiancée, expecting his first child, and did not own a house").

This Court has accordingly recognized that the Excessive Fines Clause requires courts to consider ability to pay in situations where the financial penalty might deprive the defendant of his or her means of living. Several sister jurisdictions

have recently reached similar conclusions. In 2019, the Indiana Supreme Court held on remand from the U.S. Supreme Court that a proportionality analysis for civil forfeiture should encompass consideration of the financial circumstances of the owner. *State v. Timbs*, 134 N.E.3d 12, 36-37 (Ind. 2019). "To hold the opposite would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally." *Id.* at 36; *see also Colo. Dep't Labor & Emp. v. Dami Hosp. LLC*, 442 P.3d 94, 101 (Colo. 2019) (finding "persuasive evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment").

Most recently, in August 2021, the Washington Supreme Court held that $547 in vehicle impoundment costs violated the Excessive Fines Clause when imposed on a homeless man with $50 to his name. *City of Seattle v. Long*, 493 P.3d 94, 114-15 (Wash. 2021). The court noted that while several federal courts have found that ability to pay is not a relevant consideration for the Excessive Fines Clause, other "modern state and federal courts have joined the chorus of legal scholars to conclude that the history of the clause and the reasoning of the Supreme Court strongly suggest that considering ability to pay is constitutionally required." *Id.* at 112-13 (citing cases). Joining this modern trend and noting the relatively minor nature of the offense at issue, the court found a violation of the Excessive Fines Clause. It rejected the City of Seattle's arguments that payment could occur through an installment

payment plan. "[P]aying $50 per month when Long made at most $700, would leave him with $650 with which to live. … It is difficult to conceive how Long would be able to save money for an apartment and lift himself out of homelessness while paying the fine and affording the expenses of daily life." *Id.* at 115.

The Washington Supreme Court's opinion is realistic in recognizing that very poor people are starkly limited in their present and future ability to pay financial penalties that would seem trivial to others. Criminal court costs in Pennsylvania are typically higher than the $547 that the Washington Supreme Court found constitutionally excessive. One report has found that median criminal costs in Pennsylvania in 2013 were $1,038 for defendants with public defenders and $1,336 for those with private counsel. JEFFREY T. WARD, NATHAN W. LINK, & ANDREW CHRISTY, IMPOSITION AND COLLECTION OF FINES, COSTS, AND RESTITUTION IN PENNSYLVANIA CRIMINAL COURTS 5 (ACLU of Pennsylvania, 2021).[2] These are amounts that can have serious and deleterious effects on the livelihoods of poor defendants. They therefore trigger the Eighth Amendment concern that this Court

[2] The report is available at www.aclupa.org/courtdebt. A related report on costs in Pennsylvania from 2008 to 2018 finds that "more than 15% of cases have exceedingly high costs assessed: 166,658 cases have costs over $25,000; 3,059 cases have costs over $100,000; and 195 cases have costs over $500,000, including some over $1 million." COLIN SHARPE, JON DILKS & ANDREW CHRISTY, IMPOSITION AND COLLECTION OF COURT COSTS IN PENNSYLVANIA CRIMINAL CASES: PRELIMINARY RESULTS FROM AN ANALYSIS OF 10 YEARS OF COURT DATA 3 (ACLU of Pennsylvania, 2018), https://aclupa.org/sites/default/files/field_documents/imposition_and_assessment_of_court_costs_in_pennsylvania_criminal_cases_final_revised.pdf.

has aptly identified as going all the way back to Magna Carta – "that a fine should not deprive a wrongdoer of his livelihood." *1997 Chevrolet*, 160 A.3d at 188 (quotation marks and citation omitted).

B. The Excessive Fines Clause Applies to Costs, Which Are Partially Punitive and Paid to the Government

The U.S. Supreme Court has held that economic sanctions are "fines" for purposes of the Excessive Fines Clause if the sanctions are paid to the government and "can only be explained as serving in part to punish." *Austin v. United States,* 509 U.S. 602, 607, 610 (1993) (holding that the Excessive Fines Clause can apply to civil forfeiture).[3] In its later decision in *United States v. Bajakajian*, the Court held that a civil forfeiture "imposed at the culmination of a criminal proceeding and requir[ing] conviction of an underlying felony" was sufficiently punitive to trigger the reach of the Excessive Fines Clause. 524 U.S. 321, 328-29 (1998) (reaching this holding with respect to confiscated financial assets and rejecting the government's argument that this forfeiture advanced remedial purposes).

Criminal costs fall squarely within the reach of the Excessive Fines Clause. They are paid to the government – thereby running the risk that they can "be

[3] Subsequent to this articulation, the Court has questioned the validity of the requirement that "fines" must be payable to the government. *Paroline v. United States*, 572 U.S. 434, 456 (2014). The reach of the Clause to financial penalties paid to non-governmental actors need not concern this Court in the present case, since costs are paid to the government.

exercised for purposes of oppressing political opponents, for raising revenue in unfair ways, or for any other improper use." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 272 (1989). And criminal costs in Pennsylvania can only be understood as serving in part to punish. They are imposed in criminal proceedings, they are imposed only when the defendant is found guilty, and failure to pay them can be punished by imprisonment. Indeed, as far back as 1818, the Pennsylvania Supreme Court recognized that "a statute imposing costs is penal in its nature." *Commonwealth v. Tilghman*, 4 Serg. & Rawle 127, 129, 1818 WL 2213 (Pa. 1818). More generally, treating criminal costs as within the reach of the Excessive Fines Clause is consistent with related precedent and aligns squarely with the Clause's purposes.

1. Pennsylvania Law Treats Criminal Costs as Partially Punitive

Criminal costs in Pennsylvania are deeply integrated into the criminal process. Even early in Pennsylvania history, when costs could be imposed on acquitted defendants, they were recognized as having a penal component. Today, it is even more clear that costs "can only be explained as serving in part to punish," *Austin,* 509 U.S. at 610, because they are only imposed in tandem with a plea or finding of guilt. They are therefore at least partially punitive in nature, as this Court has

repeatedly indicated. This punitive aspect is also evident in the collection process, where failure to pay costs, like fines, can give rise to imprisonment.

In 1818, in *Commonwealth v. Tilghman*, this Court considered a challenge to a Pennsylvania statute that gave the jury discretion to impose costs on an acquitted defendant. This Court upheld the statute. It acknowledged squarely that "a statute imposing costs is penal in its nature." *Tilghman*, 4 Serg. & Rawle at 129. It reasoned that "the defendant is not punished for a matter of which he stood indicted; (for he is acquitted of everything of that sort)" but "on something collateral to it," such as "some impropriety of conduct." *Id.* at 128-29. This precedent was followed for many years. *E.g.*, *Wright v. Commonwealth*, 77 Pa. 470, 471 (Pa. 1875) (following *Tilghman* in presuming that a jury which awarded costs against an acquitted defendant had "good reason" due to "the conduct of the defendant").

In 1964, this Court once again held that a jury could impose costs on an acquitted defendant. *Commonwealth v. Giaccio,* 202 A.2d 55 (Pa. 1964), *rev'd sub nom Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). Departing from *Tilghman*, however, this Court characterized the statute as non-penal. It claimed that because the costs were incident to the judgment, the "[i]mposition of costs is not part of any penalty imposed." *Id.* at 58. This Court then reasoned that it was perfectly permissible for a jury to impose costs if it found "reprehensible acts or misconduct which fall short of the offense charged." *Id.* at 59. In dissent, Justice Cohen took the

position that such imposition of costs was most definitely penal and should be struck down on due process grounds. *See id.* at 61 (Cohen, J., dissenting). He did so by adopting the dissenting opinion from the Superior Court. *Id.* This opinion in turn considered that the underlying statute "is a penal statute because under it costs can be imposed only upon a defendant who has been indicted" and "it is penal in that it may result in a jail commitment." *Commonwealth v. Giaccio*, 196 A.2d 189 (Pa. Super. Ct. 1963) (Flood, J., dissenting).

The U.S. Supreme Court unanimously overturned this Court's decision. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). The Court "agree[d] with … the dissenting judges in the appellate courts below" that the statute violated due process. *Id.* at 402. The Court did not specifically resolve whether the statute in question should be labeled "penal," but its reasoning made quite clear that it deemed it unconstitutional for a jury to have discretion over awards of criminal costs unless tied to a finding of guilt. *See id.* at 402-04; *see also id.* at 405 (Stewart, J., concurring) (describing the imposition of costs as a way for "a jury to punish a defendant"); *see also Nelson v. Colorado*, 137 S. Ct. 1249, 1256 (2017) (stating that "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary extractions" of costs, fees, and restitution).

Since *Giaccio*, criminal costs in Pennsylvania are not awarded where a defendant is acquitted, but instead are accompaniments to guilt and punishment.

They are thus necessarily partly punitive in nature. *See Austin*, 509 U.S. at 615-22 (holding civil forfeitures constitute fines because they were historically based on the notion that the property owner was complicit in prohibited conduct, revealing legislative intent to punish). Unlike fines, fees may *also* be tied to the goal of reimbursing the court system. This Court has accordingly sometimes described them as intended to be administrative. *Commonwealth v. Nicely*, 638 A.2d 213, 217 (Pa. 1994). But "[w]e need not exclude the possibility that a [sanction] serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause." *Austin*, 509 U.S. at 610. All that is required is that the sanction "can only be explained as serving in part to punish." *Id.* And in recent years, this Court has repeatedly acknowledged that costs are at least partly penal in nature. In *Commonwealth v. Garzone,* this Court was "accept[ing of the] premise that [16 P.S. § 7708, a statute imposing costs] is penal in nature." 34 A.3d 67, 75 (Pa. 2012). More recently, in *Commonwealth v. Lehman*, this Court had "little difficulty concluding [that 16 P.S. § 1403, another statute imposing costs] is also a penal statute." 243 A.3d 7, 17-18 (Pa. 2020).

The conclusion that costs are partially punitive stems not only from how they are imposed, but also from how they are collected. Criminal costs are punitive in their consequences. They are frequently bundled together with fines, such as under Rule 706 and 42 Pa. C.S. § 9728. Failure to pay can put criminal defendants at risk

of severe consequences, including driver's license suspension and contempt hearings that can lead to imprisonment. *See, e.g.,* 75 Pa. C.S. § 1533(a); Pa. R. Crim. P. 706; *see also Commonwealth v. Mauk*, 185 A.3d 406 (Pa. Super. Ct. 2018) (describing how a trial court summarily imprisoned the defendant for failure to pay his restitution, costs, and fines). The applicability of the Excessive Fines Clause to criminal costs is all the more essential given the punitive consequences that failure to pay these costs can trigger under Pennsylvania law and practice.

2. Treating Criminal Costs as within the Scope of the Excessive Fines Clause is Consistent both with Related Precedent and with the Clause's Purposes

There are at least three other good reasons to read the Excessive Fines Clause as applying to costs. First, this approach is consistent with related case law. Second, it promotes the crucial objective set forth in the Excessive Fines Clause of preserving defendants' livelihoods. Third, this approach advances an additional core purpose of the Excessive Fines Clause: the protection against problematic methods of revenue generation.

As to the first reason, both the U.S. Supreme Court and this Court have recognized the close relationship between criminal costs and modern fines in interpreting other constitutional provisions. In *Williams v. Illinois,* the U.S. Supreme Court explicitly treated imprisonment for involuntary nonpayment of fines as

equivalent to involuntary nonpayment of costs for purposes of the Fourteenth Amendment. 399 U.S. 235, 244 n.20 (1970). This Court took the same approach in *Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 160-62 (1973). Both cases noted that fines and criminal costs gave rise to the same consequence – the risk of imprisonment – and therefore treated them in tandem. *Williams*, 399 U.S. at 244 n.20; *Parrish*, 304 A.2d at 160-62. In its recent decision on the Excessive Fines Clause, the Washington Supreme Court similarly relied on the close nexus between fines and costs in holding that the "associated costs" of impounding a car were partially punitive. *City of Seattle v. Long*, 493 P.3d 94, 109 (Wash. 2021). Indeed, the Washington Supreme Court noted that there was arguably *greater* reason to be concerned about costs than fines in situations where the legislature has specified the amount of the fine but left the amount of the costs to be determined by implementing officials. *Id.* at 115.

As to the second reason, treating criminal costs as within the ambit of the Excessive Fines Clause advances the Clause's core purpose. It would be a hollow guarantee if the Excessive Fines Clause protected poor defendants from penalties that the Commonwealth labels as "fines" but left the criminal justice system free to render individuals utterly destitute through "costs." Such an approach would fail to protect the livelihood – the "contenements" – of countless poor defendants. By

contrast, applying the Excessive Fines Clause to costs as well as to fines would help safeguard the livelihoods of those subjected to fines and fees.

Finally, applying the Excessive Fines Clause to costs would protect against the risk of financial sanctions being employed inappropriately by governments because of their importance as revenue. "This concern," the U.S. Supreme Court noted recently, "is scarcely hypothetical." *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019). The Court cited an amicus brief for the proposition that "state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue." *Id.* Indeed, costs can be appealing to governments precisely because they shift financial burdens from general taxpayers to convicted individuals.[4] By funding the criminal justice system through costs imposed on those convicted rather than through general taxation, governments can simultaneously burden a deeply disfavored group and sustain a penal system that taxpayers might otherwise have more reason to question. The strong governmental incentives to add to the burdens born by convicted individuals make constitutional scrutiny all the

[4] As one example of the close links between criminal costs, revenue-raising, and punishment, consider 42 Pa. C.S. § 1725.3. This statute was originally enacted in 1992 and imposes a "user fee" on non-acquitted defendants for the costs of laboratory testing for various crimes related to substance abuse. *See* 42 Pa. C.S. § 1725.3. During debate in the Pennsylvania House of Representatives leading up to its passage, one of its sponsors explained that "[t]his legislation will mean approximately $10 million statewide in tax relief to the taxpayers, putting the burden on the criminals and drunk drivers." 1992 COMMONWEALTH OF PA. LEG. J. 1756 (Nov. 16, 1992) (statement of Rep. Mayernik); *see also id.* at 2105-06 (Nov. 25, 1992) (statement of Rep. Mayernik) (stating that this bill "would put the burden on the criminals and drunk drivers, removing that burden from the taxpayers").

more important. Treating costs as within the reach of the Excessive Fines Clause enables the Clause to fulfill its purpose as a "constant shield" against "excessive punitive economic sanctions," *id.* at 689.

C. This Court Should Construe Rule 706(C) To Require Consideration of Ability To Pay Costs at Sentencing Because This Construction Will Avoid Conflict with the Excessive Fines Clause

The question before this Court is the proper interpretation of Rule 706(C). This is not a question of constitutional law. But the Excessive Fines Clause is nonetheless highly relevant to how this Court should interpret Rule 706(C). "Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction." *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017); *see also* 1 Pa. C.S. § 1922(3) (codifying the canon of constitutional avoidance); Pa. R. Crim. P. 101(C) (providing that the rules "shall be construed in consonance with the rules of statutory construction"). This Court should therefore interpret Rule 706(C) in a manner that avoids conflict with the Excessive Fines Clause.

Rule 706(C) requires that "the court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant's financial means, including

the defendant's ability to make restitution or reparations." Pa. R. Crim. P. 706(C). No earlier cases of this Court or of the Superior Court have addressed how the Excessive Fines Clause might inform this reading. The Superior Court's decision in *Commonwealth v. Childs* was decided some years before this Court's 2017 decision in *1997 Chevrolet*, and it did not discuss the Excessive Fines Clause. *See generally Commonwealth v. Childs*, 63 A.3d 323 (Pa. Super. Ct. 2013). This Court's brief dicta in *Commonwealth v. Ford* regarding costs similarly did not consider the Excessive Fines Clause. 217 A.3d 824, 827 n. 6 (Pa. 2019).

The approach to Rule 706(C) taken by the *en banc* Superior Court raises serious constitutional concerns. It would give judges discretion to refuse to so much as *consider* ability to pay costs at sentencing – even when defendants are obviously unable to pay or where payments would come at the cost of bare necessities to defendants and their families. But judges should not be given discretion about whether to fulfil their constitutional obligations. As shown above, the Excessive Fines Clause limits the power of judges to impose financial penalties – including costs – that would deprive defendants of their livelihoods.

By contrast, interpreting Rule 706(C) to apply to the time of sentencing will help harmonize court practice with the requirements of the Excessive Fines Clause. It will commit judges to ensuring that costs are not constitutionally excessive at the time they are *imposed*. It will do justice to the ancient principle that "no man shall

have a larger amercement imposed upon him, than his circumstances or personal estate will bear." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 372 (1769).

As the situation of Mr. Lopez makes clear, there are some defendants for whom costs will be unpayable. There are some who will never have any income; some whose income will never foreseeably be greater than what subsistence can bear; and some for whom any income above subsistence is already consumed by other financial penalties. For such defendants, the principle of saving the "contenement" that is embedded in the Excessive Fines Clause sets a constitutional limit on the ability of courts to impose costs. *See City of Seattle v. Long*, 493 P.3d 94, 114-15 (Wash. 2021) (holding that the Excessive Fines Clause prohibited the imposition of $547 in costs on an indigent defendant who had committed a relatively minor offense). Some poor defendants may be able to afford some costs on a carefully calibrated installment payment plan, although they may need a "reduction of the economic sanctions" in order to avoid a "proportionality problem." *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 55-56 (2018) (noting that otherwise these defendants could end up on installment payment plans whose duration amounts to an excessive punishment). Still other defendants will have ability to pay their costs in full, either immediately or on installments. By taking ability to pay costs into account at

sentencing, trial courts can not only achieve just outcomes but also fulfill the mandate of the Eighth Amendment.

CONCLUSION

Long before the Founding, the Anglo-American legal tradition sought to protect poor persons from financial penalties that would destroy their means of living. The Framers of the U.S. and Pennsylvania Constitutions wisely embedded this protection in their respective Excessive Fines Clauses. Yet today the imposition of unpayable costs on indigent defendants is crushingly routine. Rather than giving a green light to this practice, this Court should interpret Rule 706(C) in a way that protects the constitutional rights of poor defendants. It should hold that where financial means are at issue, Rule 706(C) requires courts to consider a defendant's ability to pay *before* imposing costs.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 531 AND 2135

I hereby certify that this brief contains fewer than 7,000 words and therefore complies with the word count limits of Pa. R.A.P. 531 and Pa. R.A.P. 2135.

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CERTIFICATE OF PUBLIC ACCESS COMPLIANCE PURSUANT TO PA. R.A.P. 127

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

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, this brief was served on all parties, including the following, by PACFile:

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