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ARKANSAS’S CIVIL ASSET FORFEITURE STATUTE AND THE EIGHTH AMENDMENT’S EXCESSIVE FINES CLAUSE

I. INTRODUCTION

In the Old Testament of the Bible, when an ox killed a man it was deemed guilty and sentenced to death.¹ In ancient Greece, guilty property was banished from the country.² Roman law forced citizens to forfeit livestock that caused injury.³ These are three older examples of asset forfeiture, where property is charged in a court of law.⁴

Today, asset forfeiture is primarily used to take money and property from criminals involved in the drug trade⁵ and use those proceeds to fight crime.⁶ Law enforcement seizes cash, vehicles, guns, and real property.⁷ Asset forfeiture is used in all states, including Arkansas.⁸ In Arkansas, law enforcement can seize cash, vehicles, real property, and anything else of value that is used or exchanged in connection with a substance classified as a controlled or counterfeit substance under Arkansas law.⁹

The seizure of property serves two primary purposes. The first is remedial to remove the instruments of the drug trade from criminals.¹⁰ The second purpose is punitive—to punish those involved in criminal activity by seizure and forfeiture of property.¹¹

The federal government’s power to use forfeiture as punishment by extracting money through fines and other types of payment has been limited since the ratification of the Bill of Rights within the Constitution, through the Eighth Amendment’s Excessive Fines Clause.¹² At ratification, the Excessive Fines Clause prevented the federal government from imposing fines

1. *Exodus* 21:28.

2. OLIVER W. HOLMES, JR., *THE COMMON LAW* 5 (Stuart E. Thiel & David Widger eds., Project Gutenberg 2013) (1881) (ebook).

3. The Laws of the Twelve Tables, tbl. VII., Law I., *reprinted in* *THE CIVIL LAW* (Samuel P. Scott trans., 1932).

4. *See* 36 AM. JUR. 2d *Forfeitures and Penalties* § 1 (2020).

5. *See id.*

6. *See* 21 U.S.C. § 881(e)(2)(A) (1996) (amended 2000).

7. *Id.* § 881(a).

8. *See* ARK. CODE ANN. § 5-64-505 (West 2021).

9. *Id.*

10. *See* *Austin v. United States*, 509 U.S. 602, 621–22 (1993).

11. *Id.*

12. *Browning–Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266–68 (1989) (“[T]he history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.”).

that grossly exceeded a defendant's ability to pay.¹³ In 2019, this limitation was extended to the States through the incorporation of the Excessive Fines Clause in the Eighth Amendment in *Timbs v. Indiana*.¹⁴ This was a monumental change in the law because now the governments at both the state and federal levels are limited by the Excessive Fines Clause in their power to extract payments as a punishment for a criminal offense.¹⁵ This Note reviews the incorporation of the Excessive Fines Clause and its impact on state civil forfeiture actions.

This Note argues that the Excessive Fines Clause governs state civil forfeiture actions under Arkansas law that serve a punitive purpose. Arkansas is limited in its power to punish through extracting payments after incorporation of the Excessive Fines Clause.¹⁶ Since the Excessive Fines Clause is incorporated against the State, any action that is considered punitive and that involves an extraction of payment to the government must be analyzed under the Excessive Fines Clause.¹⁷ Because civil asset forfeiture in Arkansas is both punitive and a payment to the government, the Excessive Fines Clause governs these actions.¹⁸

Section II of this Note provides an overview of civil asset forfeiture, with Part A examining its history and statistics,¹⁹ and Part B examines its mechanics.²⁰ Section III considers the federal background of civil asset forfeiture, with Section IV covering Arkansas civil asset forfeiture law.²¹ Finally, Section V argues that Arkansas civil forfeiture law is punitive in nature and thus governed by the Excessive Fines Clause under the standards estab-

13. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 870 (2013) (discussing the early history of the Excessive Fines Clause and one case in which the Supreme Court stated that the large criminal fine imposed on a bankrupt person was excessive as the fine was impossible to pay).

14. *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019) (holding that the protections against excessive fines is fundamental and deeply rooted in the nation's history and tradition, and therefore should be incorporated by the Due Process Clause of the Fourteenth Amendment); see also 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE AND PROCEDURE § 14.2 (updated May 2021) (explaining that incorporation into the Fourteenth Amendment is done selectively, rather than wholesale, through both the privileges and immunities clause and the due process clause of the Fourteenth Amendment).

15. See ROTUNDA & NOWAK, *supra* note 14, § 14.2(a); *United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

16. See *Austin*, 509 U.S. at 618; *Timbs*, 139 S. Ct. at 686–87.

17. *Timbs*, 139 S. Ct. at 686–87; See *infra* Section IV.

18. See *infra* Section IV.

19. See *infra* Section II.A.

20. See *infra* Section II.B.

21. See *infra* Sections III, IV.

lished by the Supreme Court to determine if a law serves a punitive purpose.²²

Arkansas's law is punitive in nature because forfeiture has historically been considered punishment, both at the federal level²³ and in Arkansas.²⁴ To illustrate, Arkansas law explicitly includes an innocent owner defense that shifts the focus to the culpability of the owner.²⁵ This reveals an intent to punish only those involved in the drug trade.²⁶ Additionally, Arkansas law ties the forfeiture to the commission of an offense, also revealing an intent to punish those involved in drug trafficking.²⁷

II. AN OVERVIEW OF CIVIL ASSET FORFEITURE GENERALLY

A. Civil Asset Forfeiture: How Did We Get Here?

While modern forfeiture looks quite different from ancient forfeiture, it can still trace its roots back to ancient times.²⁸ An examination of this lineage through the concept of deodands paid to the King, forfeiture in the colonies and in the First Congress, and the modern revival of forfeiture in the war on drugs provides valuable context for how modern forfeiture law has developed to its current form.²⁹

While the legal fiction that property can be guilty can be traced back to ancient Israel,³⁰ modern *in rem* forfeiture has its roots in the medieval law of deodands.³¹ The word “deodand” comes from the Latin *deo dandum*, meaning “to be given to God,” and property would be given up to atone for the property's guilt.³² The deodand was forfeited to the Crown to provide money for religious services “for the good of the dead man's soul.”³³ Eventually,

22. See *infra* Section V.

23. *Austin v. United States*, 509 U.S. 602, 618 (1993); Eric C. Surette, Annotation, *When Does Forfeiture of Currency, Bank Account, or Cash Equivalent Violate Excessive Fines Clause of Eighth Amendment*, 164 A.L.R. Fed. 591, at 2 (2000) (“It is well established that a forfeiture of property is the equivalent of a fine and therefore is subject to the Eighth Amendment's limitations.”).

24. *Gallia v. State*, 287 Ark. 176, 179, 697 S.W.2d 108, 110 (1985).

25. ARK. CODE ANN. § 5-64-505(a)(4)(B), (a)(6)(B), (a)(8)(A) (Supp. 2021).

26. See, e.g., *Austin*, 509 U.S. at 620.

27. ARK. CODE ANN. § 5-64-505(a).

28. See *supra* notes 1–3 and accompanying text.

29. Brittany Hunter, *A History of Civil Asset Forfeiture in America*, TENTH AMENDMENT CTR. (Apr. 12, 2019), <https://tenthamendmentcenter.com/2019/04/12/a-history-of-civil-asset-forfeiture-in-america/>.

30. *Exodus* 21:28.

31. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

32. *Id.* at 681 n.16; David Pimental, *Forfeiture Procedure in Federal Court: An Overview*, 183 F.R.D. 1, 4 (1999).

33. *Calero-Toledo*, 416 U.S. at 681.

the deodand was justified primarily as a penalty for carelessness and became a regular source of the Crown's revenue.³⁴

Deodands themselves did not become part of the common law tradition of the United States,³⁵ but another form of English law that likely was derived from deodands—statutory forfeiture.³⁶ For example, the English Navigation Acts of 1660 punished violations of the act with the forfeiture of any illegally carried goods as well as the ship that carried them.³⁷

Statutory forfeiture took hold in the Colonies³⁸ and continued after the Constitution was ratified, when the First Congress passed laws allowing forfeiture of ships and cargo involved in customs offenses.³⁹ The federal government used forfeiture to fund wars, including the War of 1812, the Civil War, and the Spanish American War.⁴⁰ The use of forfeiture declined after those wars⁴¹ but briefly resurged during prohibition to prosecute bootleggers.⁴²

Modern asset forfeiture began when its use increased during the war on drugs.⁴³ In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which allowed for the seizure of drugs and personal equipment.⁴⁴ In 1978, Congress passed the Psychotropic Substances Act, which allowed for the seizure of money and securities used in drug-related crimes.⁴⁵ Then, in 1984, Congress enacted the Comprehensive Crime Control Act, which allowed for the seizure of any property related to drug crime.⁴⁶

34. *Id.*

35. *Parker-Harris Co. v. Tate*, 188 S.W. 54, 55 (Tenn. 1916).

36. *Calero-Toledo*, 416 U.S. at 683.

37. *Pimental*, *supra* note 32, at 4–5; *Austin v. United States*, 509 U.S. 602, 612 (1993).

38. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 145 (1943).

39. *Austin*, 509 U.S. at 613.

40. Annie Depper & J. Blake Hendrix, *Land Rovers, Excessive Fines, and Selective Incorporation: Civil Asset Forfeiture After Timbs v. Indiana*, 54 ARK. LAW. 14, 16, https://issuu.com/arkansas_bar_association/docs/lawyer_summer_019issuu.

41. *Id.*

42. *Id.*; *see, e.g., C.I.T. Corp. v. United States*, 40 F.2d 825, 825–26 (8th Cir. 1930).

43. *See* Darpana M. Sheth, *Policing for Profit: The Abuse of Forfeiture Laws*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 24, 25. In June 1971, President Richard Nixon declared that drug abuse was “public enemy number one” and the United States focused on eliminating illegal drug use by “increasing penalties, enforcement, and incarceration for drug offenders.” BRITANNICA, *War On Drugs United States History*, <https://www.britannica.com/topic/war-on-drugs> (Dec. 2021).

44. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236, 1276 (1970); Hunter, *supra* note 29.

45. Psychotropic Substances Act, Pub. L. No. 95-633, Nov. 10, 1978, 92 Stat 3768 (1978); Hunter, *supra* note 29.

46. Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat 1837 (1984); Hunter, *supra* note 29.

Asset forfeiture has grown tremendously since the introduction of these laws.⁴⁷ In 1986, the U.S. Department of Justice's Assets Forfeiture Fund took in \$93.7 million in proceeds from asset forfeiture.⁴⁸ That number had grown to \$500 million by 2003 and reached \$1.8 billion in 2011.⁴⁹ In Arkansas, nearly \$59 million in cash has been seized and forfeited to law enforcement between 2010–2018.⁵⁰

Forfeiture is very different today from what it was in medieval times; for example, citizens no longer pay fines to a king.⁵¹ Thoroughly understanding the history and process of civil forfeiture can clarify why the Excessive Fines Clause properly governs forfeiture today.

B. Civil Asset Forfeiture: Background, and an Example from *Timbs*

The process of civil asset forfeiture involves two primary steps.⁵² First, police seize property they believe was involved in a crime.⁵³ Second, the government files a civil *in rem* lawsuit against the property for forfeiture of the property.⁵⁴ If the government wins the lawsuit and the property is forfeited, the government takes title to the property.⁵⁵

Property seized under civil asset forfeiture most often includes contraband, cash, vehicles, and guns.⁵⁶ Other property can be taken as well, including real property, jewelry, electronics, and home furnishings.⁵⁷ Police can seize property under civil asset forfeiture when they have probable cause to believe that the property or proceeds are traceable to an unlawful act.⁵⁸

Because the lawsuit against the seized property is brought in civil court, property owners are not entitled to the same protections they would receive in a criminal lawsuit.⁵⁹ Property owners do not have the right to be

47. Sheth, *supra* note 43, at 25.

48. *Id.*

49. *Id.*

50. *Civil Asset Forfeiture in Arkansas May Change After US Supreme Court Ruling, But the State Could Do More to Protect Arkansans*, UNIV. OF CENT. ARK., ARK. CTR. FOR RES. IN ECONS. (Feb. 21, 2019), uca.edu/acre/2019/02/21/civil-asset-forfeiture-may-change [hereinafter *Civil Asset Forfeiture in Arkansas*].

51. See McLean, *supra* note 13, at 856.

52. ARK. CODE ANN. § 5-64-505(c), (g) (West 2019).

53. *Id.* § 5-64-505(c).

54. *Id.* § 5-64-505(g) (also allowing *in personam* jurisdiction); 36 AM. JUR. 2D *Forfeitures and Penalties* § 29, Westlaw (updated Nov. 2020).

55. ARK. CODE ANN. § 5-64-505(h); see 36 AM. JUR. 2D *Forfeitures and Penalties* § 75, Westlaw (updated Nov. 2020).

56. ARK. CODE ANN. § 5-64-505(a); *Civil Asset Forfeiture in Arkansas*, *supra* note 50.

57. DICK M. CARPENTER II, ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 8 (2d ed. 2015).

58. ARK. CODE ANN. § 5-64-505(c).

59. Depper & Hendrix, *supra* note 40, at 15.

appointed a lawyer if they cannot afford one.⁶⁰ The government needs to prove by only a preponderance of the evidence that the seized property is guilty, rather than proving this beyond a reasonable doubt.⁶¹ Furthermore, if the property owner fails to file an answer, the property can be forfeited by default.⁶²

Timbs v. Indiana is an excellent example of how the process of civil asset forfeiture works: law enforcement arrested Tyson Timbs for dealing in a controlled substance and conspiracy to commit theft, and seized Timbs's Land Rover SUV during the arrest.⁶³ The SUV was worth about \$42,000—paid for out of the proceeds from Timbs's father's life insurance policy.⁶⁴ The trial court convicted Timbs, and he had to serve one year of home detention, five years of probation, and pay fees and costs of \$1,203.⁶⁵

Indiana then filed to forfeit Timbs's Land Rover, arguing that Timbs had used the vehicle to transport heroin.⁶⁶ The trial court found that the SUV had been used to violate a criminal statute but denied the forfeiture, as the vehicle was worth more than four times the maximum fine Timbs could be fined for his drug conviction.⁶⁷ Since the forfeiture would be grossly disproportionate to Timbs's offense, the court stated that the forfeiture was unconstitutional under the Eighth Amendment's Excessive Fines Clause.⁶⁸ The Supreme Court of Indiana reversed the trial court's decision, holding that the Excessive Fines Clause does not apply to state actions.⁶⁹ Timbs petitioned for certiorari, arguing that the Excessive Fines Clause should be incorporated against the States under the Fourteenth Amendment.⁷⁰

The Supreme Court of the United States vacated and remanded the Supreme Court of Indiana's decision,⁷¹ holding that the Excessive Fines Clause must be incorporated under the Fourteenth Amendment's Due Process Clause.⁷² The Supreme Court of Indiana would thus have to determine if the forfeiture of the vehicle was a fine subject to the Excessive Fines Clause.⁷³

Timbs provides a great example of the process of civil asset forfeiture. However, it doesn't explain everything. A deeper understanding of the fed-

60. *Id.*

61. *Id.*

62. ARK. CODE ANN. § 5-64-505(g)(5)(A) (West 2020).

63. 139 S. Ct. 682, 686 (2019).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Timbs*, 139 S. Ct. at 686.

70. *Id.* at 690.

71. *Id.* at 691.

72. *See id.* at 689.

73. *State v. Timbs*, 134 N.E.3d 12, 23 (Ind. 2019).

eral background of forfeiture—and the decision of the court in *Austin v. United States*⁷⁴—is necessary to understand the punitive nature of Arkansas’s law.

III. FEDERAL LAW BACKGROUND

Understanding federal forfeiture and the Excessive Fines Clause of the Eighth Amendment is the cornerstone of comprehending how local asset forfeiture can be punitive. The text of the Eighth Amendment is concise: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁷⁵

The Supreme Court of the United States first applied the Excessive Fines Clause in its *United States v. Bajakajian* decision in 1998.⁷⁶ The defendant in *Bajakajian* was charged with failing to report the \$357,144 he was carrying as he was leaving the country.⁷⁷ The defendant had legally obtained the money and was transporting it to pay a lawful debt.⁷⁸ To determine if the government could order the forfeiture of the money, the Supreme Court had to determine if the Excessive Fines Clause applied and if the forfeiture would violate the Clause.⁷⁹

The Supreme Court had elsewhere held that at the time the Amendment was written, the word “fine” meant “a payment to a sovereign as punishment for some offense.”⁸⁰ The government further held in *Austin* that these payments can be either in cash or in kind.⁸¹

The Court thus held in *Bajakajian* that the forfeiture of \$357,144 was a punishment subject to analysis under the Excessive Fines Clause.⁸² Additionally, it established for the first time a rule for when a fine is excessive.⁸³ A fine that is grossly disproportional to the gravity of the offense is a violation of the Excessive Fines Clause.⁸⁴

While the analysis of gross disproportionality is outside the subject of this Note, it is important to know how sparingly the Court has interpreted

74. See 509 U.S. 602, 609–11 (1993) (establishing factors for determining when a forfeiture violates the Excessive Fines Clause).

75. U.S. CONST. amend. VIII.

76. See *United States v. Bajakajian*, 524 U.S. 321, 344 (1998) (Kennedy, J. dissenting).

77. *Id.* at 324–25.

78. *Id.* at 326.

79. *Id.* at 324.

80. *Browning–Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989).

81. *Austin v. United States*, 509 U.S. 602, 609–10 (1993).

82. *Bajakajian*, 524 U.S. at 333–34.

83. *Id.* at 334.

84. *Id.* at 334–37.

and applied the Excessive Fines Clause.⁸⁵ The Court began reviewing the Excessive Fines Clause more recently due to the modern revival of punitive forfeiture during the war on drugs.⁸⁶ *Austin* highlights this revival.⁸⁷

In *Austin*, the Court considered, for the first time, whether the Excessive Fines Clause applied to civil *in rem* forfeitures.⁸⁸ There, the petitioner pleaded guilty to possessing cocaine with intent to distribute; the United States government filed an *in rem* lawsuit seeking the forfeiture of his mobile home and auto body shop.⁸⁹ The Supreme Court had to consider whether the Excessive Fines Clause applied to the forfeiture of property under the federal forfeiture statute.⁹⁰ First, the Court conducted an analysis to determine whether or not forfeiture was understood at least in part as punishment when the Excessive Fines Clause was written.⁹¹ Second, the Court had to decide whether the forfeiture statute examined in the case was understood in part as punishment.⁹²

The Court held that civil *in rem* forfeitures under the federal forfeiture statute were at least in part punitive.⁹³ The Court went through a historical analysis to first determine whether the Framers would have considered forfeiture a punishment.⁹⁴ This historical analysis involved looking at where forfeitures came from—English Common Law.⁹⁵

The Court, in its historical analysis, discussed the three types of forfeiture under English law: “deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture.”⁹⁶ Deodands were property that caused accidental death, and the property would be forfeited to the King as punishment for the owner’s negligence.⁹⁷ The second type of English forfeiture, forfeiture upon conviction of felony or treason, was clearly designed “to punish felons and traitors . . . on the ground that property was a right derived from society which one lost by violating society’s laws.”⁹⁸ The last kind of

85. *Id.* at 335.

86. *See supra* Section II.A.

87. *See Austin v. United States*, 509 U.S. 602 (1993).

88. *Id.* at 604, 610–11.

89. *Id.* at 604–05.

90. *Id.*; *see also* 21 U.S.C. § 881 (1996) (amended 2000) (stating what types of items are subject to forfeiture, such as controlled substances, conveyances, real property, and firearms; and stating what the seizure procedures are, the disposition of forfeited property, the procedure for destruction of controlled substances, and how the rights in property vest to the United States once the property is forfeited).

91. *Austin*, 509 U.S. at 610–18.

92. *Id.* at 619–22.

93. *Id.* at 621–22.

94. *Id.* at 610–614.

95. *Id.* at 611.

96. *Id.*

97. *Austin*, 509 U.S. at 611.

98. *Id.* at 611–12.

forfeiture is that which “took hold in the United States”—statutory forfeiture.⁹⁹ This forfeiture provided that objects used in violations of customs and revenue laws could be forfeited—such as ships that violated the Navigation Acts of 1660.¹⁰⁰ Statutory forfeiture was a mix of the deodand tradition and forfeiture upon conviction of treason and felonies, and thus had a similar punitive aspect.¹⁰¹ This aspect is that statutory forfeiture was also justified as a penalty for negligence.¹⁰²

After the United States gained independence, the First Congress adopted statutory forfeiture when it passed laws allowing forfeiture of ships that were involved in customs offenses.¹⁰³ Prior to independence, common law courts in the Colonies were administering English and local forfeiture statutes.¹⁰⁴ Other reasons the Court in *Austin* gave for understanding these laws to be punitive were: (1) forfeiture was listed alongside other provisions for punishment, and (2) “forfeit” was the word used for fine.¹⁰⁵

After conducting a historical analysis, the Court examined case law to determine whether *in rem* forfeiture is punitive.¹⁰⁶ The Court held that case law has long provided that statutory forfeiture imposes punishment.¹⁰⁷ In one of the Court’s earliest cases, Chief Justice Marshall had stated that forfeiture could not be imposed as punishment unless the owner knew of the violation of the law.¹⁰⁸ The Court also looked at a long line of cases where the Court has rejected the “innocence” of the owner as a defense to forfeiture.¹⁰⁹ Those decisions held that even innocent owners, ones who did not have knowledge of their property’s being used in breaking the law, must be punished for their negligence in allowing the property to be used in an offense.¹¹⁰

99. *Id.* at 613.

100. *Id.* at 612.

101. *Id.*

102. *Id.* at 612–13 (“But the Owners of Ships are to take Care what Master they employ, and the Master what Mariners; and here Negligence is plainly imputable to the Master; for he is to report the Cargo of the Ship, and if he had searched and examined the Ship with proper care, according to his Duty, he would have found the Tea . . . and so might have prevented the Forfeiture.” (quoting *Mitchell v. Torup*, Park. 227, 145 Eng.Rep. 764, 768 (Ex.1766))).

103. *Austin*, 509 U.S. at 613.

104. *Id.*

105. *Id.* at 614.

106. *Id.* at 614–19.

107. *Id.* at 614.

108. *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (“The court is also of opinion, that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him. If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property.”).

109. *Austin*, 509 U.S. at 615.

110. *Id.*

The Court then considered whether the forfeitures under the federal statutes should be considered punishment.¹¹¹ The Court held that forfeitures under the statutes were punishment, for the following reasons: (1) there was nothing in the text of the statute or the legislative history contradicting the historical understanding that forfeiture is in part punitive; (2) the forfeiture statutes expressly provide an innocent owner defense, indicating that forfeiture can be a punishment for negligence; and (3) Congress chose to connect the forfeiture directly to drug offenses.¹¹² Here follows a brief discussion of each of these three points.

The lack of contradictory text in the statute or legislative history as compared to the historical understanding of forfeiture as punishment was one of the main factors that led the Court to conclude the federal statute was punitive, and in fact the legislative history actually bolstered its analysis.¹¹³ Several examples in the legislative history showed Congress *meant* for forfeiture to serve as punishment.¹¹⁴ When Congress added the sections of the law under scrutiny in *Austin*, it recognized that fines and imprisonment were not enough to deter or punish those who trade in dangerous drugs.¹¹⁵ Congress specifically stated that forfeiture of real property was “a powerful deterrent.”¹¹⁶ The Court used these statements by Congress to show that these provisions are punitive and not remedial only.¹¹⁷

Another way the Court showed that the forfeiture statute is punitive was through the included innocent owner provisions.¹¹⁸ The three innocent owner provisions in the federal statute at the time of *Austin* were 21 U.S.C. §§ 881(a)(4)(A), (a)(4)(C), and (a)(7).¹¹⁹ The first provision in § 881(a)(4)(A) stated:

[N]o conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter.¹²⁰

111. *Id.* at 619–22.

112. *Id.* at 619–20.

113. *Id.* at 619.

114. *Id.* at 620.

115. S. REP. NO. 98-225, at 191 (1983) (“[T]he traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs”); *Austin*, 509 U.S. at 620.

116. S. REP. NO. 98-225, at 195 (1983).

117. *Austin*, 509 U.S. at 620–22.

118. *Id.* at 619.

119. *See id.*

120. 21 U.S.C. § 881(a)(4)(A) (1996) (amended 2000).

This section states that a common carrier will not be held liable for a violation of the subchapter unless they were a consenting party or privy to that violation. Section 881(a)(4)(C) subjects the following property to forfeiture:

[N]o conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.¹²¹

This section has to do with conveyances being used for a violation of the subchapter unless the owner of the conveyance knows, consented, or had willful blindness as to the violation being committed with the owner's conveyance. Finally, § 881(a)(7) stated:

All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.¹²²

This provision stated that real property could be forfeited when used to facilitate a violation of the subchapter punishable by more than a year's imprisonment. However, it does provide an exception for an owner of real property who did not have actual knowledge of the violation.

The *Austin* Court refers to these provisions to explain that these innocent owner exemptions focus on the culpability of the owner as a way to impose a punishment for owners who were not entirely innocent.¹²³ Essentially, these innocent owner provisions provide exceptions for those owners who did nothing wrong. Because they focus on the innocence or guilt of the owner and provide an exception to forfeiture for owners who were innocent, the provisions are intended to punish through forfeiture only those owners who were not innocent.

Additionally, the Court in *Austin* also held that the statute was punitive in part because of the link between the forfeiture and drug offenses.¹²⁴ In § 881(a)(4), a conveyance could be forfeited if it was used or intended to be

121. 21 U.S.C. § 881(a)(4)(C) (1996) (amended 2000).

122. 21 U.S.C. § 881(a)(7) (1996) (amended 2000).

123. *Austin*, 509 U.S. at 619.

124. *Id.* at 620.

used in a drug offense.¹²⁵ Section 881(a)(7) also states that real property could be forfeited for the same cause.¹²⁶ The Court ultimately held the statute, at least in part, was punitive due to the legislature's tying forfeiture to crime; this showed an intent to punish those involved with the commission of crimes.¹²⁷

Austin is important because it establishes that the Excessive Fines Clause can apply to both civil cases and to an *in rem* forfeiture proceeding.¹²⁸ However, when *Austin* was decided, the Excessive Fines Clause applied to only the federal government; today, it also applies to the States as a result of *Timbs*.¹²⁹

In 1791, the Bill of Rights did not bind the States.¹³⁰ Only after the adoption of the Fourteenth Amendment did the Bill of Rights begin to apply to the States.¹³¹ The protections contained in the Bill of Rights are incorporated against the States through the Fourteenth Amendment when they are "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition."¹³²

In *Timbs*, the Supreme Court held that the Excessive Fines Clause is both deeply rooted and fundamental.¹³³ From the Magna Carta to the Virginia Declaration of Rights to the constitutions of all fifty States, the protection against excessive fines has been a constant guard against government power and overreach.¹³⁴

Even though *Austin* was decided under federal forfeiture law, now that the Excessive Fines Clause is incorporated, the protection of the Clause applies equally to both the States and the federal government.¹³⁵ *Timbs* is a historic decision because the Supreme Court's interpretation of the Excessive Fines Clause, including the circumstances in which it applies, now binds the States.¹³⁶ Put simply, States such as Arkansas can no longer impose excessive fines as defined by the Supreme Court.¹³⁷

125. 21 U.S.C. § 881(a)(4) (1996) (amended 2000).

126. 21 U.S.C. § 881(a)(7) (1996) (amended 2000).

127. *Austin*, 509 U.S. at 619.

128. *Id.* at 618, 622.

129. *See generally* *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

130. *Id.* at 687.

131. *Id.*; *see generally* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193 (1992). "Justice Brennan tried to steer a middle course of 'selective incorporation.' Under this third approach, the Court's analysis could proceed clause by clause, fully incorporating every provision of the Bill deemed 'fundamental' without deciding in advance whether each and every clause would necessarily pass the test." *Id.* at 1196.

132. *McDonald v. City of Chicago*, 561 U.S. 742, 764–67 (2010).

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

134. *Id.* at 687–90.

135. *Id.* at 689.

136. *Id.*

137. *See id.*

The incorporation of the Excessive Fines Clause raises the question of whether the Clause applies to forfeitures under Arkansas law. To answer this question, an understanding of and some background regarding Arkansas forfeiture law is required.

IV. ARKANSAS'S FORFEITURE LAW

An understanding of Arkansas's forfeiture law begins with where it is located in the Arkansas Code. Arkansas's forfeiture law is contained in the Arkansas Code Annotated at § 5-64-505, which is entitled "Property subject to forfeiture—Procedure—Disposition of property."¹³⁸ This section of the Code is found in the chapter concerning controlled substances, which in turn is located in Title 5 of the Arkansas Code, which concerns criminal offenses.¹³⁹

Arkansas's statute contains innocent owner provisions similar to those analyzed in *Austin*, in four subdivisions of § 5-64-505.¹⁴⁰ The statute contains an innocent owner provision in § 5-64-505(a)(6)(B):

[N]o property shall be forfeited under this subdivision (a)(6) to the extent of the interest of an owner by reason of any act or omission established by him or her, by a preponderance of the evidence, to have been committed or omitted without his or her knowledge or consent.¹⁴¹

Here, the innocent owner exception applies to owners of anything of value, such as firearms, that may be furnished in exchange for controlled substances. The owner of this value cannot have his or her property forfeited unless he or she had actual knowledge of the criminal offense. There is another innocent owner provision in § 5-64-505(a)(8)(A):

No real property is subject to forfeiture under this chapter by reason of any act or omission established by the owner of the real property by a preponderance of the evidence to have been committed or omitted without his or her knowledge or consent.¹⁴²

This provision states that real property may not be forfeited unless the owner of the property had actual knowledge or consent of the criminal act leading to seizure. Each of these provisions provides an exception to forfeiture when the owner did not have knowledge or consent of the act or commission that was a violation of the law.¹⁴³

138. ARK. CODE ANN. § 5-64-505 (West 2019).

139. *Id.*

140. *Id.* §§ 5-64-505(a)(4)(A), (a)(4)(B)(i), (a)(6)(B), (a)(8)(A).

141. *Id.* § 5-64-505(a)(6)(B).

142. *Id.* § 5-64-505(a)(8)(A).

143. *Id.* §§ 5-64-505(a)(6)(B), (a)(8)(A).

The statute provides a third innocent owner provision in § 5-64-505(a)(4)(A):

No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter.¹⁴⁴

This innocent owner exception provides that unless the owner or another having authority over the conveyance being used as a common carrier is a consenting or aware party to a criminal offense, the conveyance cannot be forfeited.

The fourth and final innocent owner provision is found in § 5-64-505(a)(4)(A), and explains that the owner of a conveyance must have some knowledge or provide consent to the use of the conveyance in violation of the subchapter:

No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without his or her knowledge or consent.¹⁴⁵

But this subsection dealing with conveyances also contains an exception to this innocent owner provision.¹⁴⁶ This exception to the innocent owner exception states that those owners without knowledge but should reasonably have known of the use may have their property forfeited:

Upon a showing described in subdivision (a)(4)(B)(i) of this section by the owner or interest holder, the conveyance may nevertheless be forfeited if the prosecuting attorney establishes that the owner or interest holder either knew or should reasonably have known that the conveyance would be used to transport or in any manner to facilitate the transportation for the purpose of sale or receipt of property described in subdivision (a)(1) or subdivision (a)(2) of this section.¹⁴⁷

This exception narrows the innocent owner exception for conveyances in subdivision (a)(4)(B)(i): owners who knew or should have known about the use of the conveyance, even without actual knowledge or consent, may have to forfeit the conveyance.¹⁴⁸ The previous innocent owner exceptions, including the innocent owner exception for conveyances, applied when the

144. ARK. CODE ANN. § 5-64-505(a)(4)(A).

145. *Id.* § 5-64-505(a)(4)(B)(i).

146. *Id.* § 5-64-505(a)(4)(B)(ii).

147. *Id.*

148. *Id.* § 5-64-505(a)(4)(B)(ii).

owner did not have actual knowledge of the underlying criminal act.¹⁴⁹ Subdivision (a)(4)(B)(ii) states that owners who should have known about the use of the conveyance in a criminal offense can have that conveyance forfeited even if they had no actual knowledge of its criminal use.¹⁵⁰

In 2019, the Arkansas legislature passed the Arkansas Civil Asset Forfeiture Reform Act of 2019.¹⁵¹ This Act required a felony conviction before property can be forfeited, subject to certain exceptions, such as the property owner fleeing the state, making a plea deal, or failing to file an answer.¹⁵²

With an understanding of both federal forfeiture law and Arkansas forfeiture law, the Arkansas law can be analyzed under the standards set forth in *Austin* to determine whether the Arkansas law is punitive.¹⁵³ If the Arkansas law is at least in part punitive, the Excessive Fines Clause governs, and excessive fines under the Arkansas civil asset forfeiture statute are unconstitutional.¹⁵⁴

V. APPLICATION OF THE EXCESSIVE FINES CLAUSE TO ARKANSAS LAW

In *Austin*, the Court looked at three factors to determine whether the federal forfeiture law was punitive.¹⁵⁵ First, the Court considered the inclusion of innocent owner defenses in the statute.¹⁵⁶ Second, the Court examined the connection of forfeiture to drug offenses.¹⁵⁷ Lastly, the Court compared the statute's text and legislative history to the historical understanding of forfeiture as punishment to determine if there was a contradiction between the two.¹⁵⁸

A. Arkansas's Statute Contains Innocent Owner Protections Like Those in the Federal Statute in *Austin*

Arkansas's statute contains several innocent owner defenses that indicate that the statute intends to punish only those who are not truly innocent.¹⁵⁹ Section 5-64-505(a)(4)(B)(i) provides that a conveyance is not subject to forfeiture when the owner can show that the conveyance was used for

149. *Id.* §§ 5-64-505(a)(4)(A), (a)(4)(B)(i), (a)(6)(B), (a)(8)(A).

150. ARK. CODE ANN. § 5-64-505(a)(4)(B)(ii).

151. *Id.* § 5-64-505(m).

152. *Id.*

153. *See Austin v. United States*, 509 U.S. 602, 618–22 (1993).

154. *See id.*

155. *Id.* at 615–23; *see supra*, Section III.

156. *Austin*, 509 U.S. at 619.

157. *Id.* at 620.

158. *Id.* at 620–22.

159. ARK. CODE ANN. §§ 5-64-505(a)(4)(A)–(B)(i), (a)(6)(B), (a)(8)(A) (West 2020).

criminal purposes “without his or her knowledge or consent.”¹⁶⁰ Section 5-64-505(a)(4)(B)(ii) deals with negligence and states that the conveyance can still be forfeited if the owner knew or should have known the conveyance was being used to violate the law.¹⁶¹

The language used in the Arkansas statute is very similar to the language used in the federal statute addressed in *Austin*.¹⁶² The federal statute stated in § 881(a)(4)(A): “[N]o conveyance . . . shall be forfeited . . . unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation.”¹⁶³ And § 881(a)(4)(C) states that “no conveyance shall be forfeited . . . by reason of any act or omission . . . without the knowledge, consent, or willful blindness of the owner.”¹⁶⁴ The federal statute also included an innocent owner exception in § 881(a)(7), when it stated: “[N]o property shall be forfeited under this paragraph . . . by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”¹⁶⁵

The Arkansas statute is extremely similar, beginning with the first subsection under § 5-64-505(a)(4)(A): “No conveyance . . . is subject to forfeiture . . . unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation.”¹⁶⁶ The second paragraph under § 5-64-505(a)(4) echoes the third paragraph under § 881(a)(4), as § 5-64-505(a)(4)(B)(i) provides: “No conveyance is subject to forfeiture . . . by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without his or her knowledge or consent.”¹⁶⁷ This mirrors the federal statute, as the language from both excludes forfeiture when the owner of the conveyance did not have knowledge or consent of the use of the conveyance in violation of the law. Section 5-64-505(a)(8)(A) of the Arkansas Code states: “No real property is subject to forfeiture under this chapter by reason of any act or omission established by the owner of the real property . . . to have been committed or omitted without his or her knowledge or consent.”¹⁶⁸ This is very similar to § 881(a)(7), as both state that the property cannot be forfeited due to an act that was committed without the owner’s knowledge or consent.¹⁶⁹

160. *Id.* at § 5-64-505 (a)(4)(B)(i).

161. *Id.* at § 5-64-505 (a)(4)(B)(ii).

162. *Compare id.* § 5-64-505, with 21 U.S.C. § 881 (1996) (amended 2000).

163. 21 U.S.C. § 881(a)(4)(A) (1996) (amended 2000).

164. *Id.* § 881(a)(4)(C).

165. *Id.* § 881(a)(7).

166. ARK. CODE ANN. § 5-64-505(a)(4)(A).

167. *Id.* § 5-64-505(a)(4)(B)(i).

168. *Id.* § 5-64-505(a)(8)(A).

169. *Compare id.*, with 21 U.S.C. § 881(a)(7) (1996) (amended 2000).

The Arkansas statute contains nearly identical language to the statute that the Supreme Court of the United States called punitive.¹⁷⁰ The Supreme Court reasoned that innocent-owner exceptions in a forfeiture statute impart a punitive nature by focusing on owner culpability.¹⁷¹

Not only does Arkansas provide an innocent owner exception, but it also follows federal law in carving out an exception to the innocent owner exception when the owner is negligent.¹⁷² Section 5-64-505(a)(4)(B)(ii) provides that an innocent owner can be punished when the owner “either knew or *should reasonably have known* that the conveyance would be used to transport or in any matter to facilitate the transportation . . . of property [in violation of this chapter].”¹⁷³ The Supreme Court in *Austin* stated that historically the innocence of the owner was rejected as a common law defense to forfeiture, under the theory that when the owner allows his property to be misused, he has been negligent and can be punished for that negligence.¹⁷⁴

In *Austin*, the Court held that the federal forfeiture statute was punitive in part because it contained innocent owner exceptions that focused on the guilt or innocence of the owner of the property.¹⁷⁵ Therefore, Arkansas’s law must be punitive because it contains nearly identical language to the statutes analyzed in *Austin* under the Supreme Court’s analysis of innocent owner provisions.

B. Arkansas’s Forfeiture Statute is Connected to the Violation of Drug Offenses

Arkansas’s forfeiture statute is in Title 5 of Arkansas’s Code, where criminal offenses are located.¹⁷⁶ More specifically, the statute is located in Chapter 64 of the Code, which deals with controlled substances.¹⁷⁷ Each of the items subject to forfeiture under this section is tied to violations under Chapter 64.¹⁷⁸ For example, any property that is used as a container for controlled substances is forfeitable.¹⁷⁹ Any conveyance used or intended to be used in violation of the chapter is forfeitable.¹⁸⁰ Anything of value, including firearms, that is used as a means of exchange for a controlled substance in

170. *Austin v. United States*, 509 U.S. 602, 619–22 (1993).

171. *Id.* at 619.

172. ARK. CODE ANN. § 5-64-505(a)(4)(B)(ii).

173. *Id.* (emphasis added).

174. *Austin*, 509 U.S. at 615.

175. *Id.* at 615–19.

176. ARK. CODE ANN. § 5-64-505.

177. *Id.*

178. *Id.* § 5-64-505(a).

179. *Id.* § 5-64-505(a)(3).

180. *Id.* § 5-64-505(a)(4).

violation of the chapter can be forfeited.¹⁸¹ Finally, real property can also be forfeited when it is used or intended to be used in violation of Chapter 64.¹⁸²

The language of each of these subsections is similar to the language of the federal statute in *Austin* that the Court stated was a punitive statute.¹⁸³ In *Austin*, the court considered forfeitures of a conveyance and real property.¹⁸⁴ Tying the forfeiture of this property to the commission of drug offenses revealed a congressional intent to punish through forfeiture only those involved in drug offenses.¹⁸⁵ The Arkansas statute provides evidence of the same: the link between forfeiture and commission of the drug offenses reveals an intent to punish only those involved in drug trafficking.¹⁸⁶

Because Arkansas's forfeiture statute is tied together with commissions of criminal offenses, like the statute in *Austin*, Arkansas law is punitive as well as the statute in *Austin*. In sum, the tethering reveals an intent by the Arkansas legislature to punish those involved in drug offenses.

C. The Legislative History and the Text Support the Proposition That the Forfeiture Statute is Punitive

Two factors analyzed under *Austin* were quite similar relating to legislative history. The first was that the federal legislative history did not contradict the historical understanding of forfeiture as punishment in any way.¹⁸⁷ The second was that the actual legislative history showed congressional intent to tie forfeiture to criminal punishment.¹⁸⁸

There is limited evidence of legislative intent in Arkansas due to the fact that records of committee meetings and their contents are not generally available. However, there is evidence of legislative intent through the texts of the acts passed by the legislature.

In 2019, the Arkansas General Assembly passed the Arkansas Civil Asset Forfeiture Reform Act of 2019.¹⁸⁹ This Act required a criminal conviction before property can be forfeited under § 5-64-505.¹⁹⁰ This Act has been codified at Arkansas Code Annotated § 5-64-505(m).¹⁹¹

181. *Id.* at § 5-64-505(a)(6).

182. ARK. CODE ANN. § 5-64-505(a)(8).

183. *See Austin v. United States*, 509 U.S. 602 (1993).

184. *Id.* at 604–05.

185. *Id.* at 619–20.

186. *See* ARK. CODE ANN. § 5-64-505.

187. *Id.* at 619–20.

188. *Id.*

189. Arkansas Civil Asset Forfeiture Reform Act of 2019, 2019 Ark. Acts 476 (codified at ARK. CODE ANN. § 5-64-505(m) (West 2019)).

190. *Id.*

191. ARK. CODE ANN. § 5-64-505(m) (West 2020).

The criminal conviction requirement comes with exceptions.¹⁹² If the person from whom the property was seized died, was deported, was granted immunity or reduced punishment for testifying or assisting a law enforcement or a prosecution, fled the jurisdiction or failed to appear, failed to answer the complaint for forfeiture, abandoned or disclaimed ownership, or agreed in writing to the disposition of the property, the conviction requirement is waived.¹⁹³

The passage of this Act shows an intent to tie forfeiture to criminal activity.¹⁹⁴ Similar to the inclusion of the innocent owner defense, the legislature's goal in this text is to prevent innocent owners from forfeiting their property and to ensure only guilty owners have their property forfeited.¹⁹⁵

The General Assembly also passed a forfeiture law in 1999—the Uniform Controlled Substances Act—Forfeiture of Property.¹⁹⁶ At the beginning of this Act, the General Assembly quoted language from a comment to section 505 of the Uniform Controlled Substances Act that might be read to imply the General Assembly's intent with respect to asset forfeiture is remedial only.¹⁹⁷ However, immediately after the quoted language from the comment, the General Assembly explicitly lays out its intent with this Act: uniformity and accountability in the forfeiture process.¹⁹⁸ This is further shown through the amendments made to Arkansas's forfeiture law in the Act: they pertain to stricter time limits to initiate forfeiture proceedings and stricter governmental controls over forfeited property.¹⁹⁹

This legislative intent to tie forfeiture to criminal convictions provides further evidence that forfeiture under the Arkansas statute is punitive and should be limited by the Eighth Amendment.²⁰⁰ This matches the facts in *Austin*: that the legislature intended for forfeiture to serve in part as punish-

192. *Id.* § 5-64-505(m)(2).

193. *Id.*

194. *See id.*

195. *See id.*

196. Uniform Controlled Substances Act—Forfeiture Of Property, 1999 Arkansas Laws Act 1120 (codified at ARK. CODE ANN. § 5-64-505 (West 2019)).

197. *Id.* (“As stated in the comment to section 505 of the Uniform Controlled Substances Act, ‘Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug traffickers . . . to prevent their use in the commission of subsequent offenses’”).

198. *Id.* (“The General Assembly recognizes the importance of asset forfeiture as a means to confront drug trafficking. However, the General Assembly also recognizes . . . the lack of uniformity and accountability in forfeiture procedures across the state has undermined confidence in the system.”).

199. *Id.* (“[T]ime limits for initiating forfeiture proceedings and stricter controls over forfeited property will help alleviate such problems while strengthening forfeiture as a *vital weapon against drug trafficking*.” (emphasis in original)).

200. *See Austin v. United States*, 509 U.S. 602, 619 (1993).

ment due to the connection of forfeiture to criminal violations.²⁰¹ Furthermore, there is nothing in these acts or elsewhere that shows that the General Assembly meant to contradict the historical understanding of forfeiture as punishment that was described in *Austin*.²⁰²

D. Arkansas's Courts Have Long Recognized Forfeiture as Penal in Nature

While there may not be extensive evidence of the General Assembly's intent within the legislative history, several Arkansas courts, going back to 1985, have stated that forfeiture is indeed penal.²⁰³

In *Gallia v. State*, the Supreme Court of Arkansas considered whether a mobile home could be included among "conveyances, aircraft, vehicles[,] and vessels."²⁰⁴ The Court stated that because forfeitures are penal in nature, they are disfavored, and thus the mobile home was not interpreted to be included as a conveyance, aircraft, vehicle, or vessel.²⁰⁵

Next, in *Beebe v. State*, the Supreme Court of Arkansas considered whether the forfeiture of firearms was valid without a hearing.²⁰⁶ While there were arguments considering a motion, there was no hearing, so the court returned the weapons to Beebe.²⁰⁷ The court held this because forfeiture is penal in nature, and the statute must be interpreted narrowly.²⁰⁸

In *Burnett v. State*, the Court of Appeals of Arkansas considered whether there was evidence that a truck was transporting a controlled substance for an unlawful purpose.²⁰⁹ The court stated that forfeiture was penal in nature, and thus the statute had to be construed narrowly.²¹⁰ The court reversed due to the lack of evidence the truck was being employed to transport methamphetamine.²¹¹

In *Ridenhour v. State*, the Court of Appeals of Arkansas once again considered forfeiture of a vehicle for purposes of transporting a drug for sale

201. *Id.*

202. *Id.* at 610–15.

203. *Gallia v. State*, 287 Ark. 176, 179, 697 S.W.2d 108, 110 (1985); *Beebe v. State*, 298 Ark. 119, 120, 765 S.W.2d 943, 944 (1989); *Burnett v. State*, 51 Ark. App. 144, 146, 912 S.W.2d 441, 442 (1995); *Ridenhour v. State*, 98 Ark. App. 116, 119, 250 S.W.3d 566, 569 (2007).

204. 287 Ark. at 179, 697 S.W.2d at 110.

205. *Id.*

206. 298 Ark. at 120–21, 765 S.W.2d at 943–44.

207. *Id.*

208. *Id.* at 120, 765 S.W.2d at 944.

209. 51 Ark. App. 144, 146, 912 S.W.2d 441, 442 (1995).

210. *Id.*

211. *Id.* at 145, 912 S.W.2d at 441.

or receipt.²¹² The court stated that because forfeiture was penal in nature, the statute must be interpreted narrowly, and simply finding drugs in a vehicle does not automatically make the vehicle used for transportation for the sale of the drugs.²¹³

In *King v. State*, the Court of Appeals of Arkansas considered whether a vehicle's owner lost her interest in the vehicle under the forfeiture statute.²¹⁴ Even though the court stated the statute must be interpreted narrowly because forfeiture was penal in nature, it upheld the trial court's decision that the vehicle could be forfeited.²¹⁵

Each of these cases established that the Arkansas forfeiture statutes must be interpreted narrowly because forfeiture is penal in nature.²¹⁶ This case law further provides evidence that forfeiture in Arkansas is punitive and thus governed by the Excessive Fines Clause.

Analyzing Arkansas's law under the factors analyzed in *Austin* leads to the conclusion that Arkansas's law is punitive and therefore governed by the Excessive Fines Clause.²¹⁷ First, Arkansas's law contains innocent-owner provisions that focus on the culpability of the owner, allowing innocent owners to be free from forfeiture but punishing guilty owners by forfeiting their property.²¹⁸ Second, Arkansas's law ties forfeiture to criminal offenses, thus showing the General Assembly's intent to punish through forfeiture.²¹⁹ Finally, the Arkansas Courts have held that forfeiture in Arkansas is punitive in nature.²²⁰ These factors, enunciated by the Supreme Court in *Austin*, thus establish that the Arkansas government cannot constitutionally impose excessive fines through the Arkansas forfeiture statute.²²¹

E. Other Jurisdictions Apply the Excessive Fines Clause to State Forfeiture Statutes

The conclusion above that Arkansas forfeiture law is penal in nature and thus subject to the Excessive Fines Clause is bolstered by the analyses of courts in other states.

212. 98 Ark. App. 116, 120–21, 250 S.W.3d 556, 569–70 (2007).

213. *Id.* at 119–20, 121, 250 S.W.3d at 569, 570.

214. 2014 Ark. App. 554, at 1–6, 447 S.W.3d 126, 127–30.

215. *Id.*, 447 S.W.3d at 128–30.

216. *Gallia v. State*, 287 Ark. 176, 179, 697 S.W.2d 108, 110 (1985); *Beebe v. State*, 298 Ark. 119, 120, 765 S.W.2d 943, 944 (1989); *Burnett v. State*, 51 Ark. App. 144, 146, 912 S.W.2d 441, 442 (1995); *Ridenhour*, 98 Ark. App. at 119–20, 250 S.W.3d at 569.

217. *See supra* Section V.

218. *See supra* Section V.A.

219. *See supra* Section V.C.

220. *See supra* Section V.D.

221. *See supra* Section V; *Austin v. United States*, 509 U.S. 602, 610–20 (1993).

After Timbs' case was heard in the Supreme Court, it was remanded back to state court in Indiana. The court there held that forfeiture of his vehicle was a punitive fine under the Excessive Fines Clause.²²² The court held this because the statute focuses on the owner's involvement in crime, and the statute includes an innocent-owner defense.²²³ The State of Indiana agreed that the statute in Indiana was at least partly punitive by nature and thus was subject to the Excessive Fines Clause.²²⁴ The State of Indiana's only counterargument was to argue that the forfeiture of Timbs' vehicle was not excessive.²²⁵ Each of these factors applies to Arkansas's statute as well. Arkansas's statute focuses on involvement in crime,²²⁶ and Arkansas's statute includes innocent-owner defenses.²²⁷

A federal district court in New York has noted that when state civil forfeiture serves a punitive purpose, an Excessive Fines Clause analysis is conducted.²²⁸ The court also explained that the Excessive Fines Clause did not prohibit forfeiture, but only limited it.²²⁹

Tennessee also applied the Excessive Fines Clause analysis prior to *Timbs*.²³⁰ Tennessee reads its constitutional provision as coextensive with the United States Constitution's provision on excessive fines.²³¹ The Supreme Court of Tennessee stated that forfeiture is in part at least punitive, and thus the Tennessee Constitution's excessive fines clause applies "even to civil *in rem* forfeitures of property."²³²

These cases show that other jurisdictions apply an Excessive Fines Clause analysis to forfeiture when that forfeiture is at least in part punitive. These other jurisdictions have held that the Excessive Fines Clause applies to forfeiture when it is punitive, and forfeiture can be punitive because of: (1) the inclusion of innocent-owner defenses in the statute; (2) the law's tying forfeiture to crimes; (3) the legislature's intent for forfeiture to be punitive; and (4) courts' having held that forfeiture is punitive.²³³

222. *State v. Timbs*, 134 N.E.3d 12, 24 (Ind. 2019).

223. *Id.* at 23–24.

224. *Id.* at 24.

225. *See id.*

226. *See supra* Sections V.B–C.

227. *See supra* Section V.A.

228. *See Santagata v. Diaz*, No. 17CV3053, 2019 WL 2164082, at *2–3 (E.D.N.Y. May 17, 2019).

229. *Id.* at *3.

230. *Stuart v. State Dep't of Safety*, 963 S.W.2d 28, 34 (Tenn. 1998).

231. *Id.*

232. *Id.*

233. *See supra* Section V.

F. Arkansas's Forfeiture Statute is Not Entirely Remedial

A possible counterargument could be raised that Arkansas's forfeiture statute is remedial only; this is the argument the Government raised in *Austin*.²³⁴ The Government made two arguments for why the statute should be considered remedial in *Austin*: it removes the instruments of the drug trade from criminals, and the forfeiture serves to compensate law enforcement for its expenditure on problems such as drugs.²³⁵ However, in *Austin*, the Court held that the forfeiture only needed to serve *some* punitive purpose, not be punitive *only*, to be subject to the Excessive Fines Clause.²³⁶ *Austin* continues to be good law, and when a forfeiture statute serves at least some punitive purpose, the Excessive Fines Clause will apply to that forfeiture.²³⁷

VI. CONCLUSION

One of the earliest limitations of government power to extract payments existed in Magna Carta, signed in 1215.²³⁸ Since then, the English Bill of Rights, the Virginia Declaration of Rights, the Constitution, and state constitutions have imposed some form of limitation on excessive fines.²³⁹

Despite these limitations, governments have continued to impose excessive fines, whether it be seventeenth-century Stuart kings, southern States after the Civil War, or state and local governments today that heavily rely on fines and fees.²⁴⁰ In Arkansas, these fines sometimes take the form of civil asset forfeiture and should thus be governed by the Excessive Fines Clause after *Timbs* incorporated the clause against the states.²⁴¹ Like the statute analyzed in *Austin*, the Arkansas statute is punitive, and the Excessive Fines Clause protects against punitive payments imposed by the government.²⁴²

Arkansas practitioners should be aware of the newly-available defense for clients targeted by civil asset forfeiture after *Timbs* and *Austin*. The Framers wrote in this clause for a reason; they wanted to limit the government's power.²⁴³ As lawyers and advocates, if this defense is not raised, the government may be able to bypass this constitutional protection. Prosecut-

234. *Austin v. United States*, 509 U.S. 602, 620–21 (1993).

235. *Id.* at 620.

236. *Id.* at 621–22.

237. *See Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019); *United States v. \$63,530.00 in U.S. Currency*, 781 F.3d 949, 957 (8th Cir. 2015); *Pimentel v. City of Los Angeles*, 974 F.3d 917, 921 (9th Cir. 2020).

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

239. *Id.* at 688–89.

240. *Id.* at 688.

241. *See supra* Section V.

242. *See supra* Section V.

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

ing attorneys should be aware of the limits enforced by the Constitution and should strive to not go beyond those limits, which after *Timbs* include not imposing excessive forfeitures.

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