COMMONWEALTH OF MASSCHUSETTS

SUPREME JUDICIAL COURT

Docket No. SJC-13646

Suffolk, ss.

GREGORY RAFTERY

Appellant,

VS.

STATE RETIREMENT BOARD

Appellee.

Amicus Brief of the Estate of Caroline Walsh In Support of the Appellant Gregory Raftery

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February 19, 2025

Respectfully Submitted
Estate of Caroline Walsh
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Statement of the Issues

Whether the total forfeiture of the petitioner's pension and health insurance constitutes an excessive fine and cruel or unusual punishment in violation of article 26 of the Massachusetts Constitution; whether article 26 provides greater protection than the Eighth Amendment in this regard.

Interests of the Amicus

The Estate of Caroline Walsh is currently appealing the assessment of interest and penalties upon it, for late filing and late payment of the estate tax. The Estate's executor filed roughly 8 years after the decedent's death. The Estate has paid approximately $224,000 in tax but disputes the assessment of interest and penalties, in part as an excessive fine under the 8th Amendment and Article 26. The Estate's case is currently pending before the Appeals Court. Estate of Caroline Walsh v. Commissioner of Revenue, 2024-P-0793 (Appeals Court 2024).

Summary of the Argument

The fine imposed here is unconstitutional as an excessive fine, in violation of both Article 26 and the Eighth Amendment. The Spirit and terms of Magna Carta are the root of the guarantee, requiring generosity and mercy. The guarantees are amplified by the terms of the 1688 English Bill of Rights. The pension forfeiture imposed here is constitutionally problematic, where it is disproportionate to the gravity of the harm shown in statutes governing similar conduct. The pension

forfeiture is also a violation in gross terms, on its face, being comparable in real and mathematical terms to those fines deemed excessive in 1688-1689.

Argument

I. The Eighth Amendment is, and ought to be, incorporated and binding upon the States.

The adoption of the 13th, 14th, and 15th Amendments sharply changed the face of liberty in the United States. McDonald v. City of Chicago, 561 U.S. 742; 130 S. Ct. 3020, 3028 (2010) ("The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system.").

"The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated" McDonald, at 3034-3035. According to the McDonald Court, the Eighth Amendment prohibition on excessive fines is one of the four express provisions not yet incorporated against the States. McDonald, at 3035, n13. Then the Supreme Court decided Timbs v. Indiana, 139 S. Ct. 682 (2019), decisively holding "The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment." Id., at 687. The McDonald court specifically cast doubt on the continuing validity of the prior caselaw where it had ruled against incorporation of provisions of the Bill of Rights. McDonald, at 3046 n.30.8

II. Whether Applying the Eighth Amendment or Article 26, both the State and Federal Constitutions prohibit the imposition of excessive fines.

The Eighth Amendment to the Federal Constitution prohibits, amongst other things, the imposition of excessive fines. U.S. Const. Amendment VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). A decade before the federal Bill of Rights was proposed in 1791, the Massachusetts Constitution of 1780 included a similar provision. Specifically, Article 26 of the Declaration of Rights provides "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." Mass. Constitution (1780) Pt. 1, Art. 26.

Though both provisions have been given only limited attention by case law, they clearly extend to afford Mr. Raftery relief in this case. *See* United States v. Bajakajian, 524 U.S. 321, 327 (1998) (Supreme Court notes it has had "little occasion" to interpret the excessive fines clause of the 8th Amendment). There is no doubt that a pension forfeiture is a "fine" within the constitutional meaning of the excessive fine clauses. United States v. Schwarzbaum, 114 F.4th 1319 (11th Cir. 2024) (holding that tax penalty is a fine under the 8th Amendment). *See also* Bajakajian, 524 U.S. at 327 (fine clause applies to "payment[s] to a sovereign as punishment for some offense"). A payment is a constitutional fine so long as "it can only be explained as serving in part to punish." Austin v. United States, 509 U.S. 602, 610 (1993). *See also* Kokesh v. SEC, 581 U.S. 455, 467 (2017) ("modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes

punishment even in part"). Bajakajian distinguished an earlier case holding something remedial, by stating "[t]he additional fact that such a remedial forfeiture also 'serves to reimburse the Government for investigation and enforcement expenses,' is essentially meaningless, because even a clearly punitive criminal fine or forfeiture could be said in some measure to reimburse for criminal enforcement and investigation." 524 U.S. at 343 n.19

A. The Magna Carta, the historical antecedent of the Excessive Fines Clauses, mandate a spirit of mercy and magnanimity.

In both the Eighth Amendment and Article 26, proportionality is a *sine qua non* of an excessive fine. After all, to be prohibited the fine must be "excessive" compared to something else. The roots of the protection against excessive fines are truly ancient. §14 of the Magna Carta makes specific provision regarding fines not being so high as to put man out of either house or business.

> A Freeman shall not be amerced for a small Fault, but after that manner of his Fault, and for a great Fault, after the greatness thereof, saving to him his Contenement; and a Merchant likewise, saving to him his Merchandise; and any other's Villein than ours shall likewise be amerced, saving his Wainage, if he fall into our mercy. And none of the said Amercements shall be assessed but by the oath of honest and lawful Men of the Vicinage. Earls and Barons shall not be amerced but by their peers, and after the manner of their Offence. No Man of the Church shall be amerced after the quantity of his Spiritual Benefice, but after his Lay Tenement, and after the quantity of his Offence.

Magna Carta, §14, *as reprinted in* Steve Sheppard, 2 The Selected Writings of Sir Edward Coke at 812 (2003)[1]. Thomas Cooley, Chief Justice of Michigan, writing in one of the seminal American legal treatises of the 19th Century found the spirit of Magna Carta to animate the Eighth Amendment.

> Within such bounds as may be proscribed by law, the question of what fine shall be imposed is one addressed to the discretion of the court. But it is a discretion to be judicially exercised; and there may be cases in which a punishment, though not beyond any limit fixed by statute is nonetheless so clearly excessive as to be erroneous in law. A fine should have some reference to the party's ability to pay it. By Magna Carta a freeman was not to be amerced for a small fault, but according to the degree of fault, and for a great crime in proportion to the heinousness of it, *saving to him his contenement;* and after the same manner a merchant, *saving to him his merchandise...*The merciful spirit of these provisions addresses itself to the criminal courts of the American States through the provisions of their constitutions.

Thomas Cooley, *Treatise on Constitutional Limitations*, at 471 (7th Ed. 1907) (emphasis original).

The term used in Magna Carta is Amercements. The Supreme Court in interpreting the Eighth Amendment's fine clause also turned to Magna Carta's

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[1] "Contenenment" was a term of art signifying property held in freehold, basically land and house. Steve Sheppard, 2 The Selected Writings of Sir Edward Coke at 813 (2003). Commenting upon the savings for a merchant's goods, Lord Coke wrote "For trade and traffique is the livelihood of a Merchant, and the life of the Commonwealth, wherein the King and every subject hath interest, for the Merchant is the good bayliffe of the Realme to export and vent the native commodities of the Realme, and to import and bring in the necessary commodities for the defence and benefit of the Realme." Steve Sheppard, 2 The Selected Writings of Sir Edward Coke at 814 (2003). "Wainage" is a Saxon term derived from a wheeled cart necessary for serfs to perform their labors such as moving manure. *Id,*

provision on amercements. Kelco, 492 U.S. 257, 269-271 (1989). "Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy' because of some act offensive to the Crown." Kelco, at 269. Amercments were "the most common criminal sanction in 13th-Century England." Id.

In substance, dating back to Magna Carta (1215) a fine may not deprive a man of his house, a merchant of his goods, and even a lowly servant of the necessary tools of his trade. Couched in ancient terms, this important protection meant that fines (1) could never be issued for truly minor offences and (2) that fine could never be so large as to jeopardize a man's place in society. It could not stop him working, deprive him of his goods, or render him homeless. Even "great" offenses were subject to this limitation. In discussing the Magna Carta's amercment clause in relation to the Eighth Amendment's excessive fine clause, the Supreme Court noted the reach of the limits imposed upon the King by the clause:

> The Amercments Clause of Magna Carta limited these abuses in four ways: by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; by requiring the amercement not be so large as to deprive him of his livelihood; and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount.

Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257, 271 (1989).

The peers judging the amount are, of course, a reference to a jury trial. To the extent that forfeiture is mechanically applied, without examination by a judge or jury, it is for that reason alone constitutionally objectionable. Had Judge Young pronounced the pension forfeiture as part of the punishment, it would have constitutionally been sufficient. However, a mechanical formula, by definition, cannot be assessed to be no more than necessary. In trying to be equal to all by a mechanical formula, the Legislature's statutes sap out the individual component where the justice of a fine or forfeiture is assessed in each and every case on an individual basis as justice demands.

The pension forfeiture is also objectionable because it is applied after conviction. There is a strong societal and constitutional basis to limit collateral consequence to a conviction. Courts have, over decades, slowly widened the door that now collateral consequences such as pension forfeiture, professional licensure loss, and other attendant impositions are crippling. Massachusetts has only in the last decade started to focus on the powerful idea of rehabilitation by minimizing CORI consequences for re-entering criminals. *See* St. 2010, c. 256 (CORI Reform Law implementing "Ban the Box" rules); St. 2016, c. 64 (ending automatic drivers license suspensions for drug convictions unrelated to motor vehicles). This is an enlightened approach to justice not matched by most of history, even within this Commonwealth. Clarence Darrow, *Crime: Its Treatment and Causes* (1922), at 120-

121 (The criminal "is sent to prison for a long or shorter term. His head is shaved and he is place in prison garb; he is carefully measured and photographed in his prison clothes, so that if he should ever get back to the world he will be forever under suspicion. Even a change of name cannot help him."); *Id.* At 121-122 ("Money is freely spent on the prosecution from the beginning to the end but no effort is made to help or save. The motto of the state is: 'Millions for offense, but not one cent for reclamation.'"); *Id.* ("As all things end, prison sentences are generally finished. The prisoner is given a new suit of clothes that betrays its origin and will be useless after the first rain, ten dollars in cash, and he goes out. His heredity and his hard environment have put him in. Now the state is done with him; he is free. But there is only one place to go. Like any other released animal, he takes the same heredity back to the old environment. What else can he do? His old companions are the only ones who will give him social intercourse, which he needs first of all, and the only ones who understand him. They are the only one who will be glad to see him and help him get a job. There is only one profession for which he is better fitted after he comes out than he was before he went in, and that is a life of crime. Of course, he is a marked man and a watched man with the police…")

There is a strong constitutional basis to the idea that the justice pronounced upon an offender is complete, full, and final. That once an offender has served his punishment, justly inflicted, he has completed his obligation. An offender who has

completed his sentence has paid his debt to society and owes no more. *See* Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957) (stale arrests for supporting labor strike, indictments for violating the neutrality act, and membership in communist party decades prior do not speak to poor moral character justifying exclusion from the Bar). This is one of the important demarcations which separates the justice of a society from the vengeance of a mob. Clarence Darrow, *Crime: Its Treatment and Causes* (1922) at 141 ("To the teaching of the student and the recommendations of the humane the mob answers back: 'Give us more victims, bigger jails, stronger prisons, more scaffolds!'").

It is also worth noting that these provisions, against cruel and unusual punishment and against excessive fines, call for humanity because they belong exclusively to the guilty. Many other civil rights, such as against self-incrimination or unreasonable searches, are looked down upon as shields of the guilty, but they protect the guilty and the innocent alike. Trial rights, belonging to criminal defendants suspected of wrongdoing, are to enable a man to show is innocence. But the 8th Amendment and Article 26 guarantees protect those adjudicated guilty. They are enshrined as civil society agrees, in the abstract, that inhumane punishments are medieval and a thing of the past. Yet, Courts are always reluctant to apply the guarantees, as written, because of the clamor of the moment, whatever cause celebe catches the public eye and cries out for vengeance.

The Framers generation remembered well Magna Carta and expected that it protected from things like excessive fines or deprivation of jury trials. Benjamin W. Larabee, *Colonial Massachusetts: A History* (1979) at 226 ("These rights were guaranteed to Englishmen by the Magna Carta and conveyed to the inhabitants of Massachusetts through their royal charter."); *Charter and General Laws of the Colony of Massachusetts: 1620-1799*, (1814) at 31 ("And further our will and pleasure is, and we do hereby for us, our heirs, and successors, grant, establish and ordain, that all and every of the subjects of us…which shall go to and inhabit within our said province and territory, and every child born there… shall have and enjoy all liberties and immunities of free and natural subjects within any of the dominions of us…as if they and every of them were born within this our realm of England.") (reprinting 1691 Massachusetts Royal Charter).

The Magna Carta's generous provisions, that a fine shall not deprive a man of house, merchandise, or livelihood, must be the law of the land under Article 26. It is this right which Johns Adams referenced in writing the Massachusetts Constitution in 1780.

b. The English Bill of Rights, the direct antecedent of the both the Excessive Fines and Unusual Punishment clauses, has a strong history against large fines.

Nor were the provisions of *Magna Carta* a forgotten relic by the time the Framers were writing at the end of the 18th Century. The English Bill of Rights, one of the legal settlements to the Glorious Revolution of 1688, provided almost identically to the Eighth Amendment. 1 Will. & Mary, Sess.2 c.2 [1688] ("That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."). The 1780 Constitution was written expressly to incorporate liberties contained within the 1688 English Bill of Rights. 8 *The Papers of John Adams*, at 241, n.31 (commenting upon John Adam's original draft of the Constitution, "Arts. XXII–XXV (now XXI–XXIV) were adopted as written… [Adams] expanded these articles, rearranged phrases, and sometimes chose a synonym, but the order and substance plainly indicate borrowing." Citing the Bill of Rights, the Magna Carta, and the 1628 Petition of Right as sources).

The wording is a little opaque because Adams, like other colonial constitution drafters, lifts directly from what they considered important sources like the Magna Carta and the 1688 English Bill of Rights. But contemporary commentators point the way to the meaning of the excessive fines provision of the 1688 Bill of Rights.

Sir William Blackstone, a recent and voluminous legal commentator whose writings had great effect upon the colonists' legal thinking. Blackstone drew heavily from the Magna Carta and the English Bill of Rights of 1688, as well as earlier

commentators like Lord Coke, Sir Matthew Hale, and others. Specific to the excessive fines provision Blackstone wrote:

> The *quantum,* in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every person, that struck another, five and twenty *denarii:* this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomever he pleased, and then tender them the legal forfeiture. Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine, in general, without specifying the certain sum: which is fully sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but it's discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the second) and the same statute farther declares, that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. Now the bill of rights was only declaratory, throughout, of the old constitutional law of the land: and accordingly we find it expressly holden, long before, that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.
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> The reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna carta,* concerning amercements for misbehaviour in matters of civil right. *"Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti; salvo contenemento suo: et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur, salvo wainagio suo."* A rule, that obtained even in Henry the second's time, and means only, that no man shall have a larger amercement inposed upon him, than his

> circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms (*"Sit in misericordia"*) shall be set, *ponatur,* or reduced to a certainty, by the oath of a jury. This method, of liquidating the amercement to a precise sum, is usually done in the court-leet and court-baron by *affeerors,* or jurors sworn to *affeere,* that is, tax and moderate, the *general* amercement according to the *particular* circumstances of the offence and the offender. In imitation of which, in courts superior to these, the antient practice was to enquire by a jury, when a fine was imposed upon any man, *"quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum.* And, since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood…

Sir William Blackstone, *4 Commentaries Upon the Laws of England*, (ed. 1979) at 371-373. Academic commentary shows the direct source of the renewal, in the 1688 Bill of Rights, of the concern about punishment, fines, and bail. John D. Bessler, *A Century in the Making: The Glorious Revolution, and the Origins of the Eighth Amendment*, 27 Wm. & Mary Bill Rts. J. 989, 1022 (2019). James II, son of the executed Charles I, ascended to the throne in 1685. He was deposed three years later, in favor of his daughter and her husband (Mary II & William III).

In just three years, James II managed to lose his throne by a whole series of widespread abuses. The Convention Parliament, which gave the Crown to William & Mary on the condition that they accept the Bill of Rights, spent an extraordinary amount of time reviewing judicial abuses of the reign of James II. An extraordinary protestant Clergyman named Titus Oates was convicted of perjury and sentenced to

a cruel and demeaning sentence. *Id.* At 1019-1021. This was the root of the cruel and unusual punishment guarantee, for Oates was fined 1000 Pounds Sterling, per count (100,000 in total), and to be defrocked. *Id.* Oates was to stand in the pillory to with a placard announcing his humiliation for hours, over two days, then to be whipped in public, and then to be whipped during a public parade over three miles. *Id.* Not being a sufficient ignominy, Oates was also to stand in the pillory for hours on three selected days for the rest of his life, while also serving an indefinite sentence as a close prisoner. *Id.* The Parliament of William and Mary studied this case deeply, in committee hearings, and deciding it was an injustice.

The Convention Parliament also studied other cases from James II's reign. *Id.* At 1022-1024. Most notably, the Earl of Devonshire was fined 30,000 Pounds Sterling, by the Court of the King's Bench. *Id.* The Earl had struck Colonel Culpepper with a cane at Whitehall on April 24, 1687, for a previous slight to his honor he had not received satisfaction for. *Id.* The Earl, his plea of parliamentary privilege denied, was found guilty by three judges and fined, and jailed until he could pay the fine. *Id.* James II had fled by the time the Earl came up with the money. *Id.* Two years later, the Convention Parliament summoned the three judges before them to explain the trial and sentence. *Id.* All three judges apologized to the Earl. *Id.* After committee hearings, the House of Lords ultimate ruled that "that the fine of thirty thousand pounds imposed by the court of King's Bench upon the said Earl was

excessive and exorbitant, and against Magna Charta, the common right of the subject, and the law of the land; and that no peer of this realm, at any time, ought to be committed for non-payment of a fine to the king." *Id.*

The Convention Parliament, in the process of studying and refining the Bill of Rights, also reviewed other judicial abuses. *Id.* At 1024-1026. A protestant clergyman named Samuel Johnson received a sentence similar to Oates for daring to write religious pamphlets address to army officers. *Id*. The attention given to the cases of Oates, Johnson, and the Earl of Devonshire caused great public outcry and the House of Commons petitioned the King (William III) for redress. *Id.* The King made the wrongs right with pardon, grant of money, and lifelong pension for Johnson. The case of Oates was controversial, even after the new monarchs were installed, because his perjury had caused a panic which had caused a series of judicial murders by James II's henchmen, "Hanging Judge" Jefferies.[2] *Id.* At 1024-1026. The House of Lord split nearly evenly but did not award Oates any relief. The Earl of Devonshire was pardoned, his money remitted, and other satisfaction for honor was given. *Id.*at 1026-1027. Although the Lord did not give relief, the House of Commons studied the issue in Committee, gave its opinion, and successfully induced the King to give Oates the same relief as Johnson, pardon, money and a pension. *Id.*

[2] The alleged perjury had involved, during the life of Charles II, a "Popish Plot" of catholics who were allegedly conspiring to murder the King and replace him with the then-Duke of York (James II) a catholic king. Fearing rebellion, Judge Jefferies was dispatched to the West of England where, in sham trials known as "the Bloody Assizes," hundreds were handed death sentences merely for being Catholic or alleged involvement in the conspiracy.

Numerous other cases from the reign of James II were studied by the Convention Parliament.[3] The Convention Parliament studied the case of Dangerfield, the imprisonment of Hampden, and the fine imposed on Sir Samuel Barnardiston. *Id.* At 1028-1031. In 1684, Barnardiston was fined in 10,000 Pounds Sterling, by Judge Jefferies, after being convicted of seditious libel for writing pamphlets criticizing Judge Jefferies. *Id.* At 1030-1032. The fine was thought, by the Convention Parliament, excessive. *Id.* In particular because a mere 8 years earlier, the House of Commons had studied fines. In 1680, the highest fine complained of was a mere 1000 Pounds Sterling, but a few short years later major heightened fines of £10,000 and £20,000 and £30,000 and £40,000 were being issued. *Id.* At 1030. Hampden was fined £40,000. *Id.* Fines rang out for even small offenses, Speke (£2000) and Braddon (£1000) were fined for reporting that the earl of Essex had been murdered in the Tower. John Duttoncolt, for criticizing the Duke of Beaufort was fined an outrageous £100,000. *Id.* Oates was also fined £100,000 and imprisoned until the Revolution released him. Thomas Pilkington, for accusing James II of being catholic, was also fined £100,000. *Id.* At 1032. Even the Speaker of the House of Commons, Sir William Williams, for ordering the printing of the Journals of the House, containing Dangerfield's libels against the King, was find

[3] The Convention Parliament did not enact the 1688 Bill of Rights immediately. Originally identical language was passed months earlier as the "Declaration of Rights." Following months of study by the Convention Parliament, and refinement, and suggestions by the new Monarchs, William III & Mary II, the improved language was reenacted as the 1688 Bill of Rights, in March 1689.

£10,000, later reduced to £8,000. "It was thus a whole series of injustices that prompted Parliament to demand greater protection for British subjects—and to weigh in against 'excessive' bail and fines and against 'cruel and unusual punishments.'" *Id.* At 1031.

Should the Court worry about expansion of a constitutional guarantee, it is possible to put these excessive fines examined by the Convention Parliament into today's perspective in mathematical terms.[4]

- The Earl of Devonshire's £30,000 fine would be £6,093,644.72 in today's money or $7,694,724.52 (2/17/25 prices).
- Sir Barnardiston's £10,000 fine from 1684 would be £1,836,510.41 in today's money or $2,319,045.88 (2/17/25 prices).
- John Hampden's £40,000 fine from 1684 would be £7,346,041.63 in today's money or $9,276,183.51 (2/17/25 prices)
- Oates, Pilkington, and Duttoncolt all received £100,000 within 3 years. This would be £20,312,149.08 in today's money or $25,649,081.75 (2/17/2025 prices).
- Sir William Williams £8,000 fine would be £1,469,208.33 in today's money or $1,855,236.71 (2/17/25 prices).
- Braddock's £1,000 fine would be £183,651.04 in today's money or $231,904.59 (2/17/2025 prices)
- Speke's £2,000 fine would be £367,302.08 in today's money or $463,809.17 (2/17/2025 prices).
- Johnson was given a smaller fine of £500 (along with whippings and the pillory) which would be £91,825.52 in today's money or $115,952.29 (2/17/2025 prices).

[4] The Bank of England maintains a historical inflation adjuster which allows for the placement of sums as far back as the 1200s into modern terms. This tool is used for the above conversions. https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator

The Former Trooper here has already been punished. He's served time imprisoned, forfeited his career, paid restitution of no small amount (about $50K), in addition to a fine. To ask him to surrender a pension worth $1Million and health care ontop of it is plainly punitive beyond the constitutionally permissible scope. "Whereas the Earl of Devonshire had to grapple with a draconian fine, Oates's conviction and sentence had inflicted great infamy and stripped a man of his honor and dignity…" 27 Wm. & Mary Bill Rts. J. at 1027.

Even the mere amount, more than a million dollars for a slight of $50K, is simply punitive. On the historical ladder it might rank below Duttoncolt's £100,000 fine, but is comparable with William's £8,000 fine, and above those given to Speke, Braddock, and Johnson---all of which the Convention Parliament dubbed excessive. Fines in the same fiscal neighborhood as that contemplated by the Retirement Board expressly drove the adoption of the excessive fine's language (in the 1688 Bill of Rights) that we now use today.

c. Even if the fine was not constitutionally offensive, per se, it is still so disproportionate to the alleged corrupt taking to be impermissible.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." United States v. Bajakajian, 524 U.S. 321, 334 (1998). Proportionality is a multi-faceted inquiry which touches the nature of the offense, the facts of the case, the character of the defendant, and the harm caused by the offense. See Also BMW of North America v. Gore, 517 U.S. 559 (1996) (holding that under US Constitution penalties may not be excessive and disproportionate in relation to the harm inflicted and the reprehensibility of the conduct at issue, including punitive damages assessed by a jury).

By the calculations at issue here, for about $50,000 in corrupt takings the former Trooper is to forfeit more than $1M Million dollars. That is a disproportionately higher penalty than the alleged offense. Cf. Gore, 517 U.S. at 575, n.23 ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.") (quotation marks omitted).

As to the Federal argument Bajakajian, 524 U.S. 321 at 333-335, lights the way in determining whether a fine is excessive. Adopting a "grossly disproportionate" standard for the Eighth Amendment's Fine Clause, Bajakajian determined that a man carrying $357,144 in undisclosed cash in excess of the $10,000 reporting threshold could not constitutionally be made to forfeit the whole

amount of currency. In particular, to guide its proportionality analysis, the Court looked at four facts, (1) the comparison of the fine to the offense, (2) the particular facts, (3) the character of the defendant, and (4) the harm caused by the defense. One of these criteria involved looking at similar statutory penalties. Applying that analysis here shows the grossly disproportionate effect of the fines.

- G. L. c. 29 §66 (public employee violation of financial regulations) is punished by a fine of not more than $1000.
- G. L. c. 266 §30(1) (general larceny statute) is punished by fines of either $1500 or $25,000 depending on the property stolen.
- G. L. c. 266 §50 (larceny or embezzlement from public treasury by public employee) is punished by a $2000 fine.
- G. L. c. 266 §57 (embezzlement by fiduciary) is punished by a $2000 fine.
- G. L. c. 266 §67A (false statement in procurement of public supplies or services) is punished by a $10,000 fine.
- G. L. c. 266 §67B (presentation to public entity of false or fraudulent claim) is punished by a $10,000 fine.
- G. L. c. 267 §1 (falsifying or forging public records) does not have a fine, but does provide for ten years in prison.
- G. L. c. 268 §6 (false report or testimony to state department, or false entry on company books) is punished by a fine of not more than $1000.
- G. L. c. 268 §6A (false written report by public employee) is punished by a fine of not more than $1000
- G. L. c. 268 §13E (tampering with record in an official proceeding) is punished by a fine of either $10,000 or $25,000 depending on the kind of proceeding.
- G. L. c. 268A §26 (punishing conflict of interest violations for abuse of position or presentation of a false claim) is punished by a fine of $10,000

The most applicable and analogous criminal statutes, all of which provide small fines, although some provide for imprisonment, are listed above. The conduct at

issue here is regarded by the Legislature as small, in most cases a misdemeanor. The penalty assessed here is staggering amount, well in excess of similar punishment for similar conduct.

The Massachusetts Declaration of Rights Article 26 Excessive Fines Clause has not received extensive treatment in the cases, but it appears to follow a similar but more robust analysis to the 8th Amendment's Clause and the 14th Amendment's Due Process Clause which prohibits disproportionate penalties. Sturtevant v. Commonwealth, 158 Mass. 598, 600 (1893); Commonwealth v. Hitchings, 5 Gray (71 Mass.) 482, 486 (1855) (penalties which are too severe or disproportionate may contravene Article 26); McDonald v. Commonwealth, 173 Mass. 322, 328 (1899) (noting similarity of analysis between 8th Amendment and Article 26); Opinion of the Justices, 378 Mass. 822, 829-833 (1979) (scholarly exposition on Article 26's cruel and unusual punishment provision noting disproportional punishments draw court censure).

Even the relatively limited Article 26 caselaw would find this forfeiture excessive. *See* Commonwealth v. Novak, 272 Mass. 113, 115-116 (1930) (forfeiture of twice the amount of illegal gambling winnings was not excessive under Article 26); Commonwealth v. Dane Entertainment Services, 19 Mass. App. Ct. 573 (1985) (surcharge levied in addition to maximum statutory fine does not violate excessive fine clause of Article 26) *aff'd* 373 Mass. 197 (1986). Here, the amount to be

forfeited, more than $1Million in present value of the pension, is **more than 15 times greater** the corrupt taking of about $55K. *See* Harding v. Commonwealth, 283 Mass. 369 (1933) (under Article 26, "The value of the stolen property as set forth in the indictment is [an] indication of the gravity of the offense committed."). Disproportionality (rather than the federal standard of "grossly disproportionate") is sufficient under Article 26 to render a punishment cruel or unusual. Though the Legislature has broad power to set offenses and punishments, the power is not and cannot be unlimited. McDonald v. Commonwealth, 173 Mass. 322, 328 (1899) ("It is for the legislature to determine what acts shall be regarded as criminal and how they shall be punished. It would be going too far to say that their power is unlimited in these respects.").

In any event, the Board seeks to assess a total exactation that is compensation for decades of loyal and honorable service of Trooper Raftery, tainted only by greed in the last couple of years. For a small deviation from expected conduct, this is an egregiously high penalty.

The Court faced a similar issue in the case of Peabody Police Lieutenant Edward Bettencourt. Bettencourt was convicted of illegally accessing civil service promotional exam scores. The Public Employee Retirement Administration Commission (PERAC) sought forfeiture of Bettencourt's pension pursuant to G.L. c. 32, §15 (4). The court found the statutory forfeiture to be an unconstitutional

excessive fine and ordered that "his retirement allowance cannot be forfeited pursuant to the statute's terms." Public Employee Retirement Administration Commission v. Bettencourt, 474 Mass. 60, 78 (2016).

> [W]here a court determines that imposition of a statutorily mandated forfeiture would violate the Eighth Amendment's excessive fines clause, it is likely within the court's authority to determine a level or amount of forfeiture or fine that would be constitutionally permissible - whether the statutory forfeiture is criminal or, as here, civil in nature. (parenthetical omitted).

Public Employee Retirement Administration Commission v. Bettencourt, at 76. Thus, even if the Board is correct about the interpretation of the statutes, it would be unconstitutional as applied to the Trooper Raftery

Conclusion

The Pension Forfeiture is unconstitutional.

Respectfully Submitted,

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Certificate of Service

I, Michael Walsh, hereby certify that a copy of this brief was served upon Atty T. Kiley and AAG K. Fahey by email and by first class mail on this 19th day of February 2025.
/S/ Michael Walsh

Rule 16(a) Certificate of Compliance
I, Michael Walsh hereby certify that the foregoing complies with the rules of the Court that pertain to the filing of briefs including, but not limited to Rules 16 and 20. This brief does comply with the applicable length. The brief otherwise complies with the size and type limitation. It was written with Microsoft Word, in Times New Roman 14 point font, a proportionally spaced font calling for 1" margins under the rules. The brief contains 6,123 includable words as measured by Word (hand count).
/S/ Michael Walsh

Addendum

MA Constitutional Provisions

Article 26
Article XXVI.

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. [Added by Amendment 116] No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

US Constitutional Provisions

Eighth Amendment
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.