IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Ex. Rel., DAVE YOST, ATTORNEY GENERAL OF THE STATE OF OHIO, **Plaintiff/Respondent,** **-vs.-** **ARCO RECYCLING, INC.** **AND** **GEORGE MICHAEL RILEY NKA ANTHONY MICHAEL CASTELLO** **AND** **RESIDENTIAL COMMERCIAL INDUSTRIAL SERVICES, LLC** **Defendants/Petitioners.**	**Case No.:** **Court of Appeals Case No.: CA-21-110703** **Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District**

DEFENDANTS/PETITIONERS' MEMORANDUM IN SUPPORT OF JURISDICTION

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT PUBLIC INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THIS CASE RAISES CONSTITUTIONAL ISSUES CONCERNING THE APPLICATION OF THE EXCESSIVE FINES CLAUSE , IN WHICH THE APPELLATE COURT FOUND THAT IT DID NOT APPLY TO A CIVIL ACTION, IN WHICH OVER $30,000,000 IN FINES AND PENALTIES WERE LEVIED AGAINST PETITIONERS, ENGAGED IN RECYCLING OF CONSTRUCTION AND DEMOLITION DEBRIS.

The Excessive Fines Clause[1] of the Eighth Amendment allows the Defendants/Petitioners, to challenge the constitutionality of the financial punishment which has been assessed against them by the trial court and affirmed by the appellate court. See Daniel S. Harawa, How Much is Too Much: A Test to Protect Against Excessive Fines, 81 Ohio St. L.J.65, 68 (2020).

The most recent pronouncement from the United States Supreme Court came in the *Timbs v. Indiana*,[2] decision. "*Timbs* made the question of what constitutes an 'excessive fine' constitutionally relevant in all fifty states. State courts need to know how to determine the constitutionality of financial punishment because now, in every state across the country, defendants can challenge fines imposed against them as violating the Constitution." Daniel S.

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[1] The Excessive Fines Clause applies only to "fines," i.e., "payment[s] to a sovereign as punishment for some offense." *Bajakajian*, 524 U.S. at 327. The issue of How much is too much? has arisen before. **The Tenth Circuit addressed the issue in Continental Trend Resources, Inc. v. OXY USA Inc., 44 F.3d 1465 (10th Cir. 1995), in which the federal appellate court "upheld a compensatory damages award of $269,000 and a punitive damages award of $30,000,000**--based on tort claims for interference with contracts and prospective business advantage-- rejecting various contentions of error made by defendant OXY USA Inc. The Supreme Court vacated our judgment, OXY USA Inc. v. Continental Trend Resources, Inc., 134 L. Ed. 2d 945, 116 S. Ct. 1843 (1996), and remanded for further consideration in light of its recent decision in BMW of North America, Inc. v. Gore, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996). BMW, at the Supreme Court level, involved only whether the punitive damages award at issue there imposed a grossly excessive punishment in violation of the Due Process Clause of the Fourteenth Amendment. We therefore consider the only issue before us on remand to be whether the $30 million punitive damages award in the instant case is grossly excessive in violation of the federal constitution. Continental Trend Resources v. Oxy USA, 101 F.3d 634, 635-636, 1996 U.S. App. LEXIS 30742, *1-2 In summary, we are satisfied that a significant punitive damages award against OXY is proper and constitutionally permissible. With the guidance of the BMW opinion, however, we conclude that $30,000,000 exceeds the constitutional limit. The harm in this case, though egregious, was entirely economic, and thus less worthy of punishment than harm to health and safety. Further, the ratio between the award and the harm to these plaintiffs--both actual and potential--is too large. OXY's wealth is not irrelevant, but $30,000,000 is far more than is necessary to secure its attention and modify its behavior in Oklahoma. Continental Trend Resources v. Oxy USA, 101 F.3d 634, 642, 1996 U.S. App. LEXIS 30742, *23-24 We now must determine the maximum constitutionally permissible punitive award based on our review of the record. This obviously is a difficult decision; we must arrive at a precise dollar figure by applying guidelines that contain no absolutes to facts that provide only imprecise potential damage amounts. **Nevertheless, using our best judgment we determine that $6,000,000 is the maximum constitutionally permissible punitive damages award justified by the facts of this case.**
Continental Trend Resources v. Oxy USA, 101 F.3d 634, 643, 1996 U.S. App. LEXIS 30742, *26

[2] 139 S. Ct. 682, 687, 203 L. Ed. 2d 11, 16-17, 2019 U.S. LEXIS 1350, *7, 27 Fla. L. Weekly Fed. S 642, 2019 WL 691578

Harawa, How Much is Too Much: A Test to Protect Against Excessive Fines, 81 Ohio St. L.J.65, 68 (2020).

This Court had long acknowledged the import of the Excessive Fines Clause, in the review of fines and forfeitures in Ohio criminal and civil cases. In the case *sub judice,* the trial court assessed the following: **$9,143,860.47** in clean-up costs; a civil penalty of **$7,710,000** (calculated at $10,000 per day for the period from June 24, 2014 to August 2, 2016) and a civil penalty of **$13,680,000** (calculated at $10,000 per day June 24, 2014 to March 23, 2018). Accordingly, Mr. Riley was assessed a penalty of $20,000 per day for a period of 771 days and then a $10,000 daily fine against Mr. Riley for hundreds of days[3], when Mr. Riley was banished from the site, and could not take any actions regarding the recycling work at the ARCO facility.[4] Mr. Riley was precluded from offering regarding his ability to pay or other mitigating factors.

In the case *sub judice, Timbs* is relevant to this appeal as it provides some guidance as to what may be considered an excessive fine, grossly disproportionate to the alleged harm. In *Timbs,* the Indiana trial court concluded that a motor vehicle's worth was disproportionate to the offenses of which Timbs had been convicted and, therefore, the civil forfeiture of the vehicle was an excessive fine under the Eighth Amendment.[5] The Indiana Supreme Court concluded that the Excessive Fines Clause of the Eighth Amendment did not restrict state action. *Id.* The United States Supreme Court disagreed, noting that *in rem* forfeitures fall within the ambit of the Excessive Fines Clause and holding that it applies to the states by operation of the Due Process Clause of the Fourteenth Amendment. *Id*. at 687, 689.

[3] Extending from August 2, 2016 to March 23, 2018.
[4] See Exhibit 2: Journal Entry, filed June 29, 2021, Case No. CV-17-881301, *State of Ohio, ex.rel. Mike Dewine, v. Arco Recycling, Inc., et.al*., pages 24-25.
[5] *Timbs v. Indiana,* 139 S. Ct. 682, 687, 203 L. Ed. 2d 11, 16-17, 2019 U.S. LEXIS 1350, *7, 27 Fla. L. Weekly Fed. S 642, 2019 WL 691578

This Court has long recognized that the Excessive Fines Clause of the Eight Amendment applies to the states. *State v. Hill*, 70 Ohio St.3d 25, 1994- Ohio 12, 635 N.E.2d 1248 (1994), syllabus. *See also State v. O'Malley*, 9th Dist. Medina No. 19CA0032-M, 2020-Ohio-3141, ¶ 9. *State v. Atkinson*, 2020-Ohio-3522, P31-P32, 2020 Ohio App. LEXIS 2461, *20-21, 2020 WL 3529906. However, issues remain regarding, when does the Excessive Fines Clause apply, what factors are to be considered by a court in determining fines and penalties, what mitigating factors are to be considered, and what factors are considered in a proportionality review.

In essence, issue presented by this appeal is How Much is Too Much? In this environmental enforcement action, the trial court levied draconian fines and penalties, totaling **$30,533,860 dollars against George Michael Riley, and a limited liability company, RCI, operated by Mr. Riley.** This fine included over one year's worth of $10,000 per day penalties, in which Mr. Riley had been banished from the site. He was not present on the site and could not run the company in absentia. Further, co-Defendant Christina Beynon was penalized at all.[6] "[T]he question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *State v. McShepard*, 9th Dist. Lorain No. 07CA009118, 2007-Ohio-6006, ¶ 17, *quoting United States v. Bajakajian*, 524 U.S. 321, 336, fn. 10, 118 S. Ct. 2028, 141 L. Ed. 2d 314, (1998); *see also State v. O'Malley*, 2020-Ohio-3141, P7, 155 N.E.3d 156, 159-160, 2020 Ohio App. LEXIS 2080, *4, 2020 WL 2844245.

[6] In the instant case, on June 19, 2020, a supplemental consent order was filed regarding the claims against Beynon and ARCO in the amount of $2,744,000 and Noble Road in the amount of $2,306,000. The consent order also has Beynon agreeing to a civil penalty of $2,306,000, but says the following **"The State has agreed to hold the penalty in perpetual abeyance."** The basis for the State agreeing to such a small amount, compared to the $30,000,000 penalties and sanctions imposed against Mr. Riley and RCI was never explained either by testimony or by documentary evidence. Nor was the agreement to hold that amount in perpetual abeyance ever explained.

In the instant case, there was no proportionality review[7] undertaken. It has properly been held that to determine whether a forfeiture is a constitutionally excessive fine, a court must conduct a proportionality review. *State v. Harold*, 109 Ohio App.3d 87, 94, 671 N.E.2d 1078 (9th Dist.1996); *State v. Haponek*, 9th Dist. Lorain No. 97CA006826, 1998 Ohio App. LEXIS 74, 1998 WL 34593, *2 (stating that failure of a trial court to properly account for constitutional proportionality factors in a forfeiture determination creates reversible error). It is well settled law that a proportionality review requires the trial court to weigh the harshness of the forfeiture against, among other factors, "the fair market value of the property, the intangible and subjective value of the property, and the hardship to the defendant, including the effect of forfeiture on the defendant's family and financial condition." *State v. Kish*, 9th Dist. Lorain No. 02CA008146, 2003-Ohio-2426, ¶ 54.

The purpose of the Excessive Fines Clause is to "limit[] the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) (emphasis in *Austin*)); *see also Timbs v. Indiana*, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019) (holding that the Excessive Fines Clause applies to the states through incorporation under the Fourteenth Amendment). If one of the goals of a fine is to punish, then the fine is subject to the scrutiny of the Excessive Fines Clause. *Austin*, 509 U.S. at 610. "A punitive forfeiture violates

[7] In discussing the factors applicable to a proportionality review, the trial court focused on *Kish, supra*, and stated that the proportionality review entails the comparison of the harshness of the forfeiture to: 1) the culpability of the defendant; 2) the gravity of the offense; 3) the relationship of the property to the offense; and 4) the harm to the community. Additional factors to consider when determining the harshness of the forfeiture are the fair market value of the property, the intangible and subjective value of the property, and the hardship to the defendant, including the effect of forfeiture on the defendant's family and financial condition. The court should also evaluate the harm caused by the illegal activity and whether the defendant was directly involved in the illegal activity, the amount of drugs involved and their value, the duration of the illegal activity, and its effect on the community. (Internal citations and quotations omitted.) *State v. Kish*, 9th Dist. Lorain No. 02CA008146, 2003-Ohio-2426, ¶ 54; *State v. Harold* at 94-95; see *McShepard*, 2007-Ohio-6006 at ¶ 17 (summarizing factors).

the Excessive Fines Clause if it is *grossly disproportionate* to the gravity of a defendant's offense." *Ross v. Duggan*, 402 F.3d 575, 588-89 (6th Cir. 2004) (*quoting United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)); *Shandor v. City of Eastpointe*, 2021 U.S. App. LEXIS 30977, *11-12, 2021 FED App. 0463N (6th Cir.), 2021 WL 4775190

The fines imposed in this case, clearly constitute financial punishment, which effectively deprive Mr. Riley of any ability to maintain his livelihood, a modern version of Debtor's Prison.

As Nicholas M. McLean has pointed out, the "need for clarity is essential now for two additional reasons. First, the [United States Supreme Court] "has used the standards set out in *Bajakajian* to determine excessiveness. However, the *Bajakajian* factors, while important, are incomplete and sometimes difficult to apply." Nicolas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 845–46 (2013). As a result, "[t]his lack of guidance has created somewhat of a mess." Harawa, 81 Ohio St. L.J. at 85. In this case, the Eighth District Court of Appeals ignored the constitutional implications of the draconian fines and penalties issued against Mr. Riley. This Court now has the opportunity to review this environmental civil enforcement action, to determine whether the Excessive Fines Clause was violated and whether Mr. Riley's Due Process rights were violated.[8]

The case *sub judice* presents this Court with a unique opportunity to provide guidance, regarding the analysis of excessive fines and to fashion a meaningful standard to protect Ohio

[8] The Due Process Clause of the Fourteenth Amendment imposes substantive limits "beyond which penalties may not go." *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78, 52 L. Ed. 108, 28 S. Ct. 28 (1907). See also *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67, 64 L. Ed. 139, 40 S. Ct. 71 (1919); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286, 56 L. Ed. 760, 32 S. Ct. 406 (1912). Moreover, in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 59 L. Ed. 1419, 35 S. Ct. 886 (1915), the Court actually set aside a penalty imposed on a telephone company on the ground that it was so "plainly arbitrary and oppressive" as to violate the Due Process Clause. *Id.*, at 491. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-454, 113 S. Ct. 2711, 2718, 125 L. Ed. 2d 366, 376-377, 1993 U.S. LEXIS 4403, *20-21, 61 U.S.L.W. 4766, 61 Empl. Prac. Dec. (CCH) P42,321, 93 Cal. Daily Op. Service 4755, 93 Daily Journal DAR 8072, 126 Oil & Gas Rep. 576, 7 Fla. L. Weekly Fed. S 536.

residents, including Defendant/Petitioner, George Michael Riley from draconian fines and penalties. The analysis begins with the Excessive Fines Clause and, alternatively, an analysis of the Due Process rights of the Petitioner under *BMW of N. Am. v. Gore, 517 U.S. 559, 562-563, 116 S. Ct. 1589, 1592-1593, 134 L. Ed. 2d 809, 818-819, 1996 U.S. LEXIS 3390, *8-9*.[9]

The appellate court had a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause. *BMW*, 517 U.S. at 585, 116 S. Ct. 1589. This did not occur in this case. Mr. Riley received an excessive civil sanction of $10,000 per day for a period of 771 days, for the self-same conduct operating the recycling center and allegedly unlawfully disposing of Construction & Demolition Debris.[10]

In *State v. Hill,*[11] this Court held that the Excessive Fines Clauses of the Ohio and United States Constitutions apply to drug-related forfeitures. And in *Hill,* this Court ultimately remanded the case to the trial court for a determination as to whether the forfeiture was excessive, under the facts of that case, within the meaning of Section 9, Article I of the Ohio Constitution and the Eighth Amendment to the United States Constitution. The *Hill* Court did not set forth a particular test for the determination of excessiveness of a fine and penalty.[12]

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[9] "The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a "'grossly excessive"' punishment on a tortfeasor. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993) (and cases cited). The wrongdoing involved in this case was the decision by a national distributor of automobiles not to advise its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair amounted to less than three percent (3%) of the car's suggested retail price. The question presented is whether a $2 million punitive damages award to the purchaser of one of these cars exceeds the constitutional limit. *BMW of N. Am. v. Gore*, 517 U.S. 559, 562-563, 116 S. Ct. 1589, 1592-1593, 134 L. Ed. 2d 809, 818-819, 1996 U.S. LEXIS 3390, *8-9, 64 U.S.L.W. 4335, 96 Cal. Daily Op. Service 3490, 96 Daily Journal DAR 5747, 9 Fla. L. Weekly Fed. S 585.

[10] See Journal Entry, *State of Ohio ex.rel. Mike Dewine v. ARCO Recycling, Inc.*, Cuyahoga Cty C.P. Case No. CV-17-881301, pages 24-25, in which the trial court found that Riley and RCI illegally disposed of construction and demolition debris at the ARCO Site for 1,368 days from June 24, 2014, as alleged in Count Two of the Amended Complaint, until March 23, 2018, the date the Ohio EPA completed its removal of the debris on Site. For the violation alleged in Count Two of the Amended Complaint, Riley and RCI each incurred a maximum statutory penalty of $13,680,000. Count Two -- Riley - Illegal disposal of construction debris R.C. 3714.13(A) & (B); Ohio Adm. Code 3745-400-04(B) 1368 days @ $10,000/ day = $13,680,000 RCI - Illegal disposal of construction debris R.C. 3714.13(A) & (B); Ohio Adm. Code 3745-400-04(B) 1368 days @ $10,000/day = $13,680,000. The trial court imposed a $10,000 per day penalty for every day in which the facility was open. The evidence clearly did not establish that Mr. Riley was operating an illegal landfill for all of that time.

[11] *State v. Hill*, 70 Ohio St.3d 25, 1994 Ohio 12, 635 N.E.2d 1248 (1994).

[12] This Court did not set forth a test to be used by lower courts in determining whether a forfeiture is excessive, the court cited with apparent approval the cases of *U.S. v. Sarbello* (3rd Cir. 1993), 985 F.2d 716, and *U.S. v. Busher* (9th Cir. 1987), 817 F.2d 1409.

In the case *sub judice*, the trial court and the Eighth District did not consider all of the relevant circumstances, as Mr. Riley was precluded from offering testimony and documentary evidence on his own behalf as a discovery sanction. Accordingly, the Petitioners were precluded from presenting evidence regarding the facts and circumstances related to the operation of the recycling center. Certainly, the denial of Due Process of Law to the Petitioners, and the subsequent issuance of a monstrous fine must warrant some measure of review. In *Timbs v. Indiana*, the United States Supreme Court found that the Excessive Fines Clause must protect citizens from the abusive use of fines and penalties, as retribution and as a debilitating financial punishment, used as a source of revenue for the governmental body.[13]

STATEMENT OF THE CASE AND FACTS

A. The Facts and Circumstances of the ARCO Recycling Facility

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In *Sarbello*, at 724, the court set forth a proportionality analysis which, although not used the same in every case, "*** must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the criminal sanction. Other helpful inquires might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability, and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct." In *Busher*, the court noted, at 1415, that: "In considering the harm caused by defendant's conduct, it is certainly appropriate to take into account its magnitude: the dollar volume of the loss caused, whether physical harm to persons was inflicted, threatened or risked, or whether the crime has severe collateral consequences, e.g., drug addiction. *** In addition, the court may consider the benefit reaped by the convicted defendant." In both *Sarbello* and *Busher*, the courts noted that the Excessive Fines Clause prohibits only those forfeitures which, in light of all the relevant circumstances, are grossly disproportionate to the offense committed. See *State v. Hill*, 70 Ohio St.3d 25, 1994- Ohio 12, 635 N.E.2d 1248 (1994); see also *In re Forfeiture of 1081 W. State St.*, 1996 Ohio App. LEXIS 1918, *11-13, 1996 WL 257512.

[13] "For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago." See *Browning-Ferris*, 492 U. S., at 267, 109 S. Ct. 2909, 106 L. Ed. 2d 219. Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." *Harmelin v. Michigan*, 501 U. S. 957, 979, n. 9, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (opinion of Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit"). This concern is scarcely hypothetical. See Brief for American Civil Liberties Union et al. as Amici Curiae 7 ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.")." *Timbs v. Indiana*, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11, 18, 2019 U.S. LEXIS 1350, *10-11, 27 Fla. L. Weekly Fed. S 642, 2019 WL 691578.

"Further, as a matter of public policy, the issue of fines and forfeitures as a source of revenue is at the forefront of public discussion. Since 2010, 48 states have increased civil and criminal fees. Joseph Shapiro, Supreme Court Ruling Not Enough to Prevent Debtors Prisons, NPR (May 21, 2014), https://goo.gl/Tft4XK. "[M]any lawmakers use economic sanctions in order to avoid increasing taxes while maintaining governmental services, with some lawmakers even including increases in ticketing in projected budgets." Beth A. Colgan, The Excessive Fines Clause: Challenging the Modern Debtors' Prison, 65 UCLA L. Rev. 2, 22 (2018).

On March 4, 2014, the City of East Cleveland passed Resolution No. 11-14, which authorized the sale of the ARCO site, Parcel NO. 673-01-011, to Ohio Rock, LLC. However, the Cuyahoga County Recorder records indicate that the ARCO parcel was transferred to "1705 Noble Road Properties, LLC" on May 01, 2014. 1705 Noble Road Properties, LLC has been the owner of the ARCO site during the relevant times herein. From approximately June of 2014 until August 2, 2016, George Michael Riley, acting in concert with Christina Beynon, among others, stored construction & demolition material, at the 1705 Noble Road location, in East Cleveland, Ohio.[14]

As of August 2, 2016, Petitioner, George Michael Riley was prohibited from coming onto the ARCO Recycling property, by virtue of a Civil Protection Order ("CPO") issued against Mr. Riley, obtained by his fiancé, co-Defendant Christina Beynon, as part of her scheme to divest Mr. Riley of any ownership interest in ARCO Recycling, Inc. and 1705 Noble Road Properties, LLC. Ms. Beynon succeeded in that scheme and Mr. Riley was divested of any ownership interest in ARCO Recycling, Inc. and 1705 Noble Road Properties, Inc.

Approximately one year following Mr. Riley's banishment from the site, by his former fiancé, Christina Beynon, the State of Ohio filed its Complaint for Injunctive Relief and Statutory Penalties. [Compl., filed June 6, 2017]. On June 6, 2017, the State filed the Original Complaint against Defendants ARCO Recycling, Inc. ("ARCO"), 1705 Noble Road Properties, LLC ("1705 Noble Road Properties"), Christina Beynon, and George Michael Riley, n.k.a. Anthony Michael Castello, alleging violations of R.C. Chapter 3714 and the rules promulgated thereunder, seeking injunctive relief and civil penalties.[15] On June 6, 2017, the State of Ohio also filed a Partial Consent

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[14] Compl., ¶¶ 9-12; 4/26/2021, Brief Filed By Defendants George Michael Riley (D6) and Residential Commercial Industrial (R.C.I.) Services, LLC (D7)

[15] In *State ex.rel. Ohio v. Crock Constr. Co.*, the Complaint included specific allegations regarding the disposal practices, alleged to have been committed by the facility operator, as the Appellate Court observed:

Appellant's complaint included nine counts, each alleging multiple violations: overfilling a construction and demolition debris landfill; failure to repair leachate outbreaks; unlawful cliffing of debris; failure to maintain adequate fire control; failure to manage surface water; failure to comply with special license conditions; failure to comply with the Ohio Environmental Protection Agency

Order, which was indicative of the collusion of Christina Beynon, with the State of Ohio, from the inception of the case.

On June 27, 2017, the trial Court entered an Amended Partial Consent Order, between the State of Ohio and Defendants ARCO, 1705 Noble Road Properties, and Beynon. The preliminary consent order required ARCO, Beynon, and 1705 Noble Road Properties to, among other things: comply with R.C. Chapter 3714 and the rules thereunder, relinquish their rights in all construction and demolition debris located at the Site, allow the Ohio EPA and the Cuyahoga County Board of Health full access to the Site for the purposes of debris removal, and repay the State for all funds expended for clean-up of the Site.

Defendant George Michael Riley, who had no role with the business and had not since August 2, 2016, was not a party to that consent order. In March 2019, the State filed its First Amended Complaint to add Defendant RCI and to include allegations for violations of Ohio's construction and demolition debris laws committed by Defendants RCI and Riley. On May 6, 2019, the trial court ruled that Riley had accepted service upon RCI's behalf. RCI failed to respond to the State's Amended Complaint. The State filed a Motion for Default Judgment against RCI in June 2019. On January 8, 2020, this court granted the State's Motion for Default on RCI's liability and reserved its ruling on RCI's civil penalty for trial. The State served discovery requests upon the Defendant George Michael Riley. The State never filed a Motion to Compel Discovery under Civil Rule 37; the State never obtained an Order Compelling Discovery. The State never filed a Motion for Sanctions under Civil Rule 37.

("OEPA") [**3] director's orders; illegal disposal of construction and demolition debris; and open dumping of solid waste. *State ex rel. Ohio v. Crock Constr. Co*., 2014-Ohio-2944, P2, 2014 Ohio App. LEXIS 2885, *2-3, 2014 WL 2999302. In the case sub judice, the Amended Complaint made no such specific allegations. Instead, the evidence presented demonstrated that the turnover rate was not progressing as quickly as the Environmental Officials wanted to see. It had been improving from 11% up to 24% under the guidance of Mr. Riley. [See Testimony of Stephen Bopple, 354:12-25, 355:1-10, 375: 1-21, 376:1-23, 419:11-25, 420: 1-25, 421:1-25; Testimony of Aaron Shear, 338:1-25, 339:1-24].

Instead, on January 7, 2020, the State filed a Motion in Limine, seeking the ultimate sanction of exclusion of all witnesses, testimony and documents, which the trial court summarily granted. In fact, the trial court later refused to reconsider its ruling in November of 2020, all to the extreme prejudice and detriment of Petitioners, George Michael Riley and RCI Services, Inc.

On May 3, 2021, this case proceeded to a bench trial. The State called the following fact witnesses: Christina Beynon of ARCO Recycling, Inc.; Stephen Bopple, Environmental Specialist II with the Ohio EPA; Barry Grisez, Supervisor with the Cuyahoga County Board of Health; and Scott Hinkle, former employee of ARCO. The State also called as an expert witness Aaron Shear, Environmental Supervisor with the Division of Materials and Waste Management, Ohio EPA.

Defendants/Petitioners were wrongfully prohibited from calling any witnesses. The Defendants proffered in their Trial Brief, that had they been permitted to call witnesses, they would have called a number of witnesses,[16] to dispute the State's evidence and conclusions. Mr. Riley was prohibited from offering any documentary evidence regarding his financial circumstances or his ability to earn a living, when faced with monstrous, draconian fines and penalties. In late July

[16] **A**. Stephen Bopple, Ohio EPA Northeast District office, Environmental Engineer. He would have testified as to day-to-day operations and communication between the parties. **B**. Barry Grisez, Cuyahoga County Board of Health Supervisor. He would have testified as to communications between the parties while Riley was there. **C**. Bruce McCoy, Ohio CPA Central Office Manager, would have testified as to the communication with the EPA office and the Attorney General's office. **D**. Christine Beynon would have testified to her ownership and job duties at the companies and testify as to Riley's operational duties at the companies. **E**. Melissa Cyphert would have testified to her job duties at RCI and testify as to Riley's operational duties at the companies. **F**. Sue Hinkle would have testified to her job duties at the companies and testify as to Riley's operational duties at the companies. **G**. Scott Hinkle would have testified to his job duties at the companies and testify as to Riley's operational duties at the companies. **H**. Two sons of Scott Hinkle who worked at the facilities also would testify as to their job duties and as to Riley's operational duties at the companies. **I**. Valencia White of Cleveland Air would testify as to the Defendants being a recycling center. **J**. Michael Riley would have testified as to his responsibility and lack of culpability of the alleged violations. **K**. Allyse Morlin would have testified to her job duties at the companies and testify as to Riley's operational duties at the companies. **L**. Joseph Trampte, the compliance officer and safety inspector for ARCO, would have testified as to the environmental issues as to the grounds. **M**. Owners of Kurtz Brothers would have testified as to industry standards and day-to-day operations of the recycling business. **N**. Owner of Bowman Recycling would have testified as to industry standards and day-to-day operations of the recycling business. **O**. Owner of ASE Metals would have testified as to the amount of metal that ASE Metals purchased from ARCO. **P**. Owner of Evergreen Recycling Products of Canton, Ohio and of New Jersey would have testified about the wood at the ARCO Site. **Q**. Craig Butler, EPA Director, who would have testified as to the procedures and communications about the ARCO Site. **R**. Tamara Strassburg, a Columbus EPA employee, would have testified as to ARCO permit application and approval. **S**. Cheryl Stevens, Demolition Director for the Cuyahoga County Land Bank, would have testified as to her observations at the ARCO Site. **T**. Aaron Shear from Ohio EPA would have testified as to Ohio's laws on C&DD.

of 2016 when Riley was hospitalized for a heart attack, Steve Bopple said, on behalf of the Ohio EPA, that the operation was in compliance with EPA regulations.

On or about August 2, 2016, Beynon obtained a civil protection order against Riley so that he was removed and barred from the ARCO Site. Before Riley was ousted, there were neither environmental law violations nor a nuisance. The EPA was at the ARCO Site weekly. After ousting Riley, Beynon promoted an employee into the operator position at the ARCO Site. Without Riley, Beynon and the new operator could not perform the operations to the satisfaction of the various government entities. Riley could not enter the ARCO Site, even to obtain his vehicle due to the CPO. Months after Riley was ousted, the violations began.

On January 17, 2017, seven months after the banishment of Mr. Riley from the site, the Ohio EPA issued administrative orders. The Director's Orders found that ARCO illegally disposed of construction debris and ordered that ARCO immediately cease acceptance of construction debris and dispose of all material onsite. Beynon was listed as ARCO's President. ARCO's bank account designated Beynon as the account holder. Beynon also signed the paperwork securing a line of credit for ARCO for approximately $500,000,000 from the credit union at which she was employed. There was no evidence presented by the State, regarding Mr. Riley's income from the ARCO Recycling work presented by the State.

Mr. Riley was initially represented by Cleveland counsel in this lawsuit but that counsel withdrew from representation in early December 2018, because Riley could no longer afford to pay him. Riley was thereafter acting *pro se* until counsel entered an appearance in January 2020.

On May 7, 2019, the State deposed Riley in Columbus and Riley was unrepresented in that proceeding. That deposition functioned as a judgment debtor examination. Then on January 7, 2020, the State filed a Motion in Limine, asking the most severe sanction, against Mr. Riley and

RCI, i.e., that the Defendants be prohibited from calling any witnesses and offering any documentary exhibits, to establish financial inability to pay. The trial court, without any analysis, granted the requested, severe sanction against Mr. Riley and RCI.

On June 19, 2020, a supplemental consent order was filed regarding the claims against Beynon and ARCO in the amount of $2,744,000 and Noble Road in the amount of $2,306,000. The consent order also has Beynon agreeing to a civil penalty of **$2,306,000,** but then states the following **"The State has agreed to hold the penalty in perpetual abeyance."** The basis for the State agreeing to such a small amount, compared to the $30,000,000 penalties and sanctions imposed against Mr. Riley and RCI was never explained either by testimony or by documentary evidence. Nor was the agreement to hold that amount in perpetual abeyance ever explained.

B. THE COURT OF APPEALS AFFIRMS THE IMPOSITION OF OVER $30,000,000 IN FINES AND PENALTIES, FINDING THAT NEITHER THE EXCESSIVE FINES CLAUSE NOR DUE PROCESS CONSIDERATIONS, WERE IMPLICATED BY THE ENVIRONMENTAL CIVIL ENFORCEMENT ACTION.

The Eighth District found that the State had proven that the Defendants/Petitioners had engaged in disposal[17] of construction and demolition debris, as opposed to storage of such debris. "Illegal disposal" occurs when construction and demolition debris is placed anywhere other than a licensed landfill. Ohio Adm. Code 3745-400-01(I)(1). To constitute "stored" construction and demolition debris, the material must meet all three of the following conditions: (1) its placement must be temporary, (2) in such a manner that the material remains retrievable, and (3) substantially unchanged. R.C. 3714.01. At the end of the temporary period of storage, the material must be disposed or reused or recycled in a beneficial manner. *Id.*

[17] "Disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, emitting, or placing of any construction and demolition debris into or on any land or ground or surface water or into the air, except if the disposition or placement constitutes storage." ORC § 3714.01

In affirming the trial court, the Eighth District did not find the $30,000,00.00 of fines and penalties to be excessive, by engaging in an appellate sleight of hand of the worst sort, in which the appellate court mischaracterized, civil contempt proceedings were referred to more expansively as "civil orders" in finding that the Excessive Fines Clause was not implicated by this environmental prosecution, nor were the Due Process rights implicated. These grievous errors must be remedied by this Court.

ARGUMENT

Proposition of Law 1:

THE IMPOSITION OF OVER $30,000,000 IN FINES AND PENALTIES IS GROSSLY DISPROPORTIONATE TO THE ALLEGED HARM CAUSED BY THE PETITIONERS AND VIOLATES THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW, TO EQUAL PROTECTION UNDER THE LAW AND THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"In order to be an effective deterrent to violations, civil penalties should be large enough to hurt the offender but not cause bankruptcy." *State ex rel. Ohio Atty. Gen. v. Shelly Holding Co.*, 191 Ohio App.3d 421, 2010 Ohio 6526, 946 N.E.2d 295 (10th Dist.), ¶ 63. *See generally State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St.3d 151, 157, 1 Ohio B. 185, 438 N.E.2d 120 (1982) (holding trial court could consider evidence of defendant's financial condition to ensure civil penalty "would not be so large as to send [defendant] into bankruptcy but would be large enough to deter future violations."). There was no factual evidence presented regarding Mr. Riley's financial condition. There was no evidence of the financial gain, which Mr. Riley had actually obtained from the ARCO Recycling facility. There was no evidence regarding the effect upon Mr. Riley's livelihood or ability to pay.

The Eighth District disingenuously wrote that Excessive Fines Clause did not apply to **"civil orders"** when the cases the appellate court cited were all **civil contempt proceedings**.[18] Mr. Riley's case was not a civil contempt action. Contrary to the appellate sleight of hand by the Eighth District, the Excessive Fines Clause is implicated and this Court is the proper forum to evaluate the factors and facts, which led to an individual has been found personally liable for $30,000,000 of fines and penalties. Further, the Due Process rights of Mr. Riley are implicated, by the compounding of civil penalties for the self-same conduct, resulting in a $20,000 per day ($10,000 per day, for two counts) assessment against Mr. Riley for allegedly unlawful disposal of construction and demolition material. Multimillion dollar fines and penalties are not common, and ordinarily require actual proof of contamination and harm to the environment.[19] The Due Process

[18] The Excessive Fines Clause of the Eighth Amendment does not apply to civil contempt sanctions. *Ohio Elections Comm. v. Ohio Chamber of Commerce & Citizens for a Strong Ohio*, 158 Ohio App.3d 557, 2004 Ohio 5253, 817 N.E.2d 447, *citing In re Grand Jury Proceedings* (C.A.7, 2002), 280 F.3d 1103, 1110 ("a fine assessed for civil contempt does not implicate the Excessive Fines Clause"). See, also, *United States v. Mongelli* (C.A.2, 1993), 2 F.3d 29, 30; *Spallone v. United States* (1988), 487 U.S. 1251, 1257, 109 S. Ct. 14, 109 S. Ct. 20, 101 L.Ed.2d 964. *City of Cleveland v. Paramount Land Holdings, LLC*, 2011-Ohio-5382, P23, 2011 Ohio App. LEXIS 4454, *9-10, 2011 WL 4978480.

[19] **II. FACTUAL AND PROCEDURAL BACKGROUND**

A. The OII Site

The OII site is a 190-acre municipal landfill in Monterey Park, California. From 1948 until 1984, the landfill accepted disposal of hazardous waste. Lockheed utilized the OII landfill for disposal of hazardous waste from 1972 to 1983. Its liquid waste was transported to the OII site in 4,200-gallon capacity vacuum trucks. The liquid waste discharged by Lockheed into the landfill totaled over one million gallons of metal degreaser waste, paint sludge, alkaline solution, waste coolant, soapy water, oil, mud, percolate, and other known toxic substances.

Eventually, the OII landfill site came to the attention of state and federal agencies concerned with environmental contamination. The United States Environmental Protection Agency (EPA) determined that the OII site was contaminated by hazardous substances as defined by section 101(14) (42 U.S.C. § 9601(14)) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 United States Code section 9601 et seq. The OII site was placed on both the California hazardous waste priority list and the national priority list of the United States' most contaminated sites.

The EPA found that the environmental contamination at the OII site included leachate seepage, landfill gas, noxious odors, and groundwater contamination. As part of its efforts to protect the public and the environment from the contaminated OII site, the EPA entered into consent decrees allocating the cost of site investigation and cleanup to numerous potentially responsible parties, including Lockheed.

The first partial consent decree obligated the potentially responsible parties, including Lockheed, to pay more than $60 million to stabilize the OII landfill and to construct and operate a leachate collection system and treatment plant. Lockheed also entered into the third partial consent decree, which required payment of additional moneys and participation in the design, construction, and maintenance of a gas collection and destruction system, a cover system, and a surface water management system. Lockheed estimates that it has spent nearly $1 million to date in complying with its obligations under the OII site consent decrees, and further estimates that it will incur an additional $4 million in compliance costs.

Lockheed has also been named as a defendant in a personal injury action filed in Los Angeles County Superior Court by residents of the area surrounding the OII site who claim illness and emotional distress caused by emissions from the site.

Travelers Casualty & Sur. Co. v. Superior Court, 63 Cal. App. 4th 1440, 1445-1446, 75 Cal. Rptr. 2d 54, 57, 1998 Cal. App. LEXIS 440, *3-5, 98 Cal. Daily Op. Service 3831, 98 Daily Journal DAR 5281.

and Equal Protection Clauses protect individuals from sanctions which are downright irrational. *Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). The Eighth Amendment protects against excessive civil fines, including forfeitures.[20] The Eighth District, in essence, held that the Excessive Fines Clause did not apply and found that the civil penalty of over $30,000,000 levied against an individual was not constitutionally impermissible or an abuse of discretion, despite the fact that the penalty included over one year's worth of days in which Mr. Riley was banished from the site and could not have made any effort at recycling the materials. The issuance of multimillion dollar fines and penalties against an individual under these circumstances, in which no proportionality review was even undertaken, warrants review by this Court.

CONCLUSION

This Court has the power to accept jurisdiction over this matter to review the issuance of multimillion dollar sanctions, a grossly disproportionate amount of $30,533,860.47, against an individual, engaged in the alleged disposal of construction and demolition debris and to determine the proportionality of such sanctions, vis-à-vis the alleged conduct of Mr. Riley. The Court of Appeals' decision sets a dangerous new precedent that an individual can be denied an opportunity to present his evidence and then be severely punished with excessive fines and penalties, far beyond, any ability to repay. For these reasons, Petitioners respectfully request that this Court accept jurisdiction.

[20] *Alexander v. United States*, 509 U.S. 544, 125 L. Ed. 2d 441, 113 S. Ct. 2766 (1993); *Austin v. United States*, 509 U.S. 602, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993); *Hudson v. United States*, 522 U.S. 93, 103, 118 S. Ct. 488, 495, 139 L. Ed. 2d 450, 461, 1997 U.S. LEXIS 7497, *18-19, 66 U.S.L.W. 4024, 97 Cal. Daily Op. Service 9228, 97 Daily Journal DAR 14861, 162 A.L.R. Fed. 737, 1997 Colo. J. C.A.R. 3226, 11 Fla. L. Weekly Fed. S 265. To protect a litigant against an excessive monetary penalty in a particular application of a civil penalty statute, the *Hudson* Court noted that the Eighth Amendment protects against excessive civil fines and forfeitures, and that the Due Process and Equal Protection clauses protect individuals from entirely irrational sanctions. *Hudson,* 118 S. Ct. at 495, *cited by Sec'y v. Lyndonville Sav. Bank & Trust Co*., 1999 Vt. Envtl. LEXIS 34, *12.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, I have served a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction of Defendant/Petitioners, George Michael Riley and RCI, upon the following counsel of record on this 9th day of July, 2022, via electronic mail and/or via regular U.S. mail service, postage prepaid:

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