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## **Supreme Court of New York Appellate Division, First Department - Street Vendor Project v. City of New York**

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**Supreme Court of New York Appellate Division, First Department - Street Vendor  
Project v. City of New York**

**Cover Page Footnote**

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**SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, FIRST DEPARTMENT**

Street Vendor Project v. City of New York<sup>1</sup>  
(decided August 23, 2007)

The Street Vendor Project of the Urban Justice Center sued the City of New York, through the chairperson of the Environmental Control Board (“ECB”), for increasing fines for violating New York City Health and other Administrative Codes.<sup>2</sup> The lawsuit was filed on behalf of 300 licensed and unlicensed street vendors “who sell food and merchandise” on New York City streets.<sup>3</sup> The plaintiffs claimed the fines were arbitrary, capricious, and in violation of the Excessive Fines Clause of both the United States Constitution and the New York State Constitution.<sup>4</sup> The street vendors also contended

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<sup>1</sup> Street Vendor Project v. City of New York (*Street Vendor Project II*), 841 N.Y.S.2d 79 (App. Div. 1st Dep’t 2007).

<sup>2</sup> Street Vendor Project v. City of New York (*Street Vendor Project I*), 811 N.Y.S.2d 555, 557 (Sup. Ct. N.Y. County 2005). See Lynda Richardson, *Public Lives: A Graduate of Law School and the Burrito Cart*, N.Y. TIMES, Nov. 5, 2004, at B2. The Street Vendor Project is an organization under the nonprofit Urban Justice Center. It was founded in 2001 by Sean Basinski, who graduated Georgetown Law School in 2001 after a short stint as a New York City Street vendor. The project was initially financed as a “shoestring operation” with \$15,000 from Yale. Members, numbering approximately 200, pay \$100 in annual fees and are given tape measures and cameras to collect evidence in case of future problems with the police. *Id.*

<sup>3</sup> *Street Vendor Project I*, 811 N.Y.S.2d at 557.

<sup>4</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); N.Y. CONST. art. I, § 5 (“Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.”); *Street Vendor Project I*, 811 N.Y.S.2d at 557. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) (“We shall not decide whether the Eighth Amendment’s prohibition on excessive fines applies to the several States through the Fourteenth Amendment . . .

that the increased fines violated the City Administrative Procedure Act (“CAPA”) because the City failed to provide them with proper “notice of its intent to implement the [fine] increases.”<sup>5</sup> However, the city argued that the violations were not as extensive as the street vendors had asserted,<sup>6</sup> and that the fines served an important governmental function in decreasing recidivism rates for regulatory violations.<sup>7</sup> The court found the record before it insufficient to balance the factors necessary to conduct an excessive fines, gross disproportionality analysis, but held the plaintiffs could raise the issue in future lawsuits.<sup>8</sup>

This dispute between the street vendors and New York City began when the ECB initiated a proposed revision of its fines schedule regulating street vending on July 17, 2003.<sup>9</sup> Under this new proposal, “the penalties for the first and second violations within a 24-month period were to be doubled; the penalty for a third violation was increased to \$250; and the penalty for a fourth, or subsequent violation, was raised to \$1,000.”<sup>10</sup> What made these penalty increases so egregious, according to the street vendors, was that

[i]n comparison to the schedule of fines that had been

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<sup>5</sup> *Street Vendor Project I*, 811 N.Y.S.2d at 558.

<sup>6</sup> *Id.* (“[T]he City represents that, for implementation of the escalating fine schedule for repeat offenses, all violations by a vendor cited on a given date are treated as one.”).

<sup>7</sup> Thomas J. Lueck, *New Schedule of Higher Fines Stirs Protest of Street Vendors*, N.Y. TIMES, Aug. 23, 2005, at B6 (A spokeswoman for the Department of Consumer Affairs stated that “[t]he only way to send a clear signal to repeat violators is to step up the penalties each time there’s a violation. . . . to protect legitimate businesses, both store owners and law-abiding vendors”).

<sup>8</sup> *Street Vendor Project II*, 841 N.Y.S.2d at 80.

<sup>9</sup> *Street Vendor Project I*, 811 N.Y.S.2d at 557.

<sup>10</sup> *Id.*

in use for the preceding 20 years . . . the Schedule doubles the fines for the first and second violations, and increases the penalties for the third violation from \$100 to \$250, for the fourth violation from \$250 to \$500, for the fifth from \$250 to \$750, and for the sixth and subsequent violations from \$250 to \$1,000.<sup>11</sup>

Upon learning of the city's intent to increase fines for street vending violations, the plaintiffs moved for a preliminary injunction and declaratory relief against the city.<sup>12</sup> The plaintiffs argued they did not have proper notice of the increased fine schedule because "the City failed to publish a notice of the proposed rule thirty days prior in the *City Record*, announc[ing] the purpose of the proposed rule, solicit[ing] written comments, hold[ing] a public hearing, [and] provid[ing] notice to the City Council, news media, and Community Boards."<sup>13</sup> New York County Supreme Court Justice Carol Edmead enjoined the city from enforcing the July 2003 increases, and likewise estopped the city from denying vending licenses for failure to pay the increased fines.<sup>14</sup> After winning on the injunction issue, the plaintiffs further moved for the court to certify the affected street

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<sup>11</sup> *Id.* at 558. "[T]he old fine structure provided for a low level of fines that was . . . a cost of doing business . . . that did not deter subsequent violations." *Id.* at 558 n.1.

<sup>12</sup> *Ousmane v. City of New York*, No. 04-402648, 2005 WL 1004738, at \*2 (Sup. Ct. N.Y. County Apr. 13, 2005).

[O]n August 11, 2003, Sean Basinski, Director of the Urban Justice Center ("UJC") Street Vendor Project, was informed by the ALJ [Administrative Law Judge] during an ECB hearing that violation penalties for street vendors had increased. . . . The street vendors state that they did not know about the rule change at the time it was effected, and that . . . [they] became aware of the fine increase when they received the ALJ's decisions.

*Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*3.

vendors as a class of plaintiffs.<sup>15</sup> Justice Edmead held that “[t]hese vendors, aggrieved by the City’s failure to notify them of a penalty increase that would inflict great hardship upon them and their ability to pursue a life in this country, are entitled to relief in one swift stroke.”<sup>16</sup> Despite the city’s arguments, the court limited the class to vendors who had received Notices of Violation between July 17, 2003 and October 4, 2004.<sup>17</sup>

Shortly after Justice Edmead issued her decision in favor of the plaintiffs on the preliminary injunction and class action issues,<sup>18</sup> the ECB “adopted the subject schedule of fines . . . [on April 21, 2005] and caused it to be published in the *City Record* on June 20,

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<sup>15</sup> *Id.* at \*4. The street vendors argued: (1) joinder of the approximately 12,000 licensed street vendors is impracticable; (2) “there are questions of law or fact common to the class”; (3) “the claims of the representative parties are typical of the claims of the class”; (4) the UJC’s “extensive experience representing marginalized communities” shows that its representation of the street vendors will ensure “fair[] and adequate[] protect[ion] [of] the interests of the class”; and (5) “a class action is superior to other available methods for the fair and efficient adjudication of the controversy” given the relatively small individual claims and “lack . . . [of] financial resources to bring suit individually.” *Id.* at \*5.

<sup>16</sup> *Ousmane*, 2005 WL 1004738, at \*12. The court held the plaintiffs had met the first four prerequisites for a class action given

the numerosity of the proposed class, the predominance of common questions of law and fact among the claims of the proposed class members which derive from the same conduct of the City, the typicality of their claim to the claims of the proposed class members, and the adequacy of representation.

*Id.* at \*9. Regarding the fifth requirement, however, the court found it “cognizant that where government operations are involved, and where subsequent petitioners will be adequately protected under the principles of *stare decisis*, the ‘government operations rule’ applies so as to preclude class action certification.” *Id.*

<sup>17</sup> *Id.* at \*13. “[T]he City’s position [is] that the class be limited so as to exclude those proposed members who failed to exhaust administrative remedies within 30 days of the mailing of the ECB’s determinations.” *Id.* Justice Edmead described her ruling as “about the American Dream. . . . You can’t put it in the air and not live behind it.” Nina Bernstein, *Court Rules In Vendor’s Favor, Declaring a Fine Increase Illegal*, N.Y. TIMES, Sept. 29, 2004, at B1.

<sup>18</sup> See *Ousmane*, 2005 WL 1004738, at \*1. Justice Edmead’s decision was issued on April 13, 2005.

2005.”<sup>19</sup> The plaintiffs then instituted an Article 78 proceeding in addition to a separate motion for a preliminary injunction to challenge the city’s adoption of these increased fines.<sup>20</sup> Justice Michael D. Stallman held for the Supreme Court of New York County that the ECB’s notice of the increased penalty schedule was defective because the information it contained inadequately disclosed the underlying motivation or purpose of the rule, but held a newspaper publication could cure the defect.<sup>21</sup> In accordance with its decision on the notice issue, the court denied the plaintiffs’ motion for a preliminary injunction as moot.<sup>22</sup> The appellate division affirmed under an abuse of discretion standard of review,<sup>23</sup> enunciating the New York test for identifying an excessive fine as “whether the fine ‘is grossly disproportional to the gravity of a defendant’s offense.’ ”<sup>24</sup> It is “a sui generis inquiry turning on a myriad of factors, including the seriousness of the violation, the amount of the fine, recidivism, if any, by the vendor and the economic circumstances of the vendor.”<sup>25</sup>

The main issue for the plaintiffs was that the schedule in-

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<sup>19</sup> *Street Vendor Project I*, 811 N.Y.S.2d at 557 (italics added). “In comparison to the first revised schedule as proposed on October 15, 2004, the Schedule decreases the penalties for a fourth and fifth violation, by \$500 and \$250, respectively.” *Id.* at 558. “Among the violations covered by the new fine schedule are: not having a valid license in clear view of customers; failing to have financial records on hand while doing business on the street; failing to place price tags on merchandise; and failing to offer receipts.” See Lueck, *supra* note 7, at B6.

<sup>20</sup> *Street Vendor Project I*, 811 N.Y.S.2d at 557.

<sup>21</sup> *Id.* at 561. “[N]either the rule that ECB promulgated, nor the formulaic statement of ‘basis and purpose’ that it appended to the published rule, discloses any indication of its reasons or the rule’s basis and purpose. . . . A statement that is primarily descriptive, rather than explanatory, is inadequate.” *Id.*

<sup>22</sup> *Id.* at 562.

<sup>23</sup> *Street Vendor Project II*, 841 N.Y.S.2d at 80.

<sup>24</sup> *Id.* (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)).

<sup>25</sup> *Street Vendor Project II*, 841 N.Y.S.2d at 80.

creased maximum penalties for street vending offenses from \$250 to \$1,000.<sup>26</sup> The street vendors argued throughout the litigation that they are mostly immigrants of limited means, and that the fines constitute an extremely large portion of their business expenses in comparison to the potential earnings from their street vending operation.<sup>27</sup> The Street Vendor Project argued that its members had received an average seven tickets in 2004, totaling \$3,650 under the new schedule, while only earning \$8,400 to live and pay taxes and fines.<sup>28</sup> The extent of the impact is immense considering how easily a police officer can fine street vendors for regulatory violations, often citing them for multiple violations on the same day.<sup>29</sup> The Street Vendor Project released a report in 2006 finding “[v]iolations range[ed] from vending too close to a storefront or too far from the curb, vending on a restricted street or not having a vending license clearly visible.”<sup>30</sup>

The New York and Federal Excessive Fines Clauses are textually similar, but substantively variant.<sup>31</sup> In scrutinizing the different doctrinal tests and definitions inherent in excessive fines jurispru-

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<sup>26</sup> *Id.*

<sup>27</sup> *Street Vendor Project I*, 811 N.Y.S.2d at 558. See Richardson, *supra* note 2, at B2 (“Most [street vendors] are recent immigrants and speak little English.”). See also Bernstein, *supra* note 17, at B1.

The hot dog vendor from Bangladesh, the sidewalk watch salesman from Mauritania, the elderly Peruvian-American woman who had sold hats downtown for 15 years, all faced an end to their licenses within days because they could not afford to pay \$1,000 for repeated violations like selling within 20 feet of a doorway.

<sup>28</sup> *Street Vendor Project I*, 811 N.Y.S.2d at 558.

<sup>29</sup> See Bernstein, *supra* note 17, at B1 (One street vendor testified that “[s]ome tickets were because the table was too big. . . . Some because I was too close to the corner. Some for being less than 23 feet from the door.”).

<sup>30</sup> Justin Rocket Silverman, *Vendors Not Sold on City’s Ticketing*, NEWSDAY, Oct. 4, 2006, at A16.

<sup>31</sup> *Street Vendor Project I*, 811 N.Y.S.2d at 559.



dence, it is instructive to examine certain key distinctions and the development of the Excessive Fines Clause at the United States Supreme Court level and then analyze its impact on federal circuit court decisions, and finally compare and contrast these federal circuit court decisions to New York case law.

“Civil forfeiture is an *in rem* proceeding against the property itself and not its owner. . . . Criminal forfeiture, on the other hand, is an *in personam* proceeding against a defendant who forfeits nothing unless she is convicted of a crime.”<sup>32</sup> As a result, defendants in civil forfeiture proceedings are afforded fewer rights and constitutional protections than in criminal forfeiture proceedings.<sup>33</sup> Civil forfeiture is “a concept traceable to biblical text and carried into the Middle Ages in the form of the law of deodands.”<sup>34</sup> Contrastingly, “[c]riminal forfeiture has its roots in the common law.”<sup>35</sup>

The United States Supreme Court’s most notable articulation of what constitutes an excessive fine in a civil proceeding comes from *United States v. Bajakajian*, with Justice Thomas writing for the

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<sup>32</sup> Melissa A. Rolland, Comment, *Forfeiture Law, the Eighth Amendment’s Excessive Fines Clause, and United States v. Bajakajian*, 74 NOTRE DAME L. REV. 1371, 1374 (1999) (emphasis added).

<sup>33</sup> *Id.* “Civil forfeiture almost certainly does not define private rights, and in many cases seems only to serve as punishment. . . . In criminal forfeiture cases, courts use a higher burden of proof standard, and more constitutional protections are provided for defendants.” *Id.*

<sup>34</sup> Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461, 466 (2000). See Rolland, *supra* note 32, at 1372 (“The English medieval law of deodand held that when an inanimate object or an animal caused the death of a person, that object was forfeited. . . . The law viewed the object as being guilty itself.”).

<sup>35</sup> Johnson, *supra* note 34, at 465. “[A] felon’s estate [was prohibited] from passing title to property, thus depriving the felon’s decedents of inheritance not only from the felon but also from more remote ancestors.” *Id.* at 466.

majority.<sup>36</sup> In *Bajakajian*, the defendant, a gas station owner, attempted to board a plane from Los Angeles to Cyprus with his wife and two daughters without fully reporting the amount of money he was taking out of the country.<sup>37</sup> After a United States customs inspector approached the defendant, informing him the required reporting any money he was carrying in excess of \$10,000, the defendant told the customs inspector that that he had \$8,000, and that his wife had another \$7,000.<sup>38</sup> After a search of the family's luggage revealed that the defendant was attempting to transport a total of \$357,144, the defendant was taken into custody, and the currency was seized. A federal grand jury later indicted the defendant on three counts, at is-

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<sup>36</sup> 524 U.S. at 334. "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* "It is interesting that Justice Thomas wrote the majority opinion in *Bajakajian* because, along with Justice Scalia, he has concluded that the Eighth Amendment does not require proportionality review of prison sentences, begging the question, 'Is money different?' " Rachel A. Van Cleave, "Death Is Different," *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms For Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 253 (2003) (emphasis added). Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Thomas' majority. *Bajakajian*, 524 U.S. at 323-24 (5-4 decision). "[Justice] Thomas' approach is problematic . . . because [of the] many flaws and inconsistencies in originalist jurisprudence and his incomplete grasp of prison history. [Justice] Thomas' effort to constrain the meaning of the Eighth Amendment has failed to attract the support of any justices other than [Justice] Scalia." Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners' Rights*, 11 B.U. PUB. INT. L.J. 73, 78 (2001). Some commentators have posited that Justice Thomas' inconsistent views on the Eighth Amendment are

a natural outgrowth of his distinctive ideology that values individual responsibility and condemns moral weakness. The tenor of these opinions, however, stems at least in part from Thomas's reaction to the irony of being viewed as a beneficiary of affirmative action at every level of professional attainment – most glaringly during his nomination to fill Justice Thurgood Marshall's seat on the Supreme Court – despite his strong stance against race-conscious policies.

Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Rights Jurisprudence*, 112 HARV. L. REV. 1331, 1332 (1999).

<sup>37</sup> *Bajakajian*, 524 U.S. at 324.

<sup>38</sup> *Id.* at 324-25.

sue in the case being count three, the forfeiture of the \$357,144.<sup>39</sup>

The district court found the defendant's funds were to repay a lawful debt and were not connected to another crime.<sup>40</sup> The district court further found the defendant did not report that he was taking currency outside the United States because he was fearful and distrustful of the government.<sup>41</sup> The court held forfeiture of the entire \$357,144 "would be 'extraordinarily harsh' and 'grossly disproportionate' to the offense in question . . ."<sup>42</sup> and ordered that \$15,000 of the currency be forfeited, the defendant sentenced to three years of probation and a \$5,000 fine, the maximum fine under the Federal Sentencing Guidelines, as opposed to the statutory maximum of \$250,000 for such a reporting offense.<sup>43</sup> The Court of Appeals for the Ninth Circuit affirmed.<sup>44</sup>

The United States Supreme Court granted certiorari and held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."<sup>45</sup> The Court reasoned that a "forfeiture [of the entire \$357,144] would be grossly disproportional to the gravity of his offense. It is larger than the \$5,000 fine imposed by the district court by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government."<sup>46</sup> The majority emphasized two key con-

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<sup>39</sup> *Id.* at 325.

<sup>40</sup> *Id.* at 326

<sup>41</sup> *Id.* (internal quotations omitted).

<sup>42</sup> *Bajakajian*, 524 U.S. at 326.

<sup>43</sup> *Id.* at 325 n.2.

<sup>44</sup> *Id.* at 326; 84 F.3d 334, 335, 340 (9th Cir. 1996).

<sup>45</sup> *Bajakajian*, 524 U.S. at 334.

<sup>46</sup> *Id.* at 339-40.

siderations. The first was substantial deference to Congress. The second was that a “judicial determination regarding the gravity of a . . . criminal offense will be inherently imprecise.”<sup>47</sup> This decision marked a watershed in Eighth Amendment Excessive Fines Clause jurisprudence. Whereas previous cases failed to define what constitutes an excessive fine, *Bajakajian* gave lower courts more, albeit still imprecise, guidance for defining excessiveness.<sup>48</sup>

Two important predecessor cases to *Bajakajian*, *Austin v. United States*<sup>49</sup> and *Alexander v. United States*,<sup>50</sup> were decided on the same day and provide insight into the reasoning behind the *Bajakajian* decision. Despite the majority of circuit case law to the contrary, *Austin* held the Eighth Amendment’s Excessive Fines Clause governed punitive civil forfeitures. Comparatively, *Alexander* was able to separate the Excessive Fines and Cruel and Unusual Punishment analysis through focusing on criminal forfeiture under the Excessive Fines Clause.<sup>51</sup>

In *Austin*, the defendant’s body shop and mobile home were forfeited to the United States government after state authorities executed a search warrant for the defendant’s body shop and mobile home and found small amounts of drugs, paraphernalia, a handgun, and approximately \$4,700 in cash.<sup>52</sup> The United States Supreme

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<sup>47</sup> *Id.* at 336.

<sup>48</sup> See Johnson, *supra* note 34, at 479. “In reaching this conclusion, the Court undertook the task it had deferred in *Austin* and *Alexander* and began to lay the foundations of a newly emerging Excessive Fines Clause jurisprudence.” *Id.* (emphasis added).

<sup>49</sup> 509 U.S. 602 (1993).

<sup>50</sup> 509 U.S. 544 (1993).

<sup>51</sup> Johnson, *supra* note 34, at 471.

<sup>52</sup> *Austin*, 509 U.S. at 605.

Court held the forfeiture statute at issue did not solely serve a remedial purpose because the statute could be construed as serving to both deter and to punish.<sup>53</sup> Most notably, however, the Supreme Court declined to set forth a test for determining what makes a forfeiture constitutionally “excessive,” and held instead that it was an appropriate question for the lower courts to consider and determine.<sup>54</sup>

In *Alexander*, the defendant was sentenced to six years in prison, a \$100,000 fine, and had to pay for his prosecution, incarceration, and supervised release after being found guilty of seventeen obscenity offenses and three counts of violating the Racketeer Influenced and Corrupt Organizations Act (“RICO”).<sup>55</sup> The defendant was also ordered to forfeit his wholesale and retail businesses, including the assets, as well as the almost \$9 million acquired through racketeering.<sup>56</sup> The defendant’s vast racketeering operation included more than a dozen pornography theaters and retail stores, as well as an interest in ten commercial properties, and thirty-one other businesses.<sup>57</sup> The Supreme Court ultimately held the defendant’s punishment for his offense should have been analyzed under the Excessive Fines Clause of the Eighth Amendment to the Federal Constitution.<sup>58</sup> Further, as in *Austin*, the Court declined to answer the

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<sup>53</sup> The *Austin* Court explained that because the legislative intent of the statute was to deter and punish drug related offenses, the statute served more than a remedial purpose. Thus, it was “subject to the limitations of the Eighth Amendment’s Excessive Fines Clause.” *Id.* at 621-22.

<sup>54</sup> *Id.* at 622-23. “Prudence dictates that we allow the lower courts to consider that question in the first instance.” *Id.*

<sup>55</sup> 18 U.S.C.A. § 1962 (West 2000); *Austin*, 509 U.S. at 546, 548.

<sup>56</sup> *Alexander*, 509 U.S. at 548.

<sup>57</sup> *Id.* at 546, 548.

<sup>58</sup> *Id.* at 559.

question of whether or not the defendant's fine was excessive.<sup>59</sup>

Comparatively, the state appellate division in the instant case applied the "gross disproportionality" test that the United States Supreme Court articulated in *Bajakajian*, but used a "multitude of factors" approach in determining whether a fine is excessive under the New York State Constitution.<sup>60</sup> As the New York Court of Appeals enunciated in *County of Nassau v. Canavan*,<sup>61</sup> New York

consider[s] such factors as the seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property and the maximum punishment to which defendant could have been subject for the crimes charged, and the economic circumstances of the defendant.<sup>62</sup>

In *Canavan*, the defendant was arrested for driving while intoxicated, speeding, and failing to signal.<sup>63</sup> The defendant's car was seized after her arrest, and she was given notice that her automobile may be forfeited to Nassau County. The County later commenced a civil forfeiture action after the defendant demanded her car back.<sup>64</sup> The Court of Appeals held the Nassau County ordinance under which the defendant's car was seized was not unconstitutionally vague because it "ma[de] clear what conduct may lead to forfeiture of an in-

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<sup>59</sup> *Id.* ("We think it preferable that this question be addressed by the Court of Appeals in the first instance.").

<sup>60</sup> *Street Vendor Project II*, 841 N.Y.S.2d at 80 (quoting *Bajakajian*, 524 U.S. at 334).

<sup>61</sup> 802 N.E.2d 616 (N.Y. 2003).

<sup>62</sup> *Canavan*, 802 N.E.2d at 622.

<sup>63</sup> *Id.* at 620.

<sup>64</sup> *Id.*

strumentality of a crime.”<sup>65</sup> The court concluded the forfeiture was not disproportionate to the gravity of the offense.<sup>66</sup> The court reasoned that driving while intoxicated is a serious offense, and that if defendant had not been stopped, an innocent victim could have been seriously injured or killed from defendant’s speeding and weaving in and out of lanes with a blood alcohol level of .15 percent.<sup>67</sup> The court also stated in dicta that “the forfeiture of an automobile for a minor traffic infraction such as driving with a broken taillight or failing to signal would . . . be ‘grossly disproportional to the gravity of a defendant’s offense.’ ”<sup>68</sup>

*In re Mitchell*<sup>69</sup> is also instructive in determining what New York deems to be an excessive fine under the New York State Constitution. In *Mitchell*, the defendant was sanctioned for administrative violations by the New York City Department of Consumer Affairs for selling merchandise outside of his newsstand and for taking up an area on the sidewalk greater than seventy-two square feet.<sup>70</sup> After the city fined the defendant \$600 and revoked his vendor license, he continued to operate his newsstand without a license, and was cited twice for these infractions—the second time resulted in the city padlocking his newsstand.<sup>71</sup> After the defendant made a good

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<sup>65</sup> *Id.* at 621. “The ordinance defines an instrumentality of a crime as any property, other than real property and any buildings, fixtures, appurtenances, and improvements thereon, whose use contributes directly and materially to the commission of any offense.” *Id.* at 620 (quotations omitted).

<sup>66</sup> *Canavan*, 802 N.Y.S.2d at 622.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (quoting *Bajakajian*, 524 U.S. at 334).

<sup>69</sup> 554 N.Y.S.2d 151 (App. Div. 1st Dep’t 1990).

<sup>70</sup> *In re Mitchell*, 554 N.Y.S.2d at 152.

<sup>71</sup> *Id.* at 152-53.

faith effort to pursue administrative remedies, the court held “as an exception to the doctrine of administrative finality,” that the sanctioning court’s decision to padlock the defendant’s newsstand was not an abuse of discretion, even though it had only levied fines upon the defendant on two prior occasions.<sup>72</sup>

Further, in *Griffith v. Aponte*,<sup>73</sup> the appellate division, while not articulating a clear test for excessive fines under New York’s constitution, stated it was an excessive penalty where the plaintiff, a licensed process server, was charged \$350 for each of twenty-three charges of misconduct (totaling \$8,050) and had his process server license revoked.<sup>74</sup> The misconduct mostly entailed deficiencies in record-keeping compliance and inaccurate logbook entries as to the details of service of process. The court held that a severe monetary penalty amounting to almost half of what the petitioner made annually as a process server, coupled with a revocation of his process server license, was “shocking to one’s sense of fairness.”<sup>75</sup> The court remanded the defendant’s case, imposed a \$500 fine and limited the revocation of his license to a period not to exceed one year.<sup>76</sup>

To effectively compare and contrast the United States Supreme Court’s interpretation of the Federal Constitution’s excessive fines clause to New York’s interpretation of the state constitution’s excessive fines clause, it is important to emphasize some of the key

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<sup>72</sup> *Id.* at 153. The doctrine of administrative finality employs an “abuse of discretion standard.” *Id.*

<sup>73</sup> 506 N.Y.S.2d 167 (App. Div. 1st Dep’t 1986).

<sup>74</sup> *Griffith*, 506 N.Y.S.2d 167 at 167-68.

<sup>75</sup> *Id.* at 168 (quoting *In re Pell*, 313 N.E.2d 321, 326 (N.Y. 1974)).

<sup>76</sup> *Id.* at 168.



deficiencies in the United State's Supreme Court's case law. The main criticism of Supreme Court jurisprudence on the Excessive Fines Clause is its limited guidance for lower federal courts on when to label a fine or forfeiture "excessive."<sup>77</sup> Courts need to issue decisions that are more in-depth, comprehensive and uniform, allowing for equality and predictability in future cases.<sup>78</sup> Some commentators have noted that "[t]his lack of clarity leads to unpredictability and uncertainty both for government prosecutors seeking to comport with the constitutional mandates and defendants seeking to invoke legitimate constitutional protections."<sup>79</sup> One commentator has posited that the Supreme Court's lack of guidance on this issue has led to "the circuit courts develop[ing] three different tests to determine whether a forfeiture is excessive."<sup>80</sup> These tests are: (1) the instrumentality test;<sup>81</sup> (2) the proportionality test;<sup>82</sup> and (3) a hybrid of the two.<sup>83</sup>

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<sup>77</sup> Matthew C. Solomon, Note, *The Perils of Minimalism: United States v. Bajakajian in the Wake of the Supreme Court's Civil Double Jeopardy Excursion*, 87 GEO. L.J. 849, 854 (1999). "This lack of guidance results in confusion and uncertainty in the lower courts. . . . Moreover, it wastes judicial resources because lower courts must engage in a 'guessing game' about how the Court will eventually rule." *Id.*

<sup>78</sup> *See id.* at 870.

<sup>79</sup> *Id.* at 876.

<sup>80</sup> Rolland, *supra* note 32, at 1385.

<sup>81</sup> Rolland, *supra* note 32, at 1385. "To be constitutional under the instrumentality test, the property forfeited must have a close enough relationship to the crime that the property is deemed an instrumentality of the crime and is therefore rendered guilty." *Id.* "The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relation to the offense." *Austin*, 509 U.S. at 628 (Scalia, J., concurring).

<sup>82</sup> Rolland, *supra* note 32, at 1386. This test first compares the "gravity of the offense" with "the harshness of the punishment. In the second step, the punishment imposed is compared to punishments imposed for crimes with relatively the same gravity of offense. [The last] step compares the punishment given to punishments for the same offense in different jurisdictions." *Id.*

<sup>83</sup> Rolland, *supra* note 32, at 1388.

The first prong of the test, the instrumentality prong, requires the Government to show a "substantial connection between the property, or the appropriate portion thereof, and the offense." If the Government can

Justice Kennedy's vehement dissent in *Bajakajian* also echoed some of these key criticisms.<sup>84</sup> Justice Kennedy criticized the majority for "confus[ing] whether a fine is excessive with whether it is a punishment"<sup>85</sup> and operating under the incorrect assumption that *in personam* forfeitures were "limited to reimbursing the Government for unpaid duties."<sup>86</sup> While he agreed there should be deference to Congress, Justice Kennedy was critical of the majority's application in this case.<sup>87</sup> Further, the dissent expressed concern regarding the impact of the majority's opinion on the government's ability to deter serious money laundering activities.<sup>88</sup> The dissent argued that "[b]y invoking the Excessive Fines Clause with excessive zeal, the majority may in the long run encourage Congress to circumvent it."<sup>89</sup>

In comparing and contrasting the federal and state excessive fines case law, whether or not a civil forfeiture that serves as punishment is excessive is a fact-sensitive inquiry that varies by jurisdiction, especially at the federal circuit court level—a likely product of the Supreme Court's lack of guidance on what constitutes an excessive forfeiture. A federal circuit court's interpretation of *Bajaka-*

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show this connection, the burden then shifts to the defendant to "show that forfeiture of his property would be grossly disproportionate given the nature and extent of his criminal culpability."

*Id.* (quoting *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 985 (9th Cir. 1995)).

<sup>84</sup> *Bajakajian*, 524 U.S. at 344 (Kennedy, J., dissenting) ("For the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment.").

<sup>85</sup> *Id.* at 345.

<sup>86</sup> *Id.* at 346 (internal quotations and citation omitted).

<sup>87</sup> *Id.* at 348 ("The majority's assessment of the crime accords no deference, let alone substantial deference, to the judgment of Congress. Congress deems the crime serious, but the Court does not.").

<sup>88</sup> *Id.* at 354. "[T]he average forfeiture per dollar smuggled could amount, courtesy of today's decision, to far less than 5%. . . . [T]he fine . . . would be a modest cost of doing business in the world of drugs and crime." *Id.* (Kennedy, J., dissenting).

*jian's* holding varies based on the court's level of emphasis on the statutory scheme for forfeiture and the gravity of the offense compared to the gravity of the harm. For example, in *Qwest Corporation v. Minnesota Public Utilities Commission*,<sup>90</sup> the Eighth Circuit held that \$25.95 million in fines issued by a state public utility commission against a telecommunications company for violating certain provisions of the Federal Telecommunications Act were not excessive.<sup>91</sup> The Eighth Circuit considered *Bajakajian's* "grossly disproportionate" standard in terms of "legislative intent and the gravity of the offense relative to the fine."<sup>92</sup> The court reasoned the fine was not excessive because the "amounts [of the penalties were] well within the statutory limits and [were] consistent with the general statutory scheme."<sup>93</sup> Further, the court stated

"[t]he penalty amount [was] also not excessive in light of the gravity of the harm caused by Qwest's failure to file [an Interconnection Agreement with the Minnesota Public Utility Counsel for other local carriers to access]. . . . This failure affected the state regulatory body, the competitive environment in Minnesota, and . . . [those] that were not parties to these agreements."<sup>94</sup>

Comparatively, the Eleventh Circuit held in *United States v. 817 N.E. 29th Drive*,<sup>95</sup> that it was not an excessive fine where the

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<sup>89</sup> *Bajakajian*, 524 U.S. at 355 (Kennedy, J., dissenting).

<sup>90</sup> 427 F.3d 1061 (8th Cir. 2005).

<sup>91</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at scattered sections of 47 U.S.C.); *Qwest*, 427 F.3d at 1063

<sup>92</sup> *Id.* at 1069.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1063, 1069-70.

<sup>95</sup> 175 F.3d 1304 (11th Cir. 1999).

government seized two parcels of the defendant's land after the defendant was convicted in state court of drug possession and drug trafficking.<sup>96</sup> The court reasoned the fine was not excessive because it fell within the maximum statutory penalty and within the Federal Sentencing Guidelines.<sup>97</sup> Further, the court refused to consider that the forfeited property was the defendant's personal residence in its excessive fines analysis because "excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender."<sup>98</sup> However, other federal circuit courts have placed more emphasis on the Federal Sentencing Guidelines than on the statutory scheme at issue. In *United States v. Beras*,<sup>99</sup> the First Circuit found a forfeiture of \$138,794 for failing to report transporting money outside of the United States in excess of \$10,000, constituted an excessive fine based on similar considerations to those the *Bajakajian* Court used.<sup>100</sup> The First Circuit interpreted "*Bajakajian* . . . [to] suggest[] that the maximum penalties provided under the Guidelines should be given greater weight than the statute because the Guidelines take into consideration the culpability of the individual defendant," and therefore, the \$30,000 penalty under the Federal Sentencing Guidelines is the amount that is taken into consideration

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<sup>96</sup> *Id.* at 1307.

<sup>97</sup> *Id.* at 1309-11.

<sup>98</sup> *Id.* at 1311. "The Supreme Court . . . has made clear that whether a forfeiture is 'excessive' is determined by comparing the amount of the forfeiture to the gravity of the offense." *Id.*

<sup>99</sup> 183 F.3d 22 (1st Cir. 1999).

<sup>100</sup> *Id.* at 24. The court considered "(1) that Beras's violation was not related to any other illegal activities; (2) other penalties that Congress has authorized for Beras's crimes as well as the maximum penalty provided by the Sentencing Guidelines; and (3) the extent of the harm caused by Beras's actions." *Id.* at 29.

of whether or not a fine is excessive, and not the \$250,000 maximum fine authorized by Congress.<sup>101</sup>

Contrastingly, New York uses a “multitude of factors test” that is extremely fact-sensitive.<sup>102</sup> New York interprets an excessive fine more broadly than the federal courts and thus does not place as much emphasis on the amount dictated by the applicable statute. New York is also more sympathetic to the impact of the potential fine on the defendant. In *Street Vendor Project II*, the appellate division reasoned that the appropriate test for whether or not a fine, in the context of street vending, is excessive took into account a broad range of factors articulated in *Canavan*.<sup>103</sup> In *Canavan*, the court considered the maximum penalty for driving while intoxicated in determining whether forfeiture of a defendant’s car was an excessive fine, and also looked at the “seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property . . . and the economic circumstances of the defendant.”<sup>104</sup> Further, *Mitchell* placed great emphasis on the fine’s ability to dissuade recidivism of a statutory violation,<sup>105</sup> while *Griffith* was highly sympathetic to the fine in relation to the amount of the defendant’s income, as well as its impact on the defendant’s ability to earn a living.<sup>106</sup>

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<sup>101</sup> *Id.* at 29 n.5.

<sup>102</sup> *Street Vendor Project II*, 841 N.Y.S.2d at 80.

<sup>103</sup> *Id.*

<sup>104</sup> *Canavan*, 802 N.E.2d at 622.

<sup>105</sup> *In re Mitchell*, 554 N.Y.S.2d at 153. “Having failed to dissuade petitioner from committing the same infractions by levying fines on two prior occasions, respondent’s decision to revoke his license cannot be said to be an abuse of discretion.” *Id.*

<sup>106</sup> “[T]he severe economic sanction imposed (amounting to approximately half of petitioner’s annual income as a process server) coupled with revocation of his [process server]

Given the inconsistent views and fact-sensitive nature evident in the United States Supreme Court's interpretation of the Federal Constitution's Excessive Fines Clause and New York's interpretation of the excessive fines clause under the New York Constitution, it is difficult to predict how future courts at both the state and federal level will rule on what constitutes an excessive fine. The evolution of case law in a jurisdiction appears to be a largely determinative factor in deciding whether a fine is excessive.

In *Street Vendor Project II*, however, the solution to the dispute between New York City and the street vendors resulting from the increased penalty schedule lies less in how the law defines "excessive" and more in how the law views the social value of a street vendor. In short, the answer to the street vendor's plight lies less in the law and more in sociology.<sup>107</sup>

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license is 'shocking to one's sense of fairness' and therefore unlawful." *Griffith*, 506 N.Y.S.2d at 168 (quoting *In re Pell*, 313 N.E.2d at 326).

<sup>107</sup> See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 31-32 (1961).

The first thing to understand is that public peace – the sidewalk and street peace – of cities is not kept primarily by the police, necessary as police are. It is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves.

See also James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 31. The "broken windows theory" can be explained as follows:

[I]f a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken. This is as true in nice neighborhoods as in run-down ones. Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are populated by window-lovers; rather, one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing. (It has always been fun.)

See also MITCHELL DUNEIER, *SIDEWALK* 315 (1999) proposing a

"fixed windows theory," which explicitly follows the "broken windows" logic in reverse. When the government abdicates its responsibility to

[W]e have become accustomed to thinking of the law in essentially individualistic terms. The law defines *my* rights, punishes *his* behavior, and is applied by *that* officer because of *this* harm. We assume, in thinking this way, that what is good for the individual will be good for the community, and what doesn't matter when it happens to one person won't matter if it happens to many.<sup>108</sup>

When society is ready to consider a street vendor's value to a community's safety<sup>109</sup> and local economy,<sup>110</sup> the law will follow.

In the meantime, while the street vendors of New York City are waiting for the law to catch up to societal values, there are key compromises that street vendors and local government entities, such as Business Improvement Districts ("BIDs"), can reach in order to curtail the number of violations a street vendor incurs. Among them are BIDs placing fewer planters on city sidewalks and installing permanent vending tables with benches, making it more feasible for street vendors to operate and have more space to comply with city regulations.<sup>111</sup> Although the present legal dispute has been finalized,

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help persons who come out of prison to find homes and jobs, such persons are left to their own devices if they are to transform themselves into persons that make a contribution to society. Some behavior that appears disorderly to the casual observer is actually bringing about community controls, rather than leading to their breakdown.

<sup>108</sup> Wilson and Kelling, *supra* note 107, at 36.

<sup>109</sup> See DUNEIER, *supra* note 107, at 316-17.

[O]rder is a by-product of a system of social regulations that is grounded in an understanding of city life in its uneasy complexity. Cities should not establish too rigorous standards for pedestrian congestion, and judges should be careful of efforts to use pedestrian congestion as an excuse to eliminate vendors from high-rent districts.

<sup>110</sup> See *id.* at 317. "It is vital to the well-being of cities with extreme poverty that there be opportunities for those on the edge to engage in self-directed entrepreneurial activity."

<sup>111</sup> See *id.* "Business Improvement Districts must understand that the informal economic

the issue will undoubtedly be re-litigated when new fines go into effect.

*Sarah Marx*

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and social life has great value and need not be aesthetically pleasing.” *Id.* Sean Basinski, of the Urban Justice Center, has stated that “[t]he hypocrisy is that the same people who are complaining about vendors taking up space, are taking up space with illegal planters . . . [a]nd the city turns a blind eye.” Denny Lee, *Neighborhood Report: SoHo; A Modest Touch of Green Makes Vendors See Red*, N.Y. TIMES, Sept. 21, 2003, at 5.



## **DUE PROCESS**

United States Constitution Amendment XIV:

*[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .*

New York Constitution article I, section 6:

*No person shall be deprived of life, liberty or property without due process of law.*

