



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 11, 2019

The Honorable James White  
Chair, Committee on Corrections  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

Opinion No. KP-0267

Re: Protections against excessive fines under  
the U.S. and Texas Constitutions (RQ-0277-KP)

Dear Representative White:

In *Timbs v. Indiana*, the U.S. Supreme Court held that the Eighth Amendment's Excessive Fines Clause of the U.S. Constitution is an incorporated protection applicable to the States under the Due Process Clause of the Fourteenth Amendment. 139 S. Ct. 682, 686–87 (2019). In light of *Timbs*, you ask several questions about the protections against excessive fines under the U.S. and Texas Constitutions.<sup>1</sup> The Eighth Amendment in the Bill of Rights provides:

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

U.S. CONST. amend. VIII. The Eighth Amendment's protection against excessive fines, like its proscription of excessive bail and cruel and unusual punishment, "guards against abuses of government's punitive or criminal-law-enforcement authority." *Timbs*, 139 S. Ct. at 686. The Bill of Rights was conceived as a limitation on the powers of the federal government, and initially, courts determined that the first eight amendments did not apply to the States. *Id.* at 687; *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010). But the Due Process Clause of the Fourteenth Amendment, adopted after the Civil War, incorporates certain of the guarantees set out in the Bill of Rights, rendering them applicable to both the States and the federal government. *McDonald*, 561 U.S. at 754, 764–65. Rather than conclude that the Due Process Clause incorporates the entire Bill of Rights, however, the U.S. Supreme Court determined "that the only rights protected against state infringement by the Due Process Clause were those rights of such a nature that they are included in the conception of due process of law." *Id.* at 759 (quotation marks omitted). Thus, the Court has examined the Bill of Rights guarantee-by-guarantee over the years to determine which are incorporated rights applicable to the States—a process known as selective incorporation. *Id.* at 763–65.

"A Bill of Rights protection is incorporated . . . if it is fundamental to our scheme of ordered liberty, or deeply rooted in this Nation's history and tradition." *Timbs*, 139 S. Ct. at 687 (quotation

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<sup>1</sup>See Letter from Honorable James White, Chair, House Comm. on Corrs., to Honorable Ken Paxton, Tex. Att'y Gen. at 3–5 (Mar. 15, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

marks omitted). To make that determination, the Supreme Court in *Timbs* traced the lineage of the Excessive Fines Clause from the Magna Carta through 17th-century English law and American colonial-era provisions. *Id.* at 687–88. The Court also recounted the history of governmental abuses that warranted protection from excessive fines as a fundamental right. *Id.* at 688–89. Because of the Anglo-American history of the right to be free from excessive fines and the right’s widespread acknowledgment as fundamental, the Court held: “The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment” and thus applicable to the States. *Id.* at 687, 689.

We first consider your question whether a Texas court would conclude that the Eighth Amendment’s excessive fines guarantees are incorporated by the Fourteenth Amendment’s Due Process Clause or, alternatively, by its Privileges and Immunities Clause. Request Letter at 3. The Fourteenth Amendment guarantees not only due process of law, but also the privileges and immunities of U.S. citizens. U.S. CONST. amend. XIV, § 1. Rights under the Due Process Clause and the Privileges and Immunities Clause present different issues. *McDonald*, 561 U.S. at 759. As discussed above, the Court in *Timbs* held that the Fourteenth Amendment’s Due Process Clause incorporates the Eighth Amendment’s excessive fines protection as against the States. 139 S. Ct. at 686–87. Texas courts “are bound by U.S. Supreme Court precedent unless and until the Supreme Court overrules it.” *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 732 n.11 (Tex. 2017) (citation omitted).<sup>2</sup>

You also ask whether Texas courts would recognize article I, section 13 of the Texas Constitution “as a constitutional guarantee that protects Texans from excessive fines.” Request Letter at 3. The first sentence of article I, section 13 provides:

Excessive bail shall not be required, nor excessive fines imposed,  
nor cruel or unusual punishment inflicted.

TEX. CONST. art. I, § 13. Texas courts interpret this provision as protection from excessive fines. *See, e.g., In re Xerox Corp.*, 555 S.W.3d 518, 527 n.53 (Tex. 2018); *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980); *Ex parte Dotson*, 76 S.W.3d 393, 405 & n.57 (Tex. Crim. App. 2002); *see also Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 689 (Tex. 2002) (stating “[l]ower courts are bound to follow [the Texas Supreme] Court’s decisions”).

Next, you ask how a court would “likely interpret a law that mandates the executive branch to enforce a statute accompanied with an excessive fine.” Request Letter at 3. Courts begin statutory construction presuming the statute is constitutional and attempt to interpret a statute “in a manner that renders it constitutional if it is possible to do so.” *City of Pasadena v. Smith*, 292 S.W.3d 14, 19 (Tex. 2009). But if a court concludes that a statute imposes an unconstitutionally

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<sup>2</sup>In his concurring opinion in *Timbs*, Justice Thomas agreed that the Fourteenth Amendment incorporates the Eighth Amendment guarantees as fully applicable to the States but concluded that incorporation is due to the Privileges and Immunities Clause rather than the Due Process Clause. 139 S. Ct. at 691, 698 (Thomas, J., concurring). Justice Gorsuch also agreed that the Fourteenth Amendment incorporates the Eighth Amendment guarantees as against the States but found it unnecessary to decide which clause is the proper vehicle for incorporation. *See id.* at 691 (Gorsuch, J., concurring).

excessive fine, likely the court would not enforce the fine. *See Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 795 n.2 (Tex. App.—Austin 2008, no pet.) (stating “[a]n unconstitutional statute is void and cannot provide a basis for any right or relief”). Whether the court would declare all or only part of the statute invalid would depend on the particular statute. Unlike federal law, Texas has a law requiring courts to save the balance of a law when one part is unconstitutional. *See* TEX. GOV’T CODE § 311.031 (regarding severability of statutes).

You also ask whether “Texas and the American colonies share a similar constitutional legacy” and, if so, how that legacy would affect a court’s excessive-fines analysis. Request Letter at 5. The Supreme Court explained in *Timbs* that the language of the Eighth Amendment Excessive Fines Clause is almost the same as that in the 17th century English Bill of Rights. 139 S. Ct. at 688. Language virtually identical to the Eighth Amendment appeared in every Texas constitution from 1836 to the present.<sup>3</sup> Because of the state and federal provisions’ common language and shared history, a Texas court would likely conclude that federal jurisprudence is instructive about, if not determinative of, excessive fines issues under article I, section 13 of the Texas Constitution. *See Timbs*, 139 S. Ct. at 687 (stating that “if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits”); *cf. Corpus Christi v. Pub. Util. Comm’n*, 51 S.W.3d 231, 242 (Tex. 2001) (relying on U.S. Supreme Court case law to determine a takings issue under the Texas Constitution because of the similarity of the state and federal protections); *Comm’n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 434 (Tex. 1998) (applying federal First Amendment standards absent a showing that the text, history, and purpose of the Texas Constitution provides broader protection); *Reyes v. State*, 557 S.W.3d 624, 631 (Tex. App.—El Paso 2017, pet. ref’d) (holding that there is no significant difference in the protections against cruel and unusual punishment in the Eighth Amendment of the U.S. Constitution and article I, section 13 of the Texas Constitution).

Your remaining questions concern how a court would determine whether a fine is unconstitutionally excessive and what circumstances or factors a court would consider when making that determination. Request Letter at 4–5. While the U.S. Supreme Court in *Timbs* held that the Fourteenth Amendment incorporates the Eighth Amendment protection against fines, it did not determine whether the specific fine in question was excessive. *See Timbs*, 139 S. Ct. at 690–91. Instead, it remanded the case for the lower court to make that determination. *See id.* at 691. The case remains pending in the Indiana Supreme Court, and the Office of the Attorney General is involved in that appeal as amicus curiae. *Indiana v. Timbs*, No. 27S04-1702-MI-00070 (Ind. Mar. 27, 2017) (pending). Given the lack of guidance from the U.S. Supreme Court on a test to determine excessive fine questions and the pending litigation surrounding the application of *Timbs* to specific excessiveness determinations, we are unable to answer your final questions. *See* Tex. Att’y Gen. Op. Nos. GA-0502 (2007) at 3–4 (declining to opine on matters of pending litigation and instead deferring to the court to decide the pending issue); MW-205 (1980) at 1; V-291 (1947) at 5–6.

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<sup>3</sup>*See* REPUB. TEX. CONST. OF 1836, Declaration of Rights 11th, reprinted in 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1083 (Austin, Gammel Book Co. 1898); TEX. CONST. OF 1845, art. I, § 11; TEX. CONST. OF 1861, art. I, § 11; TEX. CONST. OF 1866, art. I, § 11; TEX. CONST. OF 1869, art. I, § 11; TEX. CONST. art. I, § 13.

**S U M M A R Y**

Courts following U.S. Supreme Court precedent would conclude that the Due Process Clause of the Fourteenth Amendment incorporates the Eighth Amendment protection against excessive fines.

Courts recognize article I, section 13 of the Texas Constitution as a constitutional protection against excessive fines. A court would not enforce an unconstitutionally excessive fine. Depending on the statute, a Texas court would be obligated to follow Texas law that requires it to separate the unconstitutional fine and uphold the portion of the statute that is constitutional, if possible.

A Texas court would likely conclude that the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution is binding on the State, and federal jurisprudence is instructive about, if not determinative of, excessive fines issues under article I, section 13 of the Texas Constitution.

Very truly yours,



KEN PAXTON  
Attorney General of Texas

JEFFREY C. MATEER  
First Assistant Attorney General

RYAN L. BANGERT  
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER  
Chair, Opinion Committee

WILLIAM A. HILL  
Assistant Attorney General, Opinion Committee