BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Investigation into Kansas Gas Service Company, a Division of One Gas Inc. Regarding the February 2021 Winter Weather Events, as Contemplated by Docket No. 21-GIMX-303-MIS.	)))))	Docket No. 21-KGSG-332-GIG

PETITION FOR RECONSIDERATION OF KCC ORDER DENYING NGTCC'S MOTION REQUESTING ISSUANCE OF A SUBPOENA

COMES NOW the Natural Gas Transportation Customer Coalition ("NGTCC") and for its Petition to the State Corporation Commission of the State of Kansas ("Commission" or "KCC") respectfully states and alleges as follows:

Introduction

1. The NGTCC has approximately 400 members in Kansas. As noted in prior pleadings in this Docket, Members include:

   a. 178 school districts located throughout Kansas who utilize the Kansas Joint Utility Management Program ("KJUMP") for natural gas transportation service offered by the Kansas Association of School Boards ("KASB");

   b. Associated Purchasing Services Corporation, the group purchasing organization of the member medical facilities of the Kansas Hospital Association, located throughout Kansas;

   c. The Archdiocese of Kansas City in Kansas and member parishes and schools;

   d. Associated Wholesale Grocers, Inc. (Kansas City, Kansas);

   e. Henke Manufacturing Corporation (Leavenworth, Kansas);

   f. Chance Rides Manufacturing, Inc. (Wichita, Kansas); and

   g. Femco, Inc. (McPherson, Kansas).

2. So as to immediately address herein the critical issues of this Petition, the NGTCC has attached as Exhibit A hereto, the required procedural history related to the Subpoena Request.

3. NGTCC members are transportation customers. We are not sales customers of Kansas Gas Service ("KGS"). As noted hereinafter, the Requested Subpoena and documents related thereto will be used for the purpose of resisting KCC Sanctioned Penalties which we believe are excessive and which hold no reasonable relationship to the contended violation of the KGS transportation tariff. Our right to proffer such defense is based on the U.S. Supreme Court case of *Timbs v. Indiana, 139 S.Ct. 682,* decided by the U.S. Supreme Court on February 20, 2019, attached hereto as Exhibit B.

4. The subpoenaed documents will permit NGTCC members to obtain information critical to the determination of whether the Penalty charged them is "excessive," based on the manner in which it was constructed, whether the trades that were included in the Index were arm's length or even completed, whether the trades were independent or were with affiliates, and whether they were sufficient in number to be statistically meaningful as a representation of the market on the days in question.

5. Without access to the information requested in the subpoena, NGTCC members and all Kansas transportation customers of KGS are doomed to pay Penalties that are facially suspect under the U. S. Constitution, and which the Commission has recognized to be of legitimate concern. Stated more starkly, if the Commission does not permit us to have access to documents to defend our constitutional rights through the issuance of the Requested Subpoena, the KCC has given state approval to collect Penalties that have extremely questionable constitutional support.

6. Separate and apart from any issue related to any consideration of natural gas costs of Kansas Gas Service (KGS), Section 11.06 of the KGS tariff, authorized by the Commission, imposes a Penalty. This section of the KGS tariff is unrelated to the natural gas costs of KGS - it is solely and exclusively a Penalty. The cost of gas of KGS could be materially higher or materially lower than the Penalty - it does not matter - the Penalty is a stated amount.

7. Protection against a Penalty that is "excessive" and which is not proportional to the contended tariff violation, has special and very direct protection under the U.S. Constitution. (*Timbs v. Indiana*) The Penalty is "facially suspect" in constitutional terms.

8 Upon a proper showing that a Penalty is "excessive" and is "not proportionate" to the offense committed, the Penalty is unconstitutional. The U.S. Constitution's Eighth Amendment Excessive Fines Clause is incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. (*Timbs v. Indiana*).

9. On February 17, 2021, the Penalty – the Gas Daily Index for Southern Star – was $622.78 per MMBtu. The Gas Daily Index for February 17, 2021, for Panhandle Eastern – the pipeline that makes the second most volume deliveries in Kansas, was $129.38 per MMBtu. Some Kansas customers facing a Penalty based on the Southern Star Gas Daily Index, cannot even physically receive service from Southern Star. The Penalty is, without a doubt, "facially suspect" under the U. S. Constitution.

10. Compared to the other pipelines serving Kansas and their applicable Daily Indices, in the period of February 13 - 17, the Penalty is $100 - $500 per MMBtu higher each day. The Penalty, therefore, has an immediate and direct economic impact on thousands of public schools, hospitals, universities and community colleges, the faith community, community service organizations, and businesses of all sizes located throughout Kansas. The economic

impact on NGTCC members and thousands of Kansas transport customers is so material that some will be unable to continue their operations. They will be lost to Kansas. The effect of the Penalty will be economically crippling throughout Kansas.

11. Separate and apart from the constitutional protection, NGTCC believes that neither the Commission nor any of the Parties to this proceeding, want a Penalty that is excessive and disproportionate to any violation of a tariff provision - but that is exactly what occurs if the Southern Star Gas Daily Index - the Penalty – does not accurately reflect the daily market for any reason.

12. This KCC authorized Penalty is the midpoint of the S & P Global Platt's Gas Daily for Southern Star Gas Pipeline. Reference to the Penalty was included at Paragraph 5 of the Commission's Order.

13. Unlike KGS sales gas customers, Coalition members suffer immediate economic harm through application of the Penalty – i.e. if the Southern Star Gas Daily Index is not accurate. Further, unlike KGS sales customers, Coalition members have no 10-year payment plan, and no opportunity to recoup losses, if the Southern Star Gas Daily Index Price is reduced in later years.

14. As will be described hereinafter, 6,217 KGS transportation customers in Kansas - including about 400 members of the Coalition, are subject to Penalties of up to $622.78 per MMBtu, based entirely on the Southern Star Gas Daily Index. The Commission in its Order Denying Request for Subpoena, stated that NGTCC had legitimate concerns regarding the Southern Star Gas Daily Index, and that the Commission shared those concerns. We thank the Commission for its frankness, and we agree – there is much to be concerned about regarding the

Southern Star Gas Daily Index in February, and NGTCC members are bearing tens of millions of dollars of those concerns.

15. As will hereinafter be discussed, Coalition members immediately and currently face tens of millions of dollars of state sanctioned Penalties, solely based on the Southern Star Gas Daily Index.

The Commission Order

16. The Commission Order (Exhibit C), dated September 9, 2021, denies the NGTCC Request that the Commission issue a Subpoena for those records of S & P Global Platts Gas Daily ("Gas Daily,") described in Paragraph 5 of the Order. However, very importantly, the Commission highlighted the pending NGTCC Motion for Stay.

17. NGTCC, by design, separated the Stay Request into two separate components because they have distinctly different protections under the law. The first – the Penalty component – has a high level of constitutional protection not accorded to the second component – cost pass through in a commercial setting regulated by a government entity.

18. The Commission recognized the two distinct components of the NGTCC Request for Stay at Paragraph 5:

(1) That the Commission Stay the provisions of any KCC approved tariff that includes a Gas Daily Index Price as a Penalty until the Commission completes its Investigation; and

(2) That the Commission Stay the provisions of the pass through of costs that include Gas Daily Price Indices until the Commission concludes its Investigation.

19. At Paragraph 9 of the Commission's Order it is stated:

> The Commission shares NGTCC's concerns regarding the wholesale gas markets and potential market manipulation. However, as explained in Staff's response, the power to investigate wholesale market behavior related to the data reported to S & P Global and the corrective action where a market participant behaves inappropriately rests with FERC.

20. While NGTCC may have a difference of opinion regarding the Order's finding, it is inapplicable to this Petition for Reconsideration. The Penalty provision authorized by the KCC – KGS Tariff Section 11.06 – is a Kansas retail gas transportation tariff, wholly within the jurisdiction of the KCC. There is no jurisdictional authority at FERC over Penalty provisions of a Kansas state tariff.

21. At Paragraph 10, the Commission states:

> While NGTCC may raise legitimate concerns, the Commission is simply not the forum for such an investigation. The Commission is focused on the behavior of its jurisdictional utilities, and whether they acted prudently under the circumstances.

22. Precisely. The KCC authorized Penalty – KGS Section 11.06 – is a local applied tariff of a KCC jurisdictional utility applicable to 6,217 Kansas transportation customers that are facing tens of millions of dollars of Penalties.

Summary Presentation

23. NGTCC members (about 400 in Kansas) are transport customers of Kansas Gas Service (KGS). There are 6,217 natural gas transport customers on the KGS system (Exhibit D). Coalition members transport natural gas on the facilities of KGS pursuant to a KCC authorized transportation tariff of KGS. The KGS tariff provides the terms and conditions of service for gas transportation, that the KCC has authorized and approved, and found to be consistent with KCC rules and regulations, as well as applicable Kansas statutes and regulations.

24. The KGS tariff, authorized by the KCC, includes Section 11 – Pipeline System Restrictions and Priorities.

25. Section 11.06 of the KCC approved tariff of KGS provides as follows:

> **Penalties for Unauthorized Usage**: A customer's unauthorized usage under an OFO or POC may cause the incurrence of penalties.
>
> 11.06.01 **Tolerance Levels**: **Penalties** may be assessed:
>
> (1) During an OFO or POC, when Unauthorized Deliveries to EFM meters exceed + or - 5% of authorized daily delivery levels.
>
> (2) During an OFO or POC, when Unauthorized Over-Deliveries to RDQ meters are less than daily delivery levels or when Unauthorized Under-Deliveries exceed authorized daily delivery levels.
>
> 11.06.02 **Penalties during OFOs and POCs**: Penalties for Unauthorized Over-Deliveries or Under-Deliveries shall be calculated as follows.
>
> (1) **Standard OFO Penalties**: For each day of the Standard OFO, **the greater of $5 or 2 1/2 times the daily midpoint stated on Gas Daily's Index for Southern Star Central Gas Pipelines (Oklahoma)** times the MMBtu of Unauthorized Over- or Under-Deliveries that exceed the tolerance level applicable under Section 11.06.01.
>
> (2) **Emergency OFO Penalties**: For each day of the Emergency OFO, **the greater of $10 or 5 times the daily midpoint stated on Gas Daily's Index for Southern Star Central Gas Pipelines (Oklahoma)** times the MMBtu of Unauthorized Over- or Under-Deliveries that exceed the tolerance level applicable under Section 11.06.01.
>
> (3) **POC Penalties**: For each day of the POC, **the greater of $20 or 10 times the daily midpoint stated on Gas Daily's Index for Southern Star Central Gas Pipelines (Oklahoma)** times the MMBtu of Unauthorized Over- or Under-Deliveries

> that exceed the tolerance level applicable under Section 11.06.01. (Emphasis added)

26. The KCC has authorized KGS to Penalize transportation customers for noncompliance with transportation tariffs of KGS, in amounts that are multiples of "the daily midpoint stated on Gas Daily's Index for Southern Star Central Gas Pipelines (Oklahoma). KGS in this Docket has requested to assess the Penalty, without application of the multiplier. The Southern Star Central Gas Pipeline Index for February 2021 is attached as Exhibit E.

27. NGTCC points out that Exhibit E demonstrates the extremely material difference of the Gas Daily Price Indexes that served Kansas, that include Southern Star, Panhandle Eastern, Northern Natural, ANR, and NGPL. The Coalition also points out to the KCC that the Southern Star Gas Daily Index includes no reference to Wyoming locations which supply as much as 25% or more of the total at typically lower prices than Oklahoma and Kansas production attached to Southern Star.

28. Based on pleadings in this Docket, the NGTCC understands the position of the Citizen's Utility Ratepayer Board (CURB) and the KCC Staff to be that Penalties must be assessed or otherwise KGS sales customers would be providing an impermissible subsidy to the KGS transportation customers.

29. In essence, CURB and Staff contend that not all of the approximately $390 million of additional gas costs of KGS in February 2021 should be the responsibility of sales customers. Instead, the Penalties must be assessed against transport customers that were in noncompliance with OFO and POC requirements. The Penalty amounts would then be an offset to amounts otherwise payable by sales customers.

The Penalties

30. KGS declared and imposed either or both, Operational Flow Orders (OFO) and Protection Orders (POC) for each day during the period February 11-23, 2021. The Penalty for violation of the OFO on the POC is "the daily midpoint stated on Gas Daily's Index for Southern Star Central Gas Pipelines Oklahoma) for the following days as set forth below:

February 11 - $9.62/MMBtu
February 12 - $44.78/MMBtu
February 13 - $329.59/MMBtu
February 14 - $329.59/MMBtu
February 15 - $329.59/MMBtu
February 16 - $329.59/MMBtu
February 17 - $622.78/MMBtu
February 18 - $44.53/MMBtu
February 19 - $7.94/MMBtu
February 20 - $4.38/MMBtu
February 21 - $4.38/MMBtu
February 22 - $4.38/MMBtu
February 23 - $2.69/MMBtu

31. The amount of the Penalty varied in the period of February 11 – 23, from $2.69/MMBtu to a level of $622.78/MMBtu. The Penalty varied 23,151% in 13 days.

32. KGS has calculated the KCG authorized penalties based on the Southern Star Gas Daily Index to be ** **. (Confidential Exhibit F)

33. NGTCC members are either directly subject to the Penalty as transporters, or indirectly subject to the Penalty through the contract provisions with their transportation agent/aggregator marketers. Coalition members have contracts with the following marketers that are Intervenors in this Docket: Symmetry, Constellation, BlueMark, and WoodRiver.

34. NGTCC members and all Kansas transportation customers of KGS are currently under direct economic threat of KCC authorized Penalties, in amounts of tens of millions of dollars, and have been directly under such *Penalty* threat since February 11, 2021. The amount of

these Penalties are dependent upon the Southern Star Gas Daily Index. The records sought in the NGTCC Subpoena Request, are the very records that are both the Penalty itself, and the foundational documents used to calculate the Penalty.

35. NGTCC and all Kansas transportation customers are directly subject to the Southern Star Gas Daily Index, even though they are not sales customers of KGS. Transportation customers are ratepayers of KGS and subject to KCC jurisdiction, and pay transportation rates.

36. In this Docket, KGS has asked the Commission to authorize KGS to waive the multiplier of the "Gas Daily's Index for Southern Star Central Gas Pipelines (Oklahoma), but instead to send invoices for collection of the Penalty. Coalition members are currently, and directly under Penalty threat authorized by the KCC for a material portion of ** .**

The Arguments Made by Staff and Adopted by the Commission Solely Relate to an Analysis of the Cost of Gas of KGS, and Are Not Relevant to the Right of NGTCC to Seek Gas Daily Index Documents to Defend Against KCC Sanctioned Penalties.

37. The NGTCC has both a state constitution and federal constitutional right to confront the charges against it, and to contest the lawfulness of a Penalty that varies 23,151% in 13 days.

38. The Request of NGTCC for the Commission to Issue a Subpoena to S & P Global Gas Daily speaks directly to the Penalties in the amount of ** ** that the KCC has sanctioned to be collected from Coalition Members and overall, 6,217 transportation customers of KGS in Kansas.

39. Arguments of the KCC Staff, which were included in the KCC Order on September 9, 2021, relate solely to the KGS cost of gas and are far wide of the mark. The manner in which the KCC considers the Gas Daily Index for Southern Star or any other Index Pricing in a KGS gas costs purchase review, is solely for the Commission to determine. But it

would be both unfair and unconstitutional to sacrifice the due process rights of gas transportation customers to obtain evidence to confront the Penalty Issue, based on the unrelated issues of the prudence of KGS gas costs – for gas that is obtained not solely by KGS from Southern Star, but from at least nine (9) different pipelines with nine (9) different Index Prices. They are two entirely separate issues.

40. The KCC Staff argues that granting of the NGTCC Motion would affect the full recovery of gas costs by KGS in this Docket, which would be inequitable. That contention is incorrect. Section 11.06 of the KGS Tariff is a Penalty provision. It does not claim to be, or is it a provision that relates to the KGS Cost of Gas. It is a Penalty, that includes a formula (the Southern Star Gas Daily Index) to measure the amount of Penalty.

41. The KCC Staff contended, and the Commission agreed, that FERC was the proper forum to investigate "wholesale gas market manipulation."[1] Again, this has no bearing upon the Penalty provisions of a state mandated Penalty affecting thousands of Kansas transport customers. The fact that FERC may be investigating a wholesale gas market manipulation issue cannot form the basis for denying transportation customers their right under both the federal and state constitutions to challenge excessive Penalties that do not carry a rational relationship to the contended violation.

42. Absent issuance of the Subpoena, NGTCC members have no avenue to protect their federal and state due process rights. They have no other options.

43. The Commission Order includes a reference to the Subpoena power of the Attorney General as an alternative path for the concerns of the NGTCC. That reference is not applicable and would not be appropriate herein. This is a KCC sanctioned and authorized

[1] The FERC Investigation, and any specific areas of that Investigation are not open to the public. (Exhibit G). Any discussion of that Investigation would be purely speculative.

Penalty. It is a part of a KCC sanctioned and authorized tariff. The Attorney General does not regulate public utility transportation in Kansas - - that is the exclusive domain of the KCC. Any and all actions related to a KCC sanctioned and authorized tariff must exclusively come from the KCC.

Conclusion

44. The Commission recognized the legitimate concerns of NGTCC in its Order, and we are grateful to the Commission for its recognition of both the seriousness and importance of the issue of the accuracy of the Southern Star Gas Daily Index Price. To several NGTCC members, the accuracy of the Southern Star Gas Daily Index and the Penalties that they face, will determine whether or not they can continue in business and remain a part of Kansas commerce.

45. NGTCC respectfully requests that the Commission Reconsider its Order, and Issue the Requested Subpoena, so that NGTCC members can be afforded the protection against "excessive" Penalties granted to them by the U. S. and Kansas Constitutions.

Respectfully submitted,

/s/ James P. Zakoura

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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

James P. Zakoura, being duly sworn upon his oath, deposes and states that he is the Attorney for the Natural Gas Transportation Customer Coalition, that he has read and is familiar with the foregoing *Petition for Reconsideration of KCC Order Denying NGTCC's Motion Requesting Issuance of a Subpoena*, and that the statements therein are true to the best of his knowledge, information, and belief.

James P. Zakoura

SUBSCRIBED AND SWORN to before me this 14th day of September, 2021.

Notary Public

My Appointment Expires:

NOTARY PUBLIC - State of Kansas
SHERREE D. CLINTON
My Appt. Expires 7-8-2025

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2021, the foregoing *Petition for Reconsideration of KCC Order Denying NGTCC's Motion Requesting Issuance of a Subpoena* was electronically filed with the Kansas Corporation Commission and that one copy was delivered electronically to all parties on the service list as follows:

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/s/ James P. Zakoura
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EXHIBIT A

EXHIBIT A
Procedural History

1. On May 28, 2021, Kansas Gas Service (KGS) filed a Motion for Limited Waiver from Section 11.06 of its tariff provisions to remove the multipliers from the calculation of penalties incurred by Marketers and Individually Balanced Transportation Customers for violating KGS' Operational Flow Orders and/or Period Curtailment Orders issued during Winter Storm Uri.

2. On June 10, 2021, the Commission issued a Supplemental Protective and Discovery Order to allow the Office of the Kansas Attorney General to review discovery produced in this Docket.

3. On July 30, 2021, the Natural Gas Transportation Customer Coalition (NGTCC) filed a Motion Requesting the Issuance of a Subpoena Compelling Testimony and Production of Documents from S & P Global Platts Gas Daily, for all documents relating to the S & P Global Platts Gas Daily Index for Southern Star Pipeline from February 10-20, 2021, and further compelling the testimony of records custodian witness(es) to explain the subpoenaed documents and in what manner they were used, included or excluded from the Gas Daily Index Prices for the period February 10-20, 2021. NGTCC considers S & P Global to be the leading independent provider of information and benchmark prices for the commodity and energy markets. NGTCC also seeks stays on: (1) any use of the S & P Global Platts Gas Daily Index Price posting as a reference in any KCC approved tariff and/or as the basis for the collection of any penalty, until the Commission completes its review of S & P Global Gas Daily Price Index Postings, and issues a further Order regarding the utilization of S & P Global Gas Daily Price Index Postings

from February 2021, and (2) the pass through to Kansas ratepayers costs resulting from a price term referencing the S & P Global Platts Gas Daily Price Index until the Commission completes its review of S & P Global Platts Gas Daily Price Index and issues an Order on the utilization of S & P Global Gas Daily Price Index Postings from February 2021.

4. On August 3, 2021, NGTCC supplemented its Request to Issue a Subpoena by adding KGS' responses to Data Requests, to purportedly evidence that KGS has failed to investigate, challenge, or appeal the Index Pricing that is the basis of the requested $451 million recovery from Kansas ratepayers.

5. On August 6, 2021, Intervenors Bonavia Properties, L.L.C., Catholic Diocese of Wichita, and TempleLive Wichita LLC endorsed NGTCC's Motion to Issue a Subpoena to S & P Global, claiming the "entire foundation of KGS's financial plan and tariff hinge on the legitimacy of the S&P Global Platts gas daily index."

6. On August 27, 2021, Staff filed its opposition to NGTCC's motion for a subpoena, questioning the jurisdictional authority to provide NGTCC the relief requested. Staff notes that the Federal Energy Regulatory Commission (FERC) monitors the publication of indices, such as S & P Global, and requires all data providers to register with it, and subjects all market participants to potential audit by FERC. Staff explains, FERC's Office of Enforcement (OE), rather than the Commission, has the authority to investigate market behavior relating to the data reported to S & P and take corrective action where a market participant behaves inappropriately. The FERC already has an open docket relating to price indices. The Commission issued its Order Denying Request to Issue Subpoena on September 9, 2021.

EXHIBIT B

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TIMBS *v.* INDIANA

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 17–1091. Argued November 28, 2018—Decided February 20, 2019

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchased for $42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction, the trial court denied the State's request. The vehicle's forfeiture, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions.

Held: The Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. Pp. 2–9.

(a) The Fourteenth Amendment's Due Process Clause incorporates and renders applicable to the States Bill of Rights protections "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *McDonald* v. *Chicago*, 561 U. S. 742, 767 (alterations omitted). If a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires. Pp. 2–3.

(b) The prohibition embodied in the Excessive Fines Clause carries forward protections found in sources from Magna Carta to the English Bill of Rights to state constitutions from the colonial era to the present day. Protection against excessive fines has been a constant

EXHIBIT B

Syllabus

shield throughout Anglo-American history for good reason: Such fines undermine other liberties. They can be used, *e.g.*, to retaliate against or chill the speech of political enemies. They can also be employed, not in service of penal purposes, but as a source of revenue. The historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is indeed overwhelming. Pp. 3–7.

(c) Indiana argues that the Clause does not apply to its use of civil *in rem* forfeitures, but this Court held in *Austin* v. *United States*, 509 U. S. 602, that such forfeitures fall within the Clause's protection when they are at least partially punitive. Indiana cannot prevail unless the Court overrules *Austin* or holds that, in light of *Austin*, the Excessive Fines Clause is not incorporated because its application to civil *in rem* forfeitures is neither fundamental nor deeply rooted.

The first argument, overturning *Austin*, is not properly before this Court. The Indiana Supreme Court held only that the Excessive Fines Clause did not apply to the States. The court did not address the Clause's application to civil *in rem* forfeitures, nor did the State ask it to do so. Timbs thus sought this Court's review only of the question whether the Excessive Fines Clause is incorporated by the Fourteenth Amendment. Indiana attempted to reformulate the question to ask whether the Clause restricted States' use of civil *in rem* forfeitures and argued on the merits that *Austin* was wrongly decided. Respondents' "right, . . . to restate the questions presented," however, "does not give them the power to expand [those] questions," *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 279, n. 10 (emphasis deleted), particularly where the proposed reformulation would lead the Court to address a question neither pressed nor passed upon below, cf. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7.

The second argument, that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures, misapprehends the nature of the incorporation inquiry. In considering whether the Fourteenth Amendment incorporates a Bill of Rights protection, this Court asks whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted. To suggest otherwise is inconsistent with the approach taken in cases concerning novel applications of rights already deemed incorporated. See, *e.g.*, *Packingham* v. *North Carolina*, 582 U. S. ___, ___. The Excessive Fines Clause is thus incorporated regardless of whether application of the Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted. Pp. 7–9.

84 N. E. 3d 1179, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS,

Syllabus

C. J., and BREYER, ALITO, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. GORSUCH, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 17–1091

TYSON TIMBS, PETITIONER *v.* INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

[February 20, 2019]

JUSTICE GINSBURG delivered the opinion of the Court.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined,

would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N. E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. We granted certiorari. 585 U. S. __ (2018).

The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." *McDonald* v. *Chicago*, 561 U. S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

I

A

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833). "The constitutional Amendments adopted in the aftermath of the Civil War," however, "fundamentally altered our country's federal system." *McDonald*, 561 U. S., at 754. With only "a handful" of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them appli-

cable to the States. *Id.*, at 764–765, and nn. 12–13. A Bill of Rights protection is incorporated, we have explained, if it is "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *Id.,* at 767 (internal quotation marks omitted; emphasis deleted).

Incorporated Bill of Rights guarantees are "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.,* at 765 (internal quotation marks omitted). Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.[1]

B

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Taken together, these Clauses place "parallel limitations" on "the power of those entrusted with the criminal-law function of government." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 263 (1989) (quoting *Ingraham* v. *Wright*, 430 U. S. 651, 664 (1977)). Directly at issue here is the phrase "nor excessive fines imposed," which "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States* v. *Bajakajian*, 524 U. S. 321, 327–328 (1998) (quot-

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[1]The sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Apodaca* v. *Oregon*, 406 U. S. 404 (1972). As we have explained, that "exception to th[e] general rule . . . was the result of an unusual division among the Justices," and it "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald*, 561 U. S., at 766, n. 14.

ing *Austin* v. *United States*, 509 U. S. 602, 609–610 (1993)). The Fourteenth Amendment, we hold, incorporates this protection.

The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement . . . ." §20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225).[2] As relevant here, Magna Carta required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." *Browning-Ferris*, 492 U. S., at 271. See also 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . ."). But cf. *Bajakajian*, 524 U. S., at 340, n. 15 (taking no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine).

Despite Magna Carta, imposition of excessive fines persisted. The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay. *E.g.*, The Grand Remonstrance ¶¶17, 34 (1641), in The Constitutional Documents of the Puritan Revolution 1625–1660, pp. 210, 212 (S. Gardiner ed., 3d ed. rev. 1906); *Browning-Ferris*, 492 U. S., at 267. When James II was overthrown in the Glorious Revolution, the

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[2] "Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown." *Browning-Ferris*, 492 U. S., at 269. "[T]hough fines and amercements had distinct historical antecedents, they served fundamentally similar purposes—and, by the seventeenth and eighteenth centuries, the terms were often used interchangeably." Brief for Eighth Amendment Scholars as *Amici Curiae* 12.

attendant English Bill of Rights reaffirmed Magna Carta's guarantee by providing that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, ch. 2, §10, in 3 Eng. Stat. at Large 441 (1689).

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Adoption of the Excessive Fines Clause was in tune not only with English law; the Clause resonated as well with similar colonial-era provisions. See, *e.g.*, Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682), in 5 Federal and State Constitutions 3061 (F. Thorpe ed. 1909) ("[A]ll fines shall be moderate, and saving men's contenements, merchandize, or wainage."). In 1787, the constitutions of eight States—accounting for 70% of the U. S. population—forbade excessive fines. Calabresi, Agudo, & Dore, State Bills of Rights in 1787 and 1791, 85 S. Cal. L. Rev. 1451, 1517 (2012).

An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U. S. population—expressly prohibited excessive fines. Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008).

Notwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on "vagrancy" and other dubious offenses. See, *e.g.*, Mississippi Vagrant Law,

Laws of Miss. §2 (1865), in 1 W. Fleming, Documentary History of Reconstruction 283–285 (1950). When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. *E.g.*, *id.* §5; see Finkelman, John Bingham and the Background to the Fourteenth Amendment, 36 Akron L. Rev 671, 681–685 (2003) (describing Black Codes' use of fines and other methods to "replicate, as much as possible, a system of involuntary servitude"). Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., 443 (1866); *id.*, at 1123–1124.

Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. Brief in Opposition 8–9. Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment. *Id.*, at 9 (citing *Norris* v. *State*, 271 Ind. 568, 576, 394 N. E. 2d 144, 150 (1979)).

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. 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 (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.").

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U. S., at 767 (internal quotation marks omitted; emphasis deleted).

II

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil *in rem* forfeitures because, the State says, the Clause's specific application to such forfeitures is neither fundamental nor deeply rooted.

In *Austin* v. *United States*, 509 U. S. 602 (1993), however, this Court held that civil *in rem* forfeitures fall within the Clause's protection when they are at least partially punitive. *Austin* arose in the federal context. But when a Bill of Rights protection is incorporated, the protection applies "identically to both the Federal Government and the States." *McDonald*, 561 U. S., at 766, n. 14. Accordingly, to prevail, Indiana must persuade us either to overrule our decision in *Austin* or to hold that, in light of *Austin*, the Excessive Fines Clause is not incorporated because the Clause's application to civil *in rem* forfeitures is neither fundamental nor deeply rooted. The first argument is not

properly before us, and the second misapprehends the nature of our incorporation inquiry.

A

In the Indiana Supreme Court, the State argued that forfeiture of Timbs's SUV would not be excessive. See Brief in Opposition 5. It never argued, however, that civil *in rem* forfeitures were categorically beyond the reach of the Excessive Fines Clause. The Indiana Supreme Court, for its part, held that the Clause did not apply to the States at all, and it nowhere addressed the Clause's application to civil *in rem* forfeitures. See 84 N. E. 3d 1179. Accordingly, Timbs sought our review of the question "[w]hether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment." Pet. for Cert. i. In opposing review, Indiana attempted to reformulate the question to ask "[w]hether the Eighth Amendment's Excessive Fines Clause restricts States' use of civil asset forfeitures." Brief in Opposition i. And on the merits, Indiana has argued not only that the Clause is not incorporated, but also that *Austin* was wrongly decided. Respondents' "right, in their brief in opposition, to restate the questions presented," however, "does not give them the power to expand [those] questions." *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 279, n. 10 (1993) (emphasis deleted). That is particularly the case where, as here, a respondent's reformulation would lead us to address a question neither pressed nor passed upon below. Cf. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005) ("[W]e are a court of review, not of first view . . . ."). We thus decline the State's invitation to reconsider our unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive.

B

As a fallback, Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures. We disagree. In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted.

Indiana's suggestion to the contrary is inconsistent with the approach we have taken in cases concerning novel applications of rights already deemed incorporated. For example, in *Packingham* v. *North Carolina*, 582 U. S. ___ (2017), we held that a North Carolina statute prohibiting registered sex offenders from accessing certain commonplace social media websites violated the First Amendment right to freedom of speech. In reaching this conclusion, we noted that the First Amendment's Free Speech Clause was "applicable to the States under the Due Process Clause of the Fourteenth Amendment." *Id.*, at ___ (slip op., at 1). We did not, however, inquire whether the Free Speech Clause's application specifically to social media websites was fundamental or deeply rooted. See also, *e.g.*, *Riley* v. *California*, 573 U. S. 373 (2014) (holding, without separately considering incorporation, that States' warrantless search of digital information stored on cell phones ordinarily violates the Fourth Amendment). Similarly here, regardless of whether application of the Excessive Fines Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.

* * *

For the reasons stated, the judgment of the Indiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–1091

TYSON TIMBS, PETITIONER *v.* INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

[February 20, 2019]

JUSTICE GORSUCH, concurring.

The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. See, *e.g.*, *post*, at 1–3 (THOMAS, J., concurring in judgment); *McDonald* v. *Chicago*, 561 U. S. 742, 805–858 (2010) (THOMAS, J., concurring in part and concurring in judgment) (documenting evidence that the "privileges or immunities of citizens of the United States" include, at minimum, the individual rights enumerated in the Bill of Rights); Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St. L. J. 1509 (2007); A. Amar, The Bill of Rights: Creation and Reconstruction 163–214 (1998); M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986). But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

SUPREME COURT OF THE UNITED STATES

No. 17–1091

TYSON TIMBS, PETITIONER *v.* INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

[February 20, 2019]

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

I

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." "On its face, this appears to grant . . . United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status." *McDonald* v. *Chicago*, 561 U. S. 742, 808 (2010) (THOMAS, J., concurring in part and concurring in judgment). But as I have previously explained, this Court "marginaliz[ed]" the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause "quite narrowly." *Id.*, at 808–809. Litigants seeking federal protection of substantive rights against the States thus needed

"an alternative fount of such rights," and this Court "found one in a most curious place," *id.*, at 809—the Fourteenth Amendment's Due Process Clause, which prohibits "any State" from "depriv[ing] any person of life, liberty, or property, without due process of law."

Because this Clause speaks only to "process," the Court has "long struggled to define" what substantive rights it protects. *McDonald*, *supra*, at 810 (opinion of THOMAS, J.). The Court ordinarily says, as it does today, that the Clause protects rights that are "fundamental." *Ante*, at 2, 3, 7, 9. Sometimes that means rights that are "'deeply rooted in this Nation's history and tradition.'" *Ante*, at 3, 7 (quoting *McDonald*, *supra*, at 767 (majority opinion)). Other times, when that formulation proves too restrictive, the Court defines the universe of "fundamental" rights so broadly as to border on meaningless. See, *e.g.*, *Obergefell* v. *Hodges*, 576 U. S. ___, ___–___ (2015) (slip op., at 1–2) ("rights that allow persons, within a lawful realm, to define and express their identity"); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"). Because the oxymoronic "substantive" "due process" doctrine has no basis in the Constitution, it is unsurprising that the Court has been unable to adhere to any "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not." *McDonald*, *supra*, at 811 (opinion of THOMAS, J.). And because the Court's substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions. *E.g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Dred Scott* v. *Sandford*, 19 How. 393, 450 (1857).

The present case illustrates the incongruity of the

Court's due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to "'proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions,'" or that the State failed to provide "some baseline procedures." *Nelson* v. *Colorado*, 581 U. S. ___, ___, n. 1 (2017) (THOMAS, J., dissenting) (slip op., at 2, n. 1). His claim has nothing to do with any "process" "due" him. I therefore decline to apply the "legal fiction" of substantive due process. *McDonald*, 561 U. S., at 811 (opinion of THOMAS, J.).

II

When the Fourteenth Amendment was ratified, "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'" *Id.*, at 813. Those "rights" were the "inalienable rights" of citizens that had been "long recognized," and "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights" against interference by the States. *Id.*, at 822, 837. Many of these rights had been adopted from English law into colonial charters, then state constitutions and bills of rights, and finally the Constitution. "Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in [the Bill of Rights] as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text." *Id.*, at 818.

The question here is whether the Eighth Amendment's prohibition on excessive fines was considered such a right. The historical record overwhelmingly demonstrates that it was.

A

The Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689," *United States* v. *Bajakajian*, 524 U. S. 321, 335 (1998), which itself formalized a longstanding English prohibition on disproportionate fines. The Charter of Liberties of Henry I, issued in 1101, stated that "[i]f any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, but *according to the measure of the offence so shall he pay* . . . ." Sources of English Legal and Constitutional History ¶8, p. 50 (M. Evans & R. Jack eds. 1984) (emphasis added). Expanding this principle, Magna Carta required that "amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood," *Bajakajian*, *supra*, at 335:

> "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner, a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy." Magna Carta, ch. 20 (1215), in A. Howard, Magna Carta: Text & Commentary 42 (rev. ed. 1998).

Similar clauses levying amercements "only in proportion to the measure of the offense" applied to earls, barons, and clergymen. Chs. 21–22, *ibid.* One historian posits that, due to the prevalence of amercements and their use in increasing the English treasury, "[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." Pleas of the Crown for the County of Gloucester xxxiv (F. Maitland ed. 1884).

The principle was reiterated in the First Statute of Westminster, which provided that no man should "be amerced, without reasonable cause, and according to the

quantity of his Trespass." 3 Edw. I, ch. 6 (1275). The English courts have long enforced this principle. In one early case, for example, the King commanded the bailiff "to take a moderate amercement proper to the magnitude and manner of th[e] offense, according to the tenour of the Great Charter of the Liberties of England," and the bailiff was sued for extorting "a heavier ransom." *Le Gras* v. *Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (1316), reprinted in 52 Selden Society 3, 5 (1934); see also *Richard Godfrey's Case*, 11 Co. Rep. 42a, 44a, 77 Eng. Rep. 1199, 1202 (1615) (excessive fines are "against law").

During the reign of the Stuarts in the period leading up to the Glorious Revolution of 1688–1689, fines were a flashpoint "in the constitutional and political struggles between the king and his parliamentary critics." L. Schwoerer, The Declaration of Rights, 1689, p. 91 (1981) (Schwoerer). From 1629 to 1640, Charles I attempted to govern without convening Parliament, but "in the absence of parliamentary grants," he needed other ways of raising revenue. 4 H. Walter, A History of England 135 (1834); see 1 T. Macaulay, History of England 85 (1899). He thus turned "to exactions, some odious and obsolete, some of very questionable legality, and others clearly against law." 1 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of George II 462 (1827) (Hallam); see 4 Walter, *supra*, at 135.

The Court of Star Chamber, for instance, "imposed heavy fines on the king's enemies," Schwoerer 91, in disregard "of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means. . . ." 2 Hallam 46–47. "[T]he strong interest of th[is] court in these fines . . . had a tendency to aggravate the punishment. . . ." 1 *id.*, at 490. "The statute abolishing" the Star Chamber in 1641 "specifically prohibited any court thereafter from . . . levying . . . excessive fines." Schwoerer 91.

"But towards the end of Charles II's reign" in the 1670s

and early 1680s, courts again "imposed ruinous fines on the critics of the crown." *Ibid.* In 1680, a committee of the House of Commons "examined the transcripts of all the fines imposed in King's Bench since 1677" and found that "the Court of King's Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists and Persons popishly affected; and excessively oppressing his Majesty's Protestant Subjects." *Ibid.*; 9 Journals of the House of Commons 692 (Dec. 23, 1680). The House of Commons determined that the actions of the judges of the King's Bench, particularly the actions of Chief Justice William Scroggs, had been so contrary to law that it prepared articles of impeachment against him. The articles alleged that Scroggs had "most notoriously departed from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors" without "any Regard to the Nature of the Offences, or the Ability of the Persons." *Id.*, at 698.

Yet "[o]ver the next few years fines became even more excessive and partisan." Schwoerer 91. The King's Bench, presided over by the infamous Chief Justice Jeffreys, fined Anglican cleric Titus Oates 2,000 marks (among other punishments) for perjury. *Id.*, at 93. For speaking against the Duke of York, the sheriff of London was fined £100,000 in 1682, which corresponds to well over $10 million in present-day dollars[1]—"an amount, which, as it extended to the ruin of the criminal, was directly contrary to the spirit of [English] law." The History of England Under the House of Stuart, pt. 2, p. 801 (1840). The King's Bench fined Sir Samuel Barnadiston £10,000 for allegedly seditious letters, a fine that was overturned by the House of

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[1] See Currency Converter: 1270–2017 (estimating the 2017 equivalent of £100,000 in 1680), http://nationalarchives.gov.uk/currency-converter (as last visited Feb. 8, 2019)

Lords as "exorbitant and excessive." 14 Journals of the House of Lords 210 (May 14, 1689). Several members of the committees that would draft the Declaration of Rights—which included the prohibition on excessive fines that was enacted into the English Bill of Rights of 1689—had themselves "suffered heavy fines." Schwoerer 91–92. And in 1684, judges in the case of John Hampden held that Magna Carta did not limit "fines for great offences" against the King, and imposed a £40,000 fine. *Trial of Hampden*, 9 State Trials 1054, 1125 (K. B. 1684); 1 J. Stephen, A History of the Criminal Law of England 490 (1883).

"Freedom from excessive fines" was considered "indisputably an ancient right of the subject," and the Declaration of Rights' indictment against James II "charged that during his reign judges had imposed excessive fines, thereby subverting the laws and liberties of the kingdom." Schwoerer 90. Article 10 of the Declaration declared "[t]hat excessive Bayle ought not to be required nor excessive fynes imposed nor cruel and unusuall Punishments inflicted." *Id.*, at 297.

Shortly after the English Bill of Rights was enacted, Parliament addressed several excessive fines imposed before the Glorious Revolution. For example, the House of Lords overturned a £30,000 fine against the Earl of Devonshire as "excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." *Case of Earl of Devonshire*, 11 State Trials 1354, 1372 (K. B. 1687). Although the House of Lords refused to reverse the judgments against Titus Oates, a minority argued that his punishments were "contrary to Law and ancient Practice" and violated the prohibition on "excessive Fines." *Harmelin* v. *Michigan*, 501 U. S. 957, 971 (1991); *Trial of Oates*, 10 State Trials 1080, 1325 (K. B. 1685). The House of Commons passed a bill to overturn Oates's conviction, and eventually, after a

request from Parliament, the King pardoned Oates. *Id.*, at 1329–1330.

Writing a few years before our Constitution was adopted, Blackstone—"whose works constituted the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 527 U. S. 706, 715 (1999)—explained that the prohibition on excessive fines contained in the English Bill of Rights "had a retrospect to some unprecedented proceedings in the court of king's bench." 4 W. Blackstone, Commentaries 372 (1769). Blackstone confirmed that this prohibition was "only declaratory . . . of the old constitutional law of the land," which had long "regulated" the "discretion" of the courts in imposing fines. *Ibid.*

In sum, at the time of the founding, the prohibition on excessive fines was a longstanding right of Englishmen.

B

"As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen," *McDonald*, 561 U. S., at 816 (opinion of THOMAS, J.), including the prohibition on excessive fines. *E.g.*, J. Dummer, A Defence of the New-England Charters 16–17 (1721) ("The Subjects Abroad claim the Privilege of *Magna Charta*, which says that no Man shall be fin'd above the Nature of his Offence, and whatever his Miscarriage be, a *Salvo Contenemento suo* is to be observ'd by the Judge"). Thus, the text of the Eighth Amendment was "'based directly on . . . the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.'" *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 266 (1989) (quoting *Solem* v. *Helm*, 463 U. S. 277, 285, n. 10 (1983)); see *Jones* v. *Commonwealth*, 5 Va. 555, 557 (1799) (opinion of Carrington, J.) (explaining that the clause in the Virginia Declaration of Rights embodied the traditional legal understanding that any "fine or amercement ought

to be according to the degree of the fault and the estate of the defendant").

When the States were considering whether to ratify the Constitution, advocates for a separate bill of rights emphasized the need for an explicit prohibition on excessive fines mirroring the English prohibition. In colonial times, fines were "the drudge-horse of criminal justice," "probably the most common form of punishment." L. Friedman, Crime and Punishment in American History 38 (1993). To some, this fact made a constitutional prohibition on excessive fines all the more important. As the well-known Anti-Federalist Brutus argued in an essay, a prohibition on excessive fines was essential to "the security of liberty" and was "as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, . . . and seizing . . . property . . . as the other." Brutus II (Nov. 1, 1787), in The Complete Bill of Rights 621 (N. Cogan ed. 1997). Similarly, during Virginia's ratifying convention, Patrick Henry pointed to Virginia's own prohibition on excessive fines and said that it would "depart from the genius of your country" for the Federal Constitution to omit a similar prohibition. Debate on Virginia Convention (June 14, 1788), in 3 Debates on the Federal Constitution 447 (J. Elliot 2d ed. 1854). Henry continued: "[W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives" to "define punishments without this control." *Ibid.*

Governor Edmund Randolph responded to Henry, arguing that Virginia's charter was "nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects." *Id.*, at 466. According to Randolph, "the exclusion of excessive bail and fines . . . would follow of itself without a bill of rights," for such fines would never be imposed absent "corruption in

the House of Representatives, Senate, and President," or judges acting "contrary to justice." *Id.*, at 467–468.

For all the debate about whether an explicit prohibition on excessive fines was necessary in the Federal Constitution, all agreed that the prohibition on excessive fines was a well-established and fundamental right of citizenship. When the Excessive Fines Clause was eventually considered by Congress, it received hardly any discussion before "it was agreed to by a considerable majority." 1 Annals of Cong. 754 (1789). And when the Bill of Rights was ratified, most of the States had a prohibition on excessive fines in their constitutions.[2]

Early commentary on the Clause confirms the widespread agreement about the fundamental nature of the prohibition on excessive fines. Justice Story, writing a few decades before the ratification of the Fourteenth Amendment, explained that the Eighth Amendment was "adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts," when "[e]normous fines and amercements were . . . sometimes imposed." 3 J. Story, Commentaries on the Constitution of the United States §1896, pp. 750–751 (1833). Story included the prohibition

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[2]Del. Const., Art. I, §11 (1792), in 1 Federal and State Constitutions 569 (F. Thorpe ed. 1909); Md. Const., Decl. of Rights, Art. XXII (1776), in 3 *id.*, at 1688; Mass. Const., pt. 1, Art. XXVI (1780), in *id.*, at 1892; N. H. Const., pt. 1, Art. 1, §XXXIII (1784), in 4 *id.*, at 2457; N. C. Const., Decl. of Rights, Art. X (1776), in 5 *id.*, at 2788; Pa. Const., Art. IX, §13 (1790), in *id.*, at 3101; S. C. Const., Art. IX, §4 (1790), in 6 *id.*, at 3264; Va. Const., Bill of Rights, §9 (1776), in 7 *id.*, at 3813. Vermont had a clause specifying that "all fines shall be proportionate to the offences." Vt. Const., ch. II, §XXIX (1786), in *id.*, at 3759. Georgia's 1777 Constitution had an excessive fines clause, Art. LIX, but its 1789 Constitution did not. And the Northwest Ordinance provided that "[a]ll fines shall be moderate; and no cruel or unusual punishments inflicted." §14, Art. 2 (1787)

on excessive fines as a right, along with the "right to bear arms" and others protected by the Bill of Rights, that "operates, as a qualification upon powers, actually granted by the people to the government"; without such a "restrict[ion]," the government's "exercise or abuse" of its power could be "dangerous to the people." *Id.*, §1858, at 718–719.

Chancellor Kent likewise described the Eighth Amendment as part of the "right of personal security . . . guarded by provisions which have been transcribed into the constitutions in this country from *magna carta*, and other fundamental acts of the English Parliament." 2 J. Kent, Commentaries on American Law 9 (1827). He understood the Eighth Amendment to "guard against abuse and oppression," and emphasized that "the constitutions of almost every state in the Unio[n] contain the same declarations in substance, and nearly in the same language." *Ibid.* Accordingly, "they must be regarded as fundamental doctrines in every state, for all the colonies were parties to the national declaration of rights in 1774, in which the . . . rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright." *Ibid.*; accord, W. Rawle, A View of the Constitution of the United States of America 125 (1825) (describing the prohibition on excessive fines as "founded on the plainest principles of justice").

C

The prohibition on excessive fines remained fundamental at the time of the Fourteenth Amendment. In 1868, 35 of 37 state constitutions "expressly prohibited excessive fines." *Ante*, at 5. Nonetheless, as the Court notes, abuses of fines continued, especially through the Black Codes adopted in several States. *Ante*, at 5–6. The "centerpiece" of the Codes was their "attempt to stabilize the black work force and limit its economic options apart from plantation

labor." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 199 (1988). Under the Codes, "the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers." *Ibid.* The Codes also included "'antienticement' measures punishing anyone offering higher wages to an employee already under contract." *Id.*, at 200.

The 39th Congress focused on these abuses during its debates over the Fourteenth Amendment, the Civil Rights Act of 1866, and the Freedmen's Bureau Act. During those well-publicized debates, Members of Congress consistently highlighted and lamented the "severe penalties" inflicted by the Black Codes and similar measures, Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (Sen. Trumbull), suggesting that the prohibition on excessive fines was understood to be a basic right of citizenship.

For example, under Mississippi law, adult "freedmen, free negroes and mulattoes" "without lawful employment" faced $50 in fines and 10 days' imprisonment for vagrancy. Reports of Assistant Commissioners of Freedmen, and Synopsis of Laws on Persons of Color in Late Slave States, S. Exec. Doc. No. 6, 39th Cong., 2d Sess., §2, p. 192 (1867). Those convicted had five days to pay or they would be arrested and leased to "any person who will, for the shortest period of service, pay said fine and forfeiture and all costs." §5, *ibid.* Members of Congress criticized such laws "for selling [black] men into slavery in punishment of crimes of the slightest magnitude." Cong. Globe, 39th Cong., 1st Sess., 1123 (1866) (Rep. Cook); see *id.*, at 1124 ("It is idle to say these men will be protected by the States").

Similar examples abound. One congressman noted that Alabama's "aristocratic and anti-republican laws, almost reenacting slavery, among other harsh inflictions impose . . . a fine of fifty dollars and six months' imprisonment on

any servant or laborer (white or black) who loiters away his time or is stubborn or refractory." *Id.*, at 1621 (Rep. Myers). He also noted that Florida punished vagrants with "a fine not exceeding $500 and imprison[ment] for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court." *Ibid.* At the time, such fines would have been ruinous for laborers. Cf. *id.*, at 443 (Sen. Howe) ("A thousand dollars! That sells a negro for his life").

These and other examples of excessive fines from the historical record informed the Nation's consideration of the Fourteenth Amendment. Even those opposed to civil-rights legislation understood the Privileges or Immunities Clause to guarantee those "fundamental principles" "fixed" by the Constitution, including "immunity from . . . excessive fines." 2 Cong. Rec. 384–385 (1874) (Rep. Mills); see also *id.*, at App. 241 (Sen. Norwood). And every post-1855 state constitution banned excessive fines. S. Calabresi & S. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008). The attention given to abusive fines at the time of the Fourteenth Amendment, along with the ubiquity of state excessive-fines provisions, demonstrates that the public continued to understand the prohibition on excessive fines to be a fundamental right of American citizenship.

* * *

The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment's prohibition on excessive fines applies in full to the States.

EXHIBIT C

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Andrew J. French, Chairperson
Dwight D. Keen
Susan K. Duffy

In the Matter of the Investigation into Kansas Gas Service Company, a Division of One Gas Inc., Regarding the February 2021 Winter Weather Events, as Contemplated by Docket No. 21-GIMX-303-MIS.	)))))	Docket No. 21-KGSG-332-GIG

ORDER DENYING NGTCC'S MOTION REQUESTING ISSUANCE OF A SUBPOENA

This matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the pleadings and record, the Commission makes the following findings:

1. On February 15, 2021, pursuant to K.S.A. 77-536(a), the Commission issued an Emergency Order in Docket No. 21-GIMX-303-MIS (21-303 Docket), directing all jurisdictional natural gas and electric utilities to coordinate efforts and take all reasonably feasible, lawful, and appropriate actions to ensure adequate transportation of natural gas and electricity to interconnected, non-jurisdictional Kansas utilities.[1] Jurisdictional natural gas utilities were ordered to do everything necessary to ensure natural gas service continued to be provided to their customers in Kansas.[2] The Commission authorized every jurisdictional natural gas distribution utility that incurs extraordinary costs associated with ensuring their customers or the customers of interconnected Kansas utilities that are non-jurisdictional to the Commission continue to receive utility service during Winter Storm Uri to defer those costs to a regulatory asset account.[3] The Commission mandated that once Winter Storm Uri ended, and after all costs have been

[1] Emergency Order, 21-GIMX-303-MIS, Feb. 15, 2021, ¶ 3.
[2] *Id.*
[3] *Id.* ¶ 4.

EXHIBIT C

accumulated and recorded, each jurisdictional utility is directed to file a compliance report in the 21-303 Docket detailing the extent of such costs incurred, and present a plan to minimize the financial impacts of this event on ratepayers over a reasonable time frame.[4]

2. On March 9, 2021, the Commission issued an Order Adopting Staff's Report and Recommendation to Open Company-Specific Investigations, which initiated this Docket.[5] The Commission's Order also included a Protective/Discovery Order.

3. On May 28, 2021, Kansas Gas Service (KGS) filed a Motion for Limited Waiver from Section 11.06 of its tariff provisions to remove the multipliers from the calculation of penalties incurred by Marketers and Individually Balanced Transportation Customers for violating KGS' Operational Flow Orders and/or Period Curtailment Orders issued during Winter Storm Uri.[6]

4. On June 10, 2021, the Commission issued a Supplemental Protective and Discovery Order to allow the Office of the Kansas Attorney General to review discovery produced in this Docket.[7]

5. On July 30, 2021, the Natural Gas Transportation Customer Coalition[8] (NGTCC) filed a Motion Requesting the Issuance of a Subpoena Compelling Testimony and Production Of Documents from S & P Global Platts Gas Daily,[9] for all documents relating to the S & P Global Platts Gas Daily Index for Southern Star Pipeline from February 10-20, 2021, and further compelling the testimony of records custodian witness(es) to explain the subpoenaed documents

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[4] *Id.* ¶5.
[5] Order Adopting Staff's Report and Recommendation to Open Company-Specific Investigations; Order on Petitions to Intervene of Bluemark Energy, LLC and CURB; Protective and Discovery Order, 21-303 Docket, March 9, 2021, ¶ 10.
[6] Motion for Limited Waiver, May 28, 2021, ¶ 12.
[7] Supplemental Protective and Discovery Order, June 10, 2021, ¶ 6.
[8] NGTCC was granted intervention on July 1, 2021.
[9] Motion of the Natural Gas Transportation Customer Coalition Requesting the Commission Issue a Subpoena Compelling Testimony and Production of Documents from S & P Global Platts Gas Daily Pursuant to K.S.A. 66-150 and K.A.R. 82-1-227, July 30, 2021.

and in what manner they were used, included or excluded from the Gas Daily Index Prices for the period February 10-20, 2021.[10] NGTCC considers S & P Global to be the leading independent provider of information and benchmark prices for the commodity and energy markets.[11] NGTCC also seeks stays on: (1) any use of the S & P Global Platts Gas Daily Index Price posting as a reference in any KCC approved tariff and/or as the basis for the collection of any penalty, until the Commission completes its review of S & P Global Gas Daily Price Index Postings, and issues a further Order regarding the utilization of S & P Global Gas Daily Price Index Postings from February 2021,[12] and (2) the pass through to Kansas ratepayers costs resulting from a price term referencing the S & P Global Platts Gas Daily Price Index until the Commission completes its review of S & P Global Platts Gas Daily Price Index and issues an Order on the utilization of S & P Global Gas Daily Price Index Postings from February 2021.[13]

6. On August 3, 2021, NGTCC supplemented its Request to Issue a Subpoena by adding KGS' responses to Data Requests, to purportedly evidence that KGS has failed to investigate, challenge, or appeal the Index Pricing that is the basis of the requested $451 million recovery from Kansas ratepayers.[14]

7. On August 6, 2021, Intervenors Bonavia Properties, L.L.C., Catholic Diocese of Wichita, and TempleLive Wichita LLC endorsed NGTCC's Motion to Issue a Subpoena to S & P Global, claiming the "entire foundation of KGS's financial plan and tariff hinge on the legitimacy of the S&P Global Platts gas daily index."[15]

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[10] *Id.*, p. 10.
[11] *Id.*, ₱ 4.
[12] *Id.*, p. 11.
[13] *Id.*
[14] Supplement to Motion of the Natural Gas Transportation Customer Coalition Requesting the Commission Issue a Subpoena, Aug. 3, 2021, ₱ 6.
[15] Joinder to Motion of the Natural Gas Transportation Customer Coalition Requesting the Commission Issue a Subpoena Compelling Testimony and Production of Documents from S & P Global Platts Gas Daily Pursuant to K.S.A. 66-150 and K.A.R. 82-1-227, Aug. 6, 2021, p. 1.

8. On August 27, 2021, Staff filed its opposition to NGTCC's motion for a subpoena, questioning the jurisdictional authority to provide NGTCC the relief requested.[16] Staff notes that the Federal Energy Regulatory Commission (FERC) monitors the publication of indices, such as S & P Global, and requires all data providers to register with it, and subjects all market participants to potential audit by FERC.[17] Staff explains, FERC's Office of Enforcement (OE), rather than the Commission, has the authority to investigate market behavior relating to the data reported to S & P and take corrective action where a market participant behaves inappropriately.[18] The FERC already has an open docket relating to price indices.[19]

9. The Commission shares NGTCC's concerns regarding the wholesale natural gas markets and potential market manipulation. However, as explained in Staff's response, the power to investigate wholesale market behavior relating to the data reported to S & P Global and take corrective action where a market participant behaves inappropriately rests with the FERC, not the Commission. As noted by Staff, FERC already has an open docket relating to price indices.[20]

10. While NGTCC may raise legitimate concerns, this Commission is simply not the forum for such an investigation. This Commission is focused on the behavior of its jurisdictional utilities and whether they acted reasonably and prudently, under the circumstances. However, if suppliers, traders, or other entities engaged in market manipulation or price gouging within the wholesale market, as NGTCC posits, FERC's investigation is intended to uncover such actions. As noted in Staff's Response, this Commission does not have authority to recalculate wholesale

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[16] Response of Commission Staff to the Natural Gas Transportation Customer Coalition's Motion for Subpoena, Motion for Administrative Notice, and Motion to Stay Request for Waiver, Aug. 27, 2021, P 8.
[17] *Id.*, P 11.
[18] *Id.*, P 12.
[19] *Id.*
[20] Response of Commission Staff to the Natural Gas Transportation Customer Coalition's Motion for Subpoena, Motion for Administrative Notice, and Motion to Stay Request for Waiver, P 12.

prices – that authority rests on the federal level.[21] So long as KGS has prudently followed its traditional gas purchase practices, and given the fact that this Commission ordered KGS and other utilities "to do all things possible and necessary to ensure natural gas…services continue to be provided to their customers in the State," we agree it would be inequitable to disallow recovery of purchased gas costs based on a suspicion of wholesale market manipulation before such investigation has concluded at the federal level. This Commission anticipates any decision in this proceeding will include provisions for Kansas customer compensation in the event FERC's investigation yields a finding of market manipulation in the future.

11. Further, given that FERC is the agency tasked with investigating and taking corrective action in the wholesale natural gas markets, the Commission's authority to issue and enforce the subpoena requested by NGTCC is questionable, at best. Under Kansas law, administrative subpoenas must satisfy three requirements: (1) the agency must be authorized to make the inquiry, (2) it must not be too indefinite, and (3) and the information sought must be relevant to the inquiry.[22] The Commission agrees with Staff that because the authority to investigate market behavior and enforce compliance rests with the FERC, the validity of a State administrative subpoena issued to S & P Global regarding the Southern Star index is questionable.[23]

12. The Commission also notes the Office of Attorney General Derek Schmidt (AG) is a party to this case and has an ongoing investigation into natural gas pricing to determine if there have been any violations of the Kansas Consumer Protection Act, the Kansas False Claims

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[21] *Id.*, ₱ 13.
[22] *Hansa Center for Optimum Health, LLC v. State*, 52 Kan.App.2d 503, 509 (2016) *citing Hines, Inc. v. State ex rel. Beyer*, 28 Kan.App.2d 181, 183 (2000).
[23] Response of Commission Staff to the Natural Gas Transportation Customer Coalition's Motion for Subpoena, Motion for Administrative Notice, and Motion to Stay Request for Waiver, ₱ 12.

Act, or any other violation of law.[24] The AG has broad authority to issue subpoenas in its ongoing investigation.

13. There is some question as to the validity of a Commission-issued subpoena to an entity outside its jurisdiction, and because the FERC and the AG have ongoing investigations, the Commission believes that those entities have adequate authority and discretion to exercise their broad subpoena powers under the circumstances. Accordingly, NGTCC's motion for issuance of a subpoena to S & P Global is denied.

THEREFORE, THE COMMISSION ORDERS:

A. NGTCC's Motion Requesting the Commission Issue a Subpoena Compelling Testimony and Production of Documents from S & P Global Platts Gas Daily is denied.

B. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).[25]

BY THE COMMISSION IT IS SO ORDERED.

French, Chairperson; Keen, Commissioner; Duffy, Commissioner

Dated: 09/09/2021

Lynn M. Retz
Executive Director

BGF

[24] Order Granting Petition to Intervene of the Office of Kansas Attorney General, July 27, 2021, P 3.
[25] K.S.A. 66-118b; K.S.A. 77-503(c); K.S.A. 77-531(b).

CERTIFICATE OF SERVICE

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I, the undersigned, certify that a true copy of the attached Order has been served to the following by means of electronic service on 09/09/2021.

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EXHIBIT D

	Customer Statistics Related to Disconnection Activity							
	Customers		Voluntary Disconnects		Involuntary Disconnects		Reconnections	
Customer Class	July 2020	July 2021	July 2020	July 2021	July 2020	July 2021	July 2020	July 2021
Residential	588,287	588,449	7,198	6,477	6,230	2,375	3,363	1,525
General Service - Small	36,785	36,798	224	149	168	44	22	11
General Service - Large	11,514	11,658	40	24	30	9	13	1
General Service - Transport Eligible	503	500	1	1	-	-	-	-
Small Generator Service	716	727	2	-	1	-	-	-
Irrigation Sales	191	176	-	1	1	-	-	-
Kansas Gas Supply	-	-	-	-	-	-	-	-
Sales for Resale	17	17	-	-	-	-	-	-
Small Transport k-System	3,711	3,692	-	-	-	-	1	-
Small Transport t-System	1,281	1,258	-	-	-	-	-	-
CNG k-System	10	10	-	-	-	-	-	-
CNG t-System	2	2	-	-	-	-	-	-
Irrigation Transport	513	511	-	-	-	-	-	-
Large Transport k - Tier 1	189	186	-	-	-	-	-	-
Large Transport k - Tier 2	115	110	-	-	-	-	-	-
Large Transport k - Tier 3	59	59	-	-	-	-	-	-
Large Transport k - Tier 4	86	87	-	-	-	-	-	-
Large Transport t - Tier 1	36	33	-	-	-	-	-	-
Large Transport t - Tier 2	25	28	-	-	-	-	-	-
Large Transport t - Tier 3	22	26	-	-	-	-	-	-
Large Transport t - Tier 4	47	43	-	-	-	-	-	-
Wholesale Transport	28	28	-	-	-	-	-	-
Interruptible Transport	29	26	-	-	-	-	-	-

EXHIBIT D

EXHIBIT E

Gas Daily Postings

	ANR OK Gas Daily	ANR LA Gas Daily	Chicago Citygate Gas Daily	ENABLE East Gas Daily	Henry Hub Gas Daily	Lebanon Hub Gas Daily	NGPL Midcon Gas Daily	NGPL Texok Gas Daily	NGPL Amarillo Gas Daily	PEPL TX-OK Gas Daily	SO STAR TX-OK-KS Gas Daily	TETCO ETX Gas Daily	TETCO KOSI Gas Daily	Trunkline ELA Gas Daily
2/1/2021	$2.570	$2.630	$2.620	$2.570	$2.670	$2.615	$2.555	$2.555	$2.580	$2.550	$2.545	$2.605	$2.625	$2.600
2/2/2021	$2.650	$2.820	$2.765	$2.695	$2.860	$2.765	$2.670	$2.690	$2.705	$2.665	$2.680	$2.715	$2.775	$2.710
2/3/2021	$2.845	$2.985	$2.960	$2.860	$3.175	$3.000	$2.835	$2.850	$2.905	$2.825	$2.820	$2.880	$3.005	$3.100
2/4/2021	$2.800	$2.830	$2.845	$2.765	$2.905	$2.815	$2.775	$2.790	$2.820	$2.760	$2.790	$2.700	$2.810	$2.800
2/5/2021	$2.860	$2.900	$2.945	$2.815	$2.915	$2.850	$2.870	$2.810	$2.895	$2.905	$2.850	$2.750	$2.900	$2.780
2/6/2021	$3.555	$3.325	$3.500	$3.430	$3.390	$3.350	$3.335	$3.220	$3.525	$3.515	$3.560	*$3.215*	$3.350	$3.260
2/7/2021	$3.555	$3.325	$3.500	$3.430	$3.390	$3.350	$3.335	$3.220	$3.525	$3.515	$3.560	*$3.215*	$3.350	$3.260
2/8/2021	$3.555	$3.325	$3.500	$3.430	$3.390	$3.350	$3.335	$3.220	$3.525	$3.515	$3.560	*$3.215*	$3.350	$3.260
2/9/2021	$3.545	$3.135	$3.175	$3.355	$3.175	$3.260	$3.330	$3.200	$3.400	$3.525	$3.655	$3.200	$3.150	$3.090
2/10/2021	$3.665	$3.120	$3.275	$3.500	$3.195	$3.205	$3.345	$3.190	$3.525	$3.675	$4.030	$3.160	$3.095	$3.090
2/11/2021	$6.055	$3.660	$3.985	$6.105	$3.675	$3.750	$4.920	$3.745	$5.740	$6.310	$9.620	$3.720	$3.595	$3.540
2/12/2021	$16.390	$5.630	$8.055	$34.385	$5.880	$6.540	$11.830	$6.895	$15.935	$14.550	$44.780	$7.000	$5.300	$5.500
2/13/2021	$213.895	$5.805	$129.835	$375.810	$6.000	$52.060	$206.110	$13.610	$180.195	$224.560	$329.595	$15.455	$5.500	$5.500
2/14/2021	$213.895	$5.805	$129.835	$375.810	$6.000	$52.060	$206.110	$13.610	$180.195	$224.560	$329.595	$15.455	$5.500	$5.500
2/15/2021	$213.895	$5.805	$129.835	$375.810	$6.000	$52.060	$206.110	$13.610	$180.195	$224.560	$329.595	$15.455	$5.500	$5.500
2/16/2021	$213.895	$5.805	$129.835	$375.810	$6.000	$52.060	$206.110	$13.610	$180.195	$224.560	$329.595	$15.455	$5.500	$5.500
2/17/2021	$100.260	$15.570	$22.075	$300.000	$16.955	$18.900	$381.480	$24.125	$117.095	$129.385	$622.785	*$14.130*	$15.000	$9.500
2/18/2021	$24.770	$15.900	$18.770	$428.640	$23.605	$16.655	$22.595	$23.465	$25.615	$23.390	$44.530	*$14.235*	$16.125	$10.000
2/19/2021	$6.220	$6.895	$6.215	$34.450	$7.495	$6.085	$6.345	$6.700	$5.970	$6.265	$7.945	*$5.870*	$6.105	$6.000
2/20/2021	$4.135	$4.415	$3.935	$4.550	$4.985	$4.020	$4.045	$3.990	$3.935	$4.010	$4.385	*$4.175*	$4.650	$4.500
2/21/2021	$4.135	$4.415	$3.935	$4.550	$4.985	$4.020	$4.045	$3.990	$3.935	$4.010	$4.385	*$4.175*	$4.650	$4.500
2/22/2021	$4.135	$4.415	$3.935	$4.550	$4.985	$4.020	$4.045	$3.990	$3.935	$4.010	$4.385	*$4.175*	$4.650	$4.500
2/23/2021	$2.675	$2.715	$2.720	$2.695	$2.840	$2.665	$2.660	$2.660	$2.650	$2.590	$2.690	$2.500		$2.730
2/24/2021	$2.680	$2.785	$2.720	$2.650	$2.790	$2.670	$2.645	$2.665	$2.715	$2.645	$2.700	$2.515	$2.615	$2.680
2/25/2021	$2.605	$2.620	$2.675	$2.530	$2.560	$2.585	$2.605	$2.620	$2.615	$2.540	$2.665	$2.560	$2.580	$2.620
2/26/2021	$2.455	$2.540	$2.530	$2.360	$2.690	$2.480	$2.440	$2.475	$2.455	$2.340	$2.465	$2.495	$2.525	$2.600
2/27/2021	$2.455	$2.540	$2.530	$2.360	$2.690	$2.480	$2.440	$2.475	$2.455	$2.340	$2.465	$2.495	$2.525	$2.600
2/28/2021	$2.455	$2.540	$2.530	$2.360	$2.690	$2.480	$2.440	$2.475	$2.455	$2.340	$2.465	$2.495	$2.525	$2.600

EXHIBIT E

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EXHIBIT F

EXHIBIT G

NEWS RELEASES

FERC to Examine Potential Wrongdoing in Markets During Recent Cold Snap

February 22, 2021

The Federal Energy Regulatory Commission (FERC) announced today that its Office of Enforcement is examining wholesale natural gas and electricity market activity during last week's extreme cold weather to determine if any market participants engaged in market manipulation or other violations.

If the Office of Enforcement finds any potential wrongdoing that can be addressed under FERC's statutory authority, it will pursue those matters as non-public investigations.

FERC explained that this examination will take place as part of the Division of Analytics and Surveillance's (DAS) ongoing surveillance of market participant behavior in the wholesale natural gas and electricity markets. The Division uses market participant-level trading data and data from the financial markets to screen daily and monthly trading at the majority of physical and financial natural gas trading hubs in the United States and the organized and bilateral wholesale electricity markets. DAS closely identifies and scrutinizes any potentially anticompetitive or manipulative behavior to determine if an investigation is appropriate.

Throughout this process, the Office of Enforcement will work with FERC's federal partners as necessary and appropriate.

R21-22

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