No. 18-1053

IN THE

Supreme Court of the United States

ASHLAND SPECIALTY CO. INC.,

Petitioner,

v.

DALE W. STEAGER, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

West Virginia audaciously asserts that – in the more than twenty years since this Court decided *United States v. Bajakajian*, 524 U.S. 321 (1998) – there has been a "lack of development of these issues in other state and federal courts" [W.V. Br. at 17]. But, as amply reflected in Ashland Specialty's Petition, each state and federal court has adopted its own framework and factors for analyzing whether a penalty is so grossly excessive that it violates the Excessive Fines Clause. West Virginia's synthesis makes it patently obvious that not only is there a split among the States (and federal circuit courts), but they have adopted analytical frameworks that significantly diverge from the *Bajakajian* analysis. Ashland Specialty is not requesting a "first review," as West Virginia asserts [W.V. Br. at 17]. Rather, this is a request for review and resolution of the myriad approaches which have emerged in the past two decades following this Court's announcement in *Bajakajian* that a penalty "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334.

REASONS FOR GRANTING THE PETITION

I. ASHLAND DOES ARGUE AND INDEED PRESENTED A QUESTION TO THIS COURT FOR REVIEW OF WHETHER THE INSTANT PENALTY IS EXCESSIVE UNDER THE FACTORS *BAJAKAJIAN* DESCRIBED, WEST VIRGINIA'S BALD ASSERTION TO THE CONTRARY NOTWITHSTANDING.

West Virginia is flatly wrong in asserting that "Ashland does not argue that the penalty is excessive under the factors *Bajakajian* described." W.V. Br. at 31. Ashland Specialty plainly presented that very question to this Court: "Was the penalty grossly disproportionate to the offense and unconstitutional under the Eight Amendment's Excessive Fines Clause and [] *Bajakajian*?" Petition, at i. Moreover, Ashland Specialty has consistently argued below – at the Office of Tax Appeals, at the Circuit Court, and at the Supreme Court of Appeals – that the instant penalty is grossly excessive under the Eighth Amendment under the *Bajakajian* grossly disproportional test.

II. WEST VIRGINIA'S SUMMARY OF THE FACTORS USED BY STATE AND FEDERAL COURTS IN EXCESSIVE FINES CLAUSE CASES DEMONSTRATES THE SPLIT AMONG THEM AND THEIR DIVERGENCE FROM *BAJAKAJIAN*.

This Court summarized its *Bajakajian* Excessive Fines Clause analysis in *Cooper Industries*, stating, "[W]e have focused on the same general criteria: [1]

the degree of the defendant's reprehensibility or culpability; [2] the relationship between the penalty and the harm to the victim caused by the defendant's actions; and [3] the sanctions imposed in other cases for comparable misconduct." *Cooper Indus. v. Leatherman Tool Grp.,* 532 U.S. 424, 435 (2001) 435 ([ ] supplied, quotations and citations omitted, citing *Bajakajian*).[1] *Compare with, Bajakajian*, 524 U.S. at 334-40. The Supreme Court of Appeals did not engage in this particular version of the *Bajakajian* analysis, and West Virginia does not argue that it did.[2]

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[1] In citing *Cooper Industries*, Ashland Specialty is not making a new argument, as West Virginia suggests [W.V. Br. at 32]; instead, *Cooper Industries* simply succinctly synthesizes this Court's analysis in *Bajakajian*, which Ashland Specialty has been arguing all along.

[2] Instead, the Supreme Court of Appeals applied the excessive fines analysis found in *Dean v. State*, 736 S.E.2d 40 (W. Va. 2012), a ***criminal forfeiture*** case which West Virginia first brought to that court's attention at oral argument. It was not until the Supreme Court of Appeals rendered its opinion in this case that it became apparent that West Virginia, like virtually all of its sister states, was using its own state-specific framework as articulated in *Dean* instead of the analysis required by *Bajakajian*. As Ashland Specialty reviewed the frameworks used by state and federal courts to evaluate Excessive Fines challenges, it became blatantly obvious that West Virginia was not alone, and that each and every court

The *Bajakajian* analytical framework differs markedly from those subsequently adopted by the federal and state courts. West Virginia claims that, "In the two decades since *Bajakajian*, courts have coalesced around three general factors: (1) the harshness of the penalty; (2) the seriousness of the offense; and (3) the defendant's culpability. Agreement around these specific factors is also no accident—the principles flow directly from *Bajakajian* itself." W.V. Br. at 18.

But, of the three factors that West Virginia identifies, only the culpability factor is present in *Bajakajian*. So, according to West Virginia, the federal and state courts are ignoring both (1) the degree of the defendant's reprehensibility or culpability and (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions.

Indeed, the *Dean* factors the Supreme Court of Appeals cited are *not* the *Bajakajian* factors. According to West Virginia, *Dean* looks at: "amount of the forfeiture and its relationship to the authorized penalty"; "nature and extent of the ***criminal*** activity" (linked by West Virginia to the "seriousness of the offense"); "relationship between the ***crime*** charged and other ***crimes***" (linked by West Virginia to the "seriousness of the offense") and "harm caused by the charged ***crime***" (linked by West Virginia to "culpability"). *Dean*, 736 S.E.2d at 42; W.V. Br. at 9 & 18-19 (emphasis added). Employing a one size fits all

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had developed its own somewhat unique framework since this Court decided *Bajakajian*.

doctrinal approach, the Supreme Court of Appeals used the *Dean* criminal forfeiture factors to evaluate the instant civil penalty in light of the Excessive Fines Clause.

West Virginia posits that "there is no material division among the many courts that apply *Bajakajian*" [W.V. Br. at 17], but there is. While the state courts of last resort pay lip service to the grossly disproportionate rule of *Bajakajian*, ***in the twenty-plus years since*** *Bajakajian*, each has developed and applied its own framework employing different factors, which are not uniform and do not comport with the analysis in *Bajakajian*. Thus, Ashland Specialty has presented this Court with the additional question, "[S]hould the Court resolve the multiple splits and affirmatively adopt factors, like those in *Cooper Industries v. Leatherman*, to decide whether a civil monetary penalty is grossly disproportionate to the underlying offense?"

The time has now come for this Court to resolve those splits by affirmatively adopting the *Cooper Industries* formulation of the *Bajakajian* test.

III. WEST VIRGINIA'S QUESTION PRESENTED CONFIRMS THE MULTIPLE SPLITS AMONG STATE AND FEDERAL COURTS AND IMPLIES THAT ANY PENALTY LESS THAN THE THEORETICAL STATUTORY MAXIMUM EVADES JUDICIAL REVIEW UNDER THE EXCESSIVE FINES CLAUSE.

The inconsistencies among such frameworks and *Bajakajian* is demonstrated by the question that West

Virginia has presented to the Court, *i.e.*, whether a civil monetary penalty assessed at the maximum percentage rate of 500% of the value of the involved goods "comports with the…Excessive Fines Clause where the penalty is less than 0.26% of the maximum monetary penalty authorized by statute and proportional to the severity of the offense". W.V. Br. at i.

In other words, West Virginia asks, can a legislature effectively immunize civil penalties from Eighth Amendment scrutiny by allowing for a maximum penalty of more than 109,500% of the value of the involved goods, thus making 500% look comparatively small? West Virginia apparently thinks so.[3]

By comparing the penalty actually imposed to the maximum possible theoretical fine,[4] West Virginia's question presented necessarily invokes the holding of *Newell Recycling Co. v. U.S. E.P.A.,* 231 F.3d 204 (5th Cir. 2000), in which the Fifth Circuit held that any penalty – *no matter how excessive – cannot violate* the Excessive Fines Clause. Ironically, West Virginia now characterizes *Newell* as an "outlier" – eschewing its holding as inconsistent with *Bajakajian* – despite the Supreme Court of Appeals' reliance on that very

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[3] This is tantamount to filing suit for a billion dollars, and then claiming a settlement demand of "only" 100 million dollars is inherently reasonable because the claim was reduced by 90% from the original demand.

[4] West Virginia cites to no support that a fine of that magnitude has ever been assessed ***anywhere***.

authority in its opinion below and other courts' adoption of *Newell*.[5] Otherwise stated, there is a split in the law that the Court should address.

IV. SPLITS EXIST NOT JUST AS TO WHAT FACTORS TO USE, BUT IN THE APPLICATION OF FACTORS, AS WEST VIRGINIA'S BRIEF HIGHLIGHTS.

Just as troubling, state and federal courts apply each factor in their chosen framework differently. In this regard, the question that West Virginia presents also necessarily implies that scrutiny under the Eighth Amendment, *e.g.*, as applied by the Supreme Court of Appeals, and some other courts, consider *only*

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[5] Nor is West Virginia correct in claiming that *Newell* "remains an outlier today." W.V. Br. at 15. *Newell* itself, 231 F.3d at 210, cited the D.C. Circuit's holding in *Pharaon v. Bd. of Gov. of Fed. Reserve Syst.*, 135 F.3d 148, 155-57 (D.C. Cir. 1998) for the proposition that there was no "Eighth Amendment violation because the penalty was within the limits established by the applicable statute." But, rather than the moribund, aberrant, authority that West Virginia would have this Court believe *Newell* represents, the Fifth Circuit continues to rely upon *Newell*, as do courts within the D.C. Circuit. *See*, *Cripps v. Louisiana Dep't of Agric. and Forestry*, 819 F.3d 221, 234 (5th Cir. 2016); *Martex Farms, Inc. v. U.S. Environmental Protection Agency*, 559 F.3d 29, 34 (5th Cir. 2009); and *Combat Veterans for Congress Political Action Comm. v. Federal Election Comm'n*, 983 F.Supp.2d 1, 19 (D.D.C. 2013).

aggravating circumstances and *not mitigating circumstances*.

The Supreme Court of Appeals, for example, considered only what Ashland Specialty did wrong, as does West Virginia in its Brief in Opposition, *e.g.*, being a "third-time offender" [W.V. Br. at 27-28], this violation being "on a significantly greater scale" [*Id.* at 28].[6] Conversely, the Supreme Court of Appeals and West Virginia ignored all mitigating circumstances.

The gravity of a criminal offense is measured by the sentence imposed; as such, the fact that an offense is purely civil, *i.e.*, with no sentence imposed, indicates that a *civil offense per se* has a *minimal level of gravity*. *United States v. Bajakajian*, 524 U.S. 321, 340 (1998) (measuring gravity of crime by reference to the sentence imposed, which was a fine only therein); *Graham v. W. Virginia*, 224 U.S. 616, 630 (1912) ("The…sentence, indicat[es] the gravity of the offense…."). "Congress sought proportionality in sentencing through a system that imposes

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[6] Of course, this ignores the fact that West Virginia always ***automatically*** imposes a 500% penalty regardless of the circumstances, belying the claim that it appropriately exercised discretion here. Petition, at 7 n.3 and 10-12. Earlier this Term, this Court rejected such *post hoc* justifications for administrative actions. *Dawson v. Steager*, ___ U.S. ___, 139 S.Ct. 698, 706 (2019) ("an implicit but lawful distinction cannot save an express and unlawful one").

appropriately different sentences for criminal conduct of differing severity." United States Sentencing Commission, Guidelines Manual, §3A1.3 (Nov. 2015). "Simple uniformity — sentencing every offender to five years [*i.e.*, imposing the same sanction on every offender, here revocation] — destroys proportionality." USSG §3A1.3 ([ ] supplied).[7]

Here, Ashland Specialty did not commit a crime and did not have the requisite criminal *mens rea* to commit a crime as the instant violation was unquestionably not purposefully, knowingly, or recklessly committed; Ashland Specialty self-reported the violation; it self-corrected the violation; and, the violations were unrelated to any other illegal activities whatsoever. Under *Bajakajian*, these facts would have indicated a "minimal level of culpability". *Bajakajian*, 524 U.S. at 334-39. But, West Virginia and some other states do not see it that way.

This Court should address this split – indeed, a fracture – in the law.

V. HAD THE *BAJAKAJIAN* ANALYSIS BEEN USED, THE INSTANT PENALTY WOULD HAVE BEEN HELD UNCONSTITUTIONAL.

West Virginia raises the point that, "Ashland does not explain how the result here would have been different had the Supreme Court of Appeals considered 'alternative' factors from any of these other courts."

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[7] *Available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf.

W.V. Br. at 25. But, the real question is whether the result would have been different had the Supreme Court of Appeals considered the factors in the *Bajakajian* analysis.

A. Ashland Specialty's level of culpability is minimal and less than the criminal culpability at issue in *Bajakajian*.

First, the degree of the defendant's reprehensibility or culpability indicate a minimal level of culpability, as discussed above at p. 9. *See Bajakajian*, 524 U.S. at 337; *Cooper Industries*, 532 U.S. at 435. Indeed, Ashland Specialty's culpability was less than the criminal violation at issue in *Bajakajian*.

B. The harm caused by Ashland Specialty was minimal because it reported its actions, thus allowing West Virginia an opportunity to fulfill its diligent enforcement obligations under the MSA.

Second, the relationship between the penalty and the harm to the victim caused by the defendant's actions indicate that there is no inherent proportionality of a penalty in the amount of 500% of the value of the subject goods where the harm caused by Ashland Specialty was minimal. *See Bajakajian*, 524 U.S. at 339; *Cooper Industries*, 532 U.S. at 435. Because Ashland Specialty self-reported and self-corrected its violation, West Virginia was afforded the opportunity to diligently enforce the MSA-implementing statutes. For example, West Virginia could have responded by immediately notifying Ashland Specialty that it had sold cigarettes that were not on the directory, which

would have reduced the number of such cigarettes sold, since all indications are that Ashland Specialty would have ceased such sales immediately. Or, West Virginia could have gone to Ashland Specialty's customers and confiscated the illegal cigarettes. Instead, West Virginia did nothing except wait for three years; then, it attempted to cure the State's own lax enforcement by harshly penalizing Ashland Specialty. Regardless, there is nothing in the record to indicate that West Virginia was harmed or indeed could be harmed by Ashland Specialty's actions, since all indications are that harm could only occur based on "West Virginia's failure to diligently enforce its MSA-implementing statutes…." W.V. Br. at 2. Indeed, the minimal harm caused by the criminal in *Bajakajian* was clearly more than the purely speculative and *de minimis* harm at issue here.

C. The sanctions imposed on Ashland Specialty by West Virginia are five times as much or more than other states for willful multi-state MSA violations involving many more cigarettes.

Third, the sanctions imposed in other cases for comparable misconduct indicate that a penalty of 500% of the value of the goods surpasses the usual, proper, or normal measure of proportion. *See Bajakajian*, 524 U.S. at 340-43; *Cooper Industries*, 532 U.S. at 435. *In State ex. rel. Wasden v. Native Wholesale Supply Co.*, 312 P.3d 1257 (Idaho 2013), a civil penalty of $214,200 was imposed for a cigarette wholesaler's *willful* importation and sale of 100 million cigarettes (10,000 master cases) that did not comply with the MSA, 408 times as many as the

244,600 cigarettes (amounting to less than 25 master cases) that Ashland Specialty inadvertently sold and for which was assessed a penalty of nearly $160,000. Had the Tax Commissioner imposed the instant penalty on Ashland Specialty at the same rate as the tobacco wholesaler in *Native Wholesale Supply*, the penalty would have been roughly $525. In another case involving the same violator, *State ex. rel. Pruitt v. Native Wholesale Supply*, 338 P.3d 613 (Okla. 2014), the same tobacco wholesaler was ordered to disgorge the gross receipts from *willfully* selling MSA non-compliant cigarettes. Had the Tax Commissioner imposed the instant penalty on Ashland Specialty at the same rate as the tobacco wholesaler in *Native Wholesale Supply*, the penalty would have been roughly $31,880.[8] Again, this factor indicates that the penalty assessed by West Virginia was grossly excessive.

Based on the above, should the Court grant *certiorari*, Ashland Specialty respectfully asserts that the instant penalty would be held unconstitutional.

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[8] *See Solem v. Helm*, 463 U.S. 277, 291 (1983) ("If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive.").

VI. THE MSA CONTRACT CANNOT AUTHORIZE WEST VIRGINIA TO IMPOSE PENALTIES THAT ARE ILLEGAL, *I.E.*, IN VIOLATION OF THE EIGHTH AMENDMENT.

West Virginia notes that "West Virginia's failure to diligently enforce MSA-implementing statutes could lead to losing a substantial portion of its annual payment." W.V. Br. at 2. Diligent enforcement is the responsibility of West Virginia, not Ashland Specialty, and the consequences of West Virginia not fulfilling its obligations are those of West Virginia to bear.

West Virginia cannot fulfill its MSA obligations simply by imposing an unconstitutionally excessive penalty on Ashland Specialty in violation of the Excessive Fines Clause.

Moreover, the law is clear that "no agreement…is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957).

VII. WEST VIRGINIA DOES NOT DISPUTE A "NATIONWIDE FIGHT OVER UNFAIR FINES AND FEES" IS GOING ON RIGHT NOW.

The "nationwide fight over unfair fines and fees" is real and the imposition of unconstitutionally excessive fines threatens to send individuals and small businesses like Ashland Specialty "into debt and bankruptcy."[9]

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[9] Kathryn Fink, *The Nationwide Fight Over Fines And Fees*, the1a.org (May 23, 2019),

CONCLUSION

This is the right Excessive Fines Clause case for the Court to review, and now is the right time.

Respectfully submitted,

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May 24, 2019

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https://the1a.org/shows/2019-05-23/the-nationwide-fight-over-excessive-fines-and-fees.