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 WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether imposing a civil penalty on a third-time offender in a heavily regulated industry comports with the Eighth Amendment's 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?

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BRIEF IN OPPOSITION

Respondent Dale W. Steager, State Tax Commissioner of West Virginia ("Commissioner"), respectfully submits that the petition for a writ of certiorari should be denied.

STATEMENT

Ashland Specialty Co. Inc. ("Ashland") challenges a $159,398 penalty assessed after it violated West Virginia's cigarette distribution laws for the third time in nine years, on a scale many times greater than its previous violations, and in a context where the State could have lost millions of dollars in Tobacco Master Settlement Agreement ("MSA") funds had it turned a blind eye to Ashland's misconduct. The penalty was 0.26% of the maximum monetary penalty the West Virginia Legislature authorized, and calculated pursuant to a formula directly proportional to the severity of Ashland's violation. There was no error in the state courts' determinations that—considering all these circumstances—the penalty rests on solid constitutional ground.

Neither does the decision below reflect confusion or division over the governing legal standards: This Court has already held that Excessive Fines Clause challenges must be evaluated under a "gross disproportionality" framework *and* provided workable guidance for applying it. The Petition points to different wording and organization as state and federal courts explain the factors they consider in excessive fines challenges, but these are distinctions without a difference—flexible expressions of the same

basic concepts within an inherently fact-specific inquiry. The decision below applied settled law to reach the right outcome; the Court should deny the Petition.

1. In 1998, four large tobacco product manufacturers entered into the MSA with West Virginia and other jurisdictions. Pet. App. 4a. The MSA settled litigation involving health-care costs attributable to cigarette smoking. See W. Va. Code § 16-9B-1. In 1999, the West Virginia Legislature began requiring tobacco product manufacturers that are not part of the MSA, yet still sell cigarettes in the State, to make annual deposits into escrow accounts. See *id.*; Pet. App. 4a. The escrow funds are held in reserve to pay a judgment or settlement if the State brings a claim that would have been covered by the MSA if the manufacturer were part of that agreement. Pet. App. 4a.

West Virginia's failure to diligently enforce MSA-implementing statutes could lead to losing a substantial portion of its annual payment. See, *e.g.*, *State ex rel. Greitens* v. *Am. Tobacco Co.*, 509 S.W.3d 726, 732-33 (Mo. 2017) (describing arbitration award reducing Missouri's MSA payments by over $50 million for failure to diligently enforce implementing laws). The Legislature strengthened the escrow statute in 2003 as part of its continuing efforts to strengthen the MSA regime, finding that "enacting procedural enhancements [would] help prevent violations and aid enforcement," and "thereby safeguard the [MSA payment], the fiscal soundness of the state, and the public health." W. Va. Code § 16-9D-1; see also Pet. App. 5a.

One of the key components of the 2003 legislation was creation of a directory of cigarette brands authorized for sale in West Virginia. Pet. App. 5a. The Commissioner has authority to add or remove cigarette brands from the list, W. Va. Code § 16-9D-3(b)(3), but must notify manufacturers and distributors before doing so, *id.* § 16-9D-3(b)(3)(A), (B). Nevertheless, the law is also clear that "[i]t is unlawful for any person . . . [t]o sell, offer, or possess for sale in this state, cigarettes of a tobacco product manufacturer or family brand not included in the directory." *Id.* § 16-9D-3(c). Any failure by the Commissioner to provide notice, or of a manufacturer or distributor to receive it, is not a defense to selling delisted cigarettes. *Id.* § 16-9D-3(b)(3)(C).

The Legislature also gave the Commissioner discretion to impose a range of penalties for violations of the Section 16-9D-3(c) regime. Together with "any other civil or criminal remedy provided by law," the Commissioner may "revoke or suspend the [entity's] business registration certificate" and "impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars" for each violation. W. Va. Code § 16-9D-8(a). Every pack of unlawfully sold cigarettes constitutes a separate violation. *Id.* The Commissioner may set a penalty within these ranges, and may choose whether to impose the other penalties instead or as well. *Id.* These penalty provisions are substantially similar to those enacted by 40 other States and territories. See, *e.g.*, Ala. Code § 6-12A-6(a); *infra* Part II & n.6.

2. Directory violations are "rare." Pet. App. 7a. In three audits of Ashland's sales between 2001 and

2009, however, the Commissioner found Section 16-9D-3(c) violations each time. Pet. App. 34a-35a. First, between January 1, 2001 and November 30, 2003, Ashland distributed 560 packs of delisted cigarettes. Pet. App. 6a, 16a. The Commissioner assessed a civil penalty of $3,808 for this first series of violations, which represented "500% of the retail value of the delisted cigarettes." Pet. App. 6a. Ashland did not contest this penalty. Pet. App. 6a.

A second pattern of violations was uncovered during an audit covering the period May 1, 2005 through February 29, 2008. That time, Ashland distributed 620 packs of cigarettes not listed in the directory. Pet. App. 6a. The Commissioner assessed a penalty of $5,127; again, 500% of the retail value of the unauthorized cigarettes. Pet. App. 6a-7a. Ashland did not contest this penalty, either. Pet. App. 6a-7a.

A 2012 audit revealed a third—and much more egregious—violation: During a three-month period between June and August 2009, Ashland distributed 12,230 packs of delisted cigarettes. See Pet. App. 6a. This time the Commissioner assessed a $159,398 penalty. As Ashland's counsel conceded below, this penalty was well under the maximum statutory penalty. Pet. App. 13a, 16a. Rather, the Commissioner used the same approach of 500% of the retail value of the illegal cigarettes; the penalty's higher dollar amount tracked the significantly expanded scope of Ashland's registry violations in 2009—over 21 times the volume of illegal distributions discovered in the first set of violations from 2001 through 2003. Pet. App. 6a-7a; 16a.

It is undisputed that the cigarettes at issue here were not listed on the registry when Ashland distributed them in West Virginia, and that the Commissioner fully complied with the notice provisions in Section 16-9D-3(b)(3)(A) and (B). Pet. 8. There is also no question that Ashland's misconduct may be considered when making MSA diligent-enforcement evaluations. Ashland argues that it lacked actual knowledge of the cigarettes' delisted status because it failed to update the contact information for its employee responsible for these issues after an unexpected staffing change. Pet. 8; see also Pet. App. 48a (discussing Ashland's "admitted negligence, which it attributes to staffing and management issues").

3. Ashland challenged the Commissioner's penalty determination before the West Virginia Office of Tax Appeals ("OTA"). At an August 2013 evidentiary hearing, the Commissioner's representative justified the $159,398 penalty because Ashland kept "making the same error" after receiving "plenty of warning" from "two previous audits." Pet. App. 8a. The representative also testified that the department's auditors "have no discretion" and the "audit program is locked in at 500 percent." Pet. App. 7a. He further explained that auditors nonetheless "have the ability to come to me," that he "ha[s] the ability to go to [his] director and get anything—to request something less," and that he did not "recall any reason to ask for a reduced rate" here. Pet. App. 7a. He also testified that deviations from 500% have "never happened," but that violations of the statutory scheme "are rare," and he has "never heard a good explanation to go up the food chain" to seek a reduction. Pet. App. 7a.

On August 18, 2014, an OTA administrative law judge ("ALJ") issued a decision reducing the Commissioner's penalty by 25%. Pet. App. 66a-83a. Relying on testimony that the Commissioner had used the same 500% penalty in previous cases, the ALJ concluded that "the Tax Commissioner exercised no discretion at all in issuing the penalty," which the tribunal characterized as the maximum allowable penalty. Pet. App. 76a. The ALJ also, however, found no error in the Commissioner's refusal to consider "certain mitigating factors" that Ashland had presented in an attempt to excuse its violation, Pet. App. 76a, and rejected Ashland's proposed alternate penalty of roughly $8,000, Pet. App. 79a. The ALJ "agree[d] with the Tax Commissioner that a larger penalty is warranted," as "this is not the first time the Petitioner has been audited and been found to have sold delisted brands." Pet. App. 79a-80a. Yet because in the ALJ's view "the maximum penalty should be reserved for the worst offenders," such as "a seller who deliberately sells delisted brands or who engaged in some criminal activity in connection with cigarette sales," Pet. App. 80a, the ALJ ultimately determined that the appropriate penalty was 375% of the retail price, or $119,548.50. Pet. App. 80a, 83a.

4. The Commissioner appealed OTA's decision to the Kanawha County Circuit Court—urging reinstatement of the original penalty—while Ashland appealed the decision to the Cabell County Circuit Court—arguing for further reduction or elimination of the penalty altogether. Pet. App. 8a & n.11. The Cabell County Circuit Court transferred Ashland's appeal to the Kanawha County Circuit Court, where both cases were decided. Pet. App. 8a & n.11.

On April 7, 2017, the Kanawha County Circuit Court reversed OTA's decision and reinstated the original $159,398 penalty because OTA's decision "usurped the statutory discretion granted to the Tax Commissioner." Pet. App. 64a, 36a. In the circuit court's view, OTA was wrong on two counts: The Commissioner *did* exercise discretion when setting the penalty amount, and the penalty was not the "maximum allowable penalty." Pet. App. 39a. The court emphasized that West Virginia law authorizes a $5,000 penalty per pack as well as revocation of the entity's business registration certificate. Pet. App. 40a; see also W. Va. Code § 16-9D-8(a). The court further found that the Commissioner considered all relevant factors when setting the penalty, and that the decision to set the penalty at 500% of retail price instead of $5,000 per pack was itself an act of discretion. Pet. App. 41a-42a. The court also found Ashland's position unpersuasive to the extent it faulted the Commissioner for not adequately considering the circumstances surrounding its violation, while simultaneously urging the court to disregard its history of noncompliance. Pet. App. 42a-44a; see also Pet. App. 35a (finding that "Ashland Specialty's failure to have a system in place which prevented the sale of delisted cigarettes was not beyond its control").

5. Ashland appealed to the Supreme Court of Appeals of West Virginia, which affirmed the circuit court. Pet. App. 26a. Writing for the majority, now-Chief Justice Walker concluded that the original penalty did not represent an abuse of discretion, that there were no mitigating circumstances warranting cancellation or reduction of the penalty, and that the penalty did not violate the Excessive Fines Clause of

either the West Virginia Constitution or the Eighth Amendment. Pet. App. 3a.

With respect to the state-law bases for the penalty, the majority emphasized the Commissioner's "broad discretion" to set a penalty, including through "revok[ing] or suspend[ing]" Ashland's business registration or assessing a civil penalty "of up to $61,150,000" under the $5,000 per pack framework. Pet. App. 14a. The decision to impose $159,398 instead was "directly correlated to the retail value of the cigarettes that Ashland sold unlawfully," and thus "was both supported by substantial evidence and based on reason." Pet. App. 14a. The court also deemed the argument that the Commissioner had consistently applied a 500% of retail value penalty "a red herring." Pet. App. 15a. The Commissioner exercised discretion by not imposing the true statutory maximum penalty, and because the approach he *did* use turns on a formula and not a dollar amount, its application was "calibrated to the severity of [Ashland's] offenses." Pet. App. 16a. The court also found no error in the Commissioner's decision not to read a "reasonable cause" defense into the statutory scheme, and thus not to adjust the penalty based on Ashland's negligent failure to receive actual notice of registry changes. Pet. App. 19a.

The court then rejected Ashland's argument that the penalty violates the Excessive Fines Clause of the West Virginia and federal Constitutions. Pet. App. 20a-24a. West Virginia has long treated the Excessive Fines Clause as incorporated, even before this Court confirmed as much in *Timbs* v. *Indiana*, 139 S. Ct. 682 (2019). See *Vanderbilt Mortg. & Fin.* v. *Cole*, 740

S.E.2d 562, 570 n.10 (W. Va. 2013). The court thus grounded its discussion in federal constitutional law.

Specifically, the court applied the test this Court announced in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), which asks whether a civil penalty is "grossly disproportionate to the gravity of [the] violation." Pet. App. 22a. The court also relied on its prior decision in *Dean* v. *State*, 736 S.E.2d 40 (W. Va. 2012), which stemmed from the "slightly different context" of civil forfeiture, yet provided helpful guidance because its analysis was "derived from" *Bajakajian* and "closely follow[ed] factors" federal courts use in similar cases. Pet. App. 22a.

These *Bajakajian*/*Dean* factors include the "amount of the forfeiture and its relationship to the authorized penalty"; "nature and extent of the criminal activity"; "relationship between the crime charged and other crimes"; and "harm caused by the charged crime." Pet. App. 21a (quoting *Dean*, 736 S.E.2d at 40). After considering these factors in light of all the circumstances, the court below concluded that the penalty withstands constitutional scrutiny because it "is not grossly disproportionate to the severity of Ashland's unlawful activity." Pet. App. 24a.

Two Justices concurred in part and dissented in part. Pet. App. 27a-28a. They "agree[d] with the result in this case" because "unlawfully selling cigarettes is, without question, deserving of a hefty monetary penalty." Pet. App. 27a. Nevertheless, they expressed concern with "the appearance that the Tax Commissioner abdicated the exercise of discretion when calculating that monetary penalty," and emphasized that "[i]n the future, [he] should plainly

articulate why a specific penalty was chosen." Pet. App. 27a-28a.

6. On October 9, 2018, the Supreme Court of Appeals denied Ashland's rehearing petition. Pet. App. 84a-85a. Ashland filed this timely Petition, followed by a supplemental brief. The Court called for this response on March 15, 2019.

REASONS FOR DENYING THE PETITION

I. COURTS ARE UNITED ON THE STANDARD FOR RESOLVING EXCESSIVE FINES CLAUSE CHALLENGES.

A. This Court Has Already Established The Gross Disproportionality Standard And The Fact-Specific Guideposts For Applying It.

Before *United States* v. *Bajakajian*, 524 U.S. 321 (1998), this Court had "little occasion to interpret, and ha[d] never actually applied, the Excessive Fines Clause." *Id.* at 327. When faced squarely with how to "articulate[] a standard for determining whether a punitive forfeiture is constitutionally excessive," however, the Court made clear that the forfeiture "violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant's offense." *Id.* at 334.

Under Ashland's view, "[t]he Court stopped there"—and the Court should accordingly grant review to continue *Bajakajian*'s work. Pet. 1. But *Bajakajian* did not announce the gross disproportionality standard from on high, then leave lower courts to grope in the dark when it came time to apply it. Rather, it provided two general "considerations" and several fact-specific guideposts

to inform the analysis. *Bajakajian*, 524 U.S. at 336-40. First, the Court extended its teaching regarding the Cruel and Unusual Punishments Clause to the Excessive Fines Clause, emphasizing that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 336. The Court also cautioned that "any judicial determination regarding the gravity of a particular criminal offense will be imprecise." *Id.* Together, these principles militate against any idea of "strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense," and toward the more flexible "gross disproportionality" standard instead. *Id.*

Second, the Court addressed how to apply the gross disproportionality test. Rather than announcing the overall standard for Excessive Fines Clause challenges and remanding for the lower court to apply it in the first instance, *Bajakajian* determined that the specific forfeiture in question "would violate the Excessive Fines Clause." 524 U.S. at 337. The Court looked at the harshness of the penalty, the nature and severity of the offense, and the low degree of culpability involved. *Id.* at 337-40. It emphasized the weightiness of a $357,114 forfeiture where there was "no correlation between the amount forfeited and the harm that the Government would have suffered had the crime gone undetected." *Id.* at 339. The forfeiture stemmed from a pure "reporting offense" that was "unrelated to any other illegal activities," and the harm from the offense was "minimal." *Id.* at 337-38. And finally, the fact that the "respondent [did] not fit into the class of persons for whom the statute was principally designed," together with a comparison of the $350,000 forfeiture to the maximum

fine of $5,000 and sentence of six months, "confirm[ed] a minimal level of culpability." *Id.* at 339.

It is thus false that *Bajakajian* "stopped short of identifying specific factors lower courts should consider in evaluating gross disproportionality." Pet. 17. Ashland attempts to explain away this portion of *Bajakajian* as "a largely case-specific inquiry," Pet. 17, and emphasizes that the Court did not "mandate" a "rigid set of factors," Pet. 17-18 (citation omitted). Yet every gross disproportionality challenge requires "case-specific," fact-heavy analysis, and lack of a checklist to guide every gross disproportionality challenge does not make the factors the Court *did* rely on any less instructive. Indeed, the fact-intensive nature of these challenges cautions against any "magic words" approach—which might artificially limit courts' consideration of the full circumstances bearing on the gross disproportionality analysis in a specific case. After all, where judicial determinations are intrinsically "imprecise," *Bajakajian*, 524 U.S. at 336, lack of a rigid test is an asset, not a liability. This Court has thus already "articulate[d] consistent and workable standards" in this sphere, Pet. 18, and there is no need to revisit the question here.

B. State And Federal Courts Apply *Bajakajian* Consistently.

There is likewise no evidence that courts struggle to apply *Bajakajian*. If anything, the almost two dozen cases Ashland cites reveal remarkable unity among state and federal courts: Virtually all courts use the gross disproportionality standard to resolve various types of Excessive Fines Clause challenges, and they apply that standard in very similar fashions.

1. As an initial matter, there is no meaningful division among courts that *Bajakajian* controls Excessive Fines Clause challenges. Ashland marshals 20 cases[1] in support of its argument that courts are divided over application of *Bajakajian*'s standard. But of those cases, only five address Eighth Amendment challenges to civil penalties.[2] Seven address criminal forfeitures,[3] and eight involve civil forfeitures.[4] Ashland tries to have it both ways: It

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[1] Ashland also invokes two cases from state intermediate appellate courts. This Court considers decisions from state courts of last resort when determining whether certiorari is appropriate. Sup. Ct. R. 10(b). Nevertheless, as discussed below these decisions do not alter the analysis.

[2] See Pet. App. 1a; *United States* v. *Aleff*, 772 F.3d 508 (8th Cir. 2014); *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408 (Cal. 2005); *Wilson* v. *Comm'r of Revenue*, 656 N.W.2d 547 (Minn. 2003); *Newell Recycling Co.* v. *E.P.A.*, 231 F.3d 204 (5th Cir. 2000).

[3] See *United States* v. *Viloski*, 814 F.3d 104 (2d Cir. 2016); *United States* v. *Young*, 618 F. App'x 96 (3d Cir. 2015); *United States* v. *Malewicka*, 664 F.3d 1099 (7th Cir. 2011); *United States* v. *Zakharia*, 418 F. App'x 414 (6th Cir. 2011); *United States* v. *Jalaram, Inc.*, 599 F.3d 347 (4th Cir. 2010); *United States* v. *Seher*, 562 F.3d 1344 (11th Cir. 2009); *United States* v. *Heldeman*, 402 F.3d 220 (1st Cir. 2005).

[4] See *People ex rel. Hartrich* v. *2010 Harley-Davidson*, 104 N.E.3d 1179 (Ill. 2018); *United States* v. *$132,245.00 in U.S. Currency*, 764 F.3d 1055 (9th Cir. 2014); *Maher* v. *Ret. Bd. of Quincy*, 895 N.E.2d 1284 (Mass. 2008); *Howell* v. *State*, 656 S.E.2d 511 (Ga. 2008); *Cty. of Nassau* v. *Canavan*, 802 N.E.2d 616 (N.Y. 2003); *Commonwealth* v. *Real Prop. & Improvements Commonly Known As 5444 Spruce St., Phila.*, 832 A.2d 396 (Pa. 2003); *United States* v. *Lot Numbered One (1) of Lavaland Annex*, 256 F.3d 949 (10th Cir. 2001); *State* v. *Real Prop. at 633 E. 640 N., Orem, Utah*, 994 P.2d 1254 (Utah 2000).

urges the Court to consider all of these cases together as support for a purported split in authority, while faulting the Supreme Court of Appeals for "ignor[ing] the deeply material differences," Pet. 15, between civil penalties and criminal forfeitures. Ashland cannot credibly argue that the tests for an excessive fine should differ, then point to purported differences in application to lament the lack of a "national uniform standard." Pet. 18.

Nevertheless, Ashland's full list of cases confirms that there is no need for this Court's review. *Bajakajian* involved a criminal forfeiture, which meant the Court had no occasion to hold that the gross disproportionality standard governs non-forfeiture cases. But even so, this question has not fostered confusion among courts. Like the decision below, all but one case Ashland cites applied the same test—whether the penalty or forfeiture was "grossly disproportional to the gravity of [the] offense," *Bajakajian*, 524 U.S. at 324—showing that courts are overwhelmingly united on this issue.

The one exception is the Fifth Circuit's decision in *Newell Recycling Co.* v. *E.P.A.*, 231 F.3d 204 (5th Cir. 2000). There, the Fifth Circuit refused to acknowledge *Bajakajian*'s applicability to civil penalties, reasoning instead that "[n]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." *Id.* at 210. This decision takes to the extreme the weight other courts commonly afford legislative determinations. For example, the Eleventh Circuit has explained that "if the value of forfeited property is within the range of

fines prescribed by Congress, a strong presumption arises that the forfeiture is constitutional." *United States* v. *817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1309 (11th Cir. 1999) (footnote omitted). Yet while most courts apply this presumption *within* the *Bajakajian* framework, the Fifth Circuit stands alone in deeming it conclusive even where it may lead to grossly disproportional results.

Newell is no reason to grant the Petition. It was decided 19 years ago, and it remains an outlier today. All of the other civil penalty cases discussed in the Petition were decided after *Newell*, and they did not follow its lead. Neither is this the right case to evaluate *Newell*'s holding even if the Court were inclined to do so: The parties have always agreed that *Bajakajian*'s gross disproportionality test controls. As discussed further below, Ashland raised new arguments in its rehearing petition about the appropriate factors when *applying* this standard, but it did not argue that the state courts should have jettisoned it altogether in the civil penalty context. Further, the court below expressly relied on *Bajakajian*. It recognized that respect for legislative judgment is tied to the gross disproportionality test, see Pet. App. 21a (quoting *Bajakajian*, 524 U.S. at 336), but ultimately applied *de novo* review to determine "whether the civil penalty imposed on Ashland is grossly disproportionate to the gravity of its violation of West Virginia Code § 16-9D-3(c)," Pet. App. 22a. Thus, even assuming *Newell* was wrongly decided, this is the wrong case to correct it. See, *e.g.*, *Timbs* v. *Indiana*, 139 S. Ct. 682, 690 (2019) (declining to consider issue that "would lead us to address a question neither pressed nor passed upon below").

The shallowness of the split over whether *Bajakajian* applies and the inadequacy of this case to address it is particularly relevant because Ashland's entire argument why "this case presents an issue of national importance," Pet. 37 (capitalization altered), turns on its assertion that "many courts have seen fit to leave decision-making" regarding the amount of punitive civil penalties "wholly up to the legislature," Pet. 39. The only citation supporting this claim of "many courts," however, is to *Newell*. Pet. 37. Nevertheless, Ashland argues that this case is "a ready vehicle" for certiorari review because the "pertinent holding below was based on the Excessive Fines Clause and *Bajakajian*." Pet. 37. That is precisely why this is the wrong case to address Ashland's concern: A case in which the court and all parties agreed that *Bajakajian* controls does not present the question whether the Eighth Amendment allows total deference to the legislature's judgment instead.

This Court's recent decision in *Timbs* does not alter this calculus. Ashland argues in its supplemental brief (at 2-3) that *Timbs* addressed only incorporation, and "did not establish standards which state and federal courts must follow" when resolving excessive fines challenges. Like many States, however, West Virginia treated the Clause as incorporated long before *Timbs*. See *Vanderbilt Mortg. & Fin.* v. *Cole*, 740 S.E.2d 562, 570 n.10 (W. Va. 2013). Nothing about *this* decision, then, would change had the court below taken it up a year later. It is also not true that *Timbs* left state courts rudderless when it comes to applying the newly incorporated right: *Bajakajian* remains good law, and

the States that did not previously look to federal law can do so now—just as the court below did here.

To be sure, *Timbs* leaves other questions unresolved, but this is the wrong case to address them. For instance, *Timbs* did not determine whether a different standard may govern civil forfeiture cases—particularly civil *in rem* forfeitures like those at issue in *Austin* v. *United States*, 509 U.S. 602 (1993). The Court declined Indiana's invitation to consider overruling *Austin* in *Timbs*, and as a civil penalties case, this is certainly not an appropriate vehicle to revisit that question. Neither does this case present the right opportunity to address the more general question whether the factors informing the Excessive Fines Clause inquiry "ought to be different for different types of fines, penalties, or forfeitures." Supp'l Br. 5. Ashland urges the Court to grant review to avoid an "'avalanche' of new Eighth Amendment litigation," Supp'l Br. 5, but this hasty approach would be contrary to the Court's repeated reminders that it is "a [C]ourt of review, not of first view." *McWilliams* v. *Dunn*, 137 S. Ct. 1790, 1801 (2017) (citation omitted). And in any event, Ashland is not only asking the Court to overlook the lack of development of these issues in other state and federal courts, but in this case as well. Ashland has consistently agreed that *Bajakajian* is the correct standard to resolve this civil penalty case—its rehearing petition in the Supreme Court of Appeals was the first time it urged the court to apply different factors, and even then it stayed within *Bajakajian*'s overall framework.

2. Similarly, there is no material division among the many courts that apply *Bajakajian*. State and federal courts consider the same general factors when

determining whether a civil penalty, civil forfeiture, or criminal forfeiture is grossly disproportionate.

The Petition seizes on variations in phrasing and the different ways courts organize relevant factors as evidence of division. See, *e.g.*, Pet. 1 ("Each court reads *Bajakajian* differently, distilling from its holding three, four, or even five factors for determining disproportionality."). Yet for a fact-specific inquiry like gross disproportionality, it is hardly surprising to find some variation around the edges. The important question is whether courts agree on the type of factors that bear on the analysis, not whether they use identical language to describe them. And the answer to that more fundamental question is yes. 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. See 524 U.S. at 337-40; *supra* Part I.A.

State Courts of Last Resort

West Virginia. In the decision below, the court applied a four-factor test from an earlier decision involving forfeiture to this civil penalty case. Pet. App. 21a. These "*Dean* factors" deliberately track the three guideposts from *Bajakajian* discussed above. See Pet. App. 22a (explaining that the *Dean* factors were "derived from" *Bajakajian*). First, *Dean* and the decision below consider the "amount of the [penalty] and its relationship to the authorized penalty." Pet. App. 21a (quoting *Dean* v. *State*, 736 S.E.2d 40, 42 (W. Va. 2012)). Second, two of the *Dean* factors consider the seriousness of the offense: "the nature and extent

of the [violation]" and the "harm" it caused. Pet. App. 21a. Finally, the court considered Ashland's culpability—both in *Dean*'s terminology of the "relationship between the crime charged and other crimes," and through the lens of other courts that have considered the issue "since *Bajakajian*," such as the Eighth Circuit's explicit consideration of "the reprehensibility of the defendant's conduct." Pet. App. 21a, 22a n.39 (quoting *United States* v. *Aleff*, 772 F.3d 508, 512 (8th Cir. 2014)).

Different wording aside, the court below hewed closely to this Court's guidance in *Bajakajian*. And as the remainder of this section illustrates, its approach does not depart substantively from that of other state courts of last resort or federal courts of appeals.

California. The Supreme Court of California took a similar approach in *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421 (Cal. 2005). There, the court considered the harshness of the penalty in terms of the defendant's ability to pay and by comparing it to the penalties imposed in other States. See *id.* (citing *Bajakajian*, 524 U.S. at 337-38). It also looked to the harm caused and its "relationship . . . [to] the penalty." *Id.* Finally, the court took into account "the defendant's culpability." *Id.*

Georgia. In *Howell* v. *State*, 656 S.E.2d 511 (Ga. 2008), the Georgia Supreme Court considered the same three factors. It reviewed the "harshness of the penalty," the "inherent gravity of the offense," and "whether the criminal activity . . . was extensive," *id.* at 512 (citation omitted).

Illinois. The most recent state-court decision in the Petition is *People ex rel. Hartrich* v. *2010 Harley-Davidson*, 104 N.E.3d 1179 (Ill. 2018). Here too, the court considered "the harshness of the penalty" and the "gravity of the offense." *Id.* at 1184 (citation omitted). There is also no substantive difference between asking "whether the [unlawful] conduct . . . was extensive," *id.* (citation omitted), and reviewing the extent of the defendant's culpability.

Massachusetts. The portion of *Maher* v. *Ret. Bd. of Quincy*, 895 N.E.2d 1284 (Mass. 2008) that the Petition quotes (at 20) illustrates that the Supreme Judicial Court of Massachusetts addresses both "the maximum penalties authorized by the Legislature," *id.* at 1291 (citing *Bajakajian*, 524 U.S. at 337-39), and the defendant's culpability, *id.* (considering "circumstances of [the defendant's] offenses" and relationship to "any other illegal activities"). In addition, *Maher* also made clear that the court considered whether the unlawful act was "serious in nature," *id.*—or in other words, that Massachusetts considers the same general factors as its sister States.

Minnesota. The Supreme Court of Minnesota also considers these factors when determining whether a civil penalty constitutes an excessive fine. In *Wilson* v. *Comm'r of Revenue*, 656 N.W.2d 547 (Minn. 2003), the court compared the civil penalty with "fines imposed for the commission of other offenses in the same jurisdiction" and "in other jurisdictions." *Id.* at 555. It also expressly considered "the gravity of the offense." *Id.* Finally, although *Wilson* did not specifically mention the defendant's culpability, the court considered relative culpability for violations of similar provisions when determining what weight it

should give to the "disparity in liability" for these similar offenses. *Id.* at 556.

New York. The Court of Appeals of New York breaks out the harshness of the penalty into multiple sub-factors: the value of the property forfeited, the maximum punishment that could have been imposed, and the defendant's economic circumstances. See *Cty. of Nassau* v. *Canavan*, 802 N.E.2d 616, 622 (N.Y. 2003). The court also considers "the seriousness of the offense" and the actual and potential harm "had the defendant not been caught." *Id.*

Pennsylvania. The Supreme Court of Pennsylvania continues the pattern. See *Commonwealth* v. *Real Prop. & Improvements Commonly Known As 5444 Spruce St., Phila.*, 832 A.2d 396, 402 (Pa. 2003). It considers "the penalty imposed as compared to the maximum penalty available," *id.*—that is, the harshness of the penalty. It considers the "harm resulting from the crime charged," *id.*, or the seriousness of the offense. And it considers "whether the violation was isolated or part of a pattern of misbehavior," *id.*—the defendant's culpability.

Utah. Finally, the Supreme Court of Utah looks to the same factors. See *State* v. *Real Prop. at 633 E. 640 N., Orem, Utah*, 994 P.2d 1254, 1259 (Utah 2000). It considers multiple sub-factors when "determin[ing] the forfeiture's harshness": Its objective and subjective value, the hardship it imposes on the defendant, and "the comparative punishment factor." *Id.* The court also reviews "the gravity of the

particular offense," *id.*, and "the defendant's culpability," *id.*[5]

Federal Courts of Appeals

Decisions from each of the federal courts of appeals are consistent with those from state courts of last resort—relying on the same three general factors to apply *Bajakajian*'s gross disproportionality standard to the specific facts before them.

First Circuit. In *United States* v. *Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005), the court considered the harshness of the penalty relative to applicable sentencing guidelines. See *id.* (citing *Bajakajian*, 524 U.S. at 337-40). It also reviewed the offense's seriousness in terms of "the harm caused by the defendant," and asked "whether the defendant falls into the class of persons at whom the criminal statute was principally directed" to assess culpability. *Id.*

Second Circuit. Using a similar approach to the First Circuit, the Second Circuit considers "the maximum sentence and fine that could have been

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[5] The Petition also addresses two decisions from state intermediate appellate courts. See Pet. 21-22 (citing *Hinkle* v. *Commonwealth*, 104 S.W.3d 778 (Ky. App. 2002); *One Car, 1996 Dodge X-Cab Truck White in Color 5YC-T17 VIN 3B7HC13Z5TG163723* v. *State*, 122 S.W.3d 422 (Tex. App. 2003)). These decisions are consistent with those from state courts of last resort. See *Hinkle*, 104 S.W.3d at 782 (considering "sentences imposed for similar crimes," the offense's "gravity," and "the effect of the forfeiture on innocent third parties" (citation omitted)); *One Car*, 122 S.W.3d at 425 (considering forfeiture's "correlation" to damages and whether defendant was part of "the class of offenders addressed by the forfeiture" (citing *Bajakajian*, 524 U.S. at 340)).

imposed," the "essence of the crime," and "whether the defendant fits into the class of persons for whom the statute was principally designed." *United States* v. *Viloski*, 814 F.3d 104, 110 (2d Cir. 2016) (citation omitted).

Third Circuit. The Third Circuit's non-precedential decision in *United States* v. *Young*, 618 F. App'x 96 (3d Cir. 2015) follows the usual pattern. The court phrased harshness of the forfeiture as "the maximum fine authorized by statute and the sentencing guidelines which are associated with the offense or offenses," seriousness of the offense as "the nature of the offense or offenses," and culpability as "whether the defendant falls into the class of persons for whom the statute was designed." *Id.* at 97.

Fourth Circuit. The Fourth Circuit's factors closely mirror those that the Supreme Court of Appeals applied here. It considers various sub-factors organized around three themes: the "amount of the forfeiture and its relationship to the authorized penalty," "the nature and extent of the criminal activity," and the defendant's "level of culpability." *United States* v. *Jalaram*, *Inc.*, 599 F.3d 347, 355-56 (4th Cir. 2010) (citing *Bajakajian*, 524 U.S. at 337-39).

Fifth Circuit. Only the Fifth Circuit does not consider these factors. Yet as discussed above, *supra* Part I.B.1., this result stems from the court's more fundamental holding that a fine within legislative limits "does not violate the Eighth Amendment"—or in other words, its refusal to evaluate gross disproportionality. *Newell*, 231 F.3d at 210.

Sixth Circuit. As with the Third Circuit, the Petition relies on a non-precedential decision from the

Sixth Circuit. Pet. 22 (citing *United States* v. *Zakharia*, 418 F. App'x 414 (6th Cir. 2011)). Also like the Third Circuit, the Sixth considers factors including "the potential fine under the advisory Guidelines range, the maximum sentence and fine that could have been imposed," and the "nature of the offense." *Zakharia*, 418 F. App'x at 422 (citations omitted). The court also reviewed facts that underscored the defendant's culpability—including "gravely undermin[ing] the judicial process" by lying under oath and otherwise causing 'significant harm," *id.*—and relied on a precedential opinion that makes clear culpability is part of the Sixth Circuit's more complete statement of its test, *id.* (citing *United States* v. *Ely*, 468 F.3d 399, 403 (6th Cir. 2006)).

Seventh Circuit. For its part, the Seventh Circuit draws its test directly from *Bajakajian* and the Second Circuit, using the same analysis discussed above in *Vilosky*. See *United States* v. *Malewicka*, 664 F.3d 1099, 1104 (7th Cir. 2011) (citing *Bajakajian*, 524 U.S. 337-39; *United States* v. *Varrone*, 554 F.3d 327, 331 (2d Cir. 2009)).

Eighth Circuit. In *United States* v. *Aleff*, 772 F.3d 508 (8th Cir. 2014), the Eighth Circuit analyzed "the sanctions in other cases for comparable misconduct," the "relationship between the penalty and the harm," and "the reprehensibility of the defendant's conduct." *Id.* at 512 (citation omitted).

Ninth Circuit. The Ninth Circuit phrases its consideration of the harshness of the penalty as "other penalties that may be imposed for the violation." *United States* v. *$132,245.00 in U.S. Currency*, 764 F.3d 1055, 1058 (9th Cir. 2014) (citation omitted). It describes the seriousness of the offense as "the nature

and extent of the crime" and "the extent of the harm caused," and it analyzes culpability by asking "whether the violation was related to other illegal activities." *Id.* (citation omitted).

Tenth Circuit. The Tenth Circuit considers the harshness of the penalty in several ways, including by comparing the penalty to the statutory maximum penalty and relevant sentencing guidelines. *United States* v. *Wagoner Cty. Real Estate*, 278 F.3d 1091, 1100 (10th Cir. 2002) (citing *Bajakajian*, 524 U.S. at 337-38). It also views "the extent of the criminal activity" and "the harm caused to other parties"—or the seriousness of the offense—and "related illegal activities." *Id.*

Eleventh Circuit. Using now-familiar language, the Eleventh Circuit analyzes "other penalties authorized by the legislature," "the harm caused by the defendant," and "whether the defendant falls into the class of persons at whom the criminal statute was principally directed." *United States* v. *Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009) (citation omitted).

* * *

The repeated refrains sounding from state and federal appellate courts reveal common factors informing the gross disproportionality analysis that come straight from *Bajakajian*—and underscore that "gross disproportionality" has proven to be a workable standard. Tellingly, Ashland does not explain how the result here would have been different had the Supreme Court of Appeals considered "alternate" factors from any of these other courts. Different terms to explain courts' rationales only matter if they lead to different outcomes in similar cases. The variations

Ashland highlights do not reach that level—indeed, most courts freely recognize that the factors they name are not set in stone, and that listing certain factors does not bar consideration of others in appropriate cases. See, *e.g.*, *Aleff*, 772 F.3d at 512 ("[p]roportionality is determined by a variety of factors, including [exemplar factors]"); *Canavan*, 802 N.E.2d at 622 (introducing test with the phrase, "we consider *such factors as*" (emphasis added)). Because courts are neither confused nor divided over how to apply *Bajakajian*, there is no need for this Court to grant review.

II. The Penalty Is Constitutional Under Any Standard.

With no meaningful division over the proper application of the gross disproportionality standard in Excessive Fines Clause cases, the Petition becomes essentially a request for error-correction. Yet viewed through either *Bajakajian*'s or *Cooper Industries*' lens, the $159,398 penalty is not grossly disproportional to Ashland's violations of West Virginia law. The state courts agreed that the fine was not excessive—even the partially dissenting justices emphasized their "agree[ment] with the result in this case," Pet. App. 27a-28a. (And although the OTA ALJ disagreed with the penalty amount, he also rejected Ashland's arguments for a minimal or nonexistent penalty and would have reduced the fine by only 25%. Pet. App. 83a.) The state courts were correct: Under all the circumstances, Ashland's penalty did not constitute an excessive fine.

As an initial matter, the court below was correct that Ashland's repeated reliance on the "automatic" imposition of its 500% penalty is a red herring. In

context—as both state courts determined, Pet. App. 14a, 39a—the record makes clear that 500% was the Commissioner's default penalty formula, not an irrefutable presumption. The Commissioner's representative clarified that department auditors always "have the ability to come to [him]" if they believe a different penalty is warranted, and that he in turn "ha[s] the ability to go to [his] director and get anything—to request something less." Pet. App. 7a. It is also difficult to speculate about patterns of behavior where violations of the directory scheme "are rare," Pet. App. 7a, and in any event, including the volume of illegal sales in the penalty formula ensures that it takes into account the relative severity of each case.

More fundamentally, Ashland's objection to the *process* by which its penalty was set is a separate question from whether the *result* of that process is a constitutionally excessive fine. Ashland does not ask this Court to grant review on Due Process Clause grounds—and for good reason. The only due-process claim Ashland pressed in the state supreme court was a venue argument. See Br. for Pet'r 32-33 & Reply Br. 19-20, No. 17-437, *Ashland Specialty Co. Inc.* v. *Steager*, 818 S.E.2d 827 (W. Va. 2018). Thus, even if the Question Presented were liberally construed to include a due-process challenge related to the Commissioner's procedures when assessing the penalty, that claim would be forfeited. Concerns about an "automatic" process are thus unfounded and irrelevant.

By contrast, multiple factors confirm that Ashland's penalty was not grossly disproportional to its offense. *First*, Ashland was an admitted third-time

offender. Ashland was on notice of its obligation to ensure that cigarettes it distributes in the State are listed on the directory—it paid a $3,808 penalty for violations ending in 2003, then $5,127 for more violations ending in 2008. Distributing over 12,000 packs of delisted cigarettes was therefore Ashland's third violation of West Virginia law in less than ten years. Ashland argues (at, *e.g.*, 34) that its violation stemmed from excusable negligence, but West Virginia law places the burden on the distributor to ensure that all cigarettes are listed in the directory. W. Va. Code § 16-9D-3(b)(3). Further, Ashland's pattern of violations weakens its argument because prior violations leading to the same percentage-based penalties should have underscored the importance of accurate recordkeeping to ensure compliance with state law. Instead, its two previous fines proved insufficient deterrents.

Second, Ashland's third series of violations was on a significantly greater scale than its first two. The 12,230 packs Ashland unlawfully distributed between June and August 2009 were over *ten times* the volume of the first two series of improper sales *combined*. See Pet. App. 6a. Even worse, the increased scale of the third violation occurred over just three months. Ashland distributed 560 packs over a three year audit period from January 2001 through November 2003, and 620 packs over a May 2005 to February 2008 audit period. This means that, even assuming the violations in the first two audit periods were limited to similar three-month subsets of the audit period, Ashland went from distributing an average of 187 and 207 packs of delisted cigarettes per month during its first two periods of noncompliance, to distributing an average of over *4,000* packs per month during the

third. Particularly in light of this escalation, there was no error in the state courts' refusal to deem "employee turnover and record keeping issues" a legally relevant excuse. Pet. App. 41a.

Third, Ashland's pattern of violations was not harmless misconduct: As the court below emphasized, West Virginia's failure to ensure that non-MSA-participating manufacturers and distributors comply with implementing laws could endanger the State's MSA payments. Pet. App. 24a. This was no empty concern. MSA-participating manufacturers have won arbitration awards reducing their required payments because of States' failure to diligently enforce statutes relating to directories like West Virginia's. Missouri faced an over $50 million reduction in its payments for lack of diligent enforcement, see *State ex rel. Greitens* v. *Am. Tobacco Co.*, 509 S.W.3d 726, 732-33 (Mo. 2017), and Pennsylvania lost over $100 million even after judicial reductions of a larger arbitration award, see *Commonwealth ex rel. Kane* v. *Philip Morris USA, Inc.*, 114 A.3d 37, 49 (Pa. Commw. 2015) (*en banc*). With an annual MSA payment of approximately $60 million to West Virginia, the potential harm from Ashland's violation—negligent or not—was real.

Fourth, Ashland's penalty was calibrated to the increasing severity of its violations. Ashland emphasizes that the Commissioner used the same 500% penalty in other similar cases, but this does not make the penalty one-size-fits-all. Unlike in *Bajakajian*, here there is "inherent proportionality" in applying a 500% penalty to the retail value of the actual unlawful sales, because the scope of the violation determines the size of the penalty. 524 U.S.

at 339; see also Pet. App. 16a (contrasting penalty here to case where penalty "was not calibrated to the severity of the . . . offenses"). Moreover, the penalty was well under the statutory maximum: Ashland conceded that the Commissioner could have imposed a penalty of $5,000 per pack, or $61,150,000. Pet. App. 13a n.17. The reality, then, is that Ashland received a penalty less than 0.26% of the statutory maximum. Similarly, the Commissioner did not exercise his discretionary authority to revoke Ashland's business registration, W. Va. Code § 16-9D-8(a), and instead allowed Ashland to continue transacting business in West Virginia despite its repeated violations of state law.

Finally, the 500% penalty comports with penalties for the same offense in the overwhelming majority of States. Over 40 jurisdictions impose substantially similar penalties for distributing cigarettes not listed in that jurisdiction's directory. The Commissioner's Alabama counterpart, for example, may "impose a civil penalty in an amount not to exceed the greater of [500%] of the retail value of the cigarettes sold or [$5,000]" for violations of Alabama's cigarette directory regime. See Ala. Code § 6-12A-6.[6] Indeed,

[6] See also Alaska Stat. § 43.50.485(a); Ariz. Rev. Stat. § 44-7111, § 6(a); Ark. Code § 26-57-1306(a)(3); Cal. Rev. & Tax. Code § 30165.1(h)(1)(b); Colo. Rev. Stat. § 39-28-306(1); Conn. Gen. Stat. § 4-28p(a); D.C. Code § 7-1803.06(a)(2); 29 Del. Code § 6088(a); Ga. Code § 10-13A-9(a); Idaho Code § 39-8406(1); 30 Ill. Comp. Stat. 167/30(a); Ind. Code § 24-3-5.4-21(d); Iowa Code § 453D.6(1); Kan. Stat. § 50-6a14(a); La. Stat. § 13:5076(a); Md. Code, Bus. Reg. § 16-507(a)(3); Mass. Gen. Laws ch. 94F, § 5(b); Mo. Stat. § 196.1032(1); Neb. Rev. Stat. § 69-2709(1); Nev. Rev. Stat. § 370.695(3); N.H. Rev. Stat. § 541-D:6(I); N.M. Stat. § 6-4-22(C); N.Y. Tax Law § 481(1)(d); N.C. Gen. Stat. § 66-293(a); Ohio Rev. Code Ann. § 1346.10(B); Okla. Stat. tit. 68, § 360.7(A); Or.

even some of the few States that impose lesser penalties authorize fines above $100,000. See, *e.g.*, Mont. Code Ann. § 16-11-509(1) (permitting $122,540 penalty for a similar civil violation in Montana). There are few penalties that carry this degree of national uniformity.

Taken together, these factors confirm the state courts' constitutional analysis. The Supreme Court of Appeals correctly concluded that, under *Bajakajian*, there is no Eighth Amendment violation. Pet. App. 22a. The harshness of the penalty is justified by the "correlation between the amount [penalized] and the harm," *Bajakajian*, 524 U.S. at 339, as well as the penalty's similarity to those authorized in the majority of States. Similarly, the severity of the offense and Ashland's culpability are underscored by Ashland's two prior violations, the dramatically increased volume of the violations at issue here, and the possible reduction in MSA payment at stake. Moreover, as a cigarette distributor Ashland is certainly "within the class . . . for whom the statute was properly designed." *Id.* at 338.

For its part, Ashland does not argue that the penalty is excessive under the factors *Bajakajian* described, but urges the Court to grant review and conclude that it fails under the factors set forth in *Cooper Industries Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001). See Pet. 33 ("[*u*]*nder the Cooper*

Rev. Stat. § 180.455(3)(a); 35 Pa. Stat. § 5702.307(a); 24 L.P.R. § 15009(a); R.I. Gen. Laws § 44-20.1-8(a); S.C. Code § 11-48-60(A); S.D. Codified Laws § 10-50-82; Tenn. Code § 67-4-2605(a); Utah Code § 59-14-608(1)(d); Vt. Stat. tit. 33, § 1923 (a); Va. Code § 3.2-4212(A); Wash. Rev. Code § 70.158.060(1); Wis. Stat. § 995.12(5); Wyo. Stat. § 9-4-1208(a).

Industries test, the 500% penalty . . . is grossly disproportionate" (emphasis added; capitalization altered)). There are significant weaknesses to this request. Most importantly, Ashland first argued *Cooper Industries* as providing the relevant factors in its petition for rehearing in the state supreme court. The question was not developed at earlier stages of the litigation, neither court below addressed it, and the Supreme Court of Appeals denied the rehearing petition without substantive explanation, Pet. App. 84a-85a. Neither does Ashland attempt to show division among federal courts of appeals or state courts of last resort on what role the *Cooper Industries* framework might play in the Excessive Fines Clause arena. Thus, even though Ashland claims that resolving this case under *Cooper Industries* would save the Court from the need to "create from wholecloth factors for evaluating a civil monetary penalty's excessiveness," Pet. 31, it is actually asking the Court to import punitive-damages factors developed under the Due Process Clause into the Excessive Fines Clause framework without any engagement from the court below or examples of other courts adopting this approach.

Nevertheless, pushing past whether the *Cooper Industries* question was properly preserved, there would be no error under its terms, either. This result is unsurprising, because the factors in *Cooper Industries* deliberately overlap with *Bajakajian*: *Bajakajian* was one of the cases *Cooper Industries* relied on when determining the limits of permissible punitive-damages awards, *Cooper Indus.*, 532 U.S. at 434, and some courts have found *Cooper Industries* instructive in the excessive fines context, too, see *Aleff*, 772 F.3d at 512.

Cooper Industries teaches that when assessing a punitive damages award, courts should consider "the defendant's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct." *Cooper Indus.*, 532 U.S. at 435. The first factor—culpability—is also part of the *Bajakajian* framework and militates in favor of constitutionality for the same reasons discussed above. So too for the second factor. Although the court below did not center its decision on *Cooper Industries*, it considered the relationship between Ashland's penalty and the harm its violations posed within the gross disproportionality analysis. Pet. App. 24a (explaining that the Legislature enacted West Virginia Code §§ 16-9D-1 through 10 "to prevent violations and aid enforcement of the laws implementing the MSA and so to 'safeguard the Master Settlement Agreement, the fiscal soundness of the state, and the public health'" (citation omitted)).

Ashland resists this conclusion by faulting the court for looking to "hypothetical harm." Pet. 35. But the case Ashland cites in the same section of the Petition—*BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996)—teaches that potential harm is relevant to a proportionality inquiry no less than actual. *Id.* at 581 & n.34. The state court correctly considered two sources of harm: the threat of lost MSA funds for non-diligent enforcement of MSA-related laws, and danger to "the public health" from selling unauthorized cigarettes. Pet. App. 24a (quoting W. Va. Code § 16-9D-1). Furthermore, if Ashland truly wishes to import principles from punitive-damages law into the excessive fines context, then the $159,398

penalty certainly satisfies the second *Cooper Industries* factor: It constitutes a 5-to-1 ratio between the penalty and the harm, measured in terms of the retail value of the illegal cigarettes, and "[s]ingle-digit multipliers"—or ratios below 10-to-1—"are more likely to comport with due process." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 425 (2003).

Finally, the third factor of "sanctions imposed in other cases for comparable misconduct" supports the conclusion of the court below. Ashland criticizes the Commissioner for imposing 500% penalties in other cases as supposed evidence of a lack of discretion in Ashland's case. *E.g.*, Pet. 7 n.3, 10, 12, 36. In terms of the *Cooper Industries* factors, however, this critique reveals that the sanctions imposed in comparable cases are not only similar, but are calculated using an *identical* formula.

The Supreme Court of Appeals also explained that "the West Virginia Legislature has authorized similar, civil penalties in the context of the retail sale of alcohol," Pet. App. 24a (citation omitted), which further indicates that Ashland was not singled out for harsh treatment, but was treated the same as all entities selling regulated substances outside the State's legal frameworks. And finally, as discussed above, Ashland's penalty was consistent with the penalty ranges that the overwhelming majority of States authorize for similar registry violations. Ashland's misconduct was thus addressed under the same framework as both in-state and out-of-state offenders.

Under any approach, then, the state court correctly determined that the $159,398 penalty was not grossly disproportionate to Ashland's repeated

violations of state law. This case presents no important and unresolved question of federal law, nor even any error to correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

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May 15, 2019