No. _____

In The
Supreme Court of the United States

BERNARD J. MORELLO,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

LUCCI SMITH LAW, PLLC
JACQUELINE LUCCI SMITH
Counsel of Record
JOSEPH K. WATTS
WILLIAM L. BOWERS
2550 Gray Falls Dr., Suite 395
Houston, Texas 77077
T: 832-494-1700
JLSmith@LucciSmithLaw.com
Counsel for Petitioner

October 10, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Does a properly enacted state statute imposing fines and penalties violate the Eighth Amendment of the United States Constitution if the state applies the statute arbitrarily and abusively?

Does the Fourteenth Amendment require states to consider substantive and procedural due process protections when imposing state statutory fines and penalties?

Does the Texas Supreme Court's "shocking the senses of mankind" standard for considering the constitutionality of statutory fines and penalties without regard to proportionality violate the Eighth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDING

White Lion Holdings, L.L.C. is a Texas limited liability company, whose sole member is Bernard J. Morello, Petitioner.

The State of Texas originally began these enforcement proceedings against White Lion Holdings, L.L.C. as the transferee of a compliance plan and permit associated with affected property. Later, the State added Bernard J. Morello, Petitioner herein.

White Lion Holdings, L.L.C. does not appeal the judgment against it in this proceeding.

Respondent is the State of Texas acting through the Texas Commission on Environmental Quality, the state agency charged with enforcing environmental regulations.

CORPORATE DISCLOSURE STATEMENT

White Lion Holdings, L.L.C. is a privately held, sole member, Texas limited liability company, has no parent company, is member managed, and is taxed as a sole proprietorship. Bernard J. Morello is the sole member/manager.

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PETITION FOR WRIT OF CERTIORARI

In 2004, White Lion Holdings, L.L.C., ("White Lion") purchased certain real property in Fort Bend County, Texas that was subject to a TCEQ[1] waste management compliance plan ("Plan").[2] Thereafter, the Plan transferred to White Lion. Petitioner, Bernard J. Morello is the sole member of White Lion, but is not a transferee of the Plan.

In 2006, the State of Texas initiated an environmental enforcement proceeding against White Lion for failing to meet certain Plan obligations. App. 1. Later, the State added Morello individually based on his ownership of White Lion. App. 1. After allowing the case to linger for over seven years, in 2013 the State moved for and obtained summary judgment against White Lion for $325,600.00 in civil penalties plus other sums, and severed the case against Morello. App. 79-80. Over a year later, the State obtained a summary judgment against Morello for the same violations, including civil penalties in the amount of $367,250.00. App. 74-75.

Petitioner respectfully requests this Honorable Court grant review to extend the protections afforded by the Eighth Amendment and the Due Process Clause to the States through the Fourteenth Amendment to the United States Constitution.

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[1] Texas Commission on Environmental Quality.

[2] The Plan included a hazardous waste permit.

OPINIONS BELOW

The opinion of the Texas Supreme Court holding that the fines assessed were not unconstitutionally excessive, overruling assertions of due process violations and reversing the court of appeals decision is reported at *State v. Morello*, 547 S.W.3d 881 (Tex. 2018) and is found at App. 1. The order denying Bernard Morello's motion for rehearing was entered June 22, 2018 and is found at App. 90.

The opinion of the Texas Court of Appeals, Third Judicial District reversing the trial court's grant of summary judgment and holding that Morello could not be held individually liable is reported at *Morello v. State*, 539 S.W.3d 330 (Tex.App.—Austin, 2016, pet. granted) and is found at App. 20.

The opinion of the Texas Court of Appeals, First Judicial District affirming the summary judgment against White Lion is unreported, but can be found at *White Lion Holdings, LLC v. State*, 2015 WL 5626564 (Tex.App.—Houston [1st Dist.] Sept. 24, 2015, pet. denied) and is found at App. 46.

The judgment of the district court granting summary judgment against Morello for violations of the White Lion Plan was issued on April 14, 2015 in Cause No. D-1-GV-06-000627, *State v. Morello*, in the 353rd District Court of Travis County, Texas, and is found at App. 76.

The judgment of the district court granting summary judgment against White Lion for violations of

the compliance plan and permit was issued on September 19, 2013 in Cause No. D-1-GV-06-000627, *State v. White Lion Holdings, LLC and Bernard J. Morello*, in the 353rd District Court of Travis County, Texas, and is found at App. 79.

JURISDICTION

Petitioner seeks review of the decision of the Texas Supreme Court issued on February 23, 2018. Petitioner's timely filed motion for rehearing was denied on June 22, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

U.S. CONST. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

> to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

This is an appeal from an environmental enforcement action against a successor in interest to a compliance plan. In 2004, White Lion Holdings, L.L.C., purchased out of bankruptcy certain real property in Fort Bend County, Texas for $150,000.00. App. 3. For decades, the prior owner, Vision Metals, Inc., operated a pipe manufacturing facility generating hazardous waste and causing subsurface pollution about which TNRCC[3] had knowledge. In 1988, TNRCC required the prior owner to follow a waste management compliance plan[4] due to the ongoing pollution resulting from operations. ("Plan").[5] App. 2-3. The Plan required the owner to: (1) operate an ANTS[6] system, (2) monitor and file reports, and (3) provide financial assurance to TCEQ that Vision was financially capable of conducting the corrective actions program. App. 3.

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[3] Texas Natural Resources Conservation Commission, the predecessor agency to TCEQ. App. 48.

[4] The Plan was issued in conjunction with a Permit authorizing the disposal of hazardous waste generated at the site until its closure.

[5] The Plan included a hazardous waste permit.

[6] Acid Neutralization and Treatment System.

After the sale TCEQ required that White Lion assume the obligations under the Plan but did not require Morello to provide any guarantees or assume any obligations individually. App. 3, 24. White Lion did not continue the operation causing the pollution. Based on the reduction in sales price (which would have afforded White Lion the resources to continue the obligations) and the current conditions at the time of the sale, White Lion assumed the obligations and the Plan transferred to White Lion alone. App. 3. Petitioner, Bernard J. Morello is the sole member of White Lion, but is not a transferee of the Plan.

Third party purchasers from the bankruptcy estate destroyed the property, including the ANTS system, preventing White Lion from being able to operate the ANTS system or obtain financial assurance. Morello began working with the EPA to address remediation efforts. App. 48. With full knowledge of this fact and despite the soil and groundwater contamination decreasing after White Lion took possession of the property, the State of Texas initiated an environmental enforcement proceeding in 2006 against White Lion for breaching the Plan. App. 1. Later, the State added Morello individually based on his ownership of White Lion.

Although the suit was filed in 2006, the State did not prosecute the action or move for an injunction to compel compliance with the Plan. App. 49. After allowing the case to linger for over seven years, the State moved for and obtained summary judgment against White Lion for $325,600.00 in civil penalties plus other sums and severed the case against Morello. App. 79-80.

Over a year later, the State obtained a summary judgment against Morello for the same violations, including civil penalties in the amount of $367,250.00. App. 74-75. The State did not allege that White Lion or Morello caused or contributed to the contamination on the property or committed an environmental tort. App. 36.

During the years that this case languished on the docket, unbeknownst to Morello the State was allowing fines to accrue daily at a cumulative rate of $200.00 each day. The State obtained in two separate judgments, one against White Lion and one against Morello, fines and fees of nearly $1,000,000.00, even though none of the contractual breaches complained of resulted in any harm to the environment.

Petitioner respectfully requests that this Honorable Court grant review to extend the protections afforded by the Eighth Amendment to state statutory fines and penalties and substantive and due process rights through the due process clause of the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

The issue of whether cumulative statutory fines assessed daily by a government agency as a penalty are subject to the prohibition against excessive fines in the Eighth Amendment has not been considered by this Court for over a century. The existing precedent of this Court holds that state fines that are penal in

nature are subject to the Eighth Amendment but allows lower courts to craft appropriate tests. However, the Circuits are in conflict as some have no test because they consider any fine imposed by the legislature as *per se* constitutional while others have fashioned inconsistent tests for judicial scrutiny of the constitutionality of statutory fines and penalties. This lack of guidance has left the state courts and agencies unchecked, resulting in the deprivation of due process and uncertainty in the law for the citizenry of the several states.

Given the inconsistent treatment of the Excessive Fines Clause of the Eighth Amendment, and this Court's policy of preventing abuse of a State's prosecutorial powers, this Court should extend the Excessive Fines Clause to the States through the Fourteenth Amendment and establish guidelines for its application, particularly for statutorily imposed fines.

Some statutorily imposed fines may appear reasonable on their face, but when coupled with prosecutorial abuse, delay or compounding parties and violations, facially reasonable fines become palpably excessive. Application of the Eighth Amendment in an as-applied challenge presents an issue of first impression.

This Court first articulated a standard for forfeitures in 1998. Justice Thomas noted, "[u]ntil today, however, we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly

disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Similar constraints and guidance are needed for statutory penalties.

The Texas Supreme Court erred in conceding judicial review of statutory fines because they did not want to "override the legislature's discretion." *State v. Morello*, 547 S.W.3d 881, 898 (Tex. 2018); App. 17. The prosecutorial abuse of seeking fines against both a company and its sole member in separate lawsuits, coupled with unjustifiable delay by failing to prosecute the violations for over seven years, amassed disproportionate fines that the Texas Supreme Court should have reviewed under the Eighth and Fourteenth Amendments. The daily fines imposed were unconstitutionally excessive and grossly disproportionate to the offense.

This Court should grant the petition, confirm that the Excessive Fines Clause in the Eighth Amendment is a limitation on the States through the Fourteenth Amendment and establish long-needed precedent in setting guidelines for its application.

I. This Court has jurisdiction to review state supreme court decisions that conflict with or violate the United States Constitution.

Even when cases arise under state law, this Court has jurisdiction to review those decisions when the state statute conflicts with the United States Constitution. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138

S. Ct. 1461, 1486 (2018) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The proposition that the Constitution is the supreme law of the land is one of the foundational tenets of the United States and has been recognized for more than two hundred years. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Any case that arises under the United States Constitution may be reviewed by the Supreme Court. *Id*. at 178.

When state laws conflict with the United States Constitution, the Supremacy Clause dictates that the Constitution is controlling over the state law. U.S. CONST. art. VI, cl. 2. Courts "shall" regard the Constitution and "must not give effect to state laws" that conflict with it. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015). The Supremacy Clause and the case law interpreting it demonstrate the "significant role that courts play in assuring the supremacy of federal law" and the rights and protections vested under the Constitution apply to all citizens. *Id*. Here, the "Maximum Penalty" provision of the Texas Water Code conflicts with the Eighth and Fourteenth Amendments of the United States Constitution, and the Constitution must prevail. *Id*.

II. The Excessive Fines Clause should be extended explicitly to the States to limit an executive agency's power to levy fines arbitrarily and abusively, as illustrated *sub judice*.

The Eighth Amendment provides: "[e]xcessive bail shall not be required, nor excessive fines imposed. . . ." U.S. CONST. amend. VIII. In 1909, this Court held that excessive fines are those that are "so grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (citing *Coffey v. Harlan County*, 204 U.S. 659 (1907)). This Court has defined a "fine" as a "payment to a sovereign as punishment for some offense" and recognizes the need to prevent "governmental abuse of prosecutorial power." *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265-66, 268 (1989). The Excessive Fines Clause acts as a limitation to the "government's power to extract payments. . . . as punishment for some offense" where that payment is considered a penalty. *United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

Penal fines may be punishment for either a civil or a criminal offense so long as the ultimate purpose of the statute under which the fine arises is one of punishment and deterrence. *United States v. Halper*, 490 U.S. 435, 447 (1989) (overturned on other grounds by *Hudson v. United States*, 522 U.S. 93 (1997)). Although Morello caused no pollution and the contamination decreased under White Lion's ownership, the TCEQ took no action for eight years following its suit to compel

compliance or punish Morello for not following the Plan and for failing to acquire financial assurances—actions made impossible through the conduct of others. App. 4. Not until 2014 did the TCEQ begin moving on this case, retroactively seeking over ten years' worth of fines (2004 through 2015) set at $50.00 per day, per violation against Morello in addition to fines already assessed against White Lion for the same violations. App. 4.

In the judgments against Morello and White Lion, the State recovered fines and attorney's fees totaling over $750,000.00—more than five times the purchase price of the property. App. 75, 80. The trial courts' judgments awarded more than $889,000.00 in total fines and fees for, among other things, the failure to provide $574,000.00 in financial assurance for a property that had only a $150,000.00 purchase price.[7] App. 6.

Neither Morello nor White Lion ever produced hazardous waste or contributed to the contamination. Only the prior owner did. During White Lion's ownership, the affected groundwater steadily improved without active intervention due to the fact that White Lion neither produced nor discharged any hazardous waste since purchasing the property, allowing natural attenuation to commence. Punitive fines of nearly $1,000,000.00 inflicts the kind of permanent financial damage that prevents Morello from continuing his

[7] The purchase price included a total of 197 acres, of which only 37 are owned by White Lion and subject to the Plan. The remaining 160 acres is raw land owned by Morello individually.

business endeavors or remediating the property. This is exactly the kind of grossly disproportionate penalty that the Eighth and Fourteenth Amendments are meant to prohibit.

a. In determining whether a statutory fine violates the Excessive Fines Clause, courts need guidance on par with the tests available for excessive forfeitures and excessive awards of punitive damages.

Analysis under the Eighth Amendment begins with the determination of whether the fine is penal or remedial in nature. *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919). This Court recognizes that "civil proceedings may advance punitive as well as remedial goals. . . ." *United States v. Halper*, 490 U.S. 435, 447 (1989) (overturned on other grounds by *Hudson v. United States*, 522 U.S. 93 (1997)). A fine is classified according to the purpose of the relevant statute. *Id*. at 448. Remedial fines are intended to compensate the government for its expenses or losses, *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (*per curiam*), while penal fines are meant to punish and deter wrongdoing. *Austin v. United States*, 509 U.S. 602, 609-10 (1993); *Bajakajian*, 524 U.S. at 329.

Here, the penalties assessed against Morello were imposed by the TCEQ, a governmental agency, and are to be paid to that agency, so the definition of a "fine" has been satisfied. *Browning-Ferris Indus.*, 492 U.S. at

266. The Texas statutory provision under which the State brought this enforcement proceeding is entitled "Maximum *Penalty*" and indicates the legislature's intent to use these fines to punish and deter violations of Texas's Water Code. TEX. WATER CODE § 7.102 (West 2017) (emphasis added). These fines are based on conduct, not damage, and do not compensate the government for losses. As such, the fines against Morello are penal and subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

After determining the nature of the fine, the second step of the Excessive Fines Clause analysis is the proportionality test. *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). The specifics of the tests differ between the three types of excessive penalties: forfeitures, jury awards of punitive damages, and statutory penalties. The tests for excessive forfeitures and punitive damages are well-settled in modern jurisprudence, yet the test for statutory damages has not been addressed for almost a century. *See St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *United States v. Bajakajian*, 524 U.S. 321 (1998).

Some circuits and states, including the Fifth Circuit, hold that a statutory penalty is never excessive as long as the amount of the fine is within the range imposed by the legislature, and do not consider the amount of the fine in light of the Eighth Amendment. The Texas Supreme Court adopted its own random test and will only find a statutory penalty excessive if "it becomes so manifestly violative of the constitutional

inhibitions as to shock the sense of mankind." *State v. Morello*, 547 S.W.3d at 889 (citing *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980)). Outside of Texas "shocking the sensibility of mankind" is not the criteria for testing the constitutional muster of any punishment, and this unique test is vague and effectively an outright bar to judicial review.

Other courts that do consider the constitutionality of statutory penalties, forfeitures and punitive damages pursuant to the Eighth Amendment follow this Court's directive and involve some variation of a proportionality test, though particulars differ.

When determining the excessiveness of a forfeiture, this Court prescribed a pure proportionality test: "The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish" and violates the Eighth Amendment if "it is grossly disproportional to the gravity of the defendant's offense." *Bajakajian*, 524 U.S. at 334. A forfeiture is unconstitutional when it is "grossly disproportionate" to the nature of the offense, considering the statutory penalties allowed and the amount taken by the government. *Bajakajian*, 524 U.S. 321 (1998).

Awards of punitive damages are quasi-criminal in nature because their purpose is to deter and punish wrongdoing. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). States have the power to set limits on punitive damage awards so a

judge's power of review is similarly limited.[8] *Id*. at 433 (citing *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)). A determination of "gross excessiveness" first requires courts to identify the state interests served by punitive damages. *Id*. at 568. Thereafter, courts must apply the three "guideposts" set out in *BMW*. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 575-85. These guideposts are mostly irrelevant to the issue of excessive statutory fines. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012).

However, even in cases between private parties, one of the factors in the *BMW* test is comparing the penalty at hand to comparable sanctions. *Gore*, 517 U.S. at 583. If considered in this case, the "Maximum Penalties" provision would be unconstitutionally excessive.

b. Comparison to federal statutory fines for similar violations reveals the flaw in the Texas law.

The federal statute most analogous to the *sub judice* legislative scheme is the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. §§ 6901 *et seq*.

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[8] When the punitive damages are awarded in a suit between private parties, the Eighth Amendment does not apply; rather, a determination of "grossly excessive" is made under the Fourteenth Amendment Due Process Clause. *State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408, 416-17 (2003). The Excessive Fines Clause only comes into play when the government is a party to the suit.

The EPA has codified its penalty policy in § 6928 and enumerates several factors to consider in assessing a penalty, including the seriousness of the violation and good faith efforts to comply with the statute. 42 U.S.C. § 6928.

> Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirement.

RCRA § 3008; 42 U.S.C. § 6928(a)(3).

Under RCRA, the statute the Texas Water Code emulates, no minimum assessment exits, and the fine is based on both the seriousness of the violation and mitigating factors impacting compliance. The Texas Water Code allows for no such considerations, operating instead as a strict liability statute through which the State may impose fines grossly disproportionate to both the offense and the harm caused. TEX. WATER CODE § 7.102 (West 2017).

c. Statutorily imposed penal fines remain unchecked and inconsistently applied, necessitating guidance from this Court.

Contrary to the well-settled analyses available for other civil penalties, very little guidance exists for determining the excessiveness of statutory penalties. The subject has remained undefined for almost a century. *See L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919) (discussing a penalty provision of the Copyright Act); *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). According to *Williams* a statutory fine is so excessive as to be unconstitutional under the Due Process Clause of the Fourteenth Amendment if the fine is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 67. In the matter at bar, Morello neither polluted the environment nor guaranteed the Plan.

The only yardstick for when a statutory fine is unconstitutionally excessive comes from *Williams*: a fine is unconstitutional when it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 67. There must be a balance between the statutory fine and the violation of that statute—almost identical to the proportionality test from *Bajakajian*.

In *Bajakajian* this Court held that a forfeiture of $357,144.00 to the federal government for a reporting violation was a violation of the Excessive Fines Clause. *United States v. Bajakajian*, 524 U.S. 321, 329 (1998).

The government cannot make the defendant suffer or surrender more than the harm done to the government. *Id*. at 333-34. Because a failure to report the movement of legally-obtained money to pay a legal debt cost the government nothing more than some information, the forfeiture of $357,144.00 was disproportional to any harm done, especially when compared to the penalties authorized under the statute of no more than a year in prison and a $5,000.00 fine. *Id*.

Like *Bajakajian*, Morello's violations of the Plan are no more egregious than a failure to file a report. App. 24-26. Here, the Texas Water Code authorizes a penalty range between $50.00 and $25,000.00 for each day of each violation. TEX. WATER CODE § 7.102 (West 2017). The TCEQ assessed fines of $50.00 per day against Morello but compounded that amount by asserting two separate violations against Morello and two violations against White Lion. App. 6. Thus, the cumulative fines assessed for the reporting violations was $200.00 per day, for over ten years. While championed as the statutory minimum, TCEQ's seven-year hiatus from exercising enforcement created an egregiously disproportionate penalty. Morello is currently liable for approximately $1,000,000.00 in fines and fees, both individually and as the sole member of White Lion, rather than being jointly and severally liable for the fines when the State proves a nexus between the offense and the actions of that officer. *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 745 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

In comparison to *NE Pharm*, this case involves a relatively minor offense, and the contamination levels decreased without interference by the TCEQ or an acid neutralization system, ("ANTS"), the system required under the Plan that was destroyed before Morello took possession of the property. App. 48. *See Bajakajian*, 524 U.S. at 329. Morello was not only *individually* assessed fines for removing the broken ANTS (which he had no part in), he was subjected to a separate judgment, with separate liability for the same violations as White Lion. App. 5.

The main point distinguishing this case from *Bajakajian* is the nature of the penalties. In *Bajakajian* there was an excessive forfeiture; here, an excessive statutory fine. Using the *Williams* analysis, the fine in this case is "wholly disproportioned" to the offense because it is hundreds of thousands of dollars for a relatively minor violation. Through the actions of third parties in destroying the ANTS, well heads, utilities and other property during removal of items purchased from the bankruptcy estate, Morello was unable to secure financial assurances[9] and, therefore, unable to comply with the TCEQ's compliance plan. App. 5, 48, 61. The property has improved, meaning there has been no real harm done. Yet, this relatively minor violation of the Texas Water Code somehow merited a second fine of $367,250.00 assessed over the course of ten

[9] Both Morello and White Lion were assessed penalties of $50.00 per day for failing to post financial assurance. Morello's second violation was for removing the ANTS system that was broken and could not be repaired.

years with no expenditures or action from the TCEQ after filing suit. App. 4-6. A fine far in excess of $350,000.00 is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. 63, 67 (1919). Such a grossly disproportioned fine violates the Excessive Fines Clause.

III. The "Maximum Penalty" section of the Texas Water Code is unconstitutional as-applied in this case under the Due Process Clause of the Fourteenth Amendment.

Even if the Excessive Fines Clause does not apply against the states through the Fourteenth Amendment, the statutory fine as applied in this case is still unconstitutionally excessive under the Fourteenth Amendment's Due Process Clause. U.S. CONST. amend. XIV; TEX. WATER CODE § 7.102 (West 2017). The Fourteenth Amendment Due Process Clause states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1. While it has never been decided conclusively whether this clause incorporates the Excessive Fines Clause to the states, this Court has held that the Fourteenth Amendment "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909); *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001). Here, the

statutory penalties assessed against Morello are unconstitutional as applied under the *Williams* test.

When this Court promulgated the *Williams* test, the Court had not considered whether the Excessive Fines Clause extended to the states. *Id*.; *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989). The Cruel and Unusual Punishment Clause of the Eighth Amendment has been applied against the states. *Robinson v. California*, 370 U.S. 660 (1962). The Excessive Bail Clause has also been extended over the years. *Schlib v. Kuebel*, 404 U.S. 357 (1971) (" . . . the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment."); *McDonald v. Chicago*, 561 U.S. 742, n. 12 (2010) (including bail on the list of rights established through the Fourteenth Amendment). The Excessive Fines Clause stands orphaned and should be adopted to avoid situations such as the matter *sub judice*. Applying the Excessive Fines Clause to the states would limit the penalties that the states may exact against individuals for the most minor violations of state law, which is the very purpose of the Amendment. *See St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

Even if the Excessive Fines Clause is not a limitation against the states, the Fourteenth Amendment Due Process must be evenly applied to civil penalties assessed against individuals by state governments and agencies. U.S. CONST. amend. XIV.

The relevant portion of the Texas Water Code provides:

> A person who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit relating to any other matter within the commission's jurisdiction to enforce . . . shall be assessed for each violation a civil penalty not less than $50 nor greater than $25,000 for each day of each violation as the court or jury considers proper.

TEX. WATER CODE § 7.102 (West 2017). The statute is facially valid, but its unrestrained application to the facts is constitutionally troublesome. Invalidating application of an unconstitutional-as-applied statute is a narrow remedy that has been used time and again to protect individuals' constitutional rights. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 477-78 (1995). The penalties section of the Texas Water Code, as applied here, violates Morello's constitutional rights to Fourteenth Amendment due process of the law as a deprivation of liberty and property without due process. TEX. WATER CODE § 7.102 (West 2017).

a. The Texas Water Code § 7.102 violates Morello's procedural due process rights as applied.

An unconstitutional-as-applied challenge to a statute is a narrow remedy, but an effective one, used to protect individuals' constitutional rights. *Furman v. Georgia*, 408 U.S. 238 (1972) (striking down Georgia's death penalty for want of standards to guide its

application); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down North Carolina's death penalty for failing to allow for individualized considerations); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 477-78 (1995). The penalties section of the Texas Water Code, as applied here, violates Morello's constitutional rights to Fourteenth Amendment due process of the law as a deprivation of liberty and property without due process because the lower courts failed to consider mitigating factors, and the State was allowed to linger and accumulate fines for years. TEX. WATER CODE § 7.102 (West 2017).

The statue is also vague because it failed to provide Morello notice in advance that he could be held liable for the failings of White Lion.[10]

A person must receive fair notice of both the "conduct that will subject him to punishment" and the "severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408, 417 (2003). The procedural due process issue in this case is the lack of notice of individual liability and of § 7.102's duration. Under the Water Code, a fine "shall be assessed for each day of each violation." TEX. WATER CODE § 7.102 (West 2017). There is no time limit on how long the TCEQ may assess a fine. There is no statute of limitations, nor any state law requiring action

[10] Morello was not a transferee of the compliance plan, was never given notice, and was held individually liable based on his standing as the sole, managing member of White Lion.

once a suit is filed. As a result, agencies like the TCEQ are fully within their rights to wait to file suit for years and then file suit to recover for decades of violations or file the lawsuit against an individual and take no further action while allowing daily fines to accrue against that individual in perpetuity. This practice flies in the face of the purpose of such fines and penalties, which is to ensure swift compliance, and is telling as to the lack of injury in the matter *sub judice*. If there were, TCEQ has certainly abdicated its responsibility to the citizenry to protect the health of both the people and general environment for nearly a decade.

Procedural due process constrains "governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the . . . Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Generally, some sort of hearing is required before an individual can be deprived of a property interest, and that hearing must be "at a meaningful time and in a meaningful manner." *Id*. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In *Mathews*, Social Security disability benefits were denied, and the plaintiff was found to be ineligible to receive those benefits before any evidentiary hearing occurred. *Id*. at 333. To determine the necessary procedural protections, courts analyze the governmental and private interests affected based on three factors: (1) "the private interest affected by official action . . . "; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the

probable value, if any, of additional or substitute procedural safeguards . . . "; and (3) the State's interest, "including the function involved and the fiscal and administrative burdens" that any new or substituted procedures would entail. *Id*. at 335.

Here, the private interest is Morello's right to acquire, possess, and dispose of real property unencumbered by state interference. He will be deprived of the rights of possession and voluntary alienation because the TCEQ, a state agency, failed to provide him proper notice of his individual liability. App. 24. Morello was aware of White Lion's liability as the L.L.C. owning the property and as the transferee that undertook the obligations of the compliance plan, but TCEQ did not notify Morello of his potential liability in an individual capacity until the TCEQ joined him as a defendant. App. 24.

The TCEQ collected double fines on the same property for the same violations, once against White Lion and once against Morello. The Texas Supreme Court held that such severance without proper notice did not violate Morello's due process rights. The first two prongs of the *Mathews* test weigh heavily in Morello's favor: the law as applied here was unconstitutional.

Under *Mathews*' third prong, the Texas interest in protecting and maintaining environmental quality is commendable and the TCEQ was formed for that reason. *See* Texas Commission on Environmental Quality, www.tceq.texas.gov/agency/mission.html (official

website of the TCEQ; provides the agency's mission statement and "agency philosophy"). This directive does not erase the requirement of satisfying due process. The cost to send notice of individual liability would be miniscule. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (plaintiffs are required by rule to bear the costs of notice); *Jones v. Flowers*, 547 U.S. 220 (2006). In addition to improper notice, the TCEQ also failed to take further action after filing suit, allowing the daily fines to accrue for seven years. App. 4. During that time, Morello cooperated and allowed inspectors onto the property to run tests—though he never received the results—and the property's contamination levels decreased. The State's only inconvenience would be a reduction in fines to something reasonable commensurate with the lack of harm caused to the environment.

For these reasons and based on any applicable analysis, § 7.102 of the Texas Water Code, as applied here, violates Morello's constitutional right to due process.

IV. The Circuit Courts treat the Excessive Fines Clause as if it were extended to the states but apply the "grossly disproportioned" test from *Williams* disparately. This split can only be resolved by this Court with a unified application.

Most recent cases addressing the issue of excessive statutory fines were addressed through interpretation of the Copyright Act. The Circuit Courts still apply the *Williams* analysis to those fines, but each Circuit's approach differs. In 1919, this Court proscribed the test for determining whether a fine is excessive, but no parameters or guidelines were set. This ambiguity led to each Circuit having its own method of making such determinations. At the least, there is no uniform application of the *Williams* test. At the worst, such disparate treatment of statutory fines has resulted in an abdication of judicial responsibility by courts such as the Texas Supreme Court, which adopted a completely unworkable rule, an outlier in modern jurisprudence and an effective bar to judicial scrutiny of statutory fines.

a. The First and Fifth Circuit Courts of Appeals have held that no statutory fine is unconstitutional if it falls within the prescribed statutory limits.

When reviewing cases involving statutory fines, the Fifth Circuit Court of Appeals has held repeatedly that "[a]n administrative agency's fine does not violate the Eighth Amendment—no matter how excessive the

fine may appear—if it does not exceed the limits prescribed" by the authorizing statute. *Cripps v. Louisiana Dept. of Agri. and Forestry*, 819 F.3d 221, 234 (5th Cir. 2016) (citing *Newell Recycling Co. v. E.P.A.*, 231 F.3d 204, 210 (5th Cir. 2000)). So long as a fine falls within the statutory range, the Fifth Circuit will not find it excessive. *Newell Recycling Co. v. E.P.A.*, 231 F.3d 204, 210 (5th Cir. 2000); *Vanderbilt Mortg. & Fin., Inc. v. Flores*, 692 F.3d 358, 374 (5th Cir. 2012); *Cripps v. Louisiana Dept. of Agri. and Forestry*, 819 F.3d 221, 234 (5th Cir. 2016). The "resolution of 'the mundane as well as the glamorous, matters of common law and statute as well as constitutional law'" is the job the Constitution assigned to the judiciary. *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86-87, n. 39 (1982)). Failing to give statutory fines the scrutiny owed to prosecutorial acts by a state government is an abdication of the judicial duty.

Separation-of-powers principles are intended to protect individuals from governmental abuses. *See Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) A. Hamilton). But, no matter how unconstitutional a fine is or abusive the prosecution, the Fifth Circuit will uphold it so long as this Court allows the *Williams* test to be applied unevenly.

The First Circuit Court of Appeals has followed the Fifth Circuit's example and refuses to find unconstitutional an award of statutory damages within the legislatively-set range. *Martex Farms, S.E. v. E.P.A.*,

559 F.3d 29, 34 (1st Cir. 2009) (citing *Newell Recycling Co. v. E.P.A.*, 231 F.3d 204 (5th Cir. 2000)). The First Circuit generally applies the test from *Williams* but has otherwise been entirely unwilling to find a statutory fine, as applied to an individual, unconstitutional. The Texas Supreme Court takes a similar approach, adopting an untenable rule that does not look at proportionality to either the offence or the harm, but to whether the fine is egregious enough to shock mankind. This blasé review of legislative fines imposed for the government's benefit is the epitome of judicial complacency. *See Stern*, *supra*.

When reviewing the statutory fines provision of the Copyright Act, the First Circuit recognized and applied different standards for willful and non-willful violations because the statute provided for those. *Sony BMG Music Entertainment v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013). Here, the Texas Water Code makes no such distinctions for the culpability behind violations; it is a strict liability statute so someone who acquires noncompliant property after the noncompliance began and later discovers compliance is impossible to obtain, is liable for the noncompliance, despite doing no wrong. App. 43.

b. The Second and Seventh Circuit Courts of Appeals have not conclusively spoken on this issue but afford great deference to awards within the statutory range.

Neither the Second nor the Seventh Circuit Courts of Appeals have directly addressed the *Williams* test or the Excessive Fines Clause, but both are highly deferential when statutory damages fall within the proscribed range. *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, N.Y.*, 954 F.2d 29, 39 (2d Cir. 1992); *Broadcast Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 487 (7th Cir. 1995). It is a more deferential standard of review than abuse of discretion. *Broadcast Music*, 44 F.3d at 487.

The Second Circuit has stated in *dicta* that the potential for a "devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by [the plaintiff], may raise due process issues" arising from the effects of a statute imposing the minimum statutory damages on a per-consumer basis in aggregated class action claims. *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 22 (2d Cir. 2003). These concerns must extend to individuals facing civil penalties at the hands of the government too. If the Second Circuit fears that statutory damages may be grossly disproportioned to any actual harm as to resemble a punitive damages award without the "egregious conduct" necessary for that award, the court should be wary and review the legislative fine as it would an award of punitive damages. *See id.* (citing *BMW of N.*

Am., Inc. v. Gore, 517 U.S. 559, 580 (1996); *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)). When the plaintiff inherently has more bargaining power and the power to raise fines against the defendant, the courts should be wary of the government-plaintiff's abuse of it position and power to the detriment of defendants.

c. The Eighth Circuit Court of Appeals does not extend the principle of "fair notice" to statutory fines but does apply the *Williams'* test to the total award, not just the amount per violation.

This Honorable Court, in *Williams*, held that the test for determining excessiveness of a statutory fine to be whether the fine is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919). The Eighth Circuit Court of Appeals has refused to consider the "disparity between 'actual harm'" and the statutory fine because "statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate." *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012). While that may be true, this Court and other circuits have recognized that there is a scale of culpability that must be considered when civil penalties are at issue. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996) (citing *Solem v. Helm*, 463 U.S. 277 (1983); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993)).

This test is almost identical to the Fifth Circuit's refusal to examine statutory damages. However, the Eighth Circuit held that the "absolute amount of the award, not just the amount per violation, is relevant to whether the award" is so disproportional as to be excessive under *Williams*. *Id*. at 910; *Warner Bros. Entertainment, Inc. v. X One X Prod., d/b/a A.V.E.L.A.*, 840 F.3d 971, 976-78 (8th Cir. 2016). Under the facts of this case, it is likely that the Eighth Circuit would have found the total amount of the fine to be unconstitutionally excessive. In *United States v. Lippert*, 148 F.3d 974 (8th Cir. 1998), the Eighth Circuit upheld a fine that was double the amount of the kickback the defendant received. Here, Morello's only true violation of the Texas Water Code was failing to make reports and post a financial assurance bond to the TCEQ based on contractual obligations imposed on his LLC. App. 4. This relatively minor violation does not merit almost $1,000,000.00 in fines and fees, especially when the property conditions improved during the period at issue, and the calculation methodology is considered in comparison to the RCRA's Civil Penalty Policy. 42 U.S.C. § 6928.

CONCLUSION

The Texas Supreme Court erred in holding that the fines assessed against Morello were not unconstitutionally excessive. When the Circuit Courts cannot agree on how to apply a test to determine the constitutionality of a civil penalty, this Court must step in and

give guidance so that people like Bernard Morello are not grievously injured by unjust state action and judicial nonchalance. Legislatures deserve deference, but courts must always be alert to possible abuses of power. Here, the Texas Supreme Court, following the Fifth Circuit's example, shunned its judicial duty to impose checks on the TCEQ as a state actor to Bernard Morello's detriment. But the Texas Supreme Court adopted its own random test for reviewing the constitutionality of a statutory penalty: is the fine "so manifestly violative of the constitutional inhibitions as to shock the sense of mankind."

Not only is that standard totally subjective, it is questionable that any fine could prove so shocking Applying a proper proportionality test establishes that the statutory fines imposed against Morello are grossly disproportionate to the harm and the offense for which he was charged and exceed the scope of the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. The State was allowed to double the minimum fines by alleging the same violations against Morello and his company, then sit idle for seven years as the fines accumulated to abusive sums.

The Texas Water Code, as applied in this case, failed to give notice to Morello that he could be held individually liable for the failings of his company. This cannot be allowed to stand.

For these reasons, the Petitioner respectfully requests this Honorable Court grant review to extend

the protections afforded by the Eighth Amendment and the due process clause to the States through the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

LUCCI SMITH LAW, PLLC
JACQUELINE LUCCI SMITH
Counsel of Record
JOSEPH K. WATTS
WILLIAM L. BOWERS
2550 Gray Falls Dr., Suite 395
Houston, Texas 77077
T: 832-494-1700
JLSmith@LucciSmithLaw.com
Counsel for Petitioner

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