

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ASHLAND SPECIALTY CO., INC.

Petitioner,

v.

DALE W. STEAGER, STATE TAX COMMISSIONER OF WEST VIRGINIA

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR WRIT OF CERTIORARI**

Mark Allen Loyd, Jr. (COUNSEL OF RECORD)
Brent R. Baughman
Bailey Roese
BINGHAM GREENEBAUM DOLL LLP
3500 PNC Tower
101 South Fifth Street
Louisville, Kentucky 40202
Phone: (502) 587-3552
Fax: (502) 540-2245
MLoyd@bgdlegal.com

COUNSEL FOR PETITIONER,
ASHLAND SPECIALTY CO., INC.

To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Pursuant to this Court’s Rule 13.5, Ashland Specialty Co., Inc. (“Petitioner”) respectfully requests a 30-day extension of time, to and including February 6, 2019, in which to file a petition for a writ of certiorari from a final judgment of the West Virginia Supreme Court of Appeals. The West Virginia Supreme Court of Appeals issued its judgment on May 1, 2018 and denied the Petitioner’s Petition for Rehearing on October 9, 2018. Unless extended, the time for filing a petition for a writ of certiorari will expire on January 7, 2019. This application is being filed at least 10 days prior to that date. This Court will have jurisdiction over the petition for a writ of certiorari under 28 U.S.C. § 1257. A copy of the West Virginia Supreme Court of Appeals’ opinion is attached at Tab A and the order denying the petition for rehearing is attached at Tab B.

BACKGROUND

This case involved the Excessive Fines Clause of the Eighth Amendment.¹ It concerns the application thereof to the West Virginia State Tax Commissioner’s (“Commissioner”) automatic assessment of a civil monetary penalty against Petitioner, a small business which distributes convenience store items, including cigarettes, for its inadvertent sale of a brand of cigarettes in West Virginia during a relatively brief period immediately following that brand’s removal from the West Virginia Approved Brands List for Non-Participating Manufacturers (“List”). Should a person sell cigarettes not found on the List, W. Va. Code § 16-9D-8(a) permits the Commissioner to impose a variety of penalties, including imposing a “civil penalty in an amount

¹ This Court is currently considering *Timbs v. Indiana*, No. 17-1091, a case addressing whether the Eighth Amendment’s Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars.”

Despite the *clear inadvertent nature* of Ashland Specialty’s sale of off-List cigarettes and the fact that *Ashland Specialty reported the sales to the Commissioner and discovered and corrected its mistake on its own*, the Commissioner considered none of these mitigating factors and instead automatically imposed the civil monetary penalty at the maximum² rate of 500%. The civil penalty equates to forfeiting the involved cigarettes more than *five times over, sixty-four times* the profit on the sales, *and thirty-five times the escrow payment* under the Master Settlement Agreement.

The Commissioner assessed the civil penalty on August 3, 2012, which Petitioner timely appealed to the West Virginia Office of Tax Appeals (“OTA”), arguing that the Commissioner had abused his discretion by automatically assessing the civil penalty at 500% and that the civil penalty itself violated the Eighth Amendment of the United States Constitution because it was an excessive fine. On August 18, 2014, the OTA issued its Final Decision, finding that the Commissioner abused his discretion by automatically assessing the penalty at the maximum rate of 500%; the OTA did not reach Petitioner’s constitutional claims. The OTA modified the penalty to 375% without providing reasoning for such action, and both Petitioner and the Commissioner appealed.

The appeals were consolidated in the Circuit Court of Kanawha County, which issued its Order on April 11, 2017 overturning the decision of the OTA and reinstating the original 500% civil penalty. The Circuit Court also held that the civil penalty was not unconstitutionally

² “Maximum” here refers specifically to the percentage rate to be applied to the retail value of the cigarettes for this particular civil penalty, which may be between 0% and 500%.

excessive under the Eighth Amendment. Petitioner timely appealed to the West Virginia Supreme Court of Appeals.

The West Virginia Supreme Court of Appeals held oral argument on April 11, 2018 and issued its Opinion on May 1, 2018, *Ashland Specialty Co., Inc. v. Steager*, 241 W. Va. 1, 818 S.E.2d 827 (2018). Upholding the Circuit Court's Order, the majority of the West Virginia Supreme Court agreed that the Commissioner did not abuse his discretion and that the penalty was not unconstitutionally excessive. Justice Ketchum and Justice Davis filed a separate opinion concurring in part and dissenting in part to take umbrage with the apparent lack of discretion on the part of the Commissioner when he automatically applied the 500% civil penalty without consideration of any other available penalties nor of the particular circumstances that gave rise to the sale of the off-List cigarettes.

Petitioner filed a Petition for Rehearing on May 31, 2018, largely on the basis that the West Virginia Supreme Court of Appeals improperly interpreted and relied upon a case that had not been briefed, *Dean v. State*, 230 W. Va. 40, 736 S.E.2d 40 (2012), to hold that the civil penalty was not unconstitutionally excessive. *Dean*, an in rem forfeiture case, applied standards derived from *U.S. v. Bajakajian*, 524 U.S. 321 (1998), arguably the most prominent Eighth Amendment case from this Court of the last several decades, and federal and state progeny. *Bajakajian* also dealt with a civil forfeiture, and this Court specifically declined to articulate particular standards for lower courts to look to in determining whether a particular fine was excessive, leading to a proliferation of disparate tests and factors across the United States. The West Virginia Supreme Court of Appeals denied the Petition for Rehearing on October 9, 2018.

In applying *Dean* to hold that the penalty was not unconstitutionally excessive, the West Virginia Supreme Court of Appeals muddies the water even further as to what standards courts,

especially state courts, will apply – and should apply – in evaluating a civil penalty under the Eighth Amendment.

REASONS FOR GRANTING EXTENSION OF TIME

The time to file a Petition for a Writ of Certiorari should be extended for 30 days for these reasons:

1. This case presents an important question regarding the limits the Excessive Fines Clause of the Eighth Amendment imposes on a state or local government when it applies a civil penalty and what standards courts should apply in evaluating whether such penalties are unconstitutionally excessive.
2. Petitioner required substantial time to evaluate the costs versus the benefits of preparing and filing a Petition for Certiorari and to ensure that all those affected by the appeal were able to consider and be advised appropriately regarding the complex issues involved and the most appropriate avenue for resolution – acquiescence, settlement, or to request certiorari. This required extensive analysis, evaluation, and consideration of the issues and options for counsel, coordination, and discussion. Given the importance of the issues involved, Petitioner requires additional time to complete thorough research and analysis of the relevant law, to draft the Petition to effectively and efficiently present the issue so as to be helpful to this Court, and to obtain the necessary approvals of the draft Petition, as well as time for printing thereof.
3. Petitioner has also engaged a general appellate attorney practitioner to assist in preparing the Petition who will require additional time to become familiar with the underlying record and the issues of law involved.

4. The West Virginia Supreme Court of Appeals' decision joins the many federal and state court decisions that distill *Bajakajian* down to certain factors for evaluating whether a civil penalty is excessive or not under the Excessive Fines Clause. The proliferation of disparate standards has continued unbounded since *Bajakajian* was decided in 1998 such that each state and federal circuit have a different approach to evaluating whether particular civil penalties violate the Excessive Fines Clause. *Dean*, relied upon by the West Virginia Supreme Court of Appeals in this case, cited to no less than 10 federal cases, each articulating different standards, all as a result of the holding in *Bajakajian*. Such widespread confusion and uncertainty calls out for this Court to clearly articulate consistent and workable standards.

5. This Court appears to have recognized such a need for Excessive Fines Clause standards covering civil penalties during recent oral argument in *Timbs v. Indiana*, No. 17-1091, which addressed the question of whether the Eighth Amendment's prohibition on excessive fines is incorporated against the states. *See Transcript of Oral Argument at 26, Timbs v. Indiana* (No. 17-1091) (Justice Alito: "...suppose your client, instead of using a...Land Rover...had been using a 15-year-old Kia or, at the other extreme, suppose that he had used a Bugatti, which costs like a quarter of a million dollars. *Would the Excessive Fine Clause apply differently in those three cases?* (emphasis added); *id.* at 55-56 (Justice Kagan: "...there are always going to be questions about the scope of the right to be incorporated. And, so far, we have not addressed these questions whether we've decided whether to flip the switch of incorporation or not. We've understood those questions to be distinct and – and to be questions for another day."); *id.* at 24 (Mr. Hottot, counsel for Petitioner, Tyson Timbs: "This Court's decision in *Bajakajian* has prompted the lower courts to try to articulate

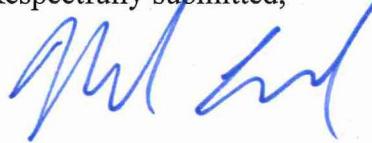
factors. And some courts use some factors; other courts use others. In an appropriate case with full briefing and – and comment from amici, this Court can and should decide that important question.”).

6. This Court should address the Excessive Fines issue given, *inter alia*, the widespread use of punitive civil penalties at the state and local levels.

7. No meaningful prejudice would arise from an extension.

Accordingly, Petitioner respectfully requests that an order be entered extending the time to file a Petition for Writ of Certiorari by 30 days, through and including February 6, 2019.

Respectfully submitted,



Mark Allen Loyd, Jr.
Counsel of Record
Brent R. Baughman
Bailey Roese
BINGHAM GREENEBAUM DOLL LLP
3500 PNC Tower
101 South Fifth Street
Louisville, Kentucky 40202-3197
Phone: (502) 587-3552
Fax: (502) 540-2245
MLoyd@BGDLegal.com

*Counsel for Petitioner,
Ashland Specialty Co., Inc.*