

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION
OF WORKERS' COMPENSATION,

Petitioner

v.

DAMI HOSPITALITY, LLC

Respondent,

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

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To the Honorable Justice Sonia Sotomayor, Circuit Justice for the United States Court of Appeals for the Tenth Circuit.

In accordance with Rule 13.5 of the Rules of this Court, Petitioner Colorado Department of Labor and Employment, Division of Workers' Compensation, respectfully requests an extension of 60 days to file a petition for writ of certiorari up to and including Friday, November 15, 2019.

JUDGMENT SOUGHT TO BE REVIEWED

Petitioner seeks review of the Colorado Supreme Court's decision in *Colo. Dep't of Labor & Emp., Div. of Workers' Compensation. v. Dami Hospitality., LLC*, 17SC200, 442 P.3d 94 (Colo. 2019). The opinion is attached as Exhibit A. The Colorado Supreme Court modified its opinion and, as modified, denied the Department's timely motion for rehearing on June 17, 2019.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257(a). Absent extension, the time for filing a petition for writ of certiorari will expire on September 16, 2019. This application is filed at least 10 days before that date.

REASONS JUSTIFYING AN EXTENSION OF TIME

This case presents a serious candidate for review. The Colorado Supreme Court held that the Eighth Amendment's Excessive Fines Clause applies to corporations and, that in imposing any fine, the Eighth Amendment requires consideration of a defendant's ability to pay the fine.

This decision deepens a significant split among the federal courts and state courts of last resort regarding whether the Excessive Fines analysis includes consideration of a defendant’s ability to pay. Many circuits and state supreme courts do not consider the financial means of a defendant as part of the Excessive Fines analysis. *See, e.g., United States v. Carlyle*, 712 F. App’x 862, 864 (11th Cir. 2017) (“The impact of the fine on the individual defendant is not considered.”); *United States v. Smith*, 656 F.3d 821, 828–29 (8th Cir. 2011) (holding a defendant’s indigence irrelevant to the excessiveness inquiry); *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998) (“A defendant’s financial condition does not . . . limit a court’s discretion in fashioning an appropriate sanction” under the Eighth Amendment); *State v. Izzolena*, 609 N.W.2d 541, 551 (Iowa 2000) (“The manner in which the amount of a particular fine impacts a particular offender is not the focus of the test.”); *State v. Webb*, 856 N.W.2d 171, 176 (S.D. 2014) (rejecting “consideration of [defendant’s] ability to pay” under the Eighth Amendment).

Other circuits and state supreme courts, however, hold that the Excessive Fines analysis should consider the defendant’s ability to pay a fine. *See, e.g., United States v. Levesque*, 546 F.3d 78, 84 (1st Cir. 2008) (holding “a court should consider a defendant’s argument that a forfeiture is excessive under the Eighth Amendment when it effectively would deprive the defendant of his or her livelihood,” and noting that “such ruinous monetary punishments are exactly the sort that motivated . . . the Excessive Fines Clause”); *United States v. Viloski*, 814 F.3d 104, 111–12 (2d Cir. 2016) (holding “courts may consider . . . whether the forfeiture would deprive the defendant

of his livelihood, i.e., his ‘future ability to earn a living.’”) (quoting *Levesque*, 546 F.3d at 85); *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 192 (Pa. 2017) (requiring consideration of “the harm forfeiture would bring to the owner”).

In *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019), the Court made clear that the Excessive Fines Clause applied to the states, but expressly left open the question of whether a defendant’s ability to pay must be considered. This case presents an ideal vehicle to address that question. The issue was raised, considered, and is determinative of the outcome below.

Here, Respondent failed to provide workers’ compensation coverage several times as required by Colorado law. After resolving the first violation, Respondent let coverage lapse again just two months later, and did not provide the required coverage for 1,698 days. Ex. A ¶ 10. After the Department began an enforcement action, Respondent conceded the violation but argued that the statutory fine (of \$250 to \$500 per day for a second violation) violated the Excessive Fines Clause. *Id.* ¶ 11–17.

The Colorado Supreme Court held that the Excessive Fines Clause applied to corporations and that “ability to pay” is an “appropriate element of the Excessive Fines Clause gross disproportionality analysis,” because “[a] fine that would bankrupt a person or put a company out of business would be a substantially more onerous fine than one that did not.” *Id.* ¶ 31. Based on this analysis, the Colorado Supreme Court vacated the fine and ordered the Department to determine Respondent’s ability to pay before imposing any fine. *Id.* ¶¶ 38–39.

The Department seeks an additional 60 days to prepare the petition for certiorari for two reasons. *First*, this case touches on many elements of the State's authority to regulate Coloradans and preparing the petition for certiorari requires extraordinary coordination among many different state agencies. This coordination takes time, particularly during the summer months when many decision makers are unavailable due to vacation. *Second*, counsel for the State has significant other matters in this Court, the Tenth Circuit, and the Colorado Supreme Court, including presenting oral argument before the Colorado Supreme Court on September 17, that require substantial time. The Department and counsel need the additional time to properly prepare a petition for certiorari.

* * *

The Department respectfully requests that an order be entered extending the time for it to file a petition for a writ of certiorari for 60 days, up to and including November 15, 2019.

Dated: August 19, 2019

Respectfully Submitted,

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/s/ Eric R. Olson

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