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.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

PHILIP J. WEISER
Attorney General

JOHN T. LEE
Senior Assistant Attorney General

ERIC R. OLSON
Solicitor General
Counsel of Record

EMMY ASHMUS LANGLEY
Assistant Solicitor General

Office of the Colorado Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Eric.Olson@coag.gov
(720) 508-6000

Counsel for Petitioner

QUESTION PRESENTED

After a corporation repeatedly failed to maintain required workers' compensation insurance, the state of Colorado imposed fines. The Colorado Supreme Court held that the Eighth Amendment's Excessive Fines Clause applied to corporations and that the state must consider the corporation's ability to pay the statutory fine before assessing it.

The question presented is:

Whether the Eighth Amendment's Excessive Fines Clause applies to corporations as it does individuals and, if so, whether and to what extent it requires consideration of an offender's ability to pay a fine in determining whether a fine is constitutional.

PARTIES TO THE PROCEEDING

All parties to the proceedings below are named in the caption.

DIRECTLY RELATED PROCEEDINGS

Colo. Dep't of Labor & Emp't, Div. of Workers' Comp. v. Dami Hosp., LLC, No. 17SC200 (Colorado Supreme Court) (judgment entered June 3, 2019, modified June 17, 2019).

Dami Hosp., LLC, v. Indus. Claim Appeals Office, No. 16CA249 (Colorado Court of Appeals, Division III) (judgment entered February 23, 2017).

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PETITION FOR WRIT OF CERTIORARI

The Colorado Department of Labor and Employment, Division of Workers' Compensation, respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS AND ORDERS BELOW

The opinion of the Colorado Supreme Court is reported at 442 P.3d 94 and reproduced in Appendix A. The opinion of the Colorado Court of Appeals is reported at 2017 COA 21 and reproduced in Appendix B.

The orders of the Colorado Industrial Claim Appeals Office and the Colorado Department of Labor, Division of Workers' Compensation, are identified by docket number 84-1545878 and are unreported. They are reproduced in Appendices C, D, E, F, and G.

JURISDICTION

The Colorado Supreme Court entered judgment on June 3, 2019. The Colorado Supreme Court modified the opinion on June 17, 2019. On September 15, 2019, Justice Sotomayor extended the time within which to file a petition for writ of certiorari to November 14, 2019, under case number 19A207.

Although state court proceedings remain pending on remand, the relevant federal issues have been resolved in this case. Therefore, this case fits within the "final judgment" rule summarized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). This case involves two federal issues—the application and scope of the Eighth Amendment—"finally decided by the highest court in the State, [that] will survive and

require decision regardless of the outcome of future state-court proceedings." *Id.* at 480.

This case also presents a situation where the federal issue, finally decided by the highest state court, may not be available for later review because Respondent may go out of business for other reasons or may choose to dissolve instead of paying whatever penalty the Colorado Department of Labor assesses. This Court has jurisdiction to hear this case now to avoid that occurrence, because "reversal of the state court on the federal issue would be preclusive of any further litigation," and "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482–83. Delaying final review of whether the Excessive Fines Clause applies to corporations and, if so, whether the corresponding analysis requires consideration of an offender's ability to pay, would put the constitutionality of nearly all routine government fines in serious doubt. *See id.* at 486–87. Certiorari is thus appropriate now and this Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The appendix reproduces Colo. Rev. Stat. § 8-43-409 (2016) (Pet. App. H).

STATEMENT OF THE CASE

A. Workers' Compensation Laws And Enforcement In Colorado

At the end of the 19th century, increases in reported work accidents and fatalities led to calls for changes to the American workplace. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & Econ. 305, 315–316, 319 (1998). Unique from other labor issues, workers, social reformers, and employers joined together to advocate for workers' compensation laws. *Id.* at 319. In this grand bargain, "[e]mployers anticipated a reduction in labor friction" and uncertainty of their liability following workplace accidents. *Id.* at 330–31. Workers and social reformers welcomed quicker and more certain recoveries for workplace accidents, even though they understood it would come at the expense of lower wages. *Id.* at 331; *see also Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 98 (2012). By 1915, Colorado, along with a few other states, had passed workers' compensation laws. Fishback & Kantor, *supra*, at 319–20. By 1950, workers' compensation laws existed in every state. *Id.* Now, employers in every state but Texas must participate in a workers' compensation system, almost always including mandatory insurance. Christopher C. French, *Dual Regulation of Insurance*, 64 Vill. L. Rev. 25, 34 (2019).

The Workers' Compensation Act of Colorado, a descendant of Colorado's early laws, requires all employers to maintain workers' compensation insurance. Colo. Rev. Stat. §§ 8-40-101 (2019); 8-43-

409 (2016).[1] To enforce the Workers' Compensation Act, the Colorado legislature created the Division of Workers' Compensation ("Division"), within the Department of Labor and Employment. *Id.* § 8-47-101(1)–(2). The Act requires the Division's director to "take either or both of the following actions" if an employer is found in default of its insurance obligations: (1) order the employer to "cease and desist immediately from continuing its business operations during the period such default continues" or (2) impose daily fines of "(I) Not more than two hundred fifty dollars for an initial violation; or (II) Not less than two hundred fifty dollars or more than five hundred dollars for a second and any subsequent violation." *Id.* § 8-43-409.

B. Respondent's Repeated Violations Of The Workers' Compensation Act Of Colorado

In 2000, Respondent, Dami Hospitality, LLC ("Dami"), purchased property for $3,300,000.00 to operate a motel in Colorado. App. 5; Denver Office of the Clerk & Recorder, *Deed to 3850 North Peoria Street*, Denver Prop. Tax'n & Assessment Sys., https://www.denvergov.org/property/realproperty/chainoftitle/160527297.

On July 1, 2005, Dami allowed its workers' compensation insurance coverage to lapse for the first time. App. 5. After the Division discovered the

[1] Because § 8-43-409 was amended on July 1, 2017, this petition refers to the version of § 8-43-409 in effect when the fine was imposed. The amounts for per diem fines, however, have not changed.

lapse in coverage, Dami conceded the violation and paid a corresponding settlement on June 9, 2006. *Id.*

Only two months later, Dami allowed its workers' compensation insurance coverage to lapse again. App. 6. Dami did not restore its coverage until June 8, 2007, and it allowed the coverage to lapse for a third time from September 12, 2010 through July 9, 2014, totaling 1,698 uncovered days since its initial violation. App. 6, 9, 142–43.

C. Proceedings Below

State Administrative Proceedings. When the Division discovered Dami's subsequent violations after its earlier settlement, it imposed 1,698 per diem fines, totaling $841,200, consistent with Colo. Rev. Stat. § 8-43-409. App. 7–9, 139. Dami again conceded the violations. App. 9, 118. The Division then proposed to settle for $425,000, the aggregated minimum per diem fines permissible under section 8-43-409(1)(b)(II), but Dami declined. App. 9–10, 130. Instead, Dami filed a brief with the Division arguing it should not have to pay the fines because, among other reasons, the fines violated the Excessive Fines Clause of the Eighth Amendment. App. 10, 116. After reviewing the brief, the Division upheld the fines, finding that the reasons for cancellation of the insurance policy were within Dami's control. App. 10, 119–20, 131. The Division declined to address Dami's Excessive Fines Clause argument. App. 10–11, 130.

Dami appealed the Division's order to the Industrial Claim Appeals Office ("Appeals Office"), a panel of examiners who have the duty and power to conduct administrative review of the Division's

orders. App. 11, 101; *see also* Colo. Rev. Stat. § 8-1-102. The Appeals Office remanded the matter to the Division for consideration of the fine's constitutionality under the Colorado Court of Appeals' holding in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). App. 11, 77, 101, 111–15. In that case, the Colorado Court of Appeals held that, in assessing penalties for excessiveness under the Eighth Amendment, a reviewing court must apply this Court's test for assessing the constitutionality of punitive jury awards. *Associated Bus. Prods.*, 126 P.3d at 326 (citing *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 425, 435 (2001)).

On remand, the Division affirmed the fine as constitutional under *Associated Business Products*. App. 11–12, 93–96. Dami again appealed to the Appeals Office, and it affirmed the Division. App. 12, 73, 88.

State Appellate Judicial Proceedings. Dami appealed the Appeals Office's ruling to the Colorado Court of Appeals. App. 12, 30. The Court of Appeals set aside the Division's imposition of the 1,698 per diem fines. App. 12, 70. In reversing the Appeals Office, the Court of Appeals "assumed without deciding that the Excessive Fines Clause could be applied to challenge regulatory fees imposed on a corporation." App. 12, 50–51. The Court of Appeals then followed the test set forth in *Associated Business Products* and added that, "ability to pay should be considered when determining whether a penalty imposed against an employer for failure to carry workers' compensation insurance is

constitutionally excessive." App. 12, 65–67. Finding that Dami had asserted that it could not afford to pay the $841,200 fine, the Court of Appeals concluded that the fine was "excessive." App. 67.

The Division petitioned the Colorado Supreme Court for certiorari and the court granted the petition. App. 12. The Colorado Supreme Court concluded the Excessive Fines Clause applies to corporations and prevents them from facing constitutionally excessive fines. App. 12–13, 16–17. The Colorado Supreme Court determined that the purpose of the Excessive Fines Clause—"to prevent the government from abusing its power to punish"—supported its application to corporations. App. 5, 16. The Colorado Supreme Court further held that the correct test to determine whether a fine violates the Excessive Fines Clause is the test from *United States v. Bajakajian*, 524 U.S. 321 (1998). App. 17–18. In that case, this Court, in evaluating the constitutionality of a forfeiture, stated that "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Bajakajian*, 524 U.S. at 337. In doing so, the Colorado Supreme Court invalidated the test relied on by the Court of Appeals in *Associated Business Products*. App. 18.

The Colorado Supreme Court, however, did not limit its holding to the text of *Bajakajian*. Instead, the Colorado Supreme Court expanded the *Bajakajian* test in two significant ways.

First, the Colorado Supreme Court concluded "that courts considering whether a fine is constitutionally excessive should consider ability to

pay in making that assessment." App. 20. Although the Colorado Supreme Court acknowledged that "[t]he United States Supreme Court has not addressed whether the Eighth Amendment proportionality assessment can or should include consideration of the ability of the person being fined to pay that fine," it nevertheless held that "ability to pay" is part of the constitutional analysis. App. 18–20. The Colorado Supreme Court inferred this requirement from this Court's previous statements that historic predecessors of the Excessive Fines Clause were created to ensure the government could not deprive a person of "his livelihood" or prevent "a larger amercement" than a person's "circumstances or personal estate will bear." App. 19. (citing *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989) and *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019)).

Second, the Colorado Supreme Court expanded the *Bajakajian* test by holding that "[w]hen a fine is imposed on a per diem basis, with each day constituting an independent violation, the evaluation of whether a fine is excessive must be done with reference to each individual daily fine." App. 23. The Colorado Supreme Court held that the proportionality analysis of *Bajakajian* should be applied not to the aggregate $841,200 fine, but to each of the $250–$500 daily fines. App. 20. The Colorado Supreme Court remanded the case for return to the Division for Dami to develop a record supporting its claim that it could not pay the fine. App. 23–24.

One state justice dissented on the per diem holding only, asserting, "I would focus on the

aggregate fine," thereby disagreeing "that the proportionality analysis must be conducted with regard to each individual per diem fine, as opposed to the total fine of $ 841,200." App. 25. (Samour, J., dissenting). Otherwise, the justice "wholeheartedly" agreed with the majority that the Eighth Amendment offered Dami protection against excessive fines. App. 26 (Samour, J., dissenting).

REASONS FOR GRANTING THE PETITION

The Colorado Supreme Court held that the Excessive Fines Clause applies to corporations, and deepened an entrenched and developed split by holding that a court may consider an offender's ability to pay in evaluating the constitutionality of a fine. These holdings merit review.

This Court should grant certiorari because this case presents the question left open by this Court in *Browning-Ferris*, 492 U.S. at 276 n.22: whether the Excessive Fines Clause applies to corporations. For the first time, a court has expressly declared that the Excessive Fines Clause extends to corporations.

In reaching that landmark decision, the Colorado Supreme Court failed to implement this Court's established framework for interpreting the Constitution. The question is not, as the Colorado Supreme Court reasoned, whether an amendment conceivably *could* be applied to a corporation, but whether a constitutional right, viewed through the lens of its historical purpose, *should* cover corporations. In bypassing the appropriate question, the Colorado Supreme Court reached a result that contravenes the history and purpose of the Excessive Fines Clause.

This case also presents a separate matter of significant practical importance that has divided appellate courts reviewing excessive fines claims under this Court's decision in *Bajakajian*, 524 U.S. at 327. Under that decision, this Court held that courts must review Excessive Fines Clause claims under the gross disproportionality standard. *Id.* But courts are split, both in the circuits and the states, as to whether a court must also consider an offending party's ability to pay. This Court's intervention is necessary to resolve the persistent split and bring much-needed uniformity to an important issue of constitutional law.

I. This Court Should Review The Colorado Supreme Court's Holding That The Excessive Fines Clause Applies To Corporations

This Court should review the Colorado Supreme Court's conclusion that the Excessive Fines Clause extends to corporations because it conflicts with this Court's interpretive standards, the history behind the Excessive Fines Clause, and this Court's precedent.

A. Whether The Excessive Fines Clause Applies To Corporations Is Important

Over the last thirty years, this Court has decided a series of cases involving the Excessive Fines Clause. In each case, a lower court had reached a holding regarding the meaning of the Excessive Fines Clause in an area of law that had not yet been addressed by this Court. *See Timbs*, 139 S. Ct. at 686 (whether the Excessive Fines Clause was incorporated to the states); *Bajakajian*, 524 U.S. at 327 (test applied for evaluating whether a fine is

excessive); *Alexander v. United States*, 509 U.S. 544, 549 (1993) (in personam criminal forfeiture); *Austin v. United States*, 509 U.S. 602, 606 (1993) (civil forfeiture cases); *Browning-Ferris*, 492 U.S. at 259 (punitive damage awards). Each time, while clarifying the meaning and reach of the Excessive Fines Clause, this Court confirmed its commitment to ensuring that courts apply Eighth Amendment protections uniformly across the country. The time for this Court's review has come once again.

This case presents the important question of whether the Excessive Fines Clause extends to corporations. The Colorado Supreme Court is not the first court to face this question. *See, e.g.*, *United States v. Chaplin's, Inc.*, 646 F.3d 846, 851 n.15 (11th Cir. 2011) ("Our analysis assumes, but does not hold, that the Eighth Amendment applies to corporations. The Supreme Court has never held that this amendment applies to corporations."); *United States v. Pilgrim Mkt. Corp.*, 944 F.2d 14, 22 (1st Cir. 1991) ("We will assume for purposes of our discussion that the eighth amendment proscription against excessive fines applies to corporations, although this is a very tenuous assumption."). But unlike the other courts, the Colorado Supreme Court held that the Excessive Fines Clause applies to corporations. App. 12–13, 16. In doing so, the Colorado Supreme Court answered an issue of federal law left unanswered by this Court but faced by numerous lower courts. *See id.* And *Timbs* clarified that the Excessive Fines Clause applies to the states under the Fourteenth Amendment. 139 S. Ct. at 686. This Court's review on an

unanswered issue of federal constitutional law is warranted.

B. The Colorado Supreme Court Contravened This Court's Precedents When It Held That The Excessive Fines Clause Applies To Corporations

In deciding whether the Excessive Fines Clause applies to corporations, the Colorado Supreme Court relied on just two basic points to reach its conclusion. First, "the text of the Excessive Fines Clause does not suggest that its protections are limited to natural persons." App. 43. Second, because the payment of monetary penalties is something that a corporation can do as an entity, the Excessive Fines Clause applies to corporations even though the other two Eighth Amendment protections—prohibitions on cruel and unusual punishment and excessive bail—do not. App. 15–17.

This Court's approach to determining whether the Excessive Fines Clause applies, however, requires more analysis. In each of the five cases where this Court has addressed the Excessive Fines Clause, its analysis depended upon the history of the clause. And the Colorado Supreme Court failed to recognize the longstanding interest states have in regulating corporations—entities that exist only as a result of state law.

1. This Court's Decisions Require An Analysis Of The Excessive Fines Clause To Determine Its Reach

In *Browning-Ferris*, this Court's first case interpreting the meaning of the Excessive Fines

Clause, this Court held that a comprehensive review of the history of the clause and the Framers' intent was required. 492 U.S. at 267–76. This Court reasoned that the "same basic mode of inquiry should be applied in considering the scope of the Excessive Fines Clause as is proper in other Eighth Amendment contexts." *Id.* at 264 n.4. In particular, "[t]he applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation." *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 670–71 (1977)). As a result, in evaluating the reach and meaning of the Excessive Fines Clause, this Court requires an examination of "the origins of the Clause and the purposes which directed its framers." *Id.*

Applying that standard in *Browning-Ferris*, this Court traced the clause from the time of Magna Carta to the First Congress. *Id.* at 264–76. Based on that history, and this Court's understanding of amercements—the 13th century English practice of penalties that led to the parallel provision in the Magna Carta—this Court held that the Excessive Fines Clause did not apply to punitive damage awards between private parties. *Id.* at 264. This Court reached that result because "[t]o hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history." *Id.*

Following *Browning-Ferris*, each time this Court answered a question regarding the scope or meaning of the Excessive Fines Clause, it has again depended on the history of the clause to understand its purpose. In *Austin*, this Court looked to the history of the Excessive Fines Clause to determine both that

it did not exclude from its reach civil punishment and that in rem forfeitures were understood at the time of the clause's ratification as punishment. *Austin*, 509 U.S. at 602, 608–10, 618. In *Alexander*, this Court relied on the historical analysis discussed in *Austin* and *Browning-Ferris* and held that in personam criminal forfeiture should be analyzed under the Excessive Fines Clause. *Alexander*, 509 U.S. at 558–59.

Later, in *Bajakajian*, this Court relied on the history of the Excessive Fines Clause in recognizing "the centrality of proportionality to the excessiveness inquiry." 524 U.S. at 335. When defining the contours of a test under that standard, this Court explained that it was forced to look to its own precedent, because history did not suggest how disproportionate to the gravity of an offense a fine must be in order to be deemed constitutionally excessive. *Id.* at 335–36.

Most recently, in *Timbs*, this Court traced the Excessive Fines Clause's "venerable lineage back to at least 1215." 139 S. Ct. at 687. Detailing the clause's persistence from the Magna Carta through today, this Court found that the Fourteenth Amendment incorporated the Excessive Fines Clause to the states because it was deeply rooted in this nation's history and tradition. *Id.* at 687–89.

2. This Court's Analysis Of The Reach Of Other Constitutional Protections Further Supports The Need For A Historical Analysis

Resolution of whether any constitutional right applies to a corporation necessarily involves more

than an analysis of whether the right *could* apply to a corporation. That is why this Court's other decisions addressing whether constitutional amendments apply to corporations have always emphasized the importance of looking to history in determining an amendment's purpose and reach.

For example, in addressing whether the Fourth Amendment's prohibition on searches and seizures applies to corporate businesses, and whether the Warrant Clause applies to commercial buildings, this Court's analysis relied on history. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970). So too when the Court addressed whether the Seventh Amendment right to a jury trial extended to corporations. *See Ross v. Bernhard*, 396 U.S. 531, 533–34 (1970). And, when determining whether corporations could claim the Fifth Amendment right against self-incrimination, this Court relied on a "general principle of English and American jurisprudence." *Hale v. Henkel*, 201 U.S. 43, 66 (1906).

3. The Colorado Supreme Court Did Not Analyze The History Of The Excessive Fines Clause

Despite this precedent, the Colorado Supreme Court's opinion did not address the historical underpinnings of the Excessive Fines Clause but instead just discussed whether the clause's text could apply. But this ahistorical approach does not lead to logical outcomes. For example, under the Colorado Supreme Court's reasoning, the Cruel and Unusual Punishment Clause should apply to

corporations because it *could* apply. The protections of the Cruel and Unusual Punishment Clause attach to criminal punishments and corporations are subject to criminal punishments and other harsh punishments such as charter revocations.[2] App. 16–17 (citing *Ingraham*, 430 U.S. at 666–68 and *Hale,* 201 U.S. at 76). But, the Colorado Supreme Court also stated in the same opinion that the "cruel and unusual punishment cannot be imposed on a corporation" because corporations cannot be jailed. App. 16–17. This irreconcilable conclusion demonstrates the need to consider the history of the text of the amendment.

The Eighth Amendment's historical purpose was not to limit government regulation of corporations. The amendment comes from the English Bill of Rights and was a response to amercements. *See Browning-Ferris*, 492 U.S. at 268–69. "Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown." *Id.* at 269. During the 1680s, the use of such fines "became even more excessive and partisan, and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Id.* at 267 (quotations omitted). "The group which drew up the 1689 Bill of Rights had firsthand experience; several had been subjected to heavy fines by the

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[2] *See* Robert Wagner, *Cruel and Unusual Corporate Punishment*, 41 J. Corp. L. 559, 568 (2018); Drew Isler Grossman, Note, *Would a Corporate "Death Penalty" Be Cruel and Unusual Punishment?*, 25 Cornell J.L. & Pub. Pol'y 697, 712–13 (2016).

King's bench." *Id.* Therefore, in including the Eighth Amendment, "[t]he Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights." *Id.*

Based on that history, it makes little sense to hold that the Excessive Fines Clause applies to corporations. The animating purpose of the clause was to prevent the government from using fines to place people in prison arbitrarily. *Id.* Corporations, of course, do not have liberty rights and cannot be imprisoned for failing to pay a fine. *See Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (holding that liberty under the Due Process Clause refers to "the liberty of natural, not artificial, persons"). After all, when the Framers adopted the Eighth Amendment with "hardly any discussion," they adopted it as a "well-established and fundamental right of citizenship." *See Timbs*, 139 S. Ct. at 696 (Thomas, J., concurring in the judgment). The Colorado Supreme Court's holding defies the history and purpose of the Excessive Fines Clause.

Finally, this Court's review is further warranted because the Colorado Supreme Court's decision conflicts with this Court's precedents that recognize the special features of corporations that inform the analysis of whether a constitutional right applies to them. A constitutional right does not apply to corporations if it is either "purely personal" *or* "is unavailable to corporations for some other reason." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978). Under this analysis, certain constitutional rights are unavailable or apply to corporations only to a lesser extent, based

on the features of the corporate form or the government's legitimate regulatory interests.

For more than a century, this Court has factored in a state's interest in regulating corporate misconduct in deciding whether and to what extent a constitutional right extends to corporations. As this Court recognized in *Hale*, "the corporation is a creature of the state." 201 U.S. at 74. Because a corporation "receives certain special privileges and franchises," it is "presumed to be incorporated for the benefit of the public." *Id.* Thus, its "rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation." *Id.* at 74–75. Therefore, "[w]hile an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges." *Id.* at 75.

In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), this Court held that the federal government's legitimate regulatory interests limited a corporation's Fourth Amendment rights and "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Id.* at 652. This Court explained that it is "[t]he Federal Government [that] allows them the privilege of engaging in interstate commerce." *Id.* As a result, "[f]avors from government often carry with them an enhanced measure of regulation." *Id.*

The same logical and equitable concerns apply here. The primary benefit in forming a corporation is for members to limit their liability for the

corporation's debts and for the corporation's conduct. *See, e.g.*, *In re Phillips*, 139 P.3d 639, 643–44 (Colo. 2006); *see also* Colo. Rev. Stat. § 7-106-203(2) ("[A] shareholder or a subscriber for shares of a corporation is not personally liable for the acts or debts of the corporation . . . ."). Dami protects its shareholders from liability through its corporate form, including tort claims from injured workers seeking compensation in the absence of mandatory workers' compensation insurance. Unlike for individuals, for whom the Excessive Fines Clause serves as a constitutional stopgap in limiting a person's liability from having to pay a government-imposed fine, corporations, by their very form, have been granted greater protection. Having already received the shield of limited liability along with the privilege of performing business as an artificial entity, it makes little sense to conclude that corporations should be given additional protection under the Excessive Fines Clause. As the Colorado Supreme Court's opinion ignored the state's legitimate interest in regulating corporate misconduct—here, failing to have insurance that would ensure, regardless of what happened to the corporation, its workers could recover workers' compensation benefits—it conflicts with this Court's precedent, and merits review.

II. This Court Should Review The Colorado Supreme Court's Holding That The Excessive Fines Clause Requires Consideration Of An Offender's Ability To Pay

This case also presents an issue of doctrinal and practical significance that has divided both federal

and state courts. In *Bajakajian*, this Court stated that the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." 524 U.S. at 334. Two considerations guide this proportionality analysis. *Id.* at 336. First, this Court explained that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* Second, because judicial determinations regarding the gravity of a particular criminal offense will be inherently imprecise, this Court adopted the standard of gross disproportionality. *Id.* In applying this constitutional excessiveness standard, this Court directed courts to compare the amount of the forfeiture to the gravity of the offenses. *Id.* at 334. If the judgment amount is grossly disproportional to the gravity of the offense, it is unconstitutional. *Id.* at 336–37.

But, as the D.C. Circuit recently explained, this Court has not resolved whether a court should consider ability to pay in determining whether a fine is unconstitutionally excessive. *See United States v. Bikundi*, 926 F.3d 761, 796 (D.C. Cir. 2019). Since this Court's decision in *Bajakajian*, eight courts of appeals have split over whether ability to pay is a factor a court should consider in assessing the constitutional validity of a fine. With multiple circuit courts and state courts locked on each side, this Court should grant certiorari to settle the issue.

Three circuits—the First, Second, and Eighth—and four state supreme courts read *Bajakajian* to require an inquiry into an offender's ability to pay or to earn a livelihood. Five other circuits—the Fifth,

Sixth, Seventh, Ninth, and Eleventh—and at least two state supreme courts forbid such consideration.

A. Courts That Require An Ability To Pay Inquiry

In *United States v. Lippert*, the Eighth Circuit stated that "ability to pay is a factor under the Excessive Fines Clause." 148 F.3d 974, 978 (8th Cir. 1998). There, the Eighth Circuit rejected the defendant's argument that he lacked the ability to pay a fine. *Id.* at 978; *see also United States v. Smith*, 656 F.3d 821, 828–29 (8th Cir. 2011) (finding that a fine was not constitutionally excessive because there was a possibility that the defendant could legitimately come into money).

The First Circuit adopted a similar standard. In *United States v. Jose*, 499 F.3d 105 (1st Cir. 2007), the defendant argued that forfeiture of $114,948 found in his luggage constituted an unconstitutionally excessive fine. *Id.* at 106. The First Circuit reasoned that, "[g]iven the history behind the Excessive Fines Clause, it is appropriate to consider whether the forfeiture in question would deprive [the defendant] of his livelihood." *Id.* at 113 (citing *Bajakajian*, 524 U.S. at 339–40 & n.15). In finding that the fine was not excessive, the court relied on the defendant's own admission that the forfeited money was not necessary to retain his livelihood. *Id.* The court also based its conclusion on evidence that the defendant's business merchandise, which had also been taken from him, was being sent to his wife so "she could resell the goods there, in accordance with the defendant's business practice." *Id.* Accordingly, the court affirmed the forfeiture

because it did not deprive the defendant of his ability to earn a livelihood.

The Second Circuit has followed the First Circuit's approach. In *United States v. Viloski*, 814 F.3d 104 (2d Cir. 2016), the defendant participated in a kickback scheme, in which developers or landlords paid consulting fees, in exchange for work never performed. *Id.* at 107. After a jury convicted the defendant of several counts, the district court ordered the defendant to forfeit $1,273,285.50, which equaled the amount of funds the defendant had acquired from landlords and developers, laundered through two entities he controlled, and passed on to a co-defendant. *Id.* According to the Second Circuit, "it seems unlikely that the *Bajakajian* Court meant to preclude courts from considering whether a forfeiture would deprive an offender of his livelihood." *Id.* at 111. Still, as the forfeiture did not threaten the defendant's livelihood, the Court rejected his excessive fines claim. *Id.* at 114–15.

In addition to the Colorado Supreme Court, the California Supreme Court, Pennsylvania Supreme Court, and Utah Supreme Court have all taken the position that ability to pay is a factor. *See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421, 423 (Cal. 2005) (remanding for further factfinding on the constitutionality of a $14,826,200 fine); *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 188–92 (Pa. 2017) (remanding for factfinding on, among other things, "whether the forfeiture would deprive the property owner of his or her livelihood"); *State ex rel. Utah Air Quality Bd. v. Truman Mortensen Family Tr.*, 8 P.3d

266, 274 (Utah 2000) (affirming a fine and noting that it was "not appropriate" to compare the fine to the wealth of the offender).

B. Courts That Forbid An Ability To Pay Inquiry

In *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998), the Ninth Circuit rejected two defendants' arguments that restitution orders violated the Excessive Fines Clause because the defendants lacked the ability to pay. *Id.* at 1143, 1145. The Ninth Circuit held that *Bajakajian*'s Excessive Fines Clause analysis does not require an inquiry into an offender's ability to pay or the hardship the sanction may cause the offender. *Id.* at 1146.

The Eleventh Circuit has reached the same conclusion. In *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304 (11th Cir. 1999), the defendant argued that the forfeiture of his home violated the Excessive Fines Clause in part because he was unable to purchase a new home. *Id.* at 1311. The Eleventh Circuit disagreed, concluding that "excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender." *Id.*

Three other circuits have embraced the same standard by limiting their excessive fines analysis to only the proportionality between the amount of a fine and the gravity of a criminal offense. In *United States v. Wallace*, 389 F.3d 483 (5th Cir. 2004), the Fifth Circuit found a fine was not excessive without considering the defendant's independent financial circumstances because the fine was below the

statutory maximum. *Id.* at 485; *see also Newell Recycling Co., Inc. v. U.S. Envtl. Prot. Agency*, 231 F.3d 204, 210 (5th Cir. 2000) ("[I]f the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment."). Likewise, in *United States v. Droganes*, 728 F.3d 580 (6th Cir. 2013), the Sixth Circuit limited its analysis to whether the forfeiture was grossly disproportional to the gravity of the defendant's offense. *Id.* at 591; *see also United States v. Zakharia*, 418 F. App'x 414, 422 (6th Cir. 2011) (listing the relevant factors to consider in determining whether a fine is grossly disproportional without including ability to pay or ability to earn a livelihood). Finally, the Seventh Circuit also omits ability to pay and ability to earn a livelihood from its list of relevant factors it considers in an excessive fines analysis. *See United States v. Malewicka*, 664 F.3d 1099, 1104 (7th Cir. 2011).

At least two state supreme courts—South Dakota and Iowa—have determined that ability to pay is not a relevant factor in an excessive fines analysis. *See 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 [proportionality] test."); *State v. Webb*, 856 N.W.2d 171, 175–76 (S.D. 2014) (rejecting a claim that a fine was unconstitutional because the offender "does not possess the ability to pay the fine" based on the fine falling "within the statutory range").

III. Whether Courts Should Consider Ability To Pay Is A Recurring Issue Of Nationwide Importance

If allowed to stand, the Colorado Supreme Court's decision will disrupt the effectiveness of state and federal regulatory efforts.

A. The Decision Below Will Disrupt State Regulatory Efforts

The Colorado Supreme Court's holding alters Colorado's regulatory power in two debilitating ways. First, the decision curtails the state's ability to regulate less-financially successful corporations. Basic economic theory holds that, any time the anticipated fine amount and the probability of being caught is less than the benefit of taking a wrongful action, a rational actor will choose to take the wrongful action. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 874 (1998).

For corporations, which have no lives and no livelihoods, the motivational calculus can skew profoundly in the direction of non-compliance. Corporations can be bankrupted by the people who control them or simply vanish, allowing the people behind them freedom to form other corporations. Penalties applied to people are different. They are tuned to the spans of human lives, lived by people earning livelihoods and maintaining reputations. In large part because of this freedom from permanent liability given corporations, our country has created the greatest economy our world has ever known. But these same attributes that enable corporations to thrive make the corporate form especially ill-suited

to an ability-to-pay requirement imposed on state and federal regulators seeking to achieve corporate compliance.

That problem is compounded because the Colorado Supreme Court's holding forces regulators to spend time focusing on an offender's financial well-being at the cost of time spent on investigating potential wrongdoing. For agencies that routinely levy penalties, such as state taxing authorities, this added ability-to-pay consideration creates substantial administrative costs. That outcome thwarts the state's regulatory efforts and reduces the disincentives for wrongful conduct.

Second, the Colorado Supreme Court's holding is at odds with the principles of proportionality. As this Court has explained, the very purpose of proportionality is to balance the amount of a fine against the gravity of the offense. *Bajakajian*, 524 U.S. at 337. In adopting an ability to pay standard, the Colorado Supreme Court endorsed the notion that less-profitable corporations should be punished less than more-profitable corporations for the same misdeeds. This result is inconsistent with the goal of achieving proper deterrence. *See* Polinsky & Shavell, *supra*, at 911 ("[F]rom the perspective of achieving proper deterrence, a defendant's wealth generally should not be considered when the defendant is a corporation."). And corporations—which can control their assets by deciding how much capital to return their owners—can impact the regulatory consequences they face for wrongful conduct.

B. The Decision Below May Disrupt Federal Regulatory Efforts

When the federal government seeks to impose a civil fine against Colorado corporations, those corporations will argue that Colorado's ability to pay rule should apply because the Colorado Supreme Court has determined that Colorado corporations have this protection. *See, e.g.*, *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law."); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98–99 (1991) (holding that because corporations are creatures of state law, gaps in federal law should be filled with state law).

If left intact, the Colorado Supreme Court's decision will disrupt the funding and enforcement models employed by much of the federal regulatory system. Between 2010 and 2015, federal agencies collected over $83 billion in civil, criminal, and regulatory fines and penalties.[3] U.S. H. Comm. on Oversight & Gov't Reform, *Restoring the Power of the Purse: Shining Light on Federal Agencies Billion Dollar Fines Collections* 4 (2016). Requiring agencies

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[3] The precise percentage of these revenues attributable to fines on corporations is not available, but a review of the major fines imposed during this time period suggests that they constitute the vast majority. *See, e.g.*, Office of Pub. Affairs, *Justice Department Collects More Than $23 Billion in Civil and Criminal Cases in Fiscal Year 2015*, Dep't of Just. (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-collects-more-23-billion-civil-and-criminal-cases-fiscal-year-2015.

to assess corporate wrongdoers' ability to pay would disrupt these funding streams and imperil important government functions that depend on them.

The Colorado Supreme Court's holding requiring consideration of a corporation's financial status would undercut agencies' regulatory powers if applied to federal regulatory efforts, either through courts holding that the opinion below governs Colorado corporations or if extended to other courts. The rule imposes a heavy burden on agencies to evaluate the financial position of every corporate defendant before issuing every single corporate fine. Agencies would have to expend additional resources confronting the inevitable wave of excessive fines litigation.

Besides interfering with agency operations, the Colorado Supreme Court's decision undermines federal bankruptcy law. In cases where a fine would actually threaten a corporation's financial viability, the Bankruptcy Code prioritizes which expenses and claims an unsuccessful corporation should pay. *See* 11 U.S.C. § 507. The Bankruptcy Code, in some instances, prevents the discharge of many fines or penalties owed to governments. *See, e.g.*, *id.* § 523(a)(7). Creating a constitutional obligation to consider ability to pay before imposing fines or penalties turns this priority system upside down for companies facing bankruptcy—reducing the fines owed and shifting more funds to other obligations. This two-step process creates different outcomes than would otherwise occur under the Bankruptcy Code.

Finally, the Colorado Supreme Court's decision weakens federal regulatory efforts. Preventing the government from fining a corporation above its ability to pay divests the federal government of its most powerful enforcement mechanism in stopping the worst corporate misconduct. While a state could pull a corporation's charter (or forbid a corporation from another state from doing business there), the federal government could not. The federal government could use fines to close down and prevent the most egregious corporate misconduct. Yet, if the government cannot fine a corporation more than it can pay, the federal government will lose its ability to impose its most powerful penalty—putting an egregious wrongdoer out of business.

CONCLUSION

Because the Colorado Supreme Court incorrectly extended the Excessive Fines Clause to corporations and required an ability-to-pay inquiry before imposing statutory fines, deepening an extensive and meaningful split, this Court should grant the petition for certiorari.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

JOHN T. LEE
Senior Assistant Attorney General

ERIC R. OLSON
Solicitor General
Counsel of Record

EMMY ASHMUS LANGLEY
Assistant Solicitor General

Office of the Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Eric.Olson@coag.gov
(720) 508-6000

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