No. 19-641

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 SUPREME COURT OF COLORADO

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause prohibits excessive fines imposed against corporations and, if so, whether and to what extent it requires consideration of a defendant's ability to pay the amount of the fine imposed.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Dami Hospitality, LLC, states that it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Respondent Dami Hospitality, LLC (Dami) agrees with the State that the Court should grant certiorari in this case. The State's petition presents an opportunity to resolve a question the Court left open more than two decades ago—whether and how a defendant's "income and wealth are relevant considerations in judging the excessiveness of a fine" under the Excessive Fines Clause. *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (citing *United States v. Bajakajian*, 524 U.S. 321, 340 n.15 (1998)). There is an acknowledged lower-court split on that question, and its resolution is exceptionally important—not only for regulators, as the State explains, but also for the regulated. Massive fines imposed without regard to a defendant's means take a ruinous toll on individuals and small businesses nationwide. As the administrative state has grown, so too has the threat of crippling financial penalties, which often are nominally set at small daily rates but then balloon into devastating amounts. It is time for the Court to provide guidance regarding just how much devastation the Constitution will tolerate.

This case offers an ideal vehicle to provide such guidance. The State seeks to extract an $841,200 fine—the total amount of a $250-$500 daily rate assessed over four-plus years—from an individually owned company based on inadvertent lapses in workers' compensation insurance coverage for a motel, the company's sole asset. This purely regulatory offense caused no actual harm to anyone and in fact went unnoticed for years—both by the State and by Dami's sole owner, Soon Pak, a 75-year-old Korean immigrant who speaks little English but, like millions of Americans, is trying to make ends

meet as small business owner. After discovering the lapses in coverage, Ms. Pak obtained the insurance and sought to resolve the matter based on an affordable fine. The State, however, insisted on an aggregated six-figure fine so large that it would plunge both Dami and Ms. Pak into bankruptcy, force the motel out of business, and thereby deprive Ms. Pak of the means by which she earns a living.

The question whether and to what extent an offender's financial means must be considered in evaluating the excessiveness of a fine is thus squarely presented here. The State challenges the Colorado Supreme Court's ruling that a defendant's ability to pay should be considered as part of the excessiveness analysis. App. 19. Dami challenges the limitations that the court placed on the consideration of that factor, including the court's holding that a defendant's ability to pay may be balanced away in a proportionality inquiry that excludes consideration of the aggregate fine assessed and instead focuses only on the "individual daily fine" (here, $250-$500). *Id.* at 20-23. As the partial dissent explained below, this approach renders the excessiveness analysis "an exercise in futility." *Id.* at 27. Both federal and state courts are divided on the question whether and to what extent a defendant's ability to pay must be considered under the Excessive Fine Clause analysis. *See infra* at 15-20. And this is an increasingly recurring issue of undeniable importance.[1]

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[1] To ensure that this Court may review the entirety of the Colorado Supreme Court's ability-to-pay analysis, Dami has filed a conditional cross-petition addressed to the aspect of the decision with which Dami disagrees. It is not clear, however, that a cross-petition is required. The State's petition presents

The State also asks the Court to decide whether the Excessive Fines Clause applies to corporations, a question this Court reserved in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989). The Colorado Supreme Court held that the Excessive Fines Clause protects corporations as well as individuals. App. 16-17. That ruling is correct, and Dami stands ready to defend it. But this question is undeniably important, and Dami therefore has no objection to certiorari on this issue as well. Regulated entities, and especially small businesses like Dami, would benefit from a ruling from this Court making clear that the Excessive Fines Clause protects corporations, too.

Accordingly, the petition should be granted.

JURISDICTION

Dami agrees with the State that this Court has jurisdiction under 28 U.S.C. § 1257(a) to decide the question presented by the State's petition, notwithstanding that the Colorado Supreme Court's decision remands for further proceedings. *See* Pet. 1-2. Although Section 1257(a) authorizes review of "final judgments or decrees" from state courts, this Court takes a "'pragmatic approach' to the question of finality," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (citation omitted), and in doing so has identified "four categories" of cases in which a state

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the question "whether and to what extent [the Excessive Fines Clause] requires consideration of an offender's ability to pay a fine," Pet. i, and determining *how* an offender's ability to pay a fine affects the excessiveness analysis is "fairly encompass[ed]" within that question. *South Dakota v. Bourland*, 508 U.S. 679, 687 n.8 (1993). But Dami's conditional cross-petition eliminates any potential impediment to reaching this argument.

court's decision on a federal issue will be treated as "final" even though further proceedings are contemplated by the decision under review, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). For these cases, the Court has held, there is no reason to await further proceedings, and "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Id.* at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Application of *Cox* here leads to the conclusion that this Court has jurisdiction.

The question presented by the State falls comfortably within *Cox*'s third category, which permits review in cases where, notwithstanding "further proceedings on the merits in the state courts to come," "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481. In this category of cases, the petitioner's victory on remand would "moot[]" their ability to seek review, while the respondent's victory on remand would "preclude[]" the petitioner "from pressing its federal claim again on appeal." *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984); *see North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 161-64 (1973); Stephen M. Shapiro et al., *Supreme Court Practice* 166 (10th ed. 2013).

Snyder's Drug Stores is on all fours with this case. There, this Court held that it had jurisdiction to review a state court's constitutional ruling even though further proceedings were contemplated for remand. 414 U.S. at 159-64. The case involved a challenge to a pharmacy permit denial on constitutional and statutory grounds. As the Court explained, if the State Pharmacy Board denied the

permit on remand based on the statutory ground alone, then the constitutional question would have become moot from the Board's perspective; if, on the other hand, the Board granted the permit, the Board would have had to "appeal its own grant," which the applicable state law did not permit. *Id.* at 163-64.

So too here. If the Division concluded on remand that the daily fine is not excessive under the Colorado Supreme Court's analysis, then it would be unnecessary for the State to raise the issues presented in its petition here. If, on the other hand, the Division found the daily fine excessive, then the State would be unable to seek further review. Colorado law only permits an appeal of a Division order that requires the appellant "to pay a penalty or benefits." Colo. Rev. Stat. § 8-43-301(2); *see Bradley v. Industrial Claim Appeals Office*, 841 P.2d 1071, 1072-73 (Colo. App. 1992) (party cannot seek review when the order does not "require it to pay a penalty or benefits"). Because the Division would obviously not order itself to pay a penalty or benefits, there is no mechanism that would allow the Division "to appeal its own order." *Snyder's Drug Stores*, 414 U.S. at 163. The Court should therefore "treat the judgment in the instant case as 'final.'" *Id.* at 162.

Additionally, *Cox* permits review in cases where (1) the petitioner could prevail on remand on a different ground, "thus rendering unnecessary review of the federal issue" in a later appeal; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and (3) "refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-83; *see Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984). As explained

above, the proceedings on remand may eliminate this Court's "opportunity to pass on [the issues raised by the State]." *Southland*, 465 U.S. at 6. A judgment in favor of the State by this Court, on the other hand, would "terminate litigation of the merits." *Id.* at 6-7; *see Cox*, 420 U.S. at 485-86. Moreover, the decision below "has important [regulatory] implications for . . . other [s]tates" beyond Colorado, *Goodyear Atomic*, 486 U.S. at 180, as "state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue," *Timbs*, 139 S. Ct. at 689 (citation omitted). Addressing the merits of the questions presented is thus "consistent with the pragmatic approach" taken by this Court "in determining finality." *Cox*, 420 U.S. at 486-87.

The Court also has jurisdiction to decide the interrelated "to what extent" issue (Pet. i)—i.e., *how* a defendant's ability to pay should be considered in determining excessiveness, including whether the Colorado Supreme Court erred in holding that a court cannot consider the total fine imposed on an offender in evaluating the excessiveness of the fine (and, instead, may only consider "each individual daily fine"). App. 23. This question is closely intertwined with the question about whether a defendant's ability to pay should be considered at all, as demonstrated by the conflict in the lower courts. *See infra* at 18-20.

Moreover, *Cox* permits review in cases where "the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. In this case, the remand ordered by the state supreme court is limited to evaluating Dami's ability to pay in "reference to each individual *daily* fine." App. 23 (emphasis added); *see id.* at 24-25. The court rejected Dami's argument that the excessiveness analysis

should consider a defendant's ability to pay in light of the total amount of the fine. *Id.* at 23. But as the partial dissent below observed, "Dami has never argued that the daily fine . . . is unconstitutionally excessive; rather, Dami has contended all along that the [total] $841,200 fine is." *Id.* at 25 (Samour, J., dissenting in relevant part). As a result, the remand ordered by the Colorado Supreme Court—to consider the excessiveness of only the daily amount—will be "an exercise in futility." *Id.* at 27.

To be clear, Dami "has no other defense to interpose" in the wake of the Colorado Supreme Court's decision narrowing the focus of the excessiveness analysis to the individual daily fine, and is willing to "conce[de] that [t]his case rests upon" the excessiveness of the total fine. *Pope v. Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 382 (1953). Moreover, Dami has limited resources and cannot afford to pursue a futile claim through an additional round of proceedings before the Division and Colorado courts. Dami therefore waives any argument it might have that the individual daily fine is excessive under the Colorado Supreme Court's decision. The "outcome" of the proceedings on remand is thus "preordained," and delaying review would be an "'unnecessary waste of time.'" *Cox*, 420 U.S. at 479 (citation omitted). This Court has jurisdiction to review the Colorado Supreme Court's decision now.

STATEMENT

1. Dami Hospitality, LLC (Dami) is a Colorado-based corporation solely owned by Ms. Soon Pak. App. 33. Ms. Pak immigrated to the United States from South Korea along with her husband in 1974,

and became a U.S. citizen in 1978. C.F. 135-36.[2] A few years after arriving in America, the couple purchased the Royal Host Motel in Denver, Colorado. *Id.* at 136. Ms. Pak—who speaks little English—relied on her husband to run the motel. But in 1984, Mr. Pak was tragically murdered at the motel during a robbery. *Id.* at 137. She then enlisted the help of her brother-in-law to run the motel, but he died in 1995, prompting Ms. Pak to sell the motel. *Id.*

In 2000, Ms. Pak formed Dami to open and operate a Motel 8 on Peoria Street in Denver. App. 5, 104. The Motel 8 employs a handful of employees with a total "annual payroll [of] less than $50,000." *Id.* at 62. Dami is required to maintain workers' compensation insurance pursuant to the Workers' Compensation Act of Colorado, Colo. Rev. Stat. § 8-40-101 *et seq.* Ms. Pak has always relied on an insurance agent to ensure that her business maintained the required workers' compensation insurance. C.F. 138. In 2005, however, her longtime insurance agent retired, and Ms. Pak hired a new agent, Young Kim. *Id.* at 138-39. Ms. Pak "trusted [Kim] to maintain the necessary coverages" for the Motel 8, including workers' compensation insurance. App. 33, 62.

Unbeknownst to Ms. Pak, however, Kim allowed Dami's workers' compensation insurance to lapse. The first lapse occurred in July 2005. *Id.* at 5. The Colorado Division of Workers' Compensation notified Dami of the lapse, and Dami paid a $1,200 fine the next year. *Id.* at 5, 31. A second lapse occurred in August 2006 and lasted until June 2007. *Id.* at 6. Dami's workers' compensation coverage lapsed a third time in September 2010, this time until July

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[2] "C.F.," or Court File, is the record in the Colorado courts.

2014. *Id.* But after paying the fine for the first lapse, Ms. Pak never suspected that Kim had allowed coverage to lapse again. *Id.* at 62. And she had no reason to—she instructed Kim to obtain the required insurance coverage, Kim never told her that her policies lacked workers' compensation insurance, and none of Dami's employees had ever filed a workers' compensation claim. *Id.* at 62, 75.

2. In February 2014—seven years after the 2006-2007 lapse—the Division "discovered" the second and third lapses, *id.* at 6, and ordered Dami to pay "a fine" in "the total amount of $841,200.00." *Id.* at 137-39 (emphasis omitted). The Division calculated this amount pursuant to Colo. Rev. Stat. § 8-43-409(1)(b) and Rule 3-6(D), Colo. Code Regs. § 1101-3:3, an implementing regulation that provides an escalating schedule of "daily fines from $250/day up to $500/day for each day of default" for "second and subsequent violation[s]." App. 8 (citations omitted); *see id.* at 142-43 (calculating the "total amount of the fine" for Dami's "subsequent violation").[3] The total fine covered 1,698 days. *See id.* at 9, 142-43. The Division insisted that Dami pay "the total amount" within 20 days. *Id.* at 139-40.

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[3] In light of the extraordinary fine sought this case, the Colorado state legislature amended the statute in 2017; it now "limit[s] the maximum period for which fines can be imposed to 'three years prior to the date an employer is notified by the division of a potential violation.'" App. 21 n.5 (quoting Colo. Rev. Stat. § 8-43-409(1.5)(c)). Even that period, however, can result in the imposition of crippling penalties against small business owners like Ms. Pak.

Ms. Pak asked the Division to reduce the fine in light of her circumstances. *Id.* at 33; *see* Add. 1a-2a.[4] In a letter, Ms. Pak explained that she was the "sole owner" of Dami; she "believed" the insurance policies she obtained for the motel had "included the required coverage"; and the $841,200 fine far exceeded the amount "[her] business grosses in one year." Add. 1a. The fine was "way beyond [her] ability to pay." *Id.* at 2a. She added: "If the penalty stands as presented, I have no choice but to declare personal and business bankruptcy and go out of business." *Id.* In a separate letter, Kim, the insurance agent, readily "accepted responsibility for the lack of workers' compensation insurance," admitting that he "did not tell [Ms. Pak] about Workers' Compensation." App. 33; *see* C.F. 109.

The Division was unmoved. It issued a supplemental order, App. 116-35, maintaining that the fine is mandatory and does not "contain an exclusion or exemption from incurring and paying a fine based upon a Respondent's financial inability to pay." *Id.* at 130. The Division further refused to consider the excessiveness of the amount under the Excessive Fines Clause, believing that only the courts could address the constitutional issue. *Id.* The Division accordingly stood by its assessment of "a fine" in "the total amount of $841,200.00" and ordered Dami to pay it within 20 days. *Id.* at 131-32, 135.

Dami administratively appealed to the Industrial Claim Appeals Office (ICAO), arguing, among other things, that the fine was unconstitutionally excessive. The ICAO vacated the Division's order, *id.* at 101-15, concluding that the Division erred in merely

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[4] Ms. Pak's letter request to the Division, in the record below at C.F. 104, is reproduced in an addendum to this response.

considering "only the length of time involved in the violation" while ignoring other components of the excessiveness analysis, *id.* at 112-14. The ICAO thus remanded for the Division to consider whether the statute had been "unconstitutionally applied" to Dami under test used by this Court to evaluate punitive damages under the Due Process Clause. *Id.* at 112-13; *see Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). This test—known in Colorado courts as the *Associated Business Products* test[5]—considers the (1) degree of the defendant's reprehensibility, (2) disparity between the harm inflicted and the fine imposed, and (3) difference between the fine imposed and fines imposed in comparable cases. App. 113-14. The ICAO remanded for application of the test. *Id.* at 114-15.

On remand, the Division issued an order declaring that "all of the *Associated Business Products* factors are already incorporated into Rule 3-6(D)," and therefore concluding that "the fine of $841,200.00 assessed against [Dami] according to that Rule is appropriate." *Id.* at 92-96. Dami again appealed to the ICAO, and the ICAO affirmed. *Id.* at 72-90.

3. Dami sought review of the Division's ruling in the Colorado Court of Appeals, which vacated the ICAO's decision and remanded. *Id.* at 29-71.

Applying the *Associated Business Products* factors, the court first found that Dami was "at the low end of the reprehensibility scale," noting that Ms. Pak "was unaware of the lapses of workers' compensation insurance" and relied on "her insurance

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[5] *See Associated Bus. Prods. v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

agent to maintain the necessary coverages." *Id.* at 62. Second, the court found that the lapses in insurance coverage "did not actually harm any of Dami's employees," and that the potential harm was minimal given Dami's few employees and the "lengthy history with no reported claims." *Id.* at 62-63. Third, the court concluded that the significant delay between the lapse in coverage and notice of the violation could have produced "significantly disparate fines" among uninsured employers. *Id.* at 64-65. Finally, considering Dami's inability to pay the fine, the court found that "a fine of $841,200 . . . would put [Dami]—and [Ms. Pak]—into bankruptcy." *Id.* at 65-67. "Based on all of these facts," the court found "the $841,200 fine to be excessive." *Id.* at 67.

The court remanded to the Division for it to recalculate the fine. *Id.* at 67, 71.

4. The State sought review in the Colorado Supreme Court, which reversed the court of appeals' judgment and remanded. *Id.* at 1-28.

First, the court rejected the State's argument that corporations are not protected by the Excessive Fines Clause. *Id.* at 13-17. The court explained that the text of the Excessive Fines Clause "does not include any limitation on who merits protection from the imposition of excessive fines." *Id.* at 15. And the court declined the State's invitation to cabin the Excessive Fines Clause within the scope of the other provisions in the Eighth Amendment, explaining that this Court has rejected such a wholesale approach to Eighth Amendment interpretation. *Id.* at 16 (citing *Austin v. United States*, 509 U.S. 602, 608-11 & n.5 (1993)).

Second, the court held that the proper test for determining the excessiveness of a regulatory fine

comes from this Court's decision in *Bajakajian*, which considers whether "the [fine] is grossly disproportional to the gravity of the . . . offense." App. 17-18 (alterations in original) (quoting *Bajakajian*, 524 U.S. at 337). The court held that a defendant's "ability to pay" should be considered as part of that analysis in determining "whether a fine is constitutionally excessive." *Id.* at 20. The court reached that conclusion by looking to "a number of [this Court's] cases" that describe the "historical predecessors of the Excessive Fines Clause" as "requiring that a penalty 'not be so large as to deprive [a person] of his livelihood.'" *Id.* at 19 (alteration in original) (citation omitted). This history, the court held, requires "consideration of ability to pay." *Id.*

But the court relegated consideration of a defendant's ability to pay to merely a factor in the proportionality analysis. *Id.* at 19-20. And because the court reduced the entire excessiveness analysis to a question of proportionality tied to the offense, the court then held that the "staggeringly high-dollar aggregate" fine imposed in this case must be viewed solely "on a per diem basis." *Id.* at 20-23. This per-diem perspective thus applies for purposes of determining not only whether a fine is proportional to the *offense*, but also whether a fine would destroy the livelihood of the *offender*. *Id.* at 20-21. The court ordered that the case be remanded to the court of appeals so it could be returned to the Division for it to consider Dami's ability to pay, but solely in "reference to each individual daily fine." *Id.* at 23.

Justice Samour dissented from the court's holding that "Dami is restricted to challenging the daily fine amount" as part of the ability-to-pay analysis. *Id.* at 25-28 (concurring in part and dissenting in part). He

explained that, in "reality," the Division "imposed a one-time aggregate fine retroactively," and it is that total fine that should be subject to constitutional attack. *Id.* at 28. Indeed, he noted, "Dami has never argued that the daily fine of $250 to $500 is unconstitutionally excessive; rather, Dami has contended all along that the $841,200 fine is." *Id.* at 25. The majority's "focus on the daily fine amount instead of the total fine Dami must pay," he concluded, "renders the entire constitutional analysis an exercise in futility" and "greatly risks immunizing the Director and the statute from constitutional attack under the Eighth Amendment." *Id.* at 27.[6]

ARGUMENT

I. The Court Should Grant Certiorari To Decide Whether And How The Excessive Fines Clause Requires Consideration Of A Defendant's Ability To Pay

Dami agrees that the Court should grant review to decide whether and to what extent the Excessive Fines Clause requires consideration of an offender's ability to pay in determining when a fine is unconstitutionally excessive. This question is exceptionally important for regulated entities and, in particular, individuals and small businesses. It is the subject of an entrenched, three-way conflict in both federal and state courts. And this case presents a clean vehicle to address this question.

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[6] At the State's request, the Colorado Supreme Court recalled the mandate pending disposition of the State's certiorari petition by this Court. *See* Order, No. 2017SC200 (June 25, 2019). So the case remains before the Colorado Supreme Court.

A. The Lower Courts Are Intractably Divided On The Ability-To-Pay Issue

More than two decades ago, in *United States v. Bajakajian*, 524 U.S. 321 (1998), this Court held that a fine "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334.[7] In so holding, however, the Court expressly left open the question whether the excessiveness analysis should consider a defendant's "wealth or income" and the impact of the fine on the defendant's "livelihood." *Id.* at 340 n.15; *see Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (noting that *Bajakajian* "t[ook] no position" on this question).

As multiple courts and commentators have acknowledged, "a circuit split" has "emerge[d]" on this question "in the years since *Bajakajian*" was decided. *State v. Yang*, __ P.3d __, 2019 WL 5932259, at *5 n.3 (Mont. Nov. 12, 2019) (citing Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833 (2013)); *see United States v. Bikundi*, 926 F.3d 761, 796 n.5 (D.C. Cir. 2019) (describing the split); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 321 (2014) (noting the "confusion" in the "[l]ower courts" on this question); Colleen P. Murphy, *Reviewing Congressionally Created Remedies for Excessiveness*, 73 Ohio St. L.J.

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[7] Although *Bajakajian* involved a forfeiture, the Court explained that the Excessive Fines Clause applies to all "payments" to the government, "whether in cash or in kind, as punishment for some offense." 524 U.S. at 328 (citation omitted). The lower courts thus generally apply *Bajakajian* to traditional fines (payments in cash) as well as forfeitures (payments in kind). *See, e.g.*, App. 17-18; *State ex rel. Utah Air Quality Bd. v. Truman Mortensen Family Tr.*, 8 P.3d 266, 273 (Utah 2000).

651, 700 (2012) ("The appellate courts are divided as to whether the defendant's ability to pay is a factor under the Excessive Fines Clause.").

In fact, the lower courts have split into essentially three different camps on this issue.

1. Camp 1: A defendant's ability to pay is irrelevant in gauging excessiveness

Some courts refuse to consider an offender's ability to pay or financial circumstances, apparently believing that proportionality between the fine and the offense is the exclusive measure of excessiveness. The Eleventh Circuit, for example, has repeatedly held that the excessiveness analysis does "not take into account the impact the fine would have on an individual defendant." *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009); *see, e.g.*, *United States v. Carlyle*, 712 F. App'x 862, 864 (11th Cir. 2017); *United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999), *cert. denied*, 531 U.S. 828 (2000); *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999), *cert. denied*, 528 U.S. 1083 (2000). In that court's view, *Bajakajian* "made clear" that "excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender" or "the [offender's] assets." *817 N.E. 29th Drive*, 175 F.3d at 1311.

Other circuits have likewise suggested that a defendant's ability to pay is irrelevant to the constitutional analysis. The Seventh Circuit has insisted that a defendant's "ability to pay" would not "trigger a question of constitutional dimension" under the Excessive Fines Clause. *United States v. Sato*, 814 F.2d 449, 452-53 (7th Cir.), *cert. denied*, 484 U.S. 928 (1987). And the Fifth Circuit has repeatedly

declared that a "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 statute authorizing it." *Cripps v. Louisiana Dep't of Agric. & Forestry*, 819 F.3d 221, 234 (5th Cir.) (citing *Newell Recycling Co. v. United States EPA*, 231 F.3d 204, 210 (5th Cir. 2000)), *cert. denied*, 137 S. Ct. 305 (2016). The Fifth Circuit has applied that rule even in cases where the offender argued an inability to pay the fine imposed. *See Gonzalez v. United States Dep't of Commerce Nat'l Oceanic & Atmospheric Admin.*, 420 F. App'x 364, 368-70 (5th Cir. 2011).[8]

In the state courts, the Iowa Supreme Court has held that "[t]he manner in which the amount of a particular fine impacts a particular offender is not the focus of the [excessiveness] test." *State v. Izzolena*, 609 N.W.2d 541, 551 (Iowa 2000); *see id.* at 555 (Lavorato, J., dissenting) ("The majority's per se approach also denies a defendant the opportunity to show that the . . . fine would deprive the defendant of a livelihood."). So too for the South Dakota Supreme Court, which has held that considering a defendant's financial circumstances "loses sight of the question at

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[8] The Ninth Circuit has also suggested that the defendant's inability to pay is irrelevant to the constitutional excessiveness analysis. *See United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir.) ("[A]n Eighth Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender."), *cert. denied*, 525 U.S. 975 (1998). That court has, however, intermittently considered whether "a fine would 'deprive [the defendant] of his livelihood.'" *United States v. Hantzis*, 403 F. App'x 170, 172 (9th Cir. 2010) (quoting *Bajakajian*, 524 U.S. at 335), *cert. denied*, 563 U.S. 952 (2011); *see also Dubose*, 146 F.3d at 1146 (noting that the "proportionality test for *forfeitures* . . . include[s] consideration of the financial hardship of the defendant" (emphasis added)).

issue—whether the criminal fine is grossly disproportionate to the offense committed." *State v. Webb*, 856 N.W.2d 171, 175-76 (S.D. 2014).

2. Camp 2: A defendant's ability to pay is a standalone protection

As it has acknowledged, the First Circuit has taken a position directly "at odds with the Eleventh Circuit," holding that courts must consider whether, based on the defendant's financial circumstances, the imposed fine "would deprive the defendant of his or her livelihood." *United States v. Levesque*, 546 F.3d 78, 83-84 & n.4 (1st Cir. 2008) (vacating decision approving fine and remanding for consideration of whether the fine was "so onerous as to deprive [the] defendant of . . . her future ability to earn a living"); *see, e.g.*, *United States v. Fogg*, 666 F.3d 13, 20 (1st Cir. 2011); *Martex Farms, S.E. v. United States EPA*, 559 F.3d 29, 34 (1st Cir. 2009); *United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007).

This position is grounded on the history of the Excessive Fines Clause. As these decisions have explained, a fine "so onerous" that "it effectively would deprive the defendant of his or her livelihood" is "exactly the sort that motivated the 1689 Bill of Rights and, consequently, the Excessive Fines Clause" itself. *Levesque*, 546 F.3d at 84-85; *see Bikundi*, 926 F.3d 796 n.5 (explaining the First Circuit's position that "the original meaning of the Excessive Fines Clause prohibits fines so severe as to deprive a defendant of his or her 'contenement' or livelihood, understood as the ability to secure the necessities of life"). That history, moreover, demonstrates that the restriction on imposing livelihood-ruining fines "inhered regardless of the

relationship between the [fine] and the gravity of the offense." *Levesque*, 546 F.3d at 84. This ability-to-pay limitation thus presents a "separate" question from the "test for gross disproportionality." *Id.* at 85.[9]

3. Camp 3: A defendant's ability to pay should be considered as part of the proportionality analysis

Still other courts have taken more of a middle-ground approach, holding, like the court below, that an offender's "ability to pay" should be considered, but only as an "element of the Excessive Fines Clause gross disproportionality analysis." App. 19.

For example, in *United States v. Viloski*, 814 F.3d 104 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1223 (2017), the Second Circuit agreed with the First Circuit that, in determining excessiveness, courts must consider whether the fine "would deprive the defendant of his livelihood, *i.e.*, his 'future ability to earn a living.'" *Id.* at 111-12 (quoting *Levesque*, 546 F.3d at 85). But the court "part[ed] ways [from] the First Circuit" by holding that whether a fine "would destroy a defendant's livelihood is a component of the proportionality analysis, not a separate inquiry." *Id.* at 111-12 & n.12. The court rested that conclusion on *Bajakajian*'s statement "that 'the test for the excessiveness . . . involves *solely* a proportionality determination.'" *Id.* at 111 (emphasis added by the Second Circuit) (quoting *Bajakajian*, 524 U.S. at 333-34). Thus, in the Second Circuit, a fine "that deprives a defendant of his livelihood might nonetheless be

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[9] On remand in *Levesque*, the district court dramatically reduced the $3,068,000 fine to $2,000. *Compare Levesque*, 546 F.3d at 80, *with* Amended Judgment at 6, *United States v. Levesque*, No. 07-cr-00070 (D. Me. Oct. 19, 2009) (ECF No. 75).

constitutional, depending on his culpability or other circumstances." *Id.* at 112.

The Eighth Circuit has similarly held that courts should consider the defendant's "ability to pay" among the "variety of factors" bearing on proportionality. *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014); *see United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998). And so have several state supreme courts. *See, e.g.*, *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421 (Cal. 2005); *State v. Timbs*, 134 N.E.3d 12, 26 (Ind. 2019); *State v. Rewitzer*, 617 N.W.2d 407, 415 (Minn. 2000); *State v. Yang*, __ P.3d __, 2019 WL 5932259, at *6 (Mont. Nov. 12, 2019); *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 188-90 (Pa. 2017); *State ex rel. Utah Air Quality Bd. v. Truman Mortensen Family Tr.*, 8 P.3d 266, 274 (Utah 2000).

* * * * *

As noted above (*supra* at 15-16), this conflict has been recognized by both courts and commentators. The State itself has recognized this conflict in seeking certiorari. Pet. 20-26. And, because the conflict is at least partly a product of this Court's decision in *Bajakajian*, it will persist "in the absence of further guidance from [this] Court." McLean, *supra*, at 843.

B. The Ability-To-Pay Issue Is Exceptionally Important And Warrants Review

Dami also agrees with the State that the ability-to-pay question presents "a recurring issue of nationwide importance" warranting this Court's review. Pet. 25. Although the State focuses on the importance of the issue to regulators (*see id.* at 25-29) and its "authority to regulate Coloradans" (Appl. for Ext. of Time to File Pet. for Writ of Certiorari 4), this

issue is also important to the small businesses and individuals that are the subjects of such regulation.

1. "Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue." *Timbs*, 139 S. Ct. at 689 (quoting Br. for *Amici Curiae* American Civil Liberties Union et al. at 7, *Timbs*, *supra* (No. 17-1091) (*Timbs* ACLU Br.), 2018 WL 4462202). As explained by a diverse array of *amici curiae* in *Timbs*, revenue-driven fining practices are fraught with the potential for abuse. *See Timbs* ACLU Br. 22-30; Br. for *Amicus Curiae* Pacific Legal Foundation at 3-14 (*Timbs* PLF Br.), 2018 WL 4378614; Br. for *Amicus Curiae* Chamber of Commerce of the United States at 11-23 (*Timbs* Chamber Br.), 2018 WL 4381209; Br. for *Amici Curiae* Scholars at 17-21 (*Timbs* Scholars Br.), 2018 WL 4405431. These fines can be so severe they deprive offenders of their livelihood.

Regulatory fines imposed on a per-day basis are especially prone to abuse. Per diem fines may be set at low levels, but violations typically cover months or years, during which time the daily rate multiplies into a huge amount. *See* App. 26 (Samour, J., dissenting in relevant part). In this case, the State seeks to impose a $841,200 fine—covering 1,689 days—based on a violation that began *seven* years earlier. The $841,200 fine far exceeds even the State's own revenue expectations: a 2005 fiscal report "estimated that the *total* fines collected from *all* violators" of Colorado's workers' compensation statute would be a mere $200,000 per year. App. 64 (emphasis added). The fine levied against Dami alone is more than four times that figure. But what may be good for a State's

bank account is often crushing for the small businesses and individuals who face such fines.

The fine at issue here was assessed against Dami, but it operates equally against Dami's sole owner, Ms. Pak. As Ms. Pak told the State when it imposed the fine, the $841,200 amount is "way beyond [her] ability to pay." Add. 2a. "If the penalty stands as presented," she added, "I have no choice but to declare personal and business bankruptcy and go out of business." *Id.*; *see* App. 65-67. The State, in other words, will not only be forcing Ms. Pak out of business, it will be depriving Ms. Pak of her livelihood.

This case is by no means an isolated example. One elderly homeowner in Fort Lauderdale, Florida, faced a $150-per-day fine for certain housing code violations at her home. *Moustakis v. City of Fort Lauderdale*, 338 F. App'x 820, 820-22 (11th Cir. 2009); *see Timbs* PLF Br. 6. She spent thousands of dollars hiring workers and architects to remedy the problems, but was unable to obtain required work permits. The accumulating fines vastly dwarfed the home's $200,000 value, reaching $700,000 by the time the Eleventh Circuit decided her case. But because that court focuses only on the proportionality of the per-day amount, *see supra* at 16, the court summarily rejected her Excessive Fines Clause claim, concluding that "the $700,000 fine" was "directly proportionate to the offense." *Moustakis*, 338 F. App'x at 822. Other examples abound in the amicus briefs filed in *Timbs*. *See, e.g.*, *Timbs* PLF Br. 3-10; *Timbs* ACLU Br. 11-22; *Timbs* Scholars Br. 7-16; *Timbs* Chamber Br. 11-23.

2. As the administrative state has grown, so has the number of potential fines for violating its rules. What the State views as its "authority to regulate Coloradans" (Appl. for Ext. 4), the regulated

Coloradans view as a potential sledge hammer that can destroy well-intentioned businesses and individuals. As state and local governments "have come to rely increasingly on revenue from economic sanctions" that bear "little relationship to traditional goals of civil and criminal liability and [are] fashioned instead to fill in gaps in municipal funding," constituents are often left in "unmanageable" "debt spirals" with no escape. Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 Vand. L. Rev. 917, 919-20, 957 (2017). Such fines often take a ruinous toll on offenders, particularly on "the most vulnerable" and "least politically powerful" members of our society, many of whom are doing their best to keep up with the regulations. *Timbs* ACLU Br. 11-12. It is imperative for the Court to decide whether the Excessive Fines Clause prevents the government from extracting fines that, as is true here, would force defendants into financial ruin.

In "an alarming number of cases," low-income individuals facing sky-high fines are forced to forgo "basic necessities like food, housing, hygiene, or medicine, in order to pay what little they can, even if just a few dollars at a time." Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 8 (2018) (footnotes omitted). Likewise, aggressive forfeiture practices often "target the poor and other [vulnerable] groups," *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari), with the government in some cases seizing automobiles and even entire family homes. In *817 N.E. 29th Drive*, for example, the Eleventh Circuit's refusal to consider the defendant's livelihood allowed the government to seize his "personal residence," leaving him "unable to

purchase another residence because of a lack of other assets and a permanent disability that prevent[ed] him from obtaining employment." 175 F.3d at 1311.

Exorbitant fines have also had "particularly deleterious effects" on "immigrant entrepreneurs," who too often face massive monetary sanctions for victimless regulatory infractions that can destroy their businesses entirely. *Timbs* Chamber Br. 17-18. This case is illustrative. Ms. Pak is a 75-year-old Korean immigrant who speaks little English and has difficulty understanding technical and legal concepts. *See* Add. 1a-2a. She inadvertently allowed the workers' compensation insurance coverage to lapse on her motel, reasonably believing that the insurance agent she had hired to ensure that Dami maintained the requisite coverage had taken care of it. That lapse in coverage did not actually harm anyone—none of her few employees ever filed a workers' compensation claim, and the State did not lose a dime. Yet, having reportedly "discovered" the gap in coverage years later, App. 6, the State now seeks to extract a nearly one-million-dollar fine that would financially ruin Dami as well as its sole owner, Ms. Pak.

Ultimately, the Excessive Fines Clause provides a "fundamental" safeguard against the government's impulse to "use large fines to raise revenue" or "retaliate against . . . political enemies." *Timbs*, 139 S. Ct. at 688-89. Whether and how that safeguard accounts for the financial means of the citizens and entities it protects is a question of exceptional importance. The Court should not permit the lower-court division on that question to persist any longer.

C. The Colorado Supreme Court's Ability-To-Pay Ruling Warrants Review

Although the Colorado Supreme Court correctly held that "a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment," App. 19, it erred in limiting the consideration of a defendant's ability to pay in the excessiveness analysis, *id.* at 17-23. By folding this factor into a proportionality analysis geared to the offense, the court concluded that a defendant's ability to pay is relevant only in reference to the amount of each individual fine (without regard to the total fine imposed), and that a financially ruinous fine "might be warranted" based on the severity of the offense. *Id.* at 19-20, 23. This analysis improperly dilutes the protection guaranteed by the Excessive Fines Clause against livelihood-destroying fines.

1. As this Court has held, the history of the Excessive Fines Clause establishes that a fine must not only "be proportioned to the offense," but it must also "not deprive a wrongdoer of his livelihood." *Bajakajian*, 524 U.S. at 335; *see Timbs*, 139 S. Ct. at 687-88; *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989). While related, these limitations are "distinct." *Levesque*, 546 F.3d at 83; *see* McLean, *supra*, at 836, 894-96.

The protection against livelihood-ruining fines runs throughout the Excessive Fines Clause's "venerable lineage," all the way "back to at least 1215, when Magna Carta guaranteed that '[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, *saving to him his contenement*.'" *Timbs*, 139 S. Ct. at 687-88 (alteration in original)

(emphasis added) (quoting Magna Charta, 9 Hen. III, ch. 14, *in* 1 Eng. Stat. at Large 5 (1225)). "[A]mercements" were the "medieval predecessors of fines," *Bajakajian*, 524 U.S. at 335, and "to save a man's 'contenement'"—a principle often referred to as "*salvo contenemento*"—meant "to leave him sufficient for the sustenance of himself and those dependent on him." McLean, *supra*, at 855-56 (quoting William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 293 (2d ed. 1914)).

Magna Carta therefore ensured that "[n]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear." *Timbs*, 139 S. Ct. at 688 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 372 (1769)); *see Browning-Ferris*, 492 U.S. at 288-89 (O'Connor, J., concurring in part and dissenting in part). This protection applied regardless of whether the "fault" was "small" or "great," *Timbs*, 139 S. Ct. at 687 (quoting Magna Charta, 9 Hen. III)—"[i]n *no case* could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him," *Levesque*, 546 F.3d at 84 (emphasis added) (quoting McKechnie, *supra*, at 287). That principle held true "regardless of the relationship between the amercement and the gravity of the offense." *Id.*

Fast forward to the seventeenth-century, when the Star Chamber and Stuart kings infamously "imposed ruinous fines on the critics of the crown" without regard to "the [a]bility of the [p]ersons" to pay or "the extent of [their] means." *Timbs*, 139 S. Ct. at 693-94 (Thomas, J., concurring in the judgment) (citations omitted). The ensuing Glorious Revolution and English Bill of Rights in 1689 restored Magna Carta's "*salvo contenemento*" principle as the "law of

the land." 4 Blackstone, *supra*, at 372. And, according to that principle, Blackstone later explained, "it is *never* usual to assess a larger fine than a man is able to pay, without touching the implements of his livelyhood." *Id.* at 373 (emphasis added). Excessiveness requires consideration of "the *particular* circumstances of the offence *and the offender*," for "what is ruin to one man's fortune, may be matter of indifference to another's." *Id.* at 371, 373 (second emphasis added).

Across the ocean, "[t]he Framers of our Bill of Rights were aware of and took account of the abuses that led to the 1689 Bill of Rights." *Browning-Ferris*, 492 U.S. at 267. The excessive fines prohibition in the Virginia Declaration of Rights—which provided a template for the Excessive Fines Clause in the U.S. Constitution—"embodied the traditional legal understanding that any 'fine or amercement ought to be according to the degree of the fault *and the estate of the defendant*.'" *Timbs*, 139 S. Ct. at 695 (Thomas, J., concurring in the judgment) (emphasis added) (quoting *Jones v. Commonwealth*, 5 Va. (1 Call) 555, 557 (1799)). The Framers thus understood "the right to freedom from 'excessive fines'" to "require[] that a penalty not exceed an offender's ability to pay it." Br. for *Amici Curiae* Eighth Amendment Scholars at 3-4, 27-32, *Timbs*, *supra* (No. 17-1091), 2018 WL 4381213.

This Court has repeatedly recognized this history and stressed that, in addition to ensuring that a fine is "proportioned to the offense," a fine may "not deprive a wrongdoer of his livelihood." *Bajakajian*, 524 U.S. at 335; *see Timbs*, 139 S. Ct. at 688 (a fine must "not be so large as to deprive [an offender] of his livelihood." (alteration in original) (quoting *Browning-Ferris*, 492 U.S. at 271)).

2. Although the Colorado Supreme Court correctly identified these principles, it incorrectly conflated them into a proportionality analysis that artificially limits the consideration of a defendant's ability to pay. Under the court's proportionality analysis, not only is it possible for a livelihood-destroying fine to pass muster (App. 19-20), but a defendant's ability to pay is only relevant in "reference to each individual daily fine"—without regard to the total amount of the fine, *id.* at 23.

That analysis is demonstrably flawed and at odds with the history discussed above. The history makes clear that the fact that a fine destroys an offender's livelihood is itself a sufficient basis to hold that the fine is constitutionally excessive. Moreover, there is no sensible basis for excluding consideration of the total amount of the fine assessed. Indeed, as Justice Samour explained, artificially limiting the excessiveness analysis to the amount of each individual daily fine effectively "immuniz[es]" devastating aggregate fines "from constitutional attack under the Eighth Amendment." App. 27 (Samour, J., dissenting in relevant part). And here, "focus[ing] on the daily fine amount instead of the total fine Dami must pay renders the entire constitutional analysis an exercise in futility." *Id.*

It is difficult to imagine an instance in which a per-day rate, by itself, would *ever* have the potential to "bankrupt a person or put a company out of business." *Id.* at 19-20 (majority opinion). That is precisely why, as the dissent below explained, "Dami has never argued that the daily fine of $250 to $500 is unconstitutionally excessive; rather, Dami has contended all along that the $841,200 fine is." *Id.* at 25. The proportionality of the per-day fine ($250-

$500) with respect to the per-day offense says nothing about whether the actual amount that the State has ordered Dami to pay ($841,200) will be financially ruinous. As Justice Samour observed, the court's analysis has the bizarre, and untenable, result of "render[ing] the total amount of the fine imposed completely inconsequential." *Id.* at 27.

Moreover, this approach invites manipulation in order to insulate aggregate fines from constitutional scrutiny under the Eighth Amendment. The "fine" assessed against Dami was $841,200, not $250 or $500. *Id.* at 135. Had the State decided to adopt a monthly or yearly rate schedule, the total fine would be substantially the same, and so would Dami and Ms. Pak's inability to pay it. But under the Colorado Supreme Court's reasoning, the result could (and likely would) be different. That is nonsense. And there is no sound limiting principle—the State might as well change the $500-per-day rate to a $21-per-hour rate to dispel any doubt. It is simply implausible to think that a protection specifically designed to "*limit[]* the government's power" over citizens, *Timbs*, 139 S. Ct. at 687 (emphasis added) (citation omitted), could be circumvented through such configurations.

The Colorado Supreme Court's narrow view of the role of a defendant's ability to pay in the excessiveness analysis underscores the need for this Court's review.

II. The Court Can Also Decide Whether The Excessive Fines Clause Applies To Fines Imposed Against Corporations

The State also seeks review (Pet. 10-19) of the Colorado Supreme Court's holding that the Excessive Fines Clause is not limited to individuals but instead applies to all fines imposed by the government,

including fines imposed against corporations. *See* App. 13-17. This Court expressly reserved that issue in *Browning-Ferris*, 492 U.S. at 276 n.22, it is squarely presented in this case, and it is undeniably important. While the Colorado Supreme Court correctly held that the Excessive Fines Clause protects corporations as well as individuals, Dami has no objection to the Court granting certiorari to decide this question along with the ability-to-pay question. Indeed, small businesses would benefit from a decision by this Court eliminating any doubt that corporations are protected by the Excessive Fines Clause as well. The amicus brief filed by the Cato Institute and Independence Institute supporting Dami on this issue in the Colorado Supreme Court underscores the importance of this issue. *See* Br. of *Amici Curiae* Cato Institute and Independence Institute at 11-16 (Colo. July 2, 2018).

If the Court grants certiorari on this issue, too, it should affirm. The Court's interpretation of the Excessive Fines Clause should "start with the text of the [Eighth] Amendment." *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The text provides a prohibitory directive to the government without "any limitation on who merits protection from" the prohibited action. App. 15. And unlike being incarcerated or suffering a physically or mentally cruel and unusual punishment, "[t]he payment of monetary penalties . . . is something a corporation can do as an entity." *Browning-Ferris*, 492 U.S. at 285 (O'Connor, J., concurring in part and

dissenting in part).[10] Indeed, fines "are frequently imposed . . . upon organizational defendants" precisely because they "cannot be imprisoned." *Southern Union Co. v. United States*, 567 U.S. 343, 349 (2012). There is no textual basis for reading the Excessive Fines Clause to mean "excessive fines imposed" *against individuals*. Moreover, in the case of small, individually owned companies like Dami, a fine against the company can have a direct impact on the sole owner of the company as well.

The "nature, history, and purpose" of the Excessive Fines Clause also point to the conclusion that corporations are protected by the Excessive Fines Clause as well. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978). The history of the Clause reflects an effort "to prevent *the government* from abusing its power to punish," *Austin v. United States*, 509 U.S. 602, 606-07 (1993), by limiting the government's power to extract exorbitant fines "for purposes of oppressing political opponents, for raising revenue in unfair ways, or for any other improper use," *Browning-Ferris*, 492 U.S. at 272. The focus of the prohibition on excessive fines was the sovereign, not the subject, and nothing in the Clause's history suggests that the government could extract excessive fines merely because the target of the extraction was not an individual. To the contrary, even at the time of Magna Carta, the threat of excessive

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[10] That also sets the Excessive Fines Clause apart from other constitutional provisions that are "purely personal." Pet. 17-18 (citation omitted); *cf. Hale v. Henkel*, 201 U.S. 43, 70 (1906) (explaining that the Fifth Amendment's Self-Incrimination Clause is by its terms "limited to a person who shall be compelled in any criminal case to be a witness against *himself*," not others).

"amercements" extended beyond individuals and included "entire townships." *Id.* at 270-71 & n.15. The history and purpose of the Excessive Fines Clause thus confirm what its text indicates—the Clause prohibits "excessive fines imposed," regardless of whether the excessive fine is "imposed" against a corporation or an individual.

* * * * *

The Court should grant certiorari and reaffirm the fundamental, and increasingly important, protections that the Framers adopted in the Excessive Fines Clause against ruinous financial penalties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 6, 2019

ADDENDUM

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Saturday, November 15, 2014

Petition to Review
Paul Tauriello *or NIKI GWEN* [italics handwritten]
Director of Colorado Division of Workmen's Compensation
633 17th Street Suite 400
Denver CO 80202

Director Paul Tauriello,

My name is Soon Pak. I am the sole owner of Dami Hospitality, a motel located at 3850 Peoria Street Denver 80239. I am in receipt of Specific Findings of Fact and Order to Pay Fine, dated Oct 30, 2014.

I present to you the following explanation for lack of workmen's compensation insurance from the period Aug 10, 2006 to June 8, 2007 and Sept 12, 2010 to July 9 2014.

As is often the practice of small business in order to keep costs at a minimum, I have solicited quotes from insurance companies and brokers in order to find the best price for my insurance needs. It is because of this reason that I find myself in this predicament.

When soliciting quotes on insurance needs, the quotes I received were to include workmen's compensation insurance. Because of my immigrant background and English language deficiency, I rely on professionals to advise me wisely and make sure I do not run afoul of the laws and regulations that I am subject to as a small business owner.

In both instances of not having workmen's compensation insurance, I believed that my policies included the required coverage. It was my

understanding that I was in compliance with the regulations to secure and maintain proper workmen's compensation insurance. My trust in insurance professionals to quote and secure for me competitive workmen's compensation insurance obviously was placed in the wrong people. I now have an insurance professional, Young Kim, who speaks my native language and understands my insurance needs.

I understand the seriousness of not having workmen's compensation insurance, and I realize that not having proper insurance includes penalties for non-compliance. However, $842,200.00 is more that my business grosses in one year. It is a penalty way beyond my ability to pay. My payroll each year is less than $50,000 per year. I have never had any incidence of a worker related accident or injury. I accept responsibility of my non-compliance. I ask that you grant leniency in my case and access a fine that is more reasonable to the size of my business.

If the penalty stands as presented, I have no choice but to declare personal and business bankruptcy and go out of business.

I thank you for your consideration of this matter, and hope you reach a decision that is favorable and reasonable to Division of Workmen's Compensation's compliance division and myself as a small business owner unable to pay such an enormous fine.

Sincerely,
Soon Pak, Owner of Dami Hospitality