

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
Colorado Supreme Court**

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As this case comes to the Court, Petitioner and Respondent, albeit for very different reasons, agree that this Court should grant certiorari. The question of whether the Excessive Fines Clause of the Eighth Amendment protects corporations is an issue of nationwide importance that this Court has not yet resolved. The related issue of whether and, if so, how a court should consider an offender's ability to pay in evaluating the excessiveness of a fine has divided the circuit courts. This Court should grant certiorari to resolve these important and recurring issues.

REPLY BRIEF

I. Whether The Excessive Fines Clause Applies To Corporations Like Dami Is A Necessary Predicate To The Ability To Pay Issue.

As Dami explains, the question of whether the Excessive Fines Clause applies to corporations as it does to individuals is “squarely presented in this case, and it is undeniably important.” Resp. 30. While Dami agrees that this Court should grant certiorari to resolve the issue of whether ability to pay is a factor a court must consider in evaluating the excessiveness of a fine, Dami stops short of recognizing that this Court needs to grant certiorari on the question of whether the Excessive Fines Clause was intended to protect corporations. According to Dami, it has no objection and this Court *could* grant “certiorari on this issue, too.” Resp. 30. But whether the Excessive Fines Clause protects corporations comes before the ability to pay issue—an issue that Dami concedes “is an increasingly

recurring issue of undeniable importance” that has split the circuits. Resp. 2.

This case thus presents *two* questions for this Court’s review. First, whether the Excessive Fines Clause applies to corporations like Dami. Second, if it does, whether and to what extent an offending party’s financial means must be considered in evaluating the excessiveness of a fine. To reach the second question requires answering the first in the affirmative under existing law.

Dami’s petition itself highlights the importance of resolving whether extending the Excessive Fines Clause to protect corporations is incompatible with the clause’s reach and purpose. Throughout its response, Dami alternates between presenting itself as a corporation and as Dami’s business owner in her individual capacity. *See, e.g.*, Resp. 1-2, 7-8, 24. But this distinction matters. While a fine levied against an individual can be so excessive that it ruins that person’s livelihood, corporations face different concerns. A corporation could dissolve the day after a fine is imposed, and its shareholders could start a similar corporation the next day. In this way, the corporate form itself shields individuals from the harms that the Excessive Fines Clause protects against. As the animating reasons for protecting individuals against excessive fines do not extend to corporations, Dami’s attempts to portray itself as an *individual* in asserting that the Excessive Fines Clause should protect *Dami* underscores the conflict between how this Court has understood the clause and the Colorado Supreme Court’s reasoning in this case.

In addition, Dami begins its analysis by correctly recognizing that this “Court’s interpretation of the Excessive Fines Clause should ‘start with the text of the [Eighth] Amendment.’” Resp. 30 (citing *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019)). Dami departs from that rule, however, when it concludes that the “text provides a prohibitory directive to the government without ‘any limitation on who merits protection from’ the prohibited action.” Resp. 30 (citing App. 15). The other two clauses of the Eighth Amendment also do not place limits on who merits protection, but they exclude corporations. App. 15-17.

More fundamentally, the rote examination of whether the text explicitly excludes corporations is an incomplete analysis. Instead, the text of the amendment must be read in context, with its full purpose in mind. And that purpose, which has already been recognized by this Court, is to limit the “ability of the sovereign to use its prosecutorial power, including the power to collect fines, for *improper* ends,” such as forcing political opponents to remain in prison because they could not pay monetary penalties. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989) (emphasis added). Imposing fines for a corporation’s failure to maintain workers’ compensation insurance, when there is no risk that the corporation will be imprisoned, does not offend the Eighth Amendment. While the Founders created the Excessive Fines Clause to ensure that the government could not deprive a person of “his livelihood” or prevent “a larger amercement” than a person’s “circumstances or personal estate [could]

bear,” it is unlikely, not to mention nonsensical, that the Founders created the Excessive Fines Clause to prevent the government from depriving a corporation of its livelihood. App. 19 (citing *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019)).

II. Whether A Government Must Consider A Corporation’s Ability To Pay Before Imposing Fines Is An Important Question Of National Significance.

Governments use fines to encourage compliance with laws and regulations. These fines typically focus on the offense, not the financial wherewithal of the offender. Adding a constitutionally required analysis of financial ability to pay as a prerequisite to a government imposing a fine, as the Colorado Supreme Court did here, renders the laws unequal in application and creates contrary incentives that encourage gamesmanship and undermine important governmental interests. The Colorado Supreme Court’s expansion of the Excessive Fines Clause was improper and warrants this Court’s review because it creates significant consequences for governments and law-abiding businesses alike.

Although the parties agree that this Court should grant certiorari on the question of whether a court should consider an offender’s ability to pay in evaluating the constitutionality of a fine, Petitioner disagrees that Dami’s financial status should have any bearing on whether a fine is constitutionally valid. Dami’s failure to follow the law here and subsequent attempts to have courts impose constitutional limits on the consequences of that decision illustrates the grave harms that flow from

the Colorado Supreme Court's expansion of the Excessive Fines Clause.

The fines in this case were imposed as a result of Dami's multi-year failure to protect its workers through workers' compensation insurance. Creating a loophole for corporations to avoid payments for retrospective violations creates dangerous incentives and results in unequal treatment for similarly situated businesses. As this case demonstrates, offending corporations will gain competitive advantages over corporations in good standing, all while putting workers in harm's way. And, if the offending corporations are discovered, they could gain a further advantage over other financially solvent corporations by avoiding fines that are deemed outside of the corporations' ability to pay. Put another way, two hotels on the same street could face very different consequences for breaking the same law, solely based on how much profit the owners decide to take out of the company each year.

Colorado, like almost every other state, requires employers to obtain workers compensation insurance to promote safe workplaces, limit the liability of employers, and assist injured workers and their families. *See Williams v. Kunau*, 147 P.3d 33, 38 (Colo. 2006); *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d 237, 242 (Colo. 1992).

But, in order to accomplish the Act's "beneficent" purpose while maintaining its commitment to keeping costs reasonable to employers, employers must keep up their end of the bargain by maintaining workers' compensation

insurance. *Williams*, 147 P.3d at 38; Colo. Rev. Stat. § 8-43-409 (2019).

Employers that fail to maintain insurance can produce devastating outcomes for their employees. Uninsured injury can be exceedingly costly, far in excess of fines imposed at \$250-\$500 per day. *See, e.g., Simmons v. Precast Haulers, Inc.*, 849 N.W.2d 117, 122, 124 (2014) (Claimant slipped and fell beneath rolling tractor trailer, incurring medical expenses of \$2,161,555).

Despite these important and well-intentioned motivations for why employers should maintain workers' compensation coverage, Dami contends that it is constitutionally exempt from complying with this law because it has no ability to pay the fines, and because it is not culpable for either the lapse in coverage or any harm. Resp. 10, 24. These contentions promote dangerous business incentives.

In its self-portrayal, Dami implies that it is less culpable because its long-term lapses in coverage “did not actually harm anyone—none of [Dami’s] few employees ever filed a workers’ compensation claim, and the State did not lose a dime.” Resp. 24.

First, workers’ compensation insurance is a forward-looking, not backward-looking program. When Dami’s coverage lapsed, it had no idea whether any workers would be injured in the future. The happenstance that no injuries occurred while it had no coverage has no constitutional relevance.

Second, Dami oversimplifies the harm that a corporation that breaks the law like Dami creates. Beyond the serious harm created by putting its

employees at risk every day, rulebreaking market participants like Dami create economic harm to their competitors. Employers who forego their statutory commitments to maintain workers' compensation coverage gain an improper competitive advantage. Preventing and condemning this freeloading behavior was a major reason why the Colorado legislature mandated the imposition of fines for noncompliance with workers' compensation coverage requirements. *Hearing on H.B. 05-1139 before the H. Comm. on Bus. Affairs and Labor*, 65th Gen. Assemb., 1st Sess. (Colo. 2005) (statement of Fran Coleman, Colorado State Representative, House District 1).

Reducing liability based on a corporation's ability to pay promotes dangerous gamesmanship as it gives an incentive for corporations to reduce their assets to avoid financial liability upon discovery of their non-compliance. Worse still, employers that do not have the ability to pay fines will almost certainly not have the ability to pay for a worker's uncovered injury, compounding the potential harm that could occur from non-compliance. The remedy that Dami proposes—reducing or discharging fines when an employer does not have the assets to pay the fines—will have the ultimate effect of rewarding offending employers and punishing responsible ones. This contradictory outcome does not serve the purpose of the Excessive Fines Clause and offends our country's nationwide objective to protect workers and their families while limiting costs to employers.

CONCLUSION

The petition of certiorari should be granted, along with the cross-petition in No. 19-719, and the cases consolidated for argument.

Respectfully submitted,

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