

No. \_\_\_\_\_

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**In the  
Supreme Court of the United States**

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DAMI HOSPITALITY, LLC,  
*Cross-Petitioner,*

v.

COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT,  
DIVISION OF WORKERS' COMPENSATION,  
*Cross-Respondent.*

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF COLORADO

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**CONDITIONAL CROSS-PETITION  
FOR A WRIT OF CERTIORARI**

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DANIEL T. GOODWIN  
PAIGE ORGEL  
LAW OFFICES OF  
DANIEL T. GOODWIN  
10901 W. 120th Avenue  
Suite 350  
Broomfield, CO 80021  
(303) 763-1600

GREGORY G. GARRE  
*Counsel of Record*  
ROMAN MARTINEZ  
BLAKE E. STAFFORD  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004  
(202) 637-2207  
gregory.garre@lw.com

*Counsel for Cross-Petitioner*

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### **QUESTION PRESENTED**

How is an offender's ability to pay relevant in determining whether a fine is unconstitutional under Excessive Fines Clause of the Eighth Amendment?

**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

Cross-Petitioner Dami Hospitality, LLC, was the respondent below and is the respondent in No. 19-641. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Cross-Respondent Colorado Department of Labor and Employment, Division of Workers' Compensation, was the petitioner below and is the petitioner in No. 19-641.

**RELATED PROCEEDINGS**

Colorado Supreme Court:

*Colorado Dep't of Labor & Emp't, Div. of Workers' Comp. v. Dami Hospitality, LLC*, No. 17SC200 (June 3, 2019, modified June 17, 2019)

Colorado Court of Appeals:

*Dami Hospitality, LLC, v. Industrial Claim Appeals Office*, No. 16CA249 (Feb. 23, 2017)

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## **CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI**

Cross-Petitioner Dami Hospitality, LLC (Dami) respectfully files this conditional cross-petition for a writ of certiorari to review the judgment of the Colorado Supreme Court in this case.

### **OPINIONS BELOW**

The opinion of the Colorado Supreme Court (Pet. App. 1-28) is reported at 442 P.3d 94.<sup>1</sup> The opinion of the Colorado Court of Appeals (Pet. App. 29-71) is reported at 2017 COA 21 and available at 2017 WL 710497. The orders of the Industrial Claim Appeals Office (Pet. App. 72-90, 101-15) and the Division of Workers' Compensation (Pet. App. 91-100, 116-43) are unreported.

### **JURISDICTION**

The Colorado Supreme Court entered its judgment on June 3, 2019, and denied rehearing on June 17, 2019. Pet. App. 3. On August 27, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 14, 2019. The petition in No. 19-641 was filed on that date and placed on the Court's docket. This conditional cross-petition is being filed pursuant to this Court's Rule 12.5. This Court has jurisdiction under 28 U.S.C. § 1257(a) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975), for the reasons explained in the petition in No. 19-641, Pet.

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<sup>1</sup> "Pet." and "Pet. App." refer to the petition for a writ of certiorari and appendix in No. 19-641, and "Resp." and "Resp. Add." refer to Dami's response to that petition and accompanying addendum.

1-2, and in Dami's response to that petition, Resp. 3-7.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The relevant provision of the Workers' Compensation Act of Colorado, Colo. Rev. Stat. § 8-43-409, is reproduced at Pet. App. 144-48.

### STATEMENT

In *Colorado Department of Labor & Employment, Division of Workers' Compensation v. Dami Hospitality, LLC*, No. 19-641, the State seeks this Court's review of the question "whether and to what extent [the Excessive Fines Clause] requires consideration of an offender's ability to pay a fine." Pet. i. If the Court grants the State's petition, the Court should also grant this conditional cross-petition to ensure that the Court may address all aspects of the ability-to-pay question raised by this case.

1. The factual and procedural background of this case is set forth in Dami's response to the State's petition. See Resp. 7-14. In short, the State seeks to impose a \$841,200 fine on Dami based on inadvertent but years-long lapses in workers' compensation insurance coverage for Dami's motel. *Id.* at 7-9. The coverage had lapsed once before, a first offense for which Dami paid a \$1,200 fine. *Id.* at 8. But after the Colorado Division of Workers' Compensation "discovered" additional lapses in coverage, it calculated the total amount of the fine as \$841,200



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].” Pet. App. 6-8 (citations omitted); *see id.* at 142-43 (computing the fine for Dami’s “subsequent violation”). This staggering fine would plummet Dami, and its sole owner, 75-year-old Soon Pak, into bankruptcy, put Ms. Pak “out of business,” and thus deprive Ms. Pak of her livelihood. *See* Resp. 10, 22; Resp. Add. 2a.

2. Ms. Pak explained to the Division the ruinous consequences of the \$841,200 fine, but the Division found those consequences largely irrelevant. *See* Resp. 10. The Industrial Claim Appeals Office (ICAO) ultimately affirmed the Division’s insistence that Dami pay the fine in full, rejecting her claim that the fine is unconstitutionally excessive under the Excessive Fines Clause. *Id.* at 10-11. The Colorado Court of Appeals then vacated and remanded, concluding that the fine was unconstitutionally excessive under the Excessive Fines Clause. *Id.* at 11-12.

3. The Colorado Supreme Court reversed and remanded. Pet. App. 1-28. The court held that a defendant’s “ability to pay” should be considered in determining “whether a fine is constitutionally excessive” under the Excessive Fines Clause. *Id.* at 18-20. That conclusion derived from the “historical predecessors of the Excessive Fines Clause,” which “requir[e] that a penalty ‘not be so large as to deprive [a person] of his livelihood.’” *Id.* at 19 (alteration in original) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)). This

history, the court concluded, requires “consideration of ability to pay.” *Id.*

But the court relegated that consideration to merely one factor in the proportionality analysis described in *United States v. Bajakajian*, 524 U.S. 321 (1998), which looks to whether “the amount of the [fine] is grossly disproportional to the gravity of the . . . offense.” *Id.* at 17, 19-20 (alterations in original) (quoting *Bajakajian*, 524 U.S. at 337). Under that proportionality analysis, even a fine that is financially ruinous may be upheld based on the severity of the offense. *Id.* at 19-20. The court further held that, in conducting this proportionality analysis, the “staggeringly high-dollar aggregate” fine imposed in this case must be viewed only “on a per diem basis.” *Id.* at 20-23. The court then remanded with instructions that “the evaluation of whether a fine is excessive must be done with reference to each individual daily fine.” *Id.* at 23.

Justice Samour dissented in part from this final holding, explaining that the Division “imposed a one-time, aggregate fine retroactively,” and it is that total fine that should be subject to constitutional attack. *Id.* at 25-28. 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.

## REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The State’s petition in No. 19-641 seeks this Court’s review of the Colorado Supreme Court’s decision in this case holding that a defendant’s “ability to pay is an appropriate element of the Excessive Fines Clause” analysis. Pet. App. 19. That decision deepens a conflict of authority that warrants this Court’s review. *See* Pet. 19-24; Resp. 15-20. But the court’s decision also exacerbates an interrelated conflict about *how* a defendant’s ability to pay is relevant in assessing the excessiveness of a fine under the Excessive Fines Clause. While the parties agree that this case warrants certiorari, they disagree, deeply, about the manner in which a defendant’s ability to pay is relevant to the excessiveness analysis. Dami files this cross-petition to eliminate any doubt that this Court may review all aspects of the Colorado Supreme Court’s ability-to-pay ruling. The Court should therefore grant this conditional cross-petition along with the State’s petition.<sup>2</sup>

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<sup>2</sup> The question presented by the State in No. 19-641 is: “Whether the Eighth Amendment’s Excessive Fines Clause applies to corporations as it does to 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.” Pet. i. Because that question “fairly encompass[es]” the interrelated issue of *how* an offender’s ability to pay a fine affects the excessiveness analysis under the Eighth Amendment, Dami does not believe a cross-petition is necessary for the Court to reach this interrelated issue. *South Dakota v. Bourland*, 508 U.S. 679, 687 n.8 (1993). Nevertheless, Dami is filing this conditional cross-petition in an abundance of caution to ensure that all aspects of the Colorado Supreme Court’s ruling on the ability-to-pay issue are properly before the Court.

1. As Dami explained in its response to the State’s petition in No. 19-641, even among the lower courts holding that a defendant’s ability to pay is relevant, there is a conflict on *how* that consideration is relevant in determining excessiveness, including the extent to which ability to pay impacts an evaluation of a fine’s proportionality for purposes of determining excessiveness and provides a sufficient basis for deeming a fine excessive. *See* Resp. 18-20. Granting this conditional cross-petition will thus ensure that the Court is able to fully resolve the split.

2. By aligning with courts that refuse to consider a defendant’s ability to pay as a sufficient basis to establish excessiveness, the Colorado Supreme Court is on the wrong side of the split. *See* Resp. 25-29. As this Court has repeatedly explained, the Excessive Fines Clause imposes complementary limitations on the government’s ability to exact a fine: the fine must not only “be proportioned to the wrong,” but it must also “not be so large as to deprive [an offender] of his livelihood.” *Timbs v. Indiana*, 139 S. Ct. 682, 687-88 (2019) (alteration in original) (quoting *Browning-Ferris*, 492 U.S. at 271); *see Bajakajian*, 524 U.S. at 335.

Although the Colorado Supreme Court correctly recognized these limitations, it wrongly held that in some cases a livelihood-destroying fine “might be warranted” depending “the gravity of the offense” under a proportionality analysis. Pet. App. 20. That the government might balance away this protection is plainly contrary the very history examined by the court below—under Magna Carta, the protection against livelihood-destroying fines applied regardless of whether the “fault” was “small” or “great.” *Timbs*,

139 S. Ct. at 687 (quoting Magna Charta, 9 Hen. III, ch. 14, *in* 1 Eng. Stat. at Large 5 (1225)).

As Blackstone put it, “[n]o man shall have a larger [fine] imposed upon him, than his circumstances or personal estate will bear.” *Id.* at 688 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 372 (1769)); *see also United States v. Levesque*, 546 F.3d 78, 84 (1st Cir. 2008) (“[I]n no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him.” (emphasis added) (citation omitted)). That history demonstrates that a livelihood-destroying fine may be excessive.

In addition, even considering a defendant’s ability to pay as a factor in assessing proportionality more generally, the Court should at a minimum repudiate the Colorado Supreme Court’s holding that a defendant’s ability to pay a “staggeringly high-dollar aggregate” fine must be considered only in reference to the “daily fine” for an offense. Pet. App. 21-23; *see* Resp. 28-29. As the dissent below explained, this holding effectively reduces the excessiveness inquiry to a toothless “exercise in futility.” Pet. App. 27. As this case illustrates, the accumulation of individual daily fines into one massive, aggregate fine can destroy a defendant’s ability to making a living. *See id.* at 26-27; Resp. Add. 2a. Considering only the per-day rate is an entirely artificial inquiry that is divorced from the Excessive Fines Clause’s historical underpinnings and will only invite manipulation. Resp. 28-29.

Ultimately, the Colorado Supreme Court erred in sharply limiting the manner in which an offender’s ability to pay is relevant in determining whether a fine is excessive under the Eighth Amendment.

**CONCLUSION**

If the petition in No. 19-641 is granted, this conditional cross-petition should also be granted.

Respectfully submitted,

DANIEL T. GOODWIN  
PAIGE ORGEL  
LAW OFFICES OF  
DANIEL T. GOODWIN  
10901 W. 120th Avenue  
Suite 350  
Broomfield, CO 80021  
(303) 763-1600

GREGORY G. GARRE  
*Counsel of Record*  
ROMAN MARTINEZ  
BLAKE E. STAFFORD  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004  
(202) 637-2207  
gregory.garre@lw.com

*Counsel for Cross-Petitioner*

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