No. 21-5305

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRO ROSALES-GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court’s imposition of a $4000 criminal fine was unconstitutionally excessive under the Eighth Amendment’s Excessive Fines Clause because the court did not consider petitioner’s ability to pay the fine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted at 850 Fed. Appx. 668.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2021. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a

timely petition for rehearing. The petition for a writ of certiorari was filed on August 2, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of being found in the United States after deportation without having received consent to reapply for admission, in violation of 8 U.S.C. 1326(a) and (b)(1). Corrected Judgment 1. The district court sentenced him to a 36-month term of imprisonment and imposed a $4000 fine. Id. at 2-3. The court of appeals affirmed in part and dismissed the appeal in part. Pet. App. 1-5.

1. On April 19, 2019, police officers in West Melbourne, Florida, arrested petitioner on charges of aggravated battery with a deadly weapon and resisting an officer with violence. Presentence Investigation Report (PSR) ¶ 7.[1] United States Immigration and Customs Enforcement agents later determined that petitioner was a citizen of Mexico, that he had been granted voluntary departure from the United States three times, and that he had been deported from the United States five times. PSR ¶¶ 9-10.

[1] Petitioner pleaded no contest to battery and resisting an officer without violence, which under Florida law are lesser-included offenses of those with which he was initially charged. PSR ¶ 36.

Petitioner was charged by information with one count of being found in the United States after deportation without having received consent to reapply for admission, in violation of 8 U.S.C. 1326(a) and (b)(1). Information 1-2. Petitioner waived indictment and pleaded guilty to the information pursuant to a written plea agreement. Plea Agreement 1-2. As part of that agreement, petitioner generally "waive[d] the right to appeal [his] sentence on any ground * * * except (a) the ground that the sentence exceeds the * * * applicable guidelines range"; "(b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution." Id. at 9.

The Probation Office prepared a presentence investigation report. The Probation Office noted that petitioner could be subjected to a fine of up to $250,000 under the applicable statute and that the fine range for his offense under the Sentencing Guidelines is $4000 to $40,000. PSR ¶¶ 77, 79 (citing 18 U.S.C. 3571(b) and Sentencing Guidelines § 5E1.2(c)(3) (2018)). Petitioner did not object to the Probation Office's calculation of the fine. Addendum to PSR; Sent. Tr. 3-5.

The district court sentenced petitioner to a 36-month term of imprisonment and imposed a $4000 fine. Corrected Judgment 2-3; see Sent. Tr. 12-16. When explaining its reasons for imposing that judgment, the court noted that petitioner had been deported

from the United States (or allowed to depart under an order of removal) on eight previous occasions; that he had been convicted of battery and resisting a law enforcement officer with violence; and that he had been arrested on multiple occasions for driving under the influence. Sent. Tr. 13-15. Petitioner's counsel objected to the fine on the ground that "my client's been declared indigent." Id. at 16.

2. The court of appeals dismissed the appeal to the extent that petitioner raised arguments barred by the appeal waiver in his plea agreement, and it otherwise affirmed the length of petitioner's sentence and the imposition of the fine. Pet. App. 1-5.

The court of appeals concluded that the appeal waiver in the plea agreement barred appellate review of petitioner's claim that the district court misapplied the Sentencing Guidelines in imposing a fine despite his inability to pay. Pet. App. 3; see Pet. C.A. Br. 10-15. It accordingly dismissed the appeal to the extent that petitioner raised that issue. Pet. App. 3.

The court of appeals assumed that petitioner had preserved an objection to the imposition of the $4000 fine based on the Eighth Amendment's Excessive Fines Clause and found that the fine was not constitutionally excessive. Pet. App. 3-5. The court explained that a fine violates the Eighth Amendment "'if it is grossly disproportional to the gravity of a defendant's offense,'" and that, when conducting that inquiry, a court "consider[s] (1) whether the

defendant is in the class of persons at whom the criminal statute was primarily directed; (2) what other penalties were authorized for the offense by the legislature or the Sentencing Commission; and (3) the harm caused by the defendant." Id. at 4 (citation omitted). The court further explained because a fine's compliance with the Eighth Amendment "is determined in relation to the characteristics of the offense, not the characteristics of the offender," a court "do[es] not consider the impact the fine would have on an individual defendant." Ibid.

The court of appeals found that petitioner's fine was not grossly disproportionate to his offense. Pet. App. 4-5. First, the court observed that petitioner "is within the class of persons whom the illegal reentry statute was meant to cover because he repeatedly entered the United States after being deported." Id. at 4. Second, the court found that "the fine is not grossly disproportionate to [petitioner's] offense, particularly in light of the other penalties authorized for the offense." Ibid. The court noted that the $4000 fine "is well below the statutory maximum fine of $250,000" and "is at the bottom of the guideline range" -- and that each of those facts rendered the fine "presumptively constitutional." Ibid. And third, the court found that "the district court considered the harm caused by [petitioner] and noted the number of times he entered the United States illegally

and the additional criminal conduct in which he engaged while he was illegally present in this country." Ibid.

ARGUMENT

Petitioner contends (Pet. 16-18) that because he is unable to pay the $4000 fine, the imposition of that fine violates the Excessive Fines Clause of the Eighth Amendment. The court of appeals correctly held that the fine here was not excessive, and its unpublished, per curiam decision does not conflict with any decision of this Court or of another court of appeals or state supreme court. What is more, addressing the question presented would have little practical effect because the ability-to-pay requirement that petitioner seeks to impose would duplicate a similar requirement that already exists in the Sentencing Guidelines. And this case would be a poor vehicle to consider the question presented because petitioner forfeited the claim, leaving it reviewable only for plain error. This Court has previously denied petitions for writs of certiorari presenting similar questions, see Colorado Dep't of Labor & Emp't, Div. of Workers' Comp. v. Dami Hospitality, LLC, 140 S. Ct. 849 (2020) (No. 19-641); Dami Hospitality, LLC, v. Colorado Dep't of Labor & Emp't, Div. of Workers' Comp., 140 S. Ct. 900 (2020) (No. 19-719); Viloski v. United States, 137 S. Ct. 1223 (2017) (No. 16-508), and it should follow the same course here.

1. a. In United States v. Bajakajian, 524 U.S. 321 (1998), the government sought forfeiture of $357,144 in currency that the defendant had attempted to transport out of the country without reporting it, in violation of 31 U.S.C. 5316(a)(1)(A). That statute requires an individual to report to the government when he is transporting more than $10,000 out of the country. The Court held that a forfeiture of the full $357,144 that the defendant failed to report would violate the Excessive Fines Clause. After determining that the forfeiture in question was punitive (thereby triggering the protection of the Eighth Amendment), Bajakajian, 524 U.S. at 327-334, the Court stated that a forfeiture would violate the Excessive Fines Clause only if it was "grossly disproportional to the gravity of the defendant's offense," id. at 337. The Court concluded that the forfeiture at issue was grossly disproportional to the gravity of the reporting offense and was therefore unconstitutional. Id. at 337-340.

In finding the forfeiture grossly disproportionate, the Court in Bajakajian considered a number of factors related both to the statutory prohibition involved and to the culpability of the particular defendant. The Court first examined the nature of the crime charged, concluding that it was "solely a reporting offense," Bajakajian, 524 U.S. at 337, and was "unrelated to any other illegal activities," id. at 338. Second, the Court observed that the defendant did "not fit into the class of persons for whom the

statute was principally designed," because he was "not a money launderer, a drug trafficker, or a tax evader." Ibid. Third, the Court compared the value of the forfeited property to the penalties dictated by the Sentencing Guidelines for the particular defendant. Id. at 338-339. In that case, the maximum fine under the Guidelines was $5000 and the maximum sentence under the Guidelines was six months, which "confirm[ed]" that the crime carried "a minimal level of culpability." Id. at 339. Fourth, the Court noted that the maximum penalties authorized in the statute at issue were also "relevant" and concluded that Congress's authorization of a $250,000 fine and five years of imprisonment indicated that Congress did not regard the offense as "a trivial one." Id. at 339 n.14. Taking the third and fourth factors together, the Court explained that "the maximum fine and Guideline sentence to which [the defendant] was subject were but a fraction of the penalties authorized" by the statute, which "undercut[] any argument based solely on the statute, because [it] show[ed] that [the defendant]'s culpability relative to other potential violators of the reporting provision -- tax evaders, drug kingpins, or money launderers, for example -- [was] small indeed." Ibid. Finally, the Court considered the harm caused by the defendant's offense and concluded that it was "minimal," both because the government was the sole party affected and because the only harm inflicted was depriving

the government of the information that the defendant failed to report. Id. at 339.

Under the framework this Court used in Bajakajian, the court of appeals properly found that the imposition of a $4000 fine in this case does not violate the Excessive Fines Clause. The court considered the factors this Court looked to in Bajakajian, examining the nature of the illegal-reentry crime; whether petitioner fit into the class of persons for whom the illegal-reentry statute was principally designed; the applicable range for fines in the Sentencing Guidelines; the maximum fine authorized by federal law; and the harm that petitioner caused. See Pet. App. 4; see also pp. 4-6, supra.

b. Petitioner contends (Pet. 7) that "a defendant's current or future ability to pay a fine is a relevant consideration" in the Eighth Amendment excessive-fines inquiry. But this Court has never found that a defendant's personal circumstances, including his financial condition, are independently relevant to the gross-disproportionality inquiry. In Bajakajian, the Court merely noted that the defendant there "d[id] not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood." 524 U.S. at 340 n.15. And in Timbs v. Indiana, 139 S. Ct. 682 (2019), the Court referred back to that language in Bajakajian, while also stating that "Magna Carta required that economic sanctions * * * not be

so large as to deprive [an offender] of his livelihood." Id. at 688 (citation and internal quotation marks omitted; brackets in original).

Petitioner errs in asserting that, under the "the original meaning of the Excessive Fines Clause[,] * * * a defendant's ability to pay is a relevant consideration" and must be independently considered as part of the gross-disproportionality inquiry -- without any determination about whether a particular fine would deprive a particular defendant of his livelihood. Pet. 17; see Pet. 6-8, 16-18. The history of the Excessive Fines Clause does not support the conclusion that personal characteristics are a freestanding limitation on the size of a fine. As this Court has explained, the Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689" and is grounded in Magna Carta. See Bajakajian, 524 U.S. at 335-336. Magna Carta sought to limit perceived abuses of amercements (the predecessor of fines)

> in four ways: by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; by requiring that the amercement not be so large as to deprive [a person] of his livelihood; and by requiring that the amount of the amercement be fixed by one's peers.

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989) (emphasis added); see Bajakajian, 524 U.S. at 335; see also United States v. Levesque, 546 F.3d 78, 84 (1st Cir. 2008) ("As explained by one commentator (who is cited extensively by the Court in its historical discussion in Browning-Ferris),

'the great object' of th[e Excessive Fines Clause] was that 'in no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him.'") (quoting William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John 287 (2d ed. 1914)) (brackets omitted). Nothing in that history suggests that a defendant's personal circumstances constitute a discrete factor independent of the fine's effect on future livelihood.

The court of appeals' analysis does not conflict with the principle in Magna Carta. While the court stated that "we do not consider the impact [a] fine would have on an individual defendant," Pet. App. 4, it did not address the Excessive Fines Clause in the context of a fine that would not just be difficult or impossible to pay but would purportedly deprive an individual of his livelihood. Petitioner has not contended that paying a fine of $4000 will deprive him of his future livelihood, nor has he provided any evidence to support the conclusion that it would. See Sent. Tr. 16 (objecting to the fine solely because petitioner had been "declared indigent"); Pet. C.A. Br. 15-18; see also PSR ¶¶ 62-65 (noting petitioner's significant history of employment in both Mexico and the United States); Pet. 3-4 (statement by petitioner's counsel that "[f]rom [his] * * * income" petitioner sent $400 a month to his daughter and her mother and $650 a month to his parents).

2. Petitioner contends (Pet. 10-13) that the decision below conflicts with decisions from the First, Second, and Eighth Circuits. That contention is incorrect. Petitioner has identified no decision holding that a punitive fine or forfeiture was excessive based solely on a defendant's inability to pay at the time of conviction or the possibility that he would be unable to pay the fine in the future. And, to the extent that other courts of appeals have found that the Eighth Amendment requires a court to consider whether a fine would deprive the defendant of his livelihood, those decisions do not conflict with the decision below because the court of appeals was not presented with -- and did not decide -- that issue.

a. Petitioner errs in asserting (Pet. 11-12 & n.4) that, in conflict with the court of appeals below, the First Circuit considers a defendant's ability to pay when evaluating the constitutionality of a fine. The First Circuit in Levesque, supra, considered a challenge to a forfeiture order of more than $3 million by a defendant who claimed to have "nothing of value left to forfeit." 546 F.3d at 80. The court discussed the appropriate Eighth Amendment excessive-fines inquiry and remanded the case for the district court to apply that analysis in the first instance. See id. at 83-85. The court explained that, although

> a court should consider a defendant's argument that a forfeiture is excessive under the Eighth Amendment when it effectively would deprive the defendant of his or her livelihood, * * * a defendant's inability to satisfy a forfeiture

> at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture unconstitutional, nor is it even the correct inquiry. * * * [E]ven if there is no sign that the defendant could satisfy the forfeiture in the future, there is always a possibility that she might be fortunate enough to legitimately come into money.

Id. at 84-85 (internal quotation marks omitted). Similarly, in United States v. Jose, 499 F.3d 105 (2007), the First Circuit applied the factors in Bajakajian to uphold a $114,948 forfeiture. Id. at 111-113. The court also found that the fine was not unconstitutionally excessive because "[i]t [could not] reasonably be argued that [the] forfeiture * * * would deprive defendant of his livelihood." Id. at 113. But the court never suggested that a defendant's ability to pay is a discrete factor that must be considered independent of the fine's effect on future livelihood.

The decision below is therefore consistent with the First Circuit's recognition that a fine is not unconstitutionally excessive merely because the defendant cannot pay it at the time of conviction and may not be able to pay it in the future. And the First Circuit's acknowledgment that a forfeiture that would go so far as to deprive the defendant of his livelihood might be excessive does not conflict with the decision below, because petitioner did not argue that the $4000 fine would deprive him of his livelihood and the court of appeals therefore had no occasion to consider that issue.

For similar reasons, the decision below does not conflict with United States v. Viloski, 814 F.3d 104 (2d Cir. 2016), cert. denied, 137 S. Ct. 1223 (2017) (cited at Pet. 12-13). In Viloski, the Second Circuit found "that a court reviewing a criminal forfeiture under the Excessive Fines Clause may consider -- as part of the proportionality determination required by Bajakajian -- whether the forfeiture would deprive the defendant of his future ability to earn a living," but the Second Circuit further found "that courts should not consider a defendant's personal circumstances as a distinct factor." 814 F.3d at 107; see id. at 112 ("While hostility to livelihood-destroying fines is deeply rooted in our constitutional tradition, consideration of personal circumstances is not."). Applying that framework, the court found that a forfeiture of over $1 million would not be unconstitutionally excessive because the defendant "presented no evidence that it would prevent him from earning a living upon his release from prison." Id. at 114. The court also found that the defendant's alleged "'dire financial circumstances'" were "irrelevant" standing alone -- and that they could be considered only to the extent that, "in conjunction with the challenged forfeiture," they "would deprive [the] defendant of his livelihood." Id. at 115 (citation omitted). The Second Circuit's rejection of an ability-to-pay

inquiry in Viloski accordingly aligns with the rejection of an ability-to-pay inquiry in the decision below.

b. Contrary to petitioner's contention (Pet. 10-11), the Eighth Circuit's approach to the Excessive Fines Clause does not meaningfully conflict with the decision below. In United States v. Lippert, 148 F.3d 974 (8th Cir. 1998), the court stated that "the defendant's ability to pay is a factor under the Excessive Fines Clause," but it went on to affirm the imposition of the fine in that case, citing both the defendant's high net worth and his failure to "raise this issue in the district court." Id. at 978. The affirmance of the fine in Lippert is not in obvious conflict with the affirmance of the fine here, where petitioner did not challenge the $4000 fine as unconstitutionally excessive in the district court.

In any event, the Eighth Circuit has since clarified that "[a] defendant's inability to satisfy" a punitive forfeiture (which is subject to Bajakajian's gross-disproportionality analysis) at the time of conviction, "in and of itself, is not at all sufficient to render a forfeiture unconstitutional." United States v. Smith, 656 F.3d 821, 828 (8th Cir. 2011), cert. denied, 565 U.S. 1218 (2012) (citation omitted). In Smith, the defendant had argued that a forfeiture of $10,000 was "an excessive fine

because he [wa]s indigent." Ibid. The court rejected that argument and upheld the forfeiture, finding that "[e]ven if it appears at the time of sentencing that [the defendant] cannot satisfy the forfeiture in the future, there is always a possibility that he might legitimately come into money." Ibid. The Eighth Circuit has repeatedly relied on that proposition from Smith in upholding judgments over excessive-fines challenges. See United States v. Vanosdoll, 532 Fed. Appx. 647, 647 (8th Cir. 2013) (per curiam) (finding that "the alleged state of [the defendant's] current and future financial condition does not control the forfeiture determination" and upholding a $100,000 criminal-forfeiture judgment despite the defendant's argument that he "d[id] not, and likely will not, have the assets to pay the judgment"); see also United States v. Johnson, 956 F.3d 510, 518-520 (8th Cir. 2020). There is therefore no indication that the Eighth Circuit, if confronted with the facts of this case, would reach a different conclusion than the court of appeals reached below.[2]

[2] To the extent that any intracircuit tension exists between Lippert and Smith (and the decisions that rely on Smith), that tension would properly be resolved by the Eighth Circuit instead of this Court. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

c. And the decision below does not conflict with the state supreme court decisions that petitioner cites (Pet. 9 n.3). Although in Colorado Department of Labor & Employment, Division of Workers' Compensation v. Dami Hospitality, LLC, 442 P.3d 94 (2019) (en banc), cert. denied, 140 S. Ct. 849, and 140 S. Ct. 900 (2020), the Colorado Supreme Court stated that "courts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment," it provided as examples of potentially excessive fines those "that would bankrupt a person or put a company out of business." Id. at 102. And the court explicitly rooted that principle in Magna Carta's requirement "that a penalty 'not be so large as to deprive [a person] of his livelihood.'" Id. at 101 (quoting Browning-Ferris, 492 U.S. at 271) (brackets in original). Similarly, in Commonwealth v. 1997 Chevrolet & Contents Seized from Young, 160 A.3d 153 (2017), the Pennsylvania Supreme Court relied on Magna Carta to find that "consideration [of] whether the forfeiture would deprive the property owner of his or her livelihood, i.e., his current or future ability to earn a living" is "entirely appropriate and consistent with the teachings of Bajakajian." Id. at 189 (citation and internal quotation marks omitted). Because those decisions did not conduct an ability-to-pay inquiry independent from the consideration of whether a fine would deprive a defendant of his livelihood, they do not implicate

any conflict that warrants this Court's review. See pp. 12-15, supra.

3. Further review of the question presented is also unwarranted because the Sentencing Guidelines independently require district courts to assess the defendant's ability to pay before imposing a fine. Sentencing Guidelines § 5E1.2 provides that "[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." Sentencing Guidelines § 5E1.2(a) (2018); see Pet. App. 4 ("In determining whether to impose a fine and the amount of any fine [under the Sentencing Guidelines], the district court should consider, among other factors, the defendant's ability to pay."). The defendant carries the burden of proving his inability to pay a fine, see United States v. Hernandez, 160 F.3d 661, 665 (11th Cir. 1998), and, "[i]f the defendant establishes that * * * he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine * * * the court may impose a lesser fine or waive the fine," Sentencing Guidelines § 5E1.2(e) (2018).

Petitioner has not identified any material difference between the ability-to-pay inquiry required under Sentencing Guidelines § 5E1.2 and the ability-to-pay inquiry that he proposes to read

into the Excessive Fines Clause. And because Section 5E1.2 already instructs district courts to consider the defendant's ability to pay a fine before imposing such a penalty, the resolution of the question presented would have limited practical impact.

4. In any event, this case would be a poor vehicle to address the question presented because petitioner failed to press his excessive-fines challenge in the district court, which means that it is at most subject to plain-error review. Even if petitioner could demonstrate that the district court committed an error, but see pp. 7-11, supra, he has not suggested that he would be able to make the remaining three showings required to demonstrate plain error.

Petitioner has not argued that any error was "clear" or "obvious"; that it affected his "substantial rights"; or that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993). Notably, petitioner has identified no court of appeals that has consistently held that a defendant's ability to pay must be considered as a standalone inquiry when assessing whether a fine violates the Excessive Fines Clause -- and this Court has never so held. Petitioner therefore cannot demonstrate that the district court's failure to consider his ability to pay at his sentencing hearing was clear or plain. See Henderson v.

United States, 568 U.S. 266, 278 (2013) (explaining that even "lower court decisions that are questionable but not plainly wrong (at time of trial or at time of appeal) fall outside the * * * scope" of the plain-error rule).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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