No. 21-563

In the
Supreme Court of the United States

WARREN M. LENT, ET AL.,
Petitioners,
v.

CALIFORNIA COASTAL COMMISSION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF FOR THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions presented are:

1. Can a state administrative agency, consistent with the Due Process Clause of the Fourteenth Amendment, permanently deprive a person of millions of dollars in fines using a summary hearing process that dispenses with the heightened procedural safeguards traditionally afforded those who face a significant deprivation of property?

2. Is a $4.185 million fine, assessed to punish homeowners for failing immediately to remove ordinary residential accessories located within an undeveloped public beach-access easement, unconstitutional under the Excessive Fines Clause of the Eighth Amendment, as incorporated against the States by the Fourteenth Amendment?

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

State and federal courts need more guidance from this Court on how to interpret and apply the Excessive Fines Clause, and this case presents an ideal vehicle for providing that guidance. Like the power to tax, the power to deprive a person of money or other property is the power to destroy. The Excessive Fines Clause is a shield against government's overreaching with this extraordinarily broad power that extends to both civil and criminal matters.

Under *United States v. Bajakajian*, 524 U.S. 321 (1998), fines cannot be "grossly disproportional" to the offense at issue. But that protection varies across jurisdictions as courts define it differently. This splintering continued after this Court held in *Timbs v. Indiana*, 139 S. Ct. 682 (2019), that the Clause applies to States through the Fourteenth Amendment. Justices and judges have suggested myriad approaches for how to apply the Excessive Fines Clause, but only this Court can provide that guidance.

One example of this confusion is a circuit split on categorical permissibility. The Fifth Circuit holds that a fine does not violate the Excessive Fines Clause so

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[1] *Amicus Curiae* National Federation of Independent Business Small Business Legal Center certifies that all parties have consented to the filing of this brief, and were timely notified. No party or counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel contributed any money to fund the preparation or submission of this brief.

long as it is authorized by the statute at issue. That cannot be correct, as it makes a constitutional provision subject to the policy judgments of the very same legislators that the right is designed to protect against. While the absurdity of that rule might not have been evident in that case, this case casts it in stark relief here, where the court below held that a fine of $4.185 million against a couple homeowners is permissible because the statute would have allowed $8.37 million. By contrast, the Eleventh Circuit has held that a fine is presumptively valid so long as it is within that statutory range, a presumption that can be overcome.

There are other divisions between state and federal courts. One is whether courts should factor in whether the assessment would intrude upon homeownership rights. Another is whether courts should factor in whether the offense involves malfeasance versus nonfeasance.

Another striking aspect of this case is how it is partially predicated on the exercise of another constitutional right: due process. There would have been a viable Eighth Amendment issue even if the staff's assessment had been the final penalty, as the initial number was grossly disproportional. But to quadruple the fine merely for insisting on a Commission hearing is nothing short of breathtaking. This is all the more astonishing because the hearing in Petitioners' case did not provide several due-process features that are called for when significant deprivations are at stake. To top it off, one of the Commissioners explicitly declared that the Commission

was turning the screws to send a message to others who might want to exercise their right to a hearing.

That connection between due process and increased fines is exceedingly important to average Americans like the members of *Amicus* National Federation of Independent Business (NFIB): ordinary citizens running small businesses that on average employ ten people and have annual revenues of $500,000. While a $4 million fine would be strong medicine for all but the ultra-wealthy, it is an insurmountable sum for a typical NFIB member. It would result in insolvency. This Court should decide whether the Excessive Fines Clause provides a shield against such devastation.

The NFIB Small Business Legal Center (NFIB SBLC) is a nonprofit public interest law firm, established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. NFIB is the Nation's leading small business association, representing members in Washington, D.C., and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB SBLC frequently files *amicus* briefs in cases that affect small businesses.

ARGUMENT

I. STATE AND FEDERAL COURTS REQUIRE MORE GUIDANCE ON HOW TO APPLY THE EXCESSIVE FINES CLAUSE IN CIVIL MATTERS.

This petition offers the Court an opportunity to resolve divisions among the Nation's lower courts on the requirements of the Excessive Fines Clause of the Eighth Amendment, U.S. CONST. amend. VIII, cl. 2. This Court has held that the power to tax is the power to destroy. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819). But that principle applies to more than just taxes. The broader ability of government to take your money and property, by whatever means and for whatever reason, is the power to destroy. Whether imposed as a tax or as a penalty for allegedly obstructing a public easement, when the government declares that a homeowner or a small business must pay the government over $4 million, for most the government has claimed the power to destroy that household or business. Hence, like the power to tax, exercises of the power to impose fines must be examined carefully to ensure it always stays within constitutional boundaries. Yet federal and state courts disagree on where the Constitution draws those lines, with this case as the latest installment in that ongoing saga.

1. The Eighth Amendment's Excessive Fines Clause "has been a constant shield throughout Anglo-American history," a guarantee that is "both fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition." *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (internal

quotations omitted). It is premised on mistrust of the power of government over our property when inflicting punishment, much like the First Amendment's protection for speech, *Citizens United v. FEC*, 558 U.S. 310, 340 (2010), and the Second Amendment Amendment's protection for personal and collective safety, *see District of Columbia v. Heller*, 554 U.S. 570, 598–600 (2008).

Civil assessments do not come within the orbit of the Excessive Fines Clause insofar as they are merely remedial in character. *Austin v. United States*, 509 U.S. 602, 609–10 (1993).[2] But to the extent a sanction goes beyond compensation, such that the remaining portion of the sanction "can only be explained as serving in part to punish," it is subject to the Eighth Amendment. *Id.* at 610. A fine is excessive for Eighth Amendment purposes if it is "grossly disproportional" to the offense committed. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998). But what does that mean in practical terms? The Excessive Fines Clause's central import is "to limit the government's power to punish." *Austin*, 509 U.S. at 609–10. It bears repeating that the right is premised on a mistrust of government power to punish people through fines, a concern as relevant now as it was when the Eighth Amendment was ratified. *See Timbs*, 139 S. Ct. at 687–89.

2. But how should courts describe that limit? The reality is that the contours of the Excessive Fines

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[2] Sanctions are compensatory if they "redress the concrete loss the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001).

Clause "vary from jurisdiction to jurisdiction, with each jurisdiction free to apply its own test so long as it includes the phrase 'grossly disproportional.'" Daniel S. Harawa, *How Much is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 92 (2020). Some advocate tests, others advocate factors, and still others favor other approaches. *See id* at 86–89. The Court's recent exposition of the Eighth Amendment in *Timbs* did not resolve these divisions. "More judicial engagement is urgently needed." Wesley Hottot, *What is an Excessive Fine? Seven Questions to Ask After* Timbs, 72 ALA. L. REV. 581, 587 (2021).

Right now the best one can do is to look at non-binding authority, such as Justice Scalia's reasoning that "the touchstone is value of the fine in relation to the offense," *Austin*, 509 U.S. at 627 (Scalia, J., concurring in part and concurring in the judgment). Yet such statements advocating relative valuation as part of a comparative approach have not as of yet been incorporated into a cohesive holding of this Court to instruct the lower courts. As the Court noted in *Bajakajian*, "[t]he text and history of the Excessive Fines Clause . . . provide little guidance as to how disproportional punitive forfeiture must be to the gravity of the offense in order to be 'excessive.'" *Bajakajian*, 524 U.S. at 335. Nonetheless it is the task of this Court to provide such guidance.

3. Given the paucity of Excessive Fines Clause decisions from this Court, a couple of years ago there were at least thirteen different potential standards sanctioned by various appellate jurisdictions, primarily federal. Then two years ago this Court held that the

Clause applies to the States through the Fourteenth Amendment. *Timbs*, 139 S. Ct. at 686–87; *accord id.* at 691–93 (Thomas, J., concurring in the judgment). Although state supreme courts have concurrent jurisdiction to interpret the U.S. Constitution, *see Mental Hygiene Dep't v. Kirchner*, 380 U.S. 194, 198 (1965), explicitly holding that state laws are subject to the Excessive Fines Clause invited new types of cases where the Eighth Amendment would be on the table.

At first that would seem to solicit at least sixty-four potential standards, adding the highest courts of each State and the District of Columbia. But then this case came along, wherein an *intermediate* state court conducted its own analysis, and the State's court of last resort declined review. So now the number of interpretations of the term "grossly disproportional" could climb into the hundreds as courts continue to splinter. Only this Court can resolve those divisions and provide clarity for the Nation.

4. The confusion among the lower courts can lead to astonishing practical results, such as the one that obtained below. As Petitioners explain, "in upholding the constitutionality of the Lents' seven-figure fine, the court of appeal diverged from this Court's ruling in *Bajakajian* by failing to assess the Lents' alleged wrongdoing and resulting harm in a *comparative* context." Pet. Cert. 5. The Lents' "alleged wrongdoing—failing affirmatively to facilitate the development of a public beach-access easement—bears none of the hallmarks traditionally associated with conduct meriting steep punitive fines." *Id.* The Bill of Rights curbs government power, and only this Court

can set guardrails on a national scale to ensure those curbs are uniformly faithful to the Constitution.

Petitioners have flagged for this Court's attention the court split between the California Court of Appeal and several federal and state appellate courts that the harm caused by the Lents' alleged wrongdoing must be analyzed in a comparative context when determining the excessiveness of fines under the Eighth Amendment. *See* Pet. Cert. 27–30. Petitioners also signal how the lower court's ignoring this aspect is nothing short of absurd given that the Lents here are accused of inaction, rather than action. *See id.* at 31.

The adoption of comparative criteria—like other punishments for inaction—would be valuable to *Amicus* NFIB and its members. It would likewise be valuable to average Americans nationwide who live their lives within defined budgets.

5. But regardless of whether this Court would ultimately decide to adopt comparative criteria when determining the excessiveness of fines, courts continue to splinter on that question and other aspects of the Excessive Fines Clause. The Court should take this opportunity to say more about this fundamental right.

II. THERE IS A CIRCUIT SPLIT ON WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO EVERY FINE AUTHORIZED BY STATUTE.

The circuits are divided on whether a fine is categorically permissible under the Excessive Fines Clause so long as it is within the range authorized by statute. That clear circuit split alone warrants this

Court's review, as it would mean that the protection of a fundamental constitutional right is dependent on ordinary state legislation.

1. For example, the Fifth Circuit holds that the Excessive Fines Clause is never violated by a sum permitted by the statute at issue there. *Cripps v. Dep't of Agriculture & Forestry*, 819 F.3d 221 (5th Cir. 2016), was a case in which two citizens—pest control employees—claimed that a Louisiana commission violated their rights under the First Amendment, as well as other state and federal constitutional provisions. *Id.* at 225. During that conflict, the commission imposed fines on the employees that those employees argued violated the Eighth Amendment. *Id.* at 226. The Fifth Circuit rejected their argument, holding that "[a]n administrative agency's 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." *Id.* at 234.

The Eleventh Circuit went in the opposite direction, rejecting a categorical rule in *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304 (11th Cir. 1999), where the government sought to make a cocaine dealer forfeit his real property. *Id.* at 1307. One of the defendant's arguments was that the penalty was excessive, given that the drug sales amounted to $3,250 but the property was valued at $70,000. *Id.* The Eleventh Circuit sustained the penalty. *Id.* at 1310–11. In reaching that conclusion, the court held that "if the value of forfeited property is within the range of fines prescribed by Congress, a strong

presumption arises that the forfeiture is constitutional." *Id.* at 1309.[3] Noting that $70,000 fell far short of the statutory maximum, the appellate court decided that the defendant had not overcome that presumption of validity. *Id.* at 1310–12. It should also be noted that the statute at issue there was to punish crimes, rather than deal with civil infractions.

2. The jaw-dropping amounts of both the fine and the statutory maximum in this case highlight the need to resolve the circuit split over safe harbors. In *Cripps*, the fine against one citizen was $5,000 and the fine another was $17,000. *See Cripps*, 819 F.3d at 225–26. The Fifth Circuit noted that the statutory maximum was roughly $20,000 for both of them. *Id.* at 234–35. And in *817 N.E. 29th Drive*, the Eleventh Circuit examined a forfeiture worth $70,000. *817 N.E. 29th Drive*, 175 F.3d at 1307. Those are in stark contrast to this case, where the amount of the fine against a pair of homeowning citizens is a staggering $4.185 million. Yet as enormous as that number is to average citizens and businesses, the maximum sum authorized by these facts under the relevant California statute is a truly astronomical sum of $8.37 million. *See* Pet. Cert. App. A-30.

The Fifth Circuit's rule dictates that the Commission could assess the Lents a penalty of $8.37 million, and such an incomprehensible homeowner assessment would not only be valid—it would be per se valid as a *categorical* matter, effectively shielding it

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[3] The court did not make clear in its holding precisely what would overcome that presumption.

from judicial review. That cannot be correct. While the court below did not clearly frame its decision on either side of this circuit split, its consideration of how far short of the statutory maximum the fine fell as an indication of constitutionality echoes parts of the same rationale. This Court should resolve the circuit split by fashioning a rule of decision that corrects both the Fifth Circuit and the errant court below.

III. WHETHER FINES CAN BE MULTIPLIED FOR EXERCISING CONSTITUTIONAL RIGHTS IS AN EXCEEDINGLY IMPORTANT QUESTION.

An additional reason the Court should review the judgment below is that the fine was massively increased for the exercise of a statutory right. "[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

1. In this case, staff bureaucrats told the Lents they would be fined $950,000. Pet. Cert. App. A-4. When the Lents attempted to plead their case, the Commission more than quadrupled the fine to $4.185 million. *Id.* In case there be any doubt as to why, one Commissioner helpfully explained that his motivation was to send the message that "we don't want to be in the position . . . [of] rewarding . . . applicants that have been fighting us." Pet. Cert. 14. In other words: "If you dare to exercise your constitutional rights in front of us, we'll crush you."

Petitioners correctly assert that the process afforded them fails to satisfy the minimum guaranteed by the Fourteenth Amendment Due Process Clause, and Petitioners' discussion of applying this Court's due-process precedents to the Commission's action raises troubling questions that warrant the Court's review. *See* Pet. Cert. 16–26. If nothing else, the Due Process Clause mandates a fulsome evidentiary hearing before a significant deprivation of property. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546–48 (1985). But regardless of whether the Due Process Clause required the Commission to provide the Lents the right to speak at a public meeting of the Commission, the California legislature explicitly promised by statute that the Lents have the right to such a hearing. *See* CAL. PUB. RES. CODE § 30810. However, that hearing did not provide typical due-process features like cross-examining hostile witnesses, *see* CAL. CODE REGS. tit. 14, § 13185(a), requiring sworn testimony, *id.* § 13186, or challenging the admissibility of evidence, *id.* § 13065. This Court should decide whether, when a legislature guarantees a public hearing—but then the tribunal denies participants due-process protections during that hearing—the Eighth Amendment regards significant fines levied after that hearing as excessive for constitutional purposes.

Just because California's legislature purported to confer upon an unelected Commission the sweeping power to impose enormous fines does not mean the Constitution permitted those lawmakers to do so. But it is not entirely clear that the legislature ever did so, as the statute it wrote commands the Commission to

consider factors such as the "nature, circumstance, extent, and gravity of the violation" when assessing penalties. CAL. PUB. RES. CODE § 30820(c)(1). Whether the fault lies with the statute or with the Commission's interpretation of the statute, this Court should examine the case to determine if the result below violates the Eighth Amendment.

IV. CONFUSION REIGNS IN FEDERAL AND STATE COURTS OVER MYRIAD OTHER ASPECTS OF HOW TO APPLY THE EXCESSIVE FINES CLAUSE.

This Court has recognized additional Eighth Amendment concerns when a homeowner's rights are concerned, and those concerns also point in favor of review.

1. For example, a homeowner has a "right to maintain control over his home, and to be free from governmental interference." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). It is "a private interest of historic and continuing importance." *Id.* at 54; *cf. Payton v. New York*, 445 U.S. 573, 601 (1980) (holding that "respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic.").

The Second Circuit recognized this as a relevant consideration in determining whether a penalty violates the Excessive Fines Clause in *von Hofe v. United States*, 492 F.3d 175 (2d Cir. 2007). That case concerned a man who was growing marijuana at home, resulting in civil forfeiture. *Id.* at 179. There, the appellate court held that although the man's wife was not blameless, forfeiture would be excessive given her

"minimal blame for the criminal activity" at issue. *Id.* at 188.

The California court created yet another court split in this case by not considering this homeowner aspect. This split is all the more striking because *von Hofe* was a criminal case, and the penalty against homeowner interests was a punishment for a crime, "designed to punish [the wife] for her complicity and awareness of the criminal conduct occurring at her home." *Id.* at 189. More than a civil matter, that case involved an offense against society. Yet even in the face of conduct society condemned as an injury to the public at large, the Second Circuit concluded that invading her homeownership would be unconstitutional under the facts of the case. By contrast, the California court below paid no mind to this important interest even in a mere civil dispute over beach access.

2. An additional court split with the Second Circuit here concerns action versus inaction. The Second Circuit held that the penalty in *von Hofe* was constitutionally excessive because there was no "evidence beyond mere knowledge" of illegality; she engaged in no "actual conduct" that was illegal. *Id.* at 190. Contrary to the Second Circuit, the California Court of Appeal drew no such distinction. *See* Pet. Cert. 31. Like Mrs. von Hofe, the Lents are not accused of malfeasance. They are instead accused of *nonfeasance*. The Lents did not *do* anything. Their predecessors-in-interest erected the allegedly impermissible obstructions, and the Lents merely did not remove them. In fact, the Lents were in discussions with the Commission for years on options

of what they could do to satisfy the Commission, including offering compromises or to move the easement to the other side of their property. *See* Pet. Cert. 9–10. So to the extent this case involves any action, it was action to find a response that would satisfy the Commission. The Commission does not even claim that the Lents took any *action* that violated the law.

V. ANSWERING THESE QUESTIONS IS EXCEEDINGLY IMPORTANT TO ORDINARY AMERICANS LIKE *AMICUS* NFIB AND ITS MEMBERS.

It might surprise many ordinary Americans that this Court has never specifically held that the Constitution requires government to consider how hard a particular size of civil fine would hit its target. This has led legal commentators to observe that "[w]hether a court called upon to assess the excessiveness of a property deprivation under the Excessive Fines Clause should determine the severity of the punishment based solely on the dollar value at issue, or also treat as relevant the hardship imposed through the property deprivation, remains unsettled." Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L.J. FORUM 430, 431 (2020).

Millions of those ordinary Americans own a small business like those *Amicus Curiae* NFIB represents, and for them the questions in this case are exceedingly important. A 2019 survey of small business revenue showed that median yearly revenue is less than

$400,000 and fully 39 percent bring in less than $250,000. *Most Small Businesses Have Less Than $400,000 in Annual Revenue*, SMALL BUS. LABS (June 18, 2019), https://www.smallbizlabs.com/ 2019/06/most-small-businesses-still-have-less-than-400000-in-annual-revenue.html. The typical NFIB member small business employs ten people and has annual revenue of $500,000. *Who NFIB Represents*, NAT'L FED'N OF INDEP. BUS., https://www.nfib.com/about-nfib/what-is-nfib/who-nfib-represents/ (last visited Nov. 16, 2020). Whether unaccountable staff can impose a fine of $950,000 under these facts is one of those questions, and whether a government body can more than quadruple that fine to a sum approaching ten times the business's annual revenue merely for trying to present a case to that body is another. These are questions that those average Americans and small businesses would greatly benefit from having answered.

But this Court has not yet made such a consideration a requisite factor in excessive-fines cases. *See* Colgan & McLean, *supra*, at 433. Millions of Americans and their livelihoods are consequently currently at risk.

There is significant material available to aid the Court in answering these important questions. The Court in *Timbs* considered in close detail the historical understanding of the Excessive Fines Clause. *See Timbs*, 139 S. Ct. at 687–88. In that vein, Blackstone noted that courts should be mindful whether a penalty is greater than the accused's "circumstances or personal estate would bear." 4 WILLIAM BLACKSTONE, COMMENTARIES *372. Extensive relevant material will

be brought to the Court's attention if the Court chooses to review this matter.

CONCLUSION

In short, Excessive Fines Clause jurisprudence is so underdeveloped that the fundamental right it enshrines is currently beset by confusion. As Petitioners note, "[g]ranting the Lents' petition will allow the Court to bring consistency across jurisdictions to excessive fines jurisprudence and to provide the lower courts a much-needed 'roadmap to check against potential constitutional abuses.'" Pet. Cert. 6 (quoting Harawa, *supra*, at 92). The petition for certiorari should accordingly be granted.

Respectfully submitted,

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