No. _____

In The
Supreme Court of the United States

DANNY MCLAUGHLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

FRITZ SCHELLER, ESQUIRE
Florida Bar Number 0183113
FRITZ SCHELLER, P.L.
200 East Robinson Street
Suite 1150
Orlando, Florida 32801
(407) 792-1285
fscheller@flusalaw.com
Counsel for Petitioner and of Record

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

When deciding whether a criminal fine is disproportionate to the gravity of a defendant's crime, and thereby unconstitutional under the Eighth Amendment, may a reviewing court look beyond and consider more than the four factors identified in *United States v. Bajakajian*, 118 S. Ct. 2028 (1998); that is, are the *Bajakajian* factors exhaustive, such that a reviewing court is strictly limited to a *narrow* comparison between the amount of a fine and the characteristics of the offense; or, may a reviewing court accept, entertain, and consider *other matters in addition* to the enumerated *Bajakajian* factors when answering an Eighth Amendment challenge to a fine as excessive?

PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO THIS CASE

Petitioner, Danny McLaughlin, was the criminal defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the prosecutor and plaintiff in the district court and the appellee in the court of appeals. The related cases include the following:

United States District Court (M.D. Fla. (Orlando Division)):

United States v. Danny James McLaughlin, Case No. 6:19-cr-135-Orl-40LRH.

United States Court of Appeals (11th Cir.):

United States v. Danny James McLaughlin, 847 F. App'x 573 (11th Cir. 2021), and also available at 2021 WL 567528 (11th Cir. Feb. 16, 2021) (unpublished).

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTES

STATE CASES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Danny McLaughlin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's unpublished decision and opinion, 847 F. App'x 573 (per curiam), is provided in the petition's appendix. *See* Appendix; *see also United States v. McLaughlin*, 847 F. App'x 573, 2021 WL 567528 (11th Cir. Feb. 16, 2021) (unpublished).

JURISDICTION

The Eleventh Circuit issued its decision and opinion on February 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Mr. McLaughlin has timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rules 29.2 and 30.1.[1]

[1] This Court entered an order in March 2020 to recognize the COVID-19 pandemic extending the time in which to file a petition for a writ of certiorari from 90-days up to 150-days from the date of the lower court judgment relief is sought. *See* 589 U.S. ___, Court's Order (March 19, 2020) ("[i]n light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari: It is ordered that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

This Court determined the constitutional standard by which federal courts must answer the question as to whether a criminal fine is disproportionate to the gravity of an offense more than a decade ago in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028 (1998) (a punitive monetary fine constitutes a punishment under the Eighth Amendment and violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense"). The Court in *Bajakajian* instructed that reviewing courts should look to four enumerated factors (the "*Bajakajian* factors") when deciding whether a given fine is grossly disproportional to the gravity of a defendant's offense: (1) the essence of the crime; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature and harm caused by the defendant's conduct. *See id*. The question presented in this petition is whether a reviewing court is solely limited to accepting just these factors (are the "*Bajakajian* factors" exhaustive?), or,

whether a court may permissibly look to other considerations in addition to those listed in *Bajakajian*. Some lower courts have said no; other lower courts have said yes. This Court should resolve the conflict.

Since *Bajakajian* was decided in 1998, a split on the proper and correct application of the governing standard has developed and matured in the lower courts. The Court said in *Bajakajian* that the test to determine whether a fine is "excessive" and thereby violates the Eighth Amendment's "Excessive Fines Clause [is] if [the fine] is grossly disproportional to the gravity of a defendant's offense." 118 S. Ct. at 2036. The Court explained, "In applying this standard, the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination *de novo*, must compare the amount of the forfeiture [or fine] to the gravity of the defendant's offense. If the amount of the forfeiture [or fine] is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id*. at 2037-2038.

When *applying* the Court's standard announced in *Bajakajian*, however, the various courts below differ on what factors, considerations, and parts of the case they may properly and permissibly entertain, study, review, and digest to answer the challenge of a fine's excessiveness. Said another way, the nation's courts have been implementing the governing test in different and conflicting ways – Mr. McLaughlin humbly submits that this case affords the Court a wonderful opportunity to establish a discrete analytic process that would result in national uniformity and consistency.

In this case, for example, Mr. McLaughlin is serving a life sentence for offenses (certainly grave in their severity) of which he pled guilty and accepted responsibility. There are no facts in dispute in this case. His crimes are acute and serious, his punishment even more so – life in prison. He was also sentenced to pay a $300,000 fine. Arguably, a $300,000 fine *might* be considered constitutionally permissible *if* viewed solely in isolation from the rest of his case; or, as this petition asks, should a reviewing court, when applying the *Bajakajian* test, be allowed to look at *all* the surrounding circumstances (above and beyond *a narrow* comparison between the amount of a fine and the gravity of an offense) and render a finding through *a broad* lens of constitutional reasonableness to decide whether a criminal fine is disproportionate and excessive for purposes of Eighth Amendment review. Mr. McLaughlin argues the latter – as such, his $300,000 fine along with a life sentence when measured against the record-on-appeal *should* be deemed excessive and disproportionate to his crimes; the fine in this case *should* be found in violation of the Eighth Amendment and unconstitutional when we look to all the surrounding circumstances of Mr. McLaughlin's case. *See generally, e.g.*, *United States v. Vonn*, 535 U.S. 55, 58-59 (2002) (when conducting plain-error review, appellate courts may look to the *entire* record of the case and not simply limit review to the record from a particular proceeding where the error occurred).

Mr. McLaughlin was 59-years-old when he was sentenced to prison for the rest of his life last February

2020 (Mr. McLaughlin is 61 as of this petition). He now comes to the Court serving that life sentence. In addition to and on top of that punishment, Mr. McLaughlin was also ordered to pay a $300,000 criminal fine by the district court at his sentencing hearing.

This Court has explained, "Under the Eighth Amendment, excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Taken together, these Clauses place parallel limitations on the power of those entrusted with the criminal-law function of government. Directly at issue here is the phrase 'nor excessive fines imposed,' which limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (internal quotations and citations omitted). It is Mr. McLaughlin's contention, when measured against all the surrounding circumstances to his case, that the fine here is "excessive," as that term is accepted for purposes of the Eighth Amendment; in other words, the fine is unconstitutional – it violates the Eighth Amendment.

The lower courts disagreed with Mr. McLaughlin's position and have upheld the imposition and amount of the fine. He now asks this Court to intervene, to resolve a circuit split that has developed over how properly and correctly to decide and determine whether a fine is "excessive" for purposes of Eighth Amendment review, and to vacate and set aside the $300,000 fine imposed in this cause. To be sure, Mr. McLaughlin respectfully asks of this Court to grant his

petition for certiorari review and to accept his case for decision.

The government charged Mr. McLaughlin in a two-count indictment filed in June 2019 with (1) attempting to entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b), as well as (2) using interstate commerce facilities to commit murder-for-hire in violation of 18 U.S.C. § 1958. *See* Doc. 7. As to the enticement charge, Mr. McLaughlin was subject to a mandatory minimum penalty of 10 years' imprisonment and a maximum exposure up to life. *See* Doc. 32, page 2. Concerning the murder-for-hire charge, there was no mandatory minimum and the maximum penalty was not greater than 10 years in prison. *See id*. Criminal fines up to $250,000 per count of conviction were possible.

Mr. McLaughlin negotiated a written plea agreement with prosecutors and pled guilty as charged. (The written plea agreement was filed on October 4, 2019, at Doc. 32, and Mr. McLaughlin's change-of-plea hearing was held on October 15, 2019. *See* Doc. 36). Mr. McLaughlin underwent a pre-sentence investigation as conducted by the U.S. Probation Office who, in its Pre-Sentence Report (PSR), ultimately suggested a U.S. Sentencing Guidelines score to include a total offense level 35, a criminal history category I, and an advisory prison range between 168 and 210 months in prison (or 14 to 17 ½ years). *See* Doc. 60, pages 4-5. Probation noted that the otherwise proposed fine range was between $40,000 and $400,000. *See* USSG § 5E1.2(c)(3); *see also* PSR ¶ 99. Conversely, having

examined Mr. McLaughlin's financial environment (*see* PSR ¶¶ 85-86), probation said, "The defendant is currently incarcerated and has no monthly income or expenses. Based on the defendant's anticipated term of incarceration [which turned out to be life], the probation office believes that the defendant does not have the ability to pay a fine within the guideline range." PSR ¶ 86. Neither the government nor Mr. McLaughlin objected to the PSR or the proposed scoring of his case. *See* Doc. 60, page 4; *see also* PSR, Addendum, Doc. 49, pages 21-23.

Mr. McLaughlin's sentencing hearing was held on February 6, 2020. *See* Doc. 51. The district court varied upward from the proposed guidelines range and sentenced Mr. McLaughlin to life in prison on the enticement charge and 10 years on the murder-for-hire charge, each sentence to run concurrently with one another. *See* Doc. 60, page 34 ("It's the judgment of the Court that you are sentenced to be committed to the custody of the Bureau of Prisons for a term of life imprisonment on Count 1, and you are sentenced to a term of 120 months on Count 2. The sentence on Count 2 will run concurrent with Count 1.").

For its part, the government also argued for a fine at the time of sentencing. "The PSR sets forth the defendant's assets," it argued, *see* Doc. 60, page 28, "which show that [Mr. McLaughlin] has ability to pay a fine out of his $300,000 in IRA accounts, which he holds himself." *Id*. Thus, "[t]he United States also seeks a fine in whatever amount within the guidelines range of 40,000 to 400,000 that the Court deems appropriate."

Id. The government argued, "The cost of – as stated in the PSR, paragraph 97, the cost of prosecution shall be imposed on the defendant as required by statute. And," it continued, "factors that the Court can consider are, among other things, the expected costs to the government of any term of imprisonment and the calculation – the cost of imprisonment for 10 years alone would be $374,000." Doc. 60, page 28.

"Moreover," the government said, "the defendant has no children, so he doesn't have dependents who would be burdened by his paying of a fine. His wife has filed for divorce and has her own assets. And finally, there's no restitution in this case, so no victims are – would be out any money by the Court imposing a fine in this case." *Id*. at 28-29.

In response, the district court summarily declared, without explanation, analysis, or discussion, "I'm imposing a fine of $300,000." Doc. 60, page 37.

Mr. McLaughlin objected to the imposition of the fine: "I think the fine, in considering that those attachments are seeking monetary relief from him, a $300,000 fine is unduly punitive, and he won't have resources in light of the fact that there's a number of civil judgments being sought against him." *Id*. at 38-39.

Noting his objection, *id*. at 39, the court pronounced its sentence and then submitted and filed its written judgment and sentence on February 7, 2020, at Doc. 52. Mr. McLaughlin timely appealed, *see* Doc. 54., and the Eleventh Circuit Court of Appeals found in favor of the government, upheld the imposition and

amount of the fine, and affirmed the district court's judgment. *See* Appendix, *United States v. McLaughlin*, 847 F. App'x 573 (11th Cir. 2021) (unpublished). Mr. McLaughlin did not seek rehearing in the appellate court.

In doing so, the Eleventh Circuit recited the standard of review: "We review the imposition of a fine for clear error, [citation omitted], and the constitutionality of the fine under the Eighth Amendment *de novo*, *United States v. Bajakajian*, 524 U.S. 321, 336-37, 118 S. Ct. 2028 (1998)." *McLaughlin*, 847 F. App'x at 577. The Eleventh Circuit ruled: "The district court did not clearly err in imposing a $300,000 fine." *Id*. The court explained:

> The Sentencing Guidelines require the district court to impose a fine unless the defendant establishes that he is unable to pay a fine and is unlikely to become able to pay. USSG §5E1.2(a). The burden is on the defendant to prove his inability to pay. *United States v. Gonzalez*, 541 F.3d 1250, 1255 (11th Cir. 2008). Once a district court decides that a fine is appropriate, it must consider the factors set forth in §5E1.2, which overlap substantially with the §3553(a) factors, to determine the amount of the fine. *See United States v. Hernandez*, 160 F.3d 661, 665 (11th Cir. 1998).
>
> Here, McLaughlin did not challenge the [PSR's] statements that he had approximately $360,000 in a retirement account available to him and did not argue that a fine,

> or even a lesser fine, was not warranted, prior to the court's pronouncement of his sentence. Moreover, the record shows that the district court considered the §5E1.2 factors in determining the appropriate fine amount. The district court adopted the [PSR], which included statements as to McLaughlin's financial resources and lack of dependents, and it was clear at sentencing that the victims, including McLaughlin's wife, were not seeking restitution. And the district court heard argument from the government regarding an appropriate fine amount, including a consideration of the cost to prosecute and imprison McLaughlin. Finally, the $300,000 fine was within the $40,000 to $400,000 guideline fine range, and McLaughlin has not argued that the range was improperly calculated.
>
> For that same reason, the $300,000 fine was not excessive under the Eighth Amendment. A fine imposed with the guideline range doesn't "surpass [] the usual, the proper, or a normal measure of proportion." *Bajakajian*, 524 U.S. at 335, 119 S. Ct. 2028.

McLaughlin, 847 F. App'x at 577; *see also* Appendix.

Essentially as a clerical matter, however, it should be noted that the appellate court remanded the cause to the district court to apportion the $300,000 fine between the two counts of conviction. Noting that each count of conviction was limited to a maximum permissible fine of $250,000 (*see* 18 U.S.C. §§ 1958(a), 2422(b), and 3571(b)(3)), the court said that "the district court

erred by not specifying the apportionment of the total $300,000 fine between the two convictions." *Id*. at 577-578. "Thus," the court held, "although the total fine amount does not exceed the combined statutory maximum of $500,000, and we affirm the district court's imposition of a total $300,000 fine," the fine portion of the judgment was vacated and remanded to the district court "to specify how the $300,000 fine was apportioned between the two convictions." *Id*. As of April 21, 2021, the district court entered an amended judgment and sentence specifying that a $150,000 fine was imposed as to each count of conviction for a total fine amount of $300,000. *See* Doc. 76 (judgment on remand).

The Eleventh Circuit rendered its decision and opinion on February 16, 2021, with the mandate having been issued on March 17, 2021. *See* Appendix.

Mr. McLaughlin now petitions this Honorable Court for relief.

REASONS FOR GRANTING THE WRIT

The lower courts are split on whether it is permissible and appropriate to consider and entertain matters above and beyond the four identified factors in *United States v. Bajakajian* when comparing the amount of a fine to the gravity of a defendant's offense. This Court should accept Mr. McLaughlin's case for decision to provide the nation's courts a discrete analytic process under Bajakajian such that reviewing courts may appropriately accept, consider, and appraise other relevant issues when deciding whether a fine is excessive and unconstitutional under the Eighth Amendment. The Court is best positioned to explain whether the Bajakajian factors are exhaustive or not.

To start, there are *no* factual disputes that come to this Court under this petition. The record as it comes to the Court is clean and without complexity. Mr. McLaughlin is serving a life sentence after pleading guilty as charged under the terms and conditions of a written plea agreement. He is only challenging the imposition and amount of the district court's $300,000 criminal fine as excessive and unconstitutional under the Eighth Amendment.[2] The Eleventh Circuit said

[2] Mr. McLaughlin's question is to ask whether we are solely limited to the four enumerated factors listed by the Court in *Bajakajian* when deciding whether his fine is "excessive" and grossly disproportionate to the gravity of his offenses; or, conversely, whether we may permissibly look to all the surrounding

that the fine was okay and that it passed constitutional muster. *See* Appendix. *A fortiori*, the applicable constitutional standard of review should go without dispute – that is, the governing test to decide whether a criminal fine is "excessive" and thereby violates the Eighth Amendment comes from this Court's decision and opinion in *United States v. Bajakajian*. In *Bajakajian*, the Court announced the test to be: "If the amount of the forfeiture [or fine] is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." 118 S. Ct. at 2038. The legal standard of review, then, is concrete and definitive. *Bajakajian* explained further: "In applying this standard, the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination *de novo*, must compare the amount of the forfeiture [or fine] to the gravity of the defendant's offense." *Id*. at 2037-2038

---

circumstances of his case and what he brings to bear in the record-on-appeal when answering that question. (Especially so when the probation office declared in the PSR filed with the district court, "The defendant is currently incarcerated and has no monthly income or expenses. Based on the defendant's anticipated term of incarceration [which turned out to be life], the probation office believes that the defendant does not have the ability to pay a fine within the guideline range." PSR ¶ 86.) As discussed below, some courts follow a rule that no other factors may be accepted save for those listed in *Bajakajian* while other courts indicate the *Bajakajian* factors are *not* exhaustive and that other considerations might be lawfully considered when deciding whether a fine or forfeiture violates the Eighth Amendment. Mr. McLaughlin respectfully submits that his case provides the Court an excellent and timely opportunity (and vehicle) to render an appropriate and discrete analytic construct to better guide and assist our nation's criminal courts on the scope of Eighth Amendment review.

(footnote omitted).[3] It is *how* the lower courts *have been* applying the standard over the past thirteen years that demands this Court's attention, time, resources, and energy.[4] Mr. McLaughlin humbly submits that his case is the best vehicle to address the question, and, more so, it is the best time now to assuage any confusion on how properly to execute this Court's mandate as well as resolve the circuit split that has evolved over

---

[3] The Court explained at footnote 10, "whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." 118 S. Ct. at 2037-2038 n.10 (citing *Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 1662 (1996)).

[4] For example, the Eleventh Circuit explains its *Bajakajian* jurisprudence thus:

> A forfeiture order [or a fine] is unconstitutionally excessive when it is "grossly disproportional to the gravity of a defendant's offense." This standard narrows the judicial role in assessing the excessiveness of forfeiture orders [or fines]; rather than strict proportionality, we review fines only for gross disproportionality. Our narrowed role acknowledges principles of institutional competence: proportionality analyses are inherently imprecise and best kept within the province of legislatures, not courts.
>
> The parties and some decisions from this court refer to three factors, . . . , that guide our gross-proportionality inquiry: (1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant[.]

United States v. Chaplin's, Inc., 646 F.3d 846, 851 (footnote omitted) (cleaned up).

these past years. Mr. McLaughlin's petition should be granted.

Every federal defendant in criminal court is exposed and subject to a monetary (if not punitive) fine. *See* 18 U.S.C. § 3571; *see also* USSG § 5E1.2. The question presented here potentially impacts and affects every federal defendant undergoing sentencing proceedings. Hence, the question presented is not only significant as a practical matter, it has national impact, and is more than capable of daily repetition across the country's criminal courts. Last year, in the matter of *Colorado Dep't of Labor and Employment v. Dami Hospital*, No. 19-719, among several questions presented to the Court in the petition for a writ of certiorari filed in that case, one challenge included the specific question as to "whether and to what extent [the Eighth Amendment] requires consideration of an offender's ability to pay a fine in determining whether a fine is constitutional." Petition for Cert., No. 19-719 (Dec. 6, 2019), page (i); *see also id*. at 10 ("courts are split, both in the circuits and the states, as to whether a court must also consider an offending party's ability to pay"). Though the Court ultimately denied the petition (No. 19-719 (Jan. 13, 2020)), the petitioner there framed the issue squarely presented here.

"This case [] presents a [] matter of significant practical importance that has divided appellate courts reviewing excessive fines claims under this Court's decision in *Bajakajian*, 524 U.S. at 327." *Colorado Dep't of Labor*, Petition for Cert., No. 19-719, page 10. "Under that decision, this Court held that courts must review

Excessive Fines Clause claims under the gross disproportionality standard. But courts are split, both in the circuits and the states, as to whether a court must also consider an offending party's ability to pay. This Court's intervention is necessary to resolve the persistent split and bring much-needed uniformity to an important issue of constitutional law." *Id*. (citation omitted).

In examining *Bajakajian*, the D.C. Circuit wrote, "the Supreme Court discussed four factors [to determine excessiveness]: (1) the essence of the crime; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature and harm caused by the defendant's conduct." *United States v. Bikundi*, 926 F.3d 761, 795 (D.C. Cir. 2019). The *Bikundi* court said, however, "[t]hese factors hardly establish a discrete analytic process[.]" *Id*. (quotation omitted). Indeed, the D.C. Circuit observed:

> Although most circuits assess proportionality *without* considering a defendant's ability to pay, *see*, *e.g.*, *United States v. Beecroft*, 825 F.3d 991, 997 n.5 (9th Cir. 2016); *United States v. Smith*, 656 F.3d 821, 828-829 (8th Cir. 2011); *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999), appellants' argument draws support from the First Circuit, *see United States v. Levesque*, 546 F.3d 78, 84-85 (1st Cir. 2008), and from scholarship arguing that the original meaning of the Excessive Fines Clause prohibits fines so severe as to

> deprive a defendant of his or her "contentment" or livelihood, understood as the ability to secure the necessities of life, *see* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 854-872 (2013). In a similar vein, the Supreme Court recently described the Clause as tracing its "venerable lineage" back to Magna Carta, which safeguarded the "contentment" of Englishmen and "required the economic sanctions . . . not be so large as to deprive an offender of his livelihood." *Timbs*, 139 S. Ct. at 687-688 (citations, internal quotation marks, and brackets omitted).

Bikundi, 926 F.3d at 796 n.5 (emphasis added).

The court emphasized, "The Excessive Fines Clause does not make obvious whether a forfeiture [or fine] is excessive because a defendant is unable to pay, and '[n]either the Supreme Court nor this Court has spoken' on that issue." *Id*. (citing *United States v. Hurt*, 527 F.3d 1347, 1356 (D.C. Cir. 2008)); *see also Timbs*, 139 S. Ct. at 688 (noting that the Supreme Court has "tak[en] no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine" (citing *Bajakajian*, 524 U.S. at 340 n.15, 118 S. Ct. 2028)).[5] As previously

[5] Indeed, Mr. McLaughlin poses the broader question here as to whether a sentencing court or a reviewing court for that matter may take into consideration any multitude of other factors outside and beyond those articulated and listed in *Bajakajian* – may a court, for example, just as it would for purposes of sentencing under 18 U.S.C. § 3553(a), look to all the surrounding circumstances

submitted to the Court, "Since this Court's decision in *Bajakajian*, eight courts of appeals have split over whether ability to pay is a factor a court should consider in assessing the constitutional validity of a fine. With multiple circuit courts and state courts locked on each side, this Court should grant certiorari to settle the issue." *Colorado Dep't of Labor*, Petition for Cert., No. 19-719, page 29.

For example, "[t]hree circuits – the First, Second, and Eighth – and four state supreme courts read *Bajakajian* to require an inquiry into an offender's ability to pay or to earn a livelihood.[6] Five other circuits – the Fifth,[7]

---

of a given case when deciding whether a defendant is subject to a fine and the actual amount of any fine imposed. *See also*, *e.g.*, USSG § 5E1.2(d)(1)-(8) (the various factors a sentencing court must take into consideration when fashioning the amount of a criminal fine).

[6] *See United States v. Jose*, 499 F.3d 105 (1st Cir. 2007); *United States v. Viloski*, 814 F.3d 104 (2nd Cir. 2016); *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998); *see also People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421, 423 (Cal. 2005); *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 188-192 (Pa. 2017); *State ex rel. Utah Air Quality Bd. v. Truman Mortensen Family Tr.*, 8 P.3d 266, 274 (Utah 2000).

[7] In *United States v. Wallace*, 389 F.3d 483 (5th Cir. 2004), the Fifth Circuit found that a fine was not excessive without considering the defendant's independent financial circumstances and environment because the fine was below the statutory maximum allowed.

Sixth,[8] Seventh,[9] Ninth,[10] and Eleventh[11] – and at least two state supreme courts forbid such consideration." *Id*. at 20-21.[12] (Asked differently, then, is a court limited solely to the four enumerated factors listed in *Bajakajian* when deciding whether a fine is excessive

---

[8] *See United States v. Droganes*, 728 F.3d 580 (6th Cir. 2013) (limiting its analysis strictly to a comparison between the gravity of the offense and the amount of forfeiture in deciding whether it was grossly disproportional).

[9] *See United States v. Malewicka*, 664 F.3d 1099, 1104 (7th Cir. 2011) (limiting analysis solely to comparing amount versus gravity of offense).

[10] In *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998), the Ninth Circuit held that *Bajakajian*'s Excessive Fines Clause analysis does not require an inquiry into an offender's ability to pay or the hardship the sanction may cause.

[11] In *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999), the Eleventh Circuit said, "excessiveness is determined in relation to the characteristics of the offense, *not* in relation to the characteristics of the offender." Interestingly, however, the Eleventh Circuit wrote at footnote 16 in *United States v. Chaplin's, Inc*., 646 F.3d 846, 851 n.16 (11th Cir. 2011), that, "These factors [the *Bajakajan* factors] are not an exclusive checklist, however. '[I]t would be futile to attempt a definitive checklist of relevant factors. The relevant factors will necessarily vary from case to case.' *United States v. One Parcel Prop. Located at 427 and 429 Hall St.*, 74 F.3d 1165, 1172 (11th Cir. 1996) (citations omitted)."

[12] At page 24 of the Department's petition in No. 19-719, petitioner notes, "At least two state supreme courts – South Dakota and Iowa – have determined that ability to pay is not a relevant factor in an excessive fines analysis. *See State v. Izzolena*, 609 N.W.2d 541, 551 (Iowa 2000) ('The manner in which the amount of a particular fine impacts a particular offender is not the focus of the [proportionality] test.') *State v. Webb*, 856 N.W.2d 171, 175-76 (S.D. 2014) (rejecting a claim that a fine was unconstitutional because the offender 'does not possess the ability to pay the fine' based on the fine falling within the statutory range')."

or grossly disproportionate to the gravity of the committed offenses?)

The Eleventh Circuit said in *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304 (11th Cir. 1999), that "[t]ranslating the gravity of a crime into monetary terms [as explained by *Bajakajian*] – such that it can be proportioned to the value of forfeited property – is not a simple task." *Id*. at 1309. It buttressed its analysis by observing that "if the value of forfeited property is within the range of fines prescribed by Congress, a strong presumption arises that forfeiture is constitutional." *Id*. (footnote omitted). Moreover, "[t]he Supreme Court [ ] has made clear that whether forfeiture is 'excessive' is determined by comparing the amount of the forfeiture to the gravity of the offense, *see Bajakajian*, [118 S. Ct. at 2036], *and not by comparing the amount of forfeiture to the amount of the owner's assets*." *Id*. at 1311 (emphasis added). "In other words," according to the Eleventh Circuit, "*excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender.*" *Id*. (emphasis added). But, "[t]he characteristics of the offender are of course a legitimate and important part of a district court's determination of an appropriate fine." *Id*. at 1311 n.12 (citing USSG § 5E1.2). The Eleventh Circuit said, significantly, that any hardship suffered by a defendant from a fine, however, "is *not* part of an inquiry under the Excessive Fines Clause." *Id*. (emphasis added). The Eleventh Circuit, then, strictly interprets and applies the factors announced in *Bajakajian* and does not look to any other considerations when

deciding whether a fine or forfeiture should be found unconstitutional as excessive and grossly disproportionate.

The First Circuit disagreed with the Eleventh Circuit. In *United States v. Levesque*, 546 F.3d 78, 83 (1st Cir. 2008), the First Circuit began its analysis with the principle "that the effect of a forfeiture [or a fine] on a particular defendant is not pertinent under the [*Bajakajian* test] for gross disproportionality . . . this test focuses on the relationship between the offense and the forfeiture, *not* the relationship between forfeiture and the offender." *Levesque*, 546 F.3d at 83. Importantly, the First Circuit explained, however: "this test is *not the end of the inquiry* under the Excessive Fines Clause." *Id*. (emphasis added). The court also described, "Beyond the [*Bajakajian*] factors . . . a court should also consider whether forfeiture [or the imposition and amount of a fine] would deprive the defendant of his or her livelihood." *Id*. As such, the First Circuit recognized "[i]n so holding, we are at odds with the Eleventh Circuit, which has stated that 'we do not take into account the personal impact of a forfeiture [or fine] on the specific defendant in determining whether the forfeiture violates the Eighth Amendment.'" *Id*. at 83 n.4 (citing *United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999); *817 N.E. 29th Drive*, 175 F.3d at 1311 (holding, under *Bajakajian*, that "excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender")). The history of the Eighth Amendment, according to the First Circuit, "indicates that 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." *Levesque*, 546 F.3d at 84. "This question," the First Circuit observed, "is separate from the [*Bajakajian*] test for gross disproportionality and may require factual findings beyond those previously made by the district court." *Id*. at 85. In other words, the First Circuit looks beyond the four enumerated *Bajakajian* factors when deciding whether a fine satisfies the Eighth Amendment.

The Second Circuit agreed with the First Circuit in *United States v. Viloski*, 814 F.3d 104 (2nd Cir. 2016). In *Viloski*, the Second Circuit followed *Bajakajian* to figure out whether a fine was excessive and violated the Eighth Amendment, but noted, "Although *Bajakajian* did not provide a test for gross disproportionality, we have interpreted that decision as requiring us to consider the following four factors, which have become known as the '*Bajakajian* factors,'" including (1) the essence of the crime of the defendant and its relation to other criminal activity; (2) whether the defendant fits into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature and harm caused by the defendant's conduct. *Id*. at 110 (citing *United States v. George*, 779 F.3d 113, 122 (2nd Cir. 2015)). Key to this petition, the Second Circuit in *Viloski* asked "[t]he principal question . . . [and that] is whether these [*Bajakajian*] factors are exhaustive – a question we have never addressed directly." *Viloski*, 814 F.3d at 110. "Our cases

interpreting *Bajakajian* have neither added to the four factors nor described them as comprehensive." *Id*. (citations omitted). "In some cases, however, we have implicitly cautioned against applying the *Bajakajian* factors too rigidly." *Id*. (citations omitted).

"Our unwillingness in past cases," the Second Circuit said, "to describe the *Bajakajian* factors as exhaustive reflects *Bajakajian* itself, which never prescribed those factors as a rigid test." *Id*. (observing, in footnote 9, that this Court "often declines to provide definitive tests when interpreting constitutional provisions for the first time") (citations omitted). "And several circuits have recognized the potential relevance of additional factors." *Id*. at 111 (citing *Collins v. SEC*, 736 F.3d 521, 526-527 (D.C. Cir. 2013); *United States v. Dodge Caravan Grand SE/Sport Van*, 387 F.3d 758, 763 (6th Cir. 2003)). The Second Circuit thus "held that, when analyzing a forfeiture's [or a fine's] proportionality under the Excessive Fines Clause, courts *may consider – in addition to the four factors* we have previously derived from *Bajakajian* – whether the forfeiture would deprive the defendant of his livelihood[.]" *Viloski*, 814 F.3d at 111 (emphasis added).

The Second Circuit, with its holding, recognized that its "approach align[ed] most closely with that of the First Circuit," citing *United States v. Fogg*, 666 F.3d 13, 19 (1st Cir. 2011). It also observed that "[t]he Eighth, Ninth, and Eleventh Circuits have [ ] held that the Eighth Amendment *bars inquiry* into a defendant's personal circumstances when a court reviews criminal forfeiture," citing *United States v. Smith*, 656 F.3d 821,

828 (8th Cir. 2011); *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009) ("[w]e do not take into account the impact the fine would have on an individual defendant"); *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998); *see also United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) ("we do not take into account the personal impact of a forfeiture on [a] specific defendant"). *Viloski*, 814 F.3d at 112 n.15 (emphasis added).

In the case at bar, Mr. McLaughlin was sentenced to serve the rest of his life in prison for his guilty pleas. The government also asked the sentencing court to impose a fine. The sentencing court did that, and said, "I'm imposing a fine of $300,000." Doc. 60, page 37. For its part, the Eleventh Circuit held that this fine was constitutional – significantly so because it fell within the recommended Sentencing Guidelines range between $40,000 and $400,000. The court below found that "the $300,000 fine was not excessive under the Eighth Amendment. A fine within the fine guideline range doesn't 'surpass [] the usual, the proper, or a normal measure of proportion.'" *See* Appendix (quoting *Bajakajian*, 524 U.S. at 335, 118 S. Ct. 2028). Mr. McLaughlin respectfully disagrees and takes the position that when measured against all the surrounding circumstances given his case, including the imposition of a life sentence, to compound or even aggravate that punishment by piling on an additional $300,000 fine amounts to a grossly disproportionate penalty that should be found "excessive" and unconstitutional under Eighth Amendment review, pursuant to *Bajakajian*.

It is Mr. McLaughlin's contention that his fine has not been properly reviewed under this Court's stated mandate, and, moreover, when such review ensues, as illustrated above, there is a marked circuit split concerning the Court's gross disproportionality test articulated in *Bajakajian* and whether application of the test allows for the consideration of arguments and matters other than the four enumerated factors identified by the Court in *Bajakajian*. In deciding whether Mr. McLaughlin's $300,000 fine passes constitutional review, does the Court strictly limit the boundaries of analysis solely to a linear comparison between the characteristics of his crimes and the amount of the fine imposed? Is *Bajakajian* a test of strict application; are its four enumerated factors exclusively exhaustive? Or, may our nation's federal criminal courts consider arguments, matters, and potentially relevant issues bearing on the question of a fine's constitutionality under the Eighth Amendment *in addition* to the four specified "*Bajakajian* factors"? Some courts have said no. Other courts have said yes. This Court should resolve this conflict.

Mr. McLaughlin acknowledges that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." S. Ct. Rule 10. He humbly submits that the question presented herein merits this Court's attention, time, and resources. The facts of the case are simple, straight-forward, and not in dispute. The record-on-appeal is without complexity. The legal issue presented for review is narrowly tailored to the facts of Mr. McLaughlin's case, yet, has broad and

wide-ranging constitutional implications. It is nationally relevant and significant to the country's federal criminal courts; it has a daily practical affect and easily understood effect on a defendant's due process rights; and it is clearly capable of repetition. The courts below have taken *Bajakajian*'s gross disproportionality test and applied it imperfectly if not in conflict with one another. Mr. McLaughlin's case is an ideal opportunity and vehicle by which to better explore, discuss, study, and focus Eighth Amendment jurisprudence. The Court's decision would be extremely pragmatic for both the prosecution, the government, criminal defense lawyers, and the defense bar generally. This Court should grant Mr. McLaughlin's petition to answer the issue raised, a question of national significance, repetition, and constitutional practicality.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

FRITZ SCHELLER, ESQ.
Florida Bar No. 0183113
FRITZ SCHELLER, P.L.
200 East Robinson Street
Suite 1150
Orlando, Florida 32801
(407) 792-1285
fscheller@flusalaw.com
Counsel for Petitioner McLaughlin