No. 22-468

In The
Supreme Court of the United States

DANIEL JAMES ALTSTATT,

Petitioner,

v.

CITY OF SACRAMENTO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

In its Opposition, the City does not even attempt to argue that the court below applied the analysis required by *United States v. Bajakajian*, 524 U.S. 321, 337–40 (1998) in its "truncated" discussion of Mr. Altstatt's Excessive Fines argument. Opp. 19.

Instead, the City denies that this is an issue of great legal importance. While the City professes to agree that courts should apply *Bajakajian* and effectively concedes that the decision below failed to do so, it argues that there is nothing to see here because other courts have *mostly* "coalesced around three general factors" that "flow" from *Bajakajian*. However, the City's brief merely papers over the real divisions among state courts and lower federal courts (including those noted in Mr. Altstatt's Petition) that jurists and legal scholars have noted for years. Indeed, state and federal courts *sitting in Sacramento* currently apply two different sets of factors to analyze excessiveness under the Eighth Amendment. *See* Pet. 19–20 (comparing the *Bajakajian* factors set forth by the Ninth Circuit, *Pimentel v. City of L.A.*, 974 F.3d 917, 921 (9th Cir. 2020), with the factors set forth by the Supreme Court of California, *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421 (Cal. 2005)).

Whether and how courts should apply the factors identified in *Bajakajian* goes to the heart of the Excessive Fines Clause, and therefore represents an issue of great legal and practical importance. As this Court recently confirmed, the Eighth Amendment's "protection

against excessive fines . . . is fundamental to our scheme of ordered liberty, with deep roots in our history and tradition," and therefore should apply uniformly across the state and federal courts. *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019) (cleaned up). As the years since *Bajakajian* have shown, such uniformity will not be achieved without further guidance from this Court.

I. The decision below did not analyze any of the factors identified in *Bajakajian*.

The City does not and cannot contend that the court below applied the analysis required by *Bajakajian*, much less that it did so correctly. While the City's Opposition presents a (flawed) analysis under the *R.J. Reynolds* factors, *see* Opp. 17–19, no such analysis was conducted by the Court below, *see* App. 10–11; Pet. 8–18. Rather, the City merely argues that the court's *conclusion* was correct "despite its truncated analysis." Opp. 19. This is wrong—and not a basis to deny the Petition in any case—for multiple reasons.

First, as explained in the Petition, the below court's "analysis" of the *Bajakajian* factors was not merely "truncated"; it was *wrong*. Pet. 7–8. The court below cited the pre-*Timbs* test set forth by the California Supreme Court in *R.J. Reynolds*—which is different from the Ninth Circuit's test—and affirmed without discussing the nature of the offense, whether it related to other legal activities, or the extent of the

harm. App. 10–11. The court below therefore failed to apply the relevant factors identified by this Court in *Bajakajian*. For that reason alone, the Court should summarily vacate the decision below.

Second, the City does not defend the below court's assumption that, despite the holding of *Timbs*, it should follow *R.J. Reynolds* rather than apply the *Bajakajian* factors as set forth by the Ninth Circuit. *See Timbs*, 139 S. Ct. at 687 ("[I]f a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."). As discussed below, the differences between the state and federal tests are material and may be dispositive in this case. *See infra* at Section II.B.

Third, the City is silent about the below court's failure to remand for the necessary fact-finding if the record was insufficient to analyze the relevant factors. As explained in the Petition, the amount of the fine was not fixed until the trial court entered judgment, at which time Mr. Altstatt timely appealed. Pet. 6–8, 13. Thus, there was no opportunity in the trial court to develop facts bearing on the excessiveness of the penalties. Unlike other courts in this situation, which routinely remand to ensure due process, Pet. 13–15 & n.1, the courts below simply affirmed. The life-altering fine in this case therefore escaped constitutional scrutiny altogether. The City offers no justification.

For these reasons, there is no real dispute that the decision below conflicts with *Bajakajian*; indeed, it all but ignored it.

II. The question presented is one of great legal and practical importance.

Unable to defend the reasoning of the decision below, the City primarily argues that review is unnecessary because other courts have mostly "coalesced around" "general" factors that "flow" from *Bajakajian*. Opp. 11. This assertion is as empty as it sounds. It simply ignores the specific areas of disagreement and confusion. Different courts have announced different tests for excessiveness under the Eighth Amendment, and the differences in these tests are material—and likely dispositive—in this case.

A. Courts lack a uniform approach for analyzing excessiveness under the Eighth Amendment.

The multi-dimensional divisions in the lower courts over how to apply *Bajakajian* have been noted by the courts themselves. Pet. 19. In *City of Seattle v. Long*, the Supreme Court of Washington noted that "lower courts have looked to *Bajakajian* for factors" relevant to the "proportionality inquiry," and "[t]his has resulted in a 'patchwork' of tests in the federal circuits." 493 P.3d 94, 111 (Wash. 2021). "For example, the Eleventh Circuit applies a three-factor test and the Tenth Circuit a nine-factor test." *Id.* (citing *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007) and *United States v. Wagoner County Real Estate*, 278 F.3d 1091, 1101 (10th Cir. 2002)). The Supreme Court of Washington, for its part, follows the Ninth Circuit's *four*-factor test. *Id.* The D.C. Circuit, meanwhile, has

stated it could distill no "discrete analytic process" from *Bajakajian* and therefore would only "review [the *Bajakajian* factors] briefly to see if there are danger signals." *Collins v. SEC*, 736 F.3d 521, 527 (D.C. Cir. 2013). Even this Court has noted in a case concerning the Cruel and Unusual Punishments Clause (from which the Court borrowed the "gross disproportionality" standard it adopted in *Bajakajian*)[1] that its "cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality." *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

Conflicts have also developed among the state courts and between state and federal courts. Most relevant to this case, California's test (set forth in *R.J. Reynolds*) is different from the Ninth Circuit's test (set forth in *Pimentel* and other cases). *See* Pet. 19–21. This case directly implicates this conflict, the resolution of which may well be outcome-determinative. *See also infra* at Section II.B. Further, despite this Court's holding in *Timbs*, some state courts remain divided over the threshold question of whether they are bound to follow *Bajakajian* at all. *See* Pet. 20. Other state courts are divided over the relevance of factors such as the defendant's ability to pay. *See* Pet. 20–21. Other jurists are simply frustrated. *See State v. O'Malley*, 2022-Ohio-3207, ¶ 108 (Ohio 2022) (Donnelly, J., dissenting) ("[N]either this court nor the United States Supreme

[1] *United States v. Bajakajian*, 524 U.S. 321, 336, 118 S. Ct. 2028, 2037 (1998) ("[W]e . . . adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents.").

Court has been helpful in this area, providing only a philosophy and a general checklist of factors for courts to consider in excessive-fines challenges without delineating the relative importance of these factors or their ultimate limits.").

Legal commentators have noted the same problems. *See*, *e.g.*, Ndjuoh Mehchu, *Nickels and Dimes? Rethinking the Imposition of Special Assessment Fees on Indigent Defendants*, 99 N.C.L. REV. 1477, 1490 (2021) ("If there is any point of consensus about the grossly disproportionate standard announced in *Bajakajian*, it is that the inquiry into the excessiveness of a fine remains unclear."); Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 86–87 & nn.151–164 (2020) (outlining the "different tests" adopted by the federal courts of appeals and the state courts of last resort and noting "there is not a uniform approach"); David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 543 (2017) (noting a "patchwork of inconsistent tests . . . emerged in the various circuits" after *Bajakajian* "and only muddled the issue"); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 295 & n.92 (2014) (noting a "quagmire" in the lower courts "with respect to . . . the question of what renders a fine excessive" and collecting cases).

The decision below—which failed to analyze the *Bajakajian* factors at all—starkly belies the notion

that there is a unified excessiveness analysis that all courts recognize and apply.

B. The division among the lower courts is material in this case.

Perhaps recognizing that state and lower federal courts are not in fact aligned on how to apply the Excessive Fines Clause, the City retreats into arguing that lower courts need not apply the factors identified by *Bajakajian*—or even agree on what those specific factors are—so long as they "coalesce around" "general factors" that "flow" from *Bajakajian*. Opp. 11. But how much divergence is permissible? The City does not answer that question. Instead, by abstracting the specific points of disagreement to uselessly high levels of generality, the City seeks to avoid it. But just as a hunter is concerned with species and not class when determining if the animal in his sights is a deer or a fellow human, the specifics are material here.

For example, the courts below failed to analyze the extent of the harm, if any, caused by Mr. Altstatt's conduct. The "extent of the harm" is a factor under *Pimentel* (and *Bajakajian*, 524 U.S. at 339), but is not among the *R.J. Reynolds* factors.[2] *See* Pet. 19–20. Thus,

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[2] The City's statement that *R.J. Reynolds* "looked to the harm caused and its 'relationship . . . [to] the penalty' " is pure sleight of hand. Opp. 11. The *R.J. Reynolds* decision listed "the relationship between the harm and the penalty" as a factor and then proceeded to discuss culpability. 37 Cal. 4th at 728–31. Neither the *relationship* between harm and penalty nor the

the court's failure to analyze harm was arguably a proper application of the *R.J. Reynolds* test, but not the *Pimentel* test. Had the court analyzed this factor, it would have found no evidence of harm to anyone.[3] *See* Pet. 16. Indeed, the only indication of harm identified by the court below (or the City's brief) is the complaint's boilerplate recitation that Mr. Altstatt's conduct was "a public nuisance that was injurious and a threat to . . . health and safety." Opp. 18; App. 19–35. This factor would have weighed in favor of Mr. Altstatt. It therefore matters whether the courts must analyze it, as the Ninth Circuit has held.

Similarly, the *R.J. Reynolds* factor of "culpability" is different from the *Pimentel* factor regarding the "nature and extent of the offense." This is not merely a matter of "different wording" (Opp. 11): The former is subjective while the latter is objective. *See* Pet. 20; *State v. Timbs*, 134 N.E.3d 12, 37 (Ind. 2019) ("In the proportionality analysis, the severity of the offense must be considered alongside the owner's culpability."). Accordingly, *R.J. Reynolds* dealt with "culpability" as a question of whether the defendant acted in subjective good faith, not the *objective* nature of the offense. 37 Cal. 4th at 728–31; *see also Timbs*, 134 N.E.3d at 37

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defendant's *culpability* for the offense are the same thing as the "extent of the harm" caused by the offense.

[3] The City incorrectly states that the City received "numerous complaints from Mr. Altstatt's neighbors regarding his property." Opp. 1. To Mr. Altstatt's knowledge, all of the complaints were from a single neighbor who held a personal grudge against Mr. Altstatt.

("The culpability consideration focuses on the claimant's blameworthiness."). Under *Pimentel*, on the other hand, culpability is merely one *aspect* of a broader factor: "the nature and extent of the underlying violation." In *Pimentel*, the Ninth Circuit found that the plaintiffs were "indeed culpable . . . for failing to pay for overtime use of a metered [parking] space," but also found that the "underlying parking violation is minor." 974 F.3d at 923. Thus, it concluded that "the nature and extent of appellants' violations [were] minimal but not de minimis." *Id.* The *R.J. Reynolds* test leaves out half of this equation.

This difference is also material in this case. The City's brief argues that *R.J. Reynolds*'s culpability factor weighs against Mr. Altstatt because he did not show good faith by maintaining the alleged nuisance while attempting to remove or stay the enforcement action.[4] Opp. 18. But that says little about the nature of the underlying offense. Even if it were true that Mr. Altstatt was a hardened, unrepentant keeper of "junk" cars and fruit trees, surely the proportionality analysis must account for the *objective* difference in

[4] To the contrary, Mr. Altstatt believed in good faith that there was no nuisance on his property because the items at issue were harmless and were enclosed in his private, fenced backyard, which was secured with a locked gate. Proceeding *pro se* to vindicate his position, he became concerned that the trial court was not timely responding to his filings and was not impartial toward the City. Accordingly, he sought to have his federal constitutional defenses heard by a federal court, not to delay resolution of his case but, he hoped, to expedite it in what he believed was a more appropriate forum.

seriousness between keeping "junk" cars and fruit trees and, say, poisoning a lake. The objective non-seriousness of the underlying violation matters under *Pimentel* even where the defendant is culpable. It apparently does not matter under *R.J. Reynolds*, which focused only on subjective culpability, as shown by the lack of analysis of this factor by the court below and the City's brief.

Further, the defendant's ability to pay is a factor under *R.J. Reynolds* but not under *Pimentel*. While this Court has left open the question of whether this is a factor that must be considered, the historical sources relied upon in *Bajakajian* and *Timbs* strongly suggest that it is. *See Timbs*, 139 S. Ct. at 688; *Bajakajian*, 524 U.S. at 334–37, 340 n.15. Accordingly, some courts have made this an additional factor in their respective tests. *See* Pet. 20–21. This is another factor that would weigh in favor of Mr. Altstatt if properly analyzed.[5]

Thus, just comparing California's test and the Ninth Circuit's test, there are at least three critical differences in how these courts would apply the Excessive Fines Clause in this case. That confusion increases exponentially if the many different tests developed by

[5] The court below noted Mr. Altstatt's argument that the fine in this case will leave him "homeless and penniless," but found that it could not evaluate this factor on the record before it. App. 12. If the case is remanded for a determination on excessiveness—as the California Court of Appeal should have done in the first place (*see* Pet. 13–15)—the parties would have their first opportunity to present evidence on this important factor.

other state courts and other federal circuit courts are considered.

Incorporation of the federal Excessive Fines Clause demands a national standard. As this Court recently held, "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs*, 139 S. Ct. at 687. The Court should grant certiorari to resolve the divisions among federal and state appellate courts, exemplified by the decision below, over how courts are to apply the Excessive Fines Clause.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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