No. 24-55

IN THE
SUPREME COURT OF THE UNITED STATES

State of Montana,

Petitioner,

v.

Robert Murray Gibbons,

Respondent.

On Petition for a Writ of Certiorari
to the Montana Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Montana Supreme Court erred in holding that "[Montana Code Annotated] § 61-8-731 (requiring a mandatory-minimum fine) is irreconcilable with [Montana Code Annotated] § 46-18-231 (requiring the sentencing judge consider the offender's ability to pay)," and consequently that "before imposing a fine, the inquiry must include a proportionality consideration of the offender's ability to pay." Pet. App. 35a, ¶ 56.

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BRIEF IN OPPOSITION

The State of Montana asks this Court for relief from a Montana Supreme Court decision that interpreted one state statute to displace another. This Court's review is not appropriate to second-guess that state-law analysis, and the State's efforts to isolate a purely federal question in the state court's overall opinion are unavailing. And even if the State could overcome that threshold obstacle to this Court's intervention, the petition fails to present any policy problem that Montana's political branches could not solve for themselves.

Respect for federalism is not the only reason the Court should forgo review. The State cannot show the Montana Supreme Court's decision was wrong or that there is any reasoned disagreement among state and federal courts about the Eighth Amendment's consideration of a defendant's ability to pay a criminal fine. Indeed, in recent years, this Court has frequently denied petitions from both individuals and governments that raise the same Eighth Amendment question but lack the significant vehicle problems that vex this petition. *See, e.g.*, *City of Kent v. Jacobo-Hernandez*, 143 S. Ct. 99 (2022) (No. 21-1491); *Rosales-Gonzales v. United States*, 142 S. Ct. 781 (2022) (No. 21-5305); *Colo. Dep't of Lab. & Emp't, Div. of Workers' Comp. v. Dami Hosp., LLC*, 140 S. Ct. 849 (2020) (No. 19-641); *Dami Hosp., LLC v. Colo. Dep't of Lab. & 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). This petition should be denied as well.

STATEMENT OF THE CASE

1. Montana Code Annotated § 46-18-231, titled "Fines in felony and misdemeanor cases," sets out the requirements for imposing a criminal fine under Montana law. Subsection (1)(a) states that "whenever . . . an offender has been found guilty of an offense for which a felony penalty of imprisonment could be imposed, the sentencing judge may . . . impose a fine only in accordance with subsection (3)." Mont. Code Ann. § 46-18-231(1)(a). Subsection (3), in turn, provides that "[t]he sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine and interest." *Id.* § 46-18-231(3). "In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine and interest will impose." *Id.*

Until 2022, Montana Code Annotated § 61-8-731 governed the penalties for driving under the influence of alcohol or drugs (DUI).[1] The 2019 version of the statute provided that a person with four or more prior DUI convictions (who had been placed in a residential alcohol treatment program following at least one prior conviction) "shall be sentenced to the department of corrections for a term of not less than

[1] Since the events of this case, the relevant provision has been amended twice. In 2021, the Montana Legislature amended the provision to address an issue where the provision "which punishes a fifth or subsequent DUI offense, in allowing the sentencing court to choose between a supervisory sentence, or a $5,000 fine, or both, is *less* punitive than the punishment for a fourth or subsequent DUI." Pet. App. 29a, ¶ 51 n.2. And effective January 1, 2023, the Montana Legislature recodified the provision at Montana Code Annotated § 61-8-1008. *See* Pet. 6 n.1.

13 months or more than 5 years or be fined an amount of not less than $5,000 or more than $10,000, or both." Mont. Code Ann. § 61-8-731(3) (2019).

2. On June 19, 2019, respondent Robert Murray Gibbons drove to a bar in Troy, Montana. Pet. App. 3a, ¶ 3. After consuming several drinks, Mr. Gibbons left and walked back to his truck. *Id.* 4a, ¶ 3. A retired police officer, Richard Starks—who was also at the bar—followed Mr. Gibbons outside. *Id.* Starks watched Mr. Gibbons get into his truck and also captured two photos of Mr. Gibbons inside. *Id.* A photo showed Mr. Gibbons laying across the bench seat of his truck, with his feet on the driver's side, and his head resting on his folded arm. *Id.* The car's engine was not running. *Id.*

Starks also called police dispatch to report what he saw. Officer Travis Miller responded to the scene and approached Mr. Gibbons's car. Pet. App. 4a, ¶ 4. Officer Miller woke Mr. Gibbons up and asked if he had been sleeping. *Id.* Mr. Gibbons told the officer he had been drinking and volunteered: "I can't drive." *Id.* Miller administered field-sobriety tests and arrested Mr. Gibbons for driving under the influence. *Id.*

3. The State ultimately tried Mr. Gibbons three times. The first trial ended in a mistrial during voir dire. Pet. App. 4a, ¶ 5. The State's second attempt also ended in a mistrial. *Id*. 5a, ¶ 7. The jury deadlocked on whether Mr. Gibbons, who appeared to be sleeping while using his own arm "for a pillow," was in actual physical control of the vehicle. *Id.* 5a, ¶¶ 6-7. But at the third trial, a jury found Mr. Gibbons guilty of the DUI offense. *Id.* 10a, ¶ 14.

Mr. Gibbons's presentence investigation report indicated that Mr. Gibbons was unhoused and "currently camping" in the camper attached to his truck. Pet. App. 10a, ¶ 15. It further indicated that Mr. Gibbons had a total monthly income of approximately $1,431, largely from social security payments, and that he was $9,000 in debt. *Id.*

Relying on Montana Code Annotated § 61-8-731(3) (2019), the State asked the trial court to sentence Mr. Gibbons to a five-year custodial sentence, impose a $5,000 fine, and order forfeiture of his truck and camper vehicles. Pet. App. 10a, ¶ 17. Mr. Gibbons's counsel asked the court "to not fully impose some of the fines and fees due to an inability to pay." *Id.* 10a, ¶ 16. Mr. Gibbons's counsel also objected to the request for vehicle forfeiture because Mr. Gibbons resided in his truck and camper. *Id.* 10a, ¶ 15.

The trial court imposed a five-year custodial sentence and—deeming itself bound by "the statutory minimum" in Montana Code Annotated § 61-8-731(3)—imposed a $5,000 fine. Pet. App. 11a, ¶ 17. It declined to order vehicle forfeiture or to impose other fees, surcharges, or costs. *Id.* 97a.

4. Mr. Gibbons appealed his conviction and sentence directly to the Montana Supreme Court (as there is no intermediate appellate court in the state). The Montana Supreme Court reversed in relevant part.[2]

[2] Mr. Gibbons raised additional issues in his appeal to the Montana Supreme Court. The court rejected Mr. Gibbons' objections to the jury instructions, Pet. App. 12a-17a, ¶¶ 21-30, and his due-process and ineffective-assistance-of-counsel claims, *id.* 17a-23a, ¶¶ 31-42. Those rulings are not at issue in this Court.

a. The court framed the question as follows: whether Montana Code Annotated § 61-8-731(3), "which imposes a mandatory minimum $5,000 fine without regard to a defendant's ability to pay, is facially unconstitutional." Pet. App. 23a, ¶ 43.

To answer that question, the court began by analyzing the Montana "statutes at issue." Pet. App. 24a, ¶ 45. It explained that one of those statutes—Montana Code Annotated § 46-18-231—"clearly and plainly requires that a sentencing judge, 'whenever' an offender has been found guilty of a felony or misdemeanor, may 'only' impose a fine when the offender is able to pay." Pet. App. 25a, ¶ 45. And it further observed that the statute "makes no exception for statutes that establish a mandatory minimum fine." *Id.* Thus, looking at "the text, language, structure, and object of § 46-18-231," the Montana Supreme Court concluded that, for "all convictions," "[t]he Legislature . . . intended that the imposition of a fine be proportionate to the financial resources of an offender." Pet. App. 25a-26a, ¶¶ 45, 47.

The court then turned to the Federal and Montana Constitutions. On the one hand, the court recognized that *Timbs v. Indiana*, 586 U.S. 146 (2019), "emphasized that an individual's ability to pay was historically an essential factor in determining a fine's excessiveness." Pet. App. 26a-27a, ¶ 48; *see id.* 27a, ¶ 49 ("This concept is reflected in other Supreme Court decisions requiring courts to conduct an ability-to-pay inquiry."). And the court noted that Montana's Constitution "includes the right to be free from excessive fines" and provides similar protections as does the Eighth Amendment *See id.* 28a-29a, ¶ 50. On the other hand, the court noted that this

Court's decisions have "emphasized the primacy of the legislature" in setting fines and other punishments. *Id.* 28a, ¶ 50; *see Solem v. Helm*, 463 U.S. 277, 290 (1983).

The Montana statutory scheme, the court then held, harmonized these competing considerations. Because "the Legislature *itself* has determined that before imposing a fine, the inquiry must include a proportionality consideration of the offenders' ability to pay," the court did "not need to rely on *Timbs* to require an inquiry into a defendant's resources and ability to pay." Pet. App. 35a, ¶ 56 (emphasis added). Instead, the court concluded, the Montana Legislature had already "effectuated these federal and state constitutional protections against excessive fines by codifying the inquiry necessary to guarantee that a fine is proportional in § 46-18-231." *Id.* 29a, ¶ 50.

The next question the court addressed was whether the mandatory-minimum provision, Montana Code Annotated § 61-8-731(3), "can be applied consistent with the constitution and the purpose underlying § 46-18-231." Pet. App. 35a, ¶ 56. Relying on its prior holding in *State v. Yang*, 452 P.3d 897 (Mont. 2019), the court concluded that the answer was no. Under *Yang*, it explained, a statute "is facially unconstitutional to the extent it requires a sentencing judge to impose a mandatory fine without ever permitting the judge to consider whether the fine is excessive." Pet. App. 39a, ¶ 59 (quoting *Yang*, 452 P.3d at 904). That is because "in *all* situations a trial court is precluded from considering the factors the Montana Legislature has expressly mandated . . . to ensure that fines are not excessive as guaranteed in both the United States Constitution and Montana's Constitution." Pet. App. 38a, ¶ 58

(quoting *Yang*, 452 P.3d at 902). *Yang*'s "analysis and holding," the court explained, "are conclusive." Pet. App. 39a, ¶ 60. The court therefore overruled a prior decision, *State v. Mingus*, 84 P.3d 658 (Mont. 2004), that it saw as inconsistent with *Yang*. Pet. App. 41a, ¶ 63.

Finally, the court addressed the suggestion that it could meld both statutory provisions by allowing the mandatory-minimum fine in Montana Code Annotated § 61-8-731(3) to operate so long as the sentencing judge considered ability-to-pay factors before imposing the fine. Pet. App. 30a-33a ¶¶ 52-54. The court concluded that it was "without the authority" to do so, because only the Legislature can "establish an offense and set its penalty." *Id.* 32a, ¶ 53. Thus, it held that it could not "fashion [its] own penalty that authorizes a court to impose a fine in an amount less than what the Legislature clearly intended and mandated." *Id.*

b. Justice Shea concurred in part and dissented in part. Pet. App. 45a-51a, ¶¶ 68-79. He agreed that Montana Code Annotated § 46-18-231 "unambiguously applies to all convictions where a fine may be imposed, without exception for statutes that include a mandatory minimum fine." *Id.* 45a, ¶ 68. But he would have "[h]armoniz[ed]" the state statutes here by "allow[ing] the sentencing court to impose a fine only to the extent the defendant 'is or will be able to pay the fine,'" instead of invalidating Montana Code Annotated § 61-8-731(3). *Id.* 48a, ¶ 73.

c. Justice Rice, joined by Justice Baker, concurred in part and dissented in part. Pet. App. 52a-62a. ¶¶ 79-90. In his view, "the specific statute" governing mandatory minimums for drunk-driving offenses "should be applied above the

general" statute requiring ability-to-pay considerations for fines. *Id*. 60a, ¶ 86. He would therefore have recognized Montana Code Annotated § 61-8-731(3) as a "narrower and specific exception to the otherwise governing rule that Montana courts consider a defendant's financial circumstances when imposing fines." Pet. App. 60a-61a, ¶ 87. Justice Rice would also have rejected the argument that the Eighth Amendment requires consideration of a defendant's "ability to pay" a fine, writing that this Court had "never found that a person's income or wealth were relevant considerations in judging the excessiveness of a fine." *Id.* 57a, ¶ 85.

REASONS FOR DENYING THE WRIT

Montana's petition begins by asserting that state and federal courts are deeply divided over the whether the Eighth Amendment requires consideration of a defendant's ability to pay a fine. *See* Pet. 12-26. But in doing so, the State steps over the fundamental threshold inquiry: whether there is any federal question for this Court's review. There is not. And the State's parade of horribles rests entirely on arguments that are best addressed to the Montana Legislature, not this Court. Finally, even if the petition presented a federal question, this Court's review would not be warranted. The State has advanced no reasoned argument that the Montana Supreme Court is wrong on the merits, and there is no developed conflict on the question presented.

I. The Montana Supreme Court's decision turns on state-law, not federal-law, questions.

The Montana Supreme Court considered two Montana state statutes and concluded that one should govern over the other. That holding does not present a

federal question. And the fact that the court discussed the Eighth Amendment and its Montana equivalent as part of that analysis does not alter the state-law character of the state court's decision below.

The state supreme court's opinion proceeded in three steps. *First*, the court held that Montana Code Annotated § 46-18-231(3) requires consideration in all cases of defendants' financial circumstances when imposing fines—a requirement the Montana Legislature believed tracked the protection of the Eighth Amendment's Excessive Fines Clause and its Montana constitutional counterpart. *Second*, the court held that Montana Code Annotated § 61-8-731(3), which sets a mandatory fine of $5,000 for repeat DUI offenders, was in irreconcilable conflict with § 46-18-231(3). Pet. App. 35a, ¶ 56. *Third*, the court held that the proper remedy was to invalidate § 61-8-731(3) on its face. The State essentially agrees with the first of these holdings, at least as a statutory matter. And its disagreement with the second and third parts of the state court's reasoning turns entirely on state-law questions of statutory construction and remedies.

1. It is common ground between the parties that Montana Code Annotated § 46-18-231(3) "requires sentencing judges to consider an individual's ability to pay a fine and the burden on the defendant that paying the fine imposes." Pet. 28. That holding is inescapable from the text of the statute. The relevant provision states that "[t]he sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine and interest." Mont. Code. Ann. § 46-18-231(3). It goes on to require that, "[i]n determining the amount and method of payment, the

sentencing judge shall take into account . . . the financial resources of the offender, and the nature of the burden that payment of the fine and interest will impose." *Id.* So when the State complains that the Montana Supreme Court held that "sentencing judges must consider the 'financial resources of the offender, and the nature of the burden that payment of the fine will impose,'" it is not identifying any issue about "the Eighth Amendment's Excessive Fines Clause." Pet. 34-35 (quoting Pet. App. 25a-26a, ¶ 47). Instead, it is simply paraphrasing the Montana statutory text.

To be sure, in addition to parsing the text of the statute, the Montana Supreme Court drew support for its disposition of this case from its understanding of precedent explicating the Eighth Amendment's Excessive Fines Clause and the analogous provision of the Montana Constitution, Mont. Const. art. II § 22. The court stated that the state statute was "consistent with the Anglo-American history of the Excessive Fines Clause as a protection against fines imposed 'without any regard to the nature of the Offences, or the Ability of the Persons." Pet. App. 29a, ¶ 50 (quoting *Timbs v. Indiana*, 586 U.S. 146, 162 (2019) (Thomas, J., concurring)); *see also* Pet. App. 27a, ¶ 49 (noting that other decisions of this Court "requir[e] courts to conduct an ability-to-pay inquiry" in other circumstances) (citing *Turner v. Rogers*, 564 U.S. 431, 449 (2011); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *Bell v. Burson*, 402 U.S. 535, 539 (1971)). In addition, relying on its own precedent, the court explained that the Montana Constitution "requires that the sentencing judge be able to consider . . . the financial resources of the offender, and the nature of the burden that payment of the

fine will impose before ordering the offender to pay" a statutorily mandated fine. Pet. App. 42a, ¶ 64 (quoting *Yang*, 452 P.3d at 903).

But although the State claims that the Montana Supreme Court's decision "[r]elie[s] on this Court's decisions in [*United States v. Bajakajian*, 524 U.S. 321 (1998)] and *Timbs*," Pet. 10, the decision reveals the opposite: The court in fact stated that it "d[id] *not* need to rely on *Timbs* to require an inquiry into a defendant's resources and ability to pay." Pet. App. 35a, ¶ 56 (emphasis added). That is "because the Legislature itself has determined that before imposing a fine, the inquiry must include a proportionality consideration of the offender's ability to pay." *Id*. In other words, the court below held that the Montana Legislature's decision "to impose a statutory *offender* proportionality analysis," *id.*, eliminated any conflict between the federal Constitution and "the role of the Legislature in defining a crime and establishing its penalty," Pet. App. 31a, ¶ 52; *see Bajakajian*, 524 U.S. at 336 ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature.").

Accordingly, the State errs in asserting that there is a "federal question" that is "squarely presented" here. Pet. 4. On the contrary, the ability-to-pay requirement is part of Montana statutory law regardless of the answer to the Eighth Amendment question presented. And that ability-to-pay requirement applies, as a statutory matter, "to all convictions where a fine may be imposed." Pet. App. 25a, ¶ 45. The core merits holding on the ability-to-pay issue, therefore, does not present any question appropriate for certiorari.

2. The State does not object to the Montana Supreme Court's construction of the Montana Code's ability-to-pay provision. But the State maintains there are "two key errors" in the court's broader analysis. Pet. 3. Neither supposed error, however, presents a federal question either.

a. The State's first complaint is that "the court's description of how § 46-18-231(3) and § 61-8-731(3) operate together is wrong." Pet. 28. In particular, the State objects to the state court's determination that the mandatory-minimum provision in § 61-8-731(3) "forbids" a sentencing judge from engaging in a proportionality inquiry. Pet. 27; *see id.* at 13 (same). According to the State, a sentencing judge considering a mandatory minimum under that provision is required by state law to "consider those [proportionality] factors before imposing a fine." *Id.* at 28; *see id.* ("The sentencing judge must do this in every case."). Thus, the State argues that the mandatory-minimum provision and the ability-to-pay provision can be harmonized in at least many cases, such that its mandatory-minimum fine provision can be squared with the ability-to-pay statute.

But this Court is "bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993); *see also, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (similar). Consequently, how the Montana Supreme Court construed a state statute is not a federal-law question. Neither is the state court's analysis of "how [two state statutes] operate together." Pet. 28. Thus, much of the rhetoric in the State's petition—confirming that the State primarily objects to the state court's construction of state law—does not advance the case for certiorari. The

State attacks the court below, for example, for giving "substantial deference" only to "its favored statute, § 46-18-231(3), and not its disfavored one, § 61-8-731(3)." Pet. 33 n.8. Which Montana statutes the Montana Supreme Court "favor[s]" or "disfavor[s]," however, is outside the scope of this Court's review.

b. The State's next objection is that the Montana Supreme Court erred in invalidating the mandatory-minimum statute on its face, Pet. 29, rather than holding that it is subject only to "as-applied" constitutional challenge, *id.* at 28.

The problem for the State is that the remedial authority of the Montana Supreme Court is not a federal question. "[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008). "Federal law simply sets certain minimum requirements that States must meet," but states can otherwise choose whatever remedies they think appropriate for federal constitutional violations. *Id.* (internal quotation marks omitted); *see Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 102 (1993) (explaining that state courts are "free to choose" the "form of relief [they] will provide, so long as that relief satisfies the minimum federal requirements" outlined by this Court). That precedent confirms that the Montana Supreme Court's choice of a facial remedy is outside the scope of this Court's review.[3]

[3] Even if the Montana Supreme Court's merits analysis had been exclusively based on federal law, *but see supra* at 9-11, any decision to go beyond the federal remedial baseline would not be subject to this Court's review. The State "provide[s] no support for the proposition that federal law places a limit on state authority to provide remedies for federal constitutional violations." *Danforth*, 552 U.S. at 288.

The Montana Supreme Court's majority's response to a separate opinion confirms the state-law nature of the remedial question. Concurring in part and dissenting in part, Justice Shea urged that the two statutes should be construed to operate in tandem, with a mandatory minimum applying unless the defendant was unable to pay that sum. Pet. App. 46a, ¶ 70. The majority responded that Justice Shea's suggestion was improper as a matter of Montana's separation of powers: "This Court is without the authority to establish an offense and set its penalty, and we may not rewrite a statute to 'harmonize' it with another." *Id.* 32a, ¶ 53; *see id.* (rejecting Justice Shea's proposal to "fashion[] his own penalty that authorizes a court to impose a fine in an amount less than what the Legislature clearly intended and mandated"). The State may prefer Justice Shea's approach to the majority's. But this Court should not involve itself in parsing the assignment of power within Montana's government.

II. The Montana Legislature is best positioned to address the State's asserted harms.

Furthermore, there is no need for this Court to grant certiorari to give the State the relief that it seeks. The policy complaints raised in Montana's petition can most easily be addressed by Montana's Legislature.

1. Montana's prime objection—spelled out in the first sentence of its petition—is that "the Montana Legislature" is now powerless to subject those with the ability to pay to mandatory-minimum fines because "[a]ll mandatory minimum fines in Montana are now presumptively unconstitutional" within the state. Pet. 1. But even assuming that the Montana Supreme Court's holding has implications not only for the mandatory minimum at issue here but also all other mandatory minimums

elsewhere in the Montana Code, the State is mistaken. There are at least two independent ways the Legislature could still allow courts to impose mandatory-minimum fines.

First, the Montana Legislature could provide that courts have authority to impose fines below the mandatory minimum when doing so is necessary to account for a particular defendant's inability to pay. Such legislation would render mandatory-minimum statutes fully lawful as applied to any defendant with means to pay. It would also respond to the Montana Supreme Court's holding that it lacked authority to create a new penalty for the offense because "the office of the judge" is "not to insert what has been omitted or to omit what has been inserted," Pet. App. 32a, ¶ 53; *see also id.* 31a, ¶ 52 ("[I]t is only the Legislature that has the authority to determine the offense and the penalty.").

Second, the Legislature could choose to modify (or even repeal) the ability-to-pay statute. As explained above, *supra* at 9-11, the Montana Supreme Court's analysis and decision is grounded in that statute. The court explained that "the problem is in the mandatory nature of the minimum fine contained in § 61-8-731(3) . . . and the inability of a sentencing court to consider other sentencing statutes prescribed by the Legislature that codify constitutional proportionality principles." Pet. App. 30a, ¶ 51. Thus, a change to the language of the ability-to-pay provision would necessitate a new analysis.

It is entirely realistic to think that if the Montana Legislature agrees with the State's policy views or believes that the Montana Supreme Court otherwise frustrated

legislative intent, it will react to the decision below. *See* Pet. 32-33 & n.8. Montana lawmakers have been attentive to how Montana Code Annotated § 61-8-731 works in practice. In 2021, for example, the Legislature amended the statute to address the loophole in which third-time DUI offenders were treated more harshly than fourth-time offenders under the 2019 version of the statute. *See* Pet. App. 29a, ¶ 51 n.2. The Legislature can just as easily address any problems it believes are created by the Montana Supreme Court's opinion.

Thus, contrary to the State's rhetoric, the Montana Supreme Court has not "stripped the Legislature of a vital tool in the fight against drunk driving." Pet. 32-33. The scope of the state supreme court's decision is heavily dependent on Montana's particular statutory scheme and on the court's assessment of how two statutes work together. *See id.* at 28 ("[T]he court's description of how [the two statutes] operate together is wrong."), So the State has ample solutions to the state policy problem it identifies—chief among them, turning to its own state representatives instead of this Court.

2. The State's argument that the effects of the decision below "can[not] be contained within Montana's borders," Pet. 30, underscores the state-specific nature of its complaints. The State acknowledges that no other state court has struck down a statutory mandatory-minimum fine as facially unconstitutional. All that it can say is that "Minnesota courts" *declined* to hold that a Minnesota statute was "facially unconstitutional because Minnesota had another statutory mechanism that allowed the judge to impose a fine below the statutory minimum." *Id.* (discussing *State v.*

Madden, 910 N.W.2d 744, 747 (Minn. Ct. App. 2018)). The absence of such a "statutory mechanism" in Montana may have led to a different result in this case, but confirms that this Court's intervention is not necessary to address Montana's policy objections. Instead, the Court can leave it to the state Legislature to consider how best to harmonize or amend Montana's Code, including—if it wishes—by crafting a statutory mechanism similar to Minnesota's.

III. Even if this case presented a federal issue, it would not warrant the Court's review.

Even setting aside the distinctively state-law issues at play in this case, the petition for certiorari does not warrant this Court's review. The Court has repeatedly been asked—by litigants on both sides of the question—to review whether the Eighth Amendment's Excessive Fines Clause requires consideration of a defendant's ability to pay. It has denied those petitions over and over. *See supra* at 1. The same result is appropriate here, particularly in light of the State's failure to present a developed merits argument or to identify a genuine and deep-seated split in authority.

A. The Eighth Amendment requires consideration of the defendant's ability to pay.

In part because it agrees that Montana law "requires sentencing judges to consider an individual's ability to pay a fine," Pet. 28, the State dedicates just one page of its petition to arguing that the Eighth Amendment, properly understood, does not require consideration of a defendant's ability to pay a fine. Pet. 26-27. And that page musters no argument based on the text, history, or precedent surrounding the Excessive Fines Clause. In fact, all of the tools of constitutional interpretation

support the notion that a defendant's ability to pay is a factor under the Excessive Fines Clause.

1. This Court has made clear that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). For good reason: the word "excessive" means "exceeding a normal, usual, reasonable, or proper limit." *See Excessive*, *American Heritage of the English Language* 618 (5th ed. 2018). It carried the same meaning at the Founding. *See* Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792) ("exceed": "To go too far; to pass the bounds of fitness").

One form of proportionality, dating back to "[t]he Amercements Clause of Magna Carta," is that a fine should not "be so large as to deprive" an individual "of his livelihood." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989). That portion of the Great Charter provided that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage." *Bajakajian*, 524 U.S. at 335-36 (quoting Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.)). As Judge Newsom recently explained, "[t]o save a free man's 'position,' a merchant's 'trade,' and a villein's 'tillage'—all reflect the principle that no offender be 'pushed absolutely to the wall: his means of livelihood must be saved to him.'" *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1322 (11th Cir. 2021) (Newsom, J.,

concurring) (quoting William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 287 (2d ed. 1914)). Thus, "[t]he baseline for amercements and fines under Magna Carta was proportionality to the wrong committed *and to the defendant's ability to pay*." *Id.* at 1330-31 (Tjoflat, J., concurring in part and dissenting in part) (emphasis added); *see Timbs v. Indiana*, 586 U.S. 146, 162 (2019) (Thomas, J., concurring) (noting allegations that in 1680, Chief Justice Willian Scroggs unlawfully imposed fines "without any Regard to . . . the Ability of the Persons").

2. The State has no textual or historical arguments in response. It notes only that this Court has not definitively resolved "whether a defendant's financial situation is relevant to the excessive[ness] inquiry." Pet. 26. But there was no occasion to do so in either of the cases that the State cites. The party challenging the fine in *Bajakajian* had not argued "that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood, and the District Court made no factual findings in this respect." 524 U.S. at 340 n.15 (citation omitted). Nor was the question presented in *Timbs*, which turned on whether the Eighth Amendment was incorporated and not on the Excessive Fines Clause's substantive scope. *See* 586 U.S. at 149-50. So the Court's failure to squarely address the role of ability-to-pay analysis under the Eighth Amendment does not mean anything one way or the other.

Nor is the State correct that considering a defendant's financial circumstances when determining a fine "would move courts closer and closer to the 'strict

proportionality' standard that *Bajakajian* squarely rejected." Pet. 13. The "strict proportionality" issue discussed in *Bajakajian* had nothing to do with a defendant's financial circumstances. What this Court rejected was a strict one-to-one ratio "between the amount of a punitive forfeiture and the gravity of a criminal offense." 524 U.S. at 335. Thus, for example, if a defendant was convicted of trafficking $500 worth of a controlled substance, the Excessive Fines Clause does not require the maximum fine to be $500. The Montana Supreme Court's analysis is unrelated to that issue, as it focuses the inquiry on an entirely different factor—the offender's ability to pay—that was not addressed in *Bajakajian*.[4]

B. The petition overstates any nascent disagreement in the lower courts.

The State contends that there is a "growing split" among state and federal courts. Pet. 26. As Montana would tell it, there are two emerging camps: on the one hand, state and federal courts that "refuse to consider a defendant's individual circumstances" in the excessiveness inquiry, *id.* at 12, and on the other hand, those that "consider an individual's ability to pay," *id.* at 13. In fact, however, every state court to consider the question has held that ability to pay matters in the Excessive Fines Clause analysis. Although there may be some nascent tension in the federal courts of appeals' treatment of the issue, the question has not been meaningfully

[4] Montana also argues that the Excessive Fines Clause need not address ability to pay because there are existing due-process protections covering similar ground. Pet. 33-34. But the due-process precedents it discusses address different issues—whether a defendant can remain imprisoned because he cannot pay a fine—from whether a fine may be lawfully imposed. *See Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *Tate v. Short*, 401 U.S. 395, 398-99 (1971); *Williams v. Illinois*, 399 U.S. 235, 243-44 (1970).

aired in those forums. At a minimum, therefore, further percolation is warranted before this Court addresses the issue.

1. a. Contrary to Montana's assertion, every state court that has considered the question appears to have aligned itself with the decision below. *See City of Seattle v. Long*, 493 P.3d 94, 111-13 (Wash. 2021) ("A number of modern state and federal courts have joined the chorus of legal scholars to conclude that the history of the clause and the reasoning of the Supreme Court strongly suggest that considering ability to pay is constitutionally required."); *see, e.g.*, *Colo. Dep't of Lab. & Emp't v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019); *State v. Cowan*, 47 Cal. App. 5th 32, 47 (2020); *State v. Goodenow*, 282 P.3d 8, 17 (Or. 2012); *State v. Madden*, 910 N.W.2d 744, 749 (Minn. App. 2018); *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 871 (Pa. Commw. Ct. 2014), *aff'd*, 160 A.3d 153 (Pa. 2017). For those courts, "ability to pay" is required under either the Eighth Amendment alone, *see Goodenow*, 282 P.3d at 12 n.2 (finding state constitutional argument forfeited), or under a combination of the federal and state constitutional provisions, *see, e.g.*, *Long*, 493 P.3d at 107.

b. Montana's petition cites no case considering the question and reaching a different outcome. The petition discusses intermediate-court cases from Florida and Texas, but also admits that those intermediate appellate courts did not "consider[]" whether "the defendant's current financial situation" or "ability to pay" should bear on the inquiry. Pet. 19. That is correct: neither *Gordon v. State*, 139 So. 3d 958 (Fla. Dist. Ct. App. 2014), nor *1812 Franklin St. v. State*, 614 S.W.3d 179 (Tex. App. 2020),

addressed whether ability to pay is relevant under the Eighth Amendment. Those decisions' silence on that point does not create a split.

Neither does the Ohio Supreme Court's decision in *State v. O'Malley*, 206 N.E.3d 662 (Ohio 2022), help the State. That court was tasked with determining whether forfeiture of the defendant's vehicle violated the Eighth Amendment. *Id.* at 667. But the court declined to resolve whether it needed to consider "the forfeiture's economic impact on the defendant" because the defendant "did not demonstrate that the loss of this vehicle would be significant" to him. *Id.* at 686; *see id.* ("Though O'Malley was unemployed during the duration of his trial, he is, by all accounts, a young, able-bodied adult. And at the time of the trial court's forfeiture order, O'Malley had few expenses, given that he lived with his grandmother."). Thus, the decision does not support the State's claim that "the Ohio Supreme Court refuses to consider an individual's current financial circumstances in the excessiveness inquiry." Pet. 18.

2. The State does not fare much better when it comes to federal decisions.

a. Three circuits have issued decisions that are generally consistent with the Montana Supreme Court's approach.

As the State acknowledges, "[b]oth the First and Second Circuit[s] consider the individual circumstances of the offender" in applying the Excessive Fines Clause. Pet. 20. The First Circuit has held that "the notion that a forfeiture should not be so great as to deprive a wrongdoer of his or her livelihood is deeply rooted in the history of the Eighth Amendment." *United States v. Levesque*, 546 F.3d 78, 83-84 (1st Cir. 2008). That history, the court explained, meant that a forfeiture cannot be "so onerous as to

deprive a defendant of his or her future ability to earn a living." *Id.* at 85. The Second Circuit has adopted the First Circuit's *Levesque* test. *United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016).

The State stresses, Pet. 22, that the *Levesque* test stops short of dictating that a forfeiture is illegal whenever "the defendant does not have sufficient funds to cover the forfeiture at the time of the conviction," 546 F.3d at 85. But that qualification rests on considerations unique to "the purpose of imposing a forfeiture as a money judgment"—namely, the objective of imposing a debt akin to a "civil" judgment. *Id.* Neither the First nor Second Circuit has decided whether the same proviso applies to criminal fines. For that reason, the State errs in contending that the First and Second Circuits have held that a defendant's ability to pay a criminal "fine" is irrelevant under the Eighth Amendment. *See* Pet. 22.

Eighth Circuit law is in accord. In the forfeiture context, the court has favorably cited the First Circuit's *Levesque* test. *United States v. Smith*, 656 F.3d 821 (8th Cir. 2011). At the same time, the Eighth Circuit has long held that "in the case of fines, as opposed to forfeitures, the defendant's ability to pay is a factor under the Excessive Fines Clause." *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998).

Even if the Eighth Amendment rules governing fines and forfeitures had to be identical, it would not matter. The State suggests that *Levesque*'s "future ability to earn a living" standard is in tension with the "ability to pay" rule adopted by the state courts because the former assumes there is always a possibility the defendant might "come into money" in the future. *Levesque*, 546 F.3d at 85; *see* Pet. 20-24. But the

Montana statute that governs here provides that a sentencing court must ask whether "the offender is or *will be able* to pay the fine and interest." Mont. Code Ann. § 46-18-231(3); *see id.* § 46-18-234 ("[T]he court may grant permission for payment to be made within a specified period of time or in specified installments"). And the Montana Supreme Court further noted that this statute imposed the "exact same requirements" as a state law governing costs, which requires courts to consider "the future ability of the defendant to pay." Pet. App. 25a, ¶ 46 (quoting Mont. Code Ann. § 46-18-232). The operative Montana criminal fines statute here therefore contemplates considering both current and future financial resources, and so does not present the question of whether the Eighth Amendment requires considering a snapshot of a defendant's financial circumstances at any particular time.

b. The State also asserts that several other circuits have rejected the notion that the Eighth Amendment requires consideration of a defendant's ability to pay a criminal fine. But most of those decisions are unreasoned and arose in postures that did not require searching review of the question presented. And there is reason to believe that at least one of those circuits may revisit its precedent.

As the State admits, two of the decisions it cites—from the Fourth and D.C. Circuits—arose in the plain-error posture. Pet. 18; *see United States v. Bennett*, 986 F.3d 389, 400 (4th Cir. 2021); *United States v. Bikundi*, 926 F.3d 761, 796 (D.C. Cir. 2019). The D.C. Circuit did not address the merits of the issue because the defendant's failure to raise the argument below meant that the court would consider only objections that are "obvious" or "clear under current law." *Bikundi*, 926 F.3d at

796. And the Fourth Circuit left open the question of whether ability to pay "is an appropriate consideration." *Bennett*, 986 F.3d at 400.

The Fifth Circuit's decision in *United States v. Suarez*, 966 F.3d 376 (5th Cir. 2020), is of a piece. *See* Pet. 16-17. There, the defendant "ma[de] a fleeting statement that she is 'unable to pay' the forfeiture judgment 'or any fine.'" 966 F.3d at 388. The court found that argument "waive[d]," noting that the defendant "cite[d] no authority" to support her claim. *Id.* That is hardly the stuff of a circuit split.

The cited decisions of the Seventh and Ninth Circuits are similarly summary. *See* Pet. 17-18. The entirety of the analysis in *Grashoff v. Adams*, 65 F.4th 910 (7th Cir. 2023), consists of these sentences: "Grashoff also contends that the Eighth Amendment inquiry must consider the sanctioned person's ability to pay. We can leave that legal question for another day. Grashoff has sufficient assets to pay this civil sanction." *Id.* at 914. And the Ninth Circuit's analysis likewise spans just one paragraph, "declin[ing]" the defendant's "invitation to affirmatively incorporate a means-testing requirement for claims arising under the Eighth Amendment's Excessive Fines Clause" in a case concerning a $63 parking ticket. *Pimentel v. City of Los Angeles*, 974 F.3d 917, 924-25 (9th Cir. 2020).

The only federal court of appeals that has analyzed the question the State presents at any length and genuinely suggested it agrees with the State is the Eleventh Circuit. That court held in a 2009 forfeiture case that it would "not take into account the impact the fine would have on an individual defendant." *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009). But more recently, a two-judge

concurrence authored by Judge Newsom extensively canvassed the history on this issue and called on the court to reconsider that jurisprudence at an appropriate juncture. *Yates*, 21 F.4th at 1323 (Newsom, J., concurring); *see supra* at 18-19.

Thus, no decision from any federal courts of appeals establishes reasoned and solid precedent sufficient to create a true conflict worthy of this Court's intervention in an appropriate case. At the very least, further percolation should occur before this Court considers that constitutional claim the State presses here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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