No. 21-275

In The

Supreme Court of the United States

STARS INTERACTIVE HOLDINGS (IOM) LTD., F/K/A AMAYA GROUP HOLDINGS (IOM) LTD., AND RATIONAL ENTERTAINMENT ENTERPRISES LTD.,

Petitioners,

v.

COMMONWEALTH OF KENTUCKY, *EX REL.* J. MICHAEL BROWN, SECRETARY OF THE GOVERNOR'S EXECUTIVE CABINET,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a damages award violates due process when it is more than thirty times any conceivable harm.

2. Whether the Excessive Fines Clause bars a State from imposing a penalty over fifty times the defendant's revenue earned from the prohibited conduct.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Kentucky. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in cases raising due-process and excessive-fines issues. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *New York v. United Parcel Serv., Inc.*, 942 F.3d 554 (2d Cir. 2019).

INTRODUCTION

Three years ago, people could place a legal wager on the Super Bowl only in Nevada. Today it's legal to bet on the Super Bowl in thirty-two States and the District of Columbia. If you turn on any televised sporting event, betting odds scroll across the bottom of the screen and the announcers openly discuss whether a last-minute field goal covers the point spread or takes the game over the over/under; we are in a sports-betting boom.

Although not as swift, poker underwent a similar boom. Twenty years ago, 613 people risked $10,000 to play in the World Series of Poker's main event. By 2019, that number grew to 8,569—a 1298% increase. Turn on ESPN or Bally Sports late at night, and you are likely to see a poker broadcast.

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, paid for the brief's preparation or submission. After timely notice, all parties consented to WLF's filing this brief.

This poker boom coincided with the rise of the internet. In the early 2000s, people began exploring more ways to play poker. As with sports betting, only a few States had casinos offering poker. But people still wanted to play. With the benefit of broadband internet and sophisticated random-number-generating technology, many companies began offering online poker games.

Online poker was a smashing success. Some people began making a living by playing twenty-four poker games simultaneously. *See* Kevin Thurman, *PokerStars Supernova Elite Kevin "WizardOfAhhs" Thurman Playing 24 Cash Tables*, YouTube (Nov. 22, 2011), https://bit.ly/3ziiukW. Others just replaced watching a sitcom at night with playing poker. The amount that Americans deposited with online poker sites totaled in the upper nine figures or low ten figures. In short, online poker became not an insignificant part of the American economy.

But everything changed on "Black Friday," April 15, 2011. That day, the United States Department of Justice seized assets of the three largest poker sites in America—including PokerStars—which combined controlled over 95% of the market. According to the DOJ, the companies were violating the Unlawful Internet Gambling Enforcement Act by offering online poker.

After DOJ's seizures, the Commonwealth of Kentucky saw dollar signs. It remembered that a Kentucky statute allows any person to recover illegal gambling losses for a fifty-four-month period. Because the Commonwealth had never brought such a suit, it did not want to risk the enormous resources necessary

to sue PokerStars. So it found some contingency-fee lawyers willing to sue on its behalf.

Using a law enacted in the 1700s, the Commonwealth's suit sought treble damages for all losses suffered by Kentuckians during the fifty-four-month lookback period. Yet recouping total losses for Kentuckians was not enough for the Commonwealth's contingency-fee lawyers. Rather, they wanted to recover treble the amount that Kentuckians temporarily gave to other players; even if they received ten times that amount only seconds later.

The resulting $870 million judgment for the Commonwealth dwarfed PokerStars's Kentucky-based revenue. In fact, it was well over fifty times that amount. It also exceeded all Kentuckians' total losses on PokerStars by a factor of thirty.

The Commonwealth's disproportionate judgment violates two provisions of the United States Constitution. First, it is so excessive that it violates the Eighth Amendment's Excessive Fines Clause as incorporated against the States by the Fourteenth Amendment. It also violates the Due Process Clause of the Fourteenth Amendment because it bears no relation to the actual harm caused by PokerStars's conduct. Yet the Supreme Court of Kentucky dismissed those violations in two paragraphs filled with legal errors. These legal errors split from other state courts of last resort and federal courts of appeals. As the issues raised in this case are also of exceptional importance, this Court should grant review and clarify how lower courts must apply the Due Process and Excessive Fines Clauses when reviewing grossly disproportionate civil penalties.

STATEMENT

Over 240 years ago, Kentucky passed its Loss Recovery Act. *See* Acts of 1798, Vol. I, Digest Stat. Laws of Ky., Title 87 § 3. Under the statute, gamblers who lose more than $5 at one time or in a twenty-four-hour period, or their creditors, can sue winners to recover the losses. Ky. Rev. Stat. § 372.020. For the first six months after the loss, gamblers and their creditors are the only ones who may sue. *See id.* § 372.040. But if they fail to sue within six months, the right to sue opens to any person for the rest of the five-year limitations period—and that third party may recover treble the amount lost. *See id.*

Before Black Friday, PokerStars, believing it was legal, operated in Kentucky. Citizens across the Commonwealth played in cash games and tournaments on the site. The Commonwealth then sued to recover for losses suffered by all Kentuckians during the lookback period. But rather than seeking net losses or the amount of PokerStars's revenue traceable to Kentucky, it sought damages for every hand that any Kentuckian lost or tournament in which any Kentuckian lost money.

The circuit court adopted the Commonwealth's proposed $290 million damages figure while also holding that the Commonwealth could recover funds only if a Kentuckian lost during a calendar day. Pet. App. 152a-156a. Realizing that the order was internally contradictory, the circuit court later abandoned its holding and stuck with the $290 million damages figure. *Id.* at 128a-129a. It then trebled this figure for a final judgment of $870 million. *Id.* at 129a-136a.

The massive award was disproportionate to any potential harm. During the lookback period, Kentuckians lost only $26 million—less than 3% of the final judgment. Even counting money Kentuckians lost on calendar days—without accounting for wins on calendar days—that total was only $68 million—less than 8% of the final judgment. And PokerStars revenue traceable to Kentucky was $18 million—only 2% of the final judgment.

The Kentucky Court of Appeals reversed the circuit court's judgment on state-law grounds. Relying on the LRA's statutory history, the appellate court held that the Commonwealth was not a "person" who could sue after the six-month exclusivity period. Pet. App. 52a-65a. Seeing its windfall at risk, the Commonwealth appealed to the Supreme Court of Kentucky.

In a sharply divided opinion, the Kentucky Supreme Court held that the Commonwealth was a "person" who could sue under the LRA. Pet. App. 7a-23a. Most of the opinion focused on that issue. But because PokerStars also argued that the $870 million judgment violated the Due Process and Excessive Fines Clauses of the United States Constitution, the court addressed those issues. Yet that analysis was cursory and legally incorrect. *See id.* at 28a-29a.

In a single paragraph, the court rejected the Due Process argument. Pet. App. 29a. Relying on events that happened after litigation began, the court held that PokerStars knew that its conduct was illegal and could lead to the large damages award. *Id.* It thus held that the Commonwealth provided sufficient notice of the penalty. *Id.*

A separate paragraph rejected PokerStars's excessive fines argument. Pet. App. 28a-29a. In the Kentucky Supreme Court's view, as long as some mathematical relationship exists between the harm and the resulting civil penalty, there is no Excessive Fines Clause violation. *Id.* at 29a. In other words, a State may calculate a penalty by multiplying the harm by one million without violating the Excessive Fines Clause. Because the Supreme Court of Kentucky denied a timely rehearing petition, *id.* at 174a-175a, PokerStars now seeks certiorari.

SUMMARY OF ARGUMENT

I.A. State courts of last resort and federal courts of appeals are split on when the Eighth Amendment's Excessive Fines Clause bars a civil penalty. Most courts have agreed on a set of factors that this Court uses in similar Eighth Amendment contexts. Yet the Fifth Circuit and Kentucky Supreme Court allow any civil penalty that is authorized by statute and has a mathematical relationship to the compensatory-damages award. This Court should resolve this deepening split now.

B. Central to any Excessive Fines Clause analysis is whether a fine is grossly disproportionate to the harm. The Kentucky Supreme Court, however, ducked this inquiry and focused on the purely mathematical relationship between the $870 million judgment and the alleged harm. A closer examination of poker in general, and PokerStars's business, shows the flaws in this analysis. Poker is a game of skill; some people make a career out of playing it. Yet under the Kentucky Supreme Court's decision, even players who netted tens of thousands of dollars in poker

winnings during the lookback period were "losers" when calculating compensatory damages. To then treble that already inflated amount is a textbook Excessive Fines Clause violation.

II. This Court should also grant review to resolve a split among lower courts on how to apply this Court's due-process precedents. The Court has said in dicta that when there is a substantial award of compensatory damages, the Due Process Clause may limit a punitive damages award to the amount of the compensatory award. Many courts have properly heeded this guidance. But the Supreme Court of Kentucky declined to do so here.

Capping the ratio of punitive damages to substantial compensatory damages at 1:1 ensures that parties know their risk of exposure. Rather than having to guess at potential punitive damages, companies would know that, when a damages award is substantial, they may be forced to pay only the same amount in punitive damages. This ensures compliance with the Due Process Clause.

ARGUMENT

The $870 million judgment here shocks the conscience. Petitioners persuasively explain why review is needed to resolve a split among state courts of last resort and federal courts of appeals on how to apply *State Farm*. Pet. 20-24. This split alone warrants the Court's immediate attention. But there are also related reasons to grant review.

I. REVIEW IS NEEDED TO CLARIFY THAT PROPORTIONALITY IS CENTRAL TO THE EXCESSIVE FINES CLAUSE ANALYSIS.

A. The Kentucky Supreme Court Deepened A Split On The Excessive Fines Clause.

Two years ago, this Court held that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the States. *Timbs v. Indiana*, 139 S. Ct. 682, 687-90 (2019). So today more courts then ever must decide whether punitive civil penalties violate the Excessive Fines Clause. Most state and federal courts have coalesced around a reasonable test to determine whether a civil penalty violates the Excessive Fines Clause. But the Supreme Court of Kentucky bucked that trend.

A civil penalty "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Yet the Kentucky Supreme Court held that so long as the civil penalty has a direct mathematical relationship to the alleged harm, it is not an excessive fine. Pet. App. 29a. This holding would be laughable if it were not such a miscarriage of justice.

Under this rule, a State could impose a civil penalty of one million times the alleged harm without violating the Excessive Fines Clause. In other words, a tobacco company could be fined over $10 million if it sold one pack of cigarettes not listed on a state directory under the Master Settlement Agreement.

Sell a carton of delisted cigarettes, and a $100 million civil penalty would not violate the Excessive Fines Clause. The absurdity of this rule is self-evident. And it conflicts with the decisions of other state courts of last resort and federal courts of appeals.

The Supreme Court of California is a good example of the majority rule. When deciding whether a civil penalty violates the Excessive Fines Clause, it considers the harshness of the penalty compared to those imposed in other States and given the defendant's ability to pay. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421 (Cal. 2005) (citing *Bajakajian*, 524 U.S. at 337-38). The court also looks to the harm caused and its "relationship * * * [to] the penalty" and "the defendant's culpability." *Id.*

The Minnesota Supreme Court considers almost identical factors when deciding whether a civil penalty complies with the Excessive Fines Clause. *See Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 555 (Minn. 2003) (citation omitted). So too for the Supreme Court of Appeals of West Virginia. *See Ashland Specialty Co. Inc. v. Steager*, 818 S.E.2d 827, 836 (W. Va. 2018) (citation omitted).

These state-court decisions track federal courts of appeals' decisions. When examining whether a civil penalty is excessive, the Eighth Circuit considers "the sanctions in other cases for comparable misconduct," the "relationship between the penalty and the harm," and "the reprehensibility of the defendant's conduct." *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014) (citation omitted). The Ninth Circuit considers similar factors. *See SEC v. Brookstreet Sec. Corp.*, 664

F. App'x 654, 656 (9th Cir. 2016) (*per curiam*) (citation omitted).

The only other appellate court to adopt a view like the Kentucky Supreme Court's is the Fifth Circuit. It has held that "[n]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000). This is close to the Kentucky Supreme Court's analysis here. The two courts give legislatures unfettered discretion to set civil penalties. Under the Kentucky Supreme Court's view, a civil penalty is constitutional if it is connected to the actual harm by some mathematical formula. The Fifth Circuit also blesses such penalties.

It is impossible to reconcile the Kentucky Supreme Court's and Fifth Circuit's decisions with the consensus view. Rather than examine the relevant factors, the Kentucky Supreme Court and Fifth Circuit use bright-line rules that permit any civil penalty if it is mathematically linked to the alleged harm. This deepening of the split between state courts of last resort and federal courts of appeals deserves the Court's attention. And because the split has not disappeared over the past two decades, there is no reason to wait for more percolation in the lower courts.

B. The Kentucky Supreme Court Ignored The Actual Harm When Examining Whether The Judgment Was An Excessive Fine.

This Court has explained that when considering whether a penalty is grossly disproportionate, courts must consider "the harm to the victim caused by the defendant's actions." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001) (citation omitted). Yet the Kentucky Supreme Court glossed over the actual harm that PokerStars caused the victims. This led to the erroneous Excessive Fines Clause analysis.

1. A brief description of poker and how PokerStars operated reveals the Kentucky Supreme Court's errors. Most poker games played on PokerStars during the lookback period were no-limit Texas hold 'em. This brief thus focuses on this type of poker. But the other poker variants prevalent during the lookback period, like pot-limit Omaha and Badugi, differ only in the games' rules.

In Texas hold 'em, between two and nine players are each dealt two "hole" cards face down. One player is designated the dealer. The player to the dealer's left must post a small blind, for example $1. The next person must then post a big blind, which is double the small blind. Play then begins with the player to the big blind's left having the option to "fold" (give up and not put any money in the pot), "call" (put $2 in the pot), or "raise" (put $4 or more in the pot). Each player in turn has the same options until everyone remaining in the hand has placed the same amount in the pot or placed all their money in the pot.

Three cards are then dealt face up in the center of the table. This is called the "flop." Play then begins with the first active player to the dealer's left. That person may "check" (stay in the hand for free) or bet any amount $2 or greater. Once a player bets, others may call or raise until all players have checked or all remaining players have placed the same amount in the pot or placed all their money in the pot.

Next comes the "turn": one card is placed face up in the center of the table. The same round of betting as on the flop starts. And then comes the "river": One card is placed face up in the center of the table. Again, the same round of betting as on the flop and turn occurs. (If only one player remains in the pot at any time, he wins the pot.)

At this point, all remaining players turn over their two hole cards. The person with the best five-card poker hand combining the five face-up cards and the two hole cards wins the pot. If more than one person has the same five-card poker hand, those players split the pot evenly. The dealer "button" then rotates to the next player and a new hand begins.

For a poker game with six people, a good player plays about one pot per three hands. But she doesn't win all of those hands. On average, she may win one pot per six hands. That seemingly bad ratio does not mean, however, that the good player is losing money. For example, she may win lots of hands with large pots and lose lots of hands with small pots. If this happens, she will come out ahead in the end.

Lots of mistakes may lead a player to lose in the end. A player who plays every hand will almost

certainly see his bank account dwindle. The same goes for a player who plays only one out of every twenty hands. It's almost impossible to win playing like that.

But it is impossible to tell by looking at just one hand whether a player is a net winner or loser. The only reliable way to tell is by looking at the player's long-term statistics. *See* Steven D. Levitt et al., *Is Texas Hold 'Em a Game of Chance? A Legal and Economic Analysis*, 101 Geo. L.J. 581, 597 (2013). PokerStars produced these long-term statistics for every Kentuckian who played during the lookback period. By examining the statistics, it is easy to determine who won and who lost during that period.

2. The statistics show that the Kentuckians who lost money during the lookback period lost $26 million—less than 3% of the final judgment. Yet the Kentucky Supreme Court thought it appropriate to total all lost hands for Kentuckians, even if some players made money while playing on PokerStars. Two examples show how this inflated the judgment.

Kentuckian "kamodadragon" played on PokerStars. During the lookback period, he or she earned $92,523.02—winning $888,187.22 from other players and losing $795,664.20 to other players. *Cf.* Commonwealth's Post Hearing Rebuttal and Supplemental Memorandum in Response to PokerStars' Motion to Alter Amend or Vacate at Ex. C, *Commonwealth ex rel. Tilley v. Pocket Kings, Ltd.*, No. 10-CI-505 (Ky. Cir. Ct. Feb. 4, 2016) (data used in calculations). Was he or she "harmed" by PokerStars? Of course not. But under the Kentucky Supreme Court's convoluted reasoning, the Commonwealth

could recover for PokerStars's "harm" to kamodadragon.

Even those perhaps harmed by PokerStars's conduct were not hurt to the extent found by the Kentucky Supreme Court. Kentuckian "Brycpa" lost $1,926.01—winning $907,444.53 from other players and losing $909,370.54 to other players. *Cf.* Commonwealth's Rebuttal, *supra* (data used in calculations). The Commonwealth's calculations allow it to recover up to 1000 times Brycpa's losses. This ratio is grossly disproportionate under any reasonable test.

As the Court explained in *Bajakajian*, a "grossly disproportion[ate]" civil penalty violates the Excessive Fines Clause. 524 U.S. at 334. Considering how poker is played, the civil penalty here is grossly disproportionate to the resulting harm: It is more than thirty-three times the amount that Kentuckians lost on PokerStars. The Supreme Court of Kentucky's refusal to properly apply *Bajakajian* cries out for review.

3. This focus solely on Kentuckians' losses is most generous to the Commonwealth and the Kentucky Supreme Court. A less generous focus is the amount that PokerStars received from operating in Kentucky during the lookback period. As noted above, PokerStars's Kentucky revenue during the lookback period was about $18 million—2% of the final judgment.

Each hand, one player wins money and one or more players lose money. But how does PokerStars profit off these interactions? It collects a "rake"—a

fee—from most pots. The rake for games with between three and nine players was tied to the pot size.

PokerStars used an incremental rake structure. For every $1 in the pot, PokerStars took $0.05. So if the pot was between $10 and $10.99, PokerStars took $0.50. There was a cap on the rake that PokerStars took depending on the game's size. For lower stakes games, the cap was $2. For middle stakes, like $1/$2 Texas hold 'em, the cap was $3, and for high stakes the cap was $5.

This rake was much lower than most brick-and-mortar poker rooms. They usually charge 10% up to $6 or $7—seven times the rake that PokerStars offered during the lookback period. The brick-and-mortar poker rooms also show how the Court should view the rake collected by PokerStars.

For higher-limit games at local casinos, the rake is not collected on a per-hand basis. Rather, each player must pay a fee every thirty minutes to play in the game. For example, each player must pay $7 to play for thirty minutes. This is called a "time rake." The casino does not take any money from pots. This time-rake structure shows that the fee collected by a casino or PokerStars is a service charge for playing poker. For casinos it covers the cost of rent, electricity, salaries, and other expenses. For PokerStars, the rake pays for software, staff, servers, and other costs. In other words, the rake is a service fee like those charged by other industries.

The way that PokerStars made money from tournaments during the lookback period also shows

that a rake is a service fee. The best-known tournament PokerStars held was called the Sunday Million. The entry fee for the tournament was $215. Of that, $200 went to the prize pool and $15 was the rake. The rake as a percentage of the entry fee varied depending on the cost to play and the number of players in the tournament. But it generally hovered between five and ten percent.

Whether a player was eliminated in the first hand of the tournament or won the six-figure first prize, she paid the same rake to play in the tournament. Again, this is like paying a service fee in any other industry. So PokerStars is not engaged in gambling. It generally could not lose money by offering poker games. But neither did it stand to collect a windfall.

This differentiates poker from other games covered by the LRA. A casino, for example, can lose money if a player goes on a hot streak playing baccarat or blackjack. In these games, the casino just trusts that, over time, it will come out ahead. Another differentiating factor is that if you are playing roulette against the house, it is impossible to win over a large enough sample size. But with poker, people can win over a large sample size. Some Kentuckians were among this group of winners on PokerStars.

This analysis doesn't even consider "rakeback." During the lookback period, PokerStars players could participate in a rewards program. Based on how much they played, players were refunded a portion of the rake that they paid while playing on PokerStars. This was the rakeback.

During the lookback period, the highest rewards level was called Supernova Elite. Players who reached the minimum threshold for that level received 74.6% of their rake back. *See PokerStars rakeback in 2011*, First Time Poker Player, https://bit.ly/3Djpssg (last visited Sept. 10, 2021). This means a Supernova Elite player who paid $10,000 in rake during a year would receive $7,460 back from PokerStars. Of course, this rakeback was not part of the Kentucky courts' damages calculation.

The $18 million rake calculation also used the "dealt" method rather than the "contributed" method. In an eight-player game, a hand may see only two players' money in the pot—$20 each. If PokerStars collected a $2 rake from the hand, under the dealt method PokerStars views all eight players as having paid $0.25 in rake. But under the contributed method, PokerStars views the two players who put money into the pot as having paid $1 in rake and the other six as having paid $0 in rake.

The Kentucky Supreme Court should have considered these important nuances when deciding whether the civil penalty here was grossly disproportionate. But it chose instead to focus solely on the mathematical relationship between the vastly inflated harm and the final judgment.

4. The Kentucky Supreme Court's opinion shows the disconnect between the actual harm and the $870 million judgment. The Court held that when "Bugsy213" won $7,160.51 on PokerStars, the Commonwealth's ability to recover under the LRA turned on who it sued. It would be unable to recover if it sued those whom Bugsy213 played because the

player's net losses determine the potential LRA recovery. *See* Pet. App. 30a. But the Commonwealth could recover because it sued PokerStars, which merely collected a rake.

As Bugsy213 lost $100,893.46 to other players on PokerStars—while also winning $108,053.97 from other players—the Kentucky Supreme Court held that the Commonwealth could collect up to treble the former amount. *See* Pet. App. 30a. In other words, the Commonwealth's recovery can go from $0 to over $300,000 because it sued the game's host.

Bugsy213 netted a few thousand dollars from playing on PokerStars. Yet the Commonwealth could recover hundreds of thousands of dollars more because of who it sued. This disparate recovery makes no sense. There is no proportionality between the actual harm—$0—and the potential liability. Despite the same facts, the defendant determined the potential recovery. This lack of a proportionate relationship between the actual harm and the civil penalty is what the Excessive Fines Clause bars.

The lack of proportionality is even worse when viewing the entire lookback period. Even the best poker players in the world have good days and bad days. Some days you win; some days you lose. But under the Kentucky Supreme Court's decision, each hand determines whether you are a winning or a losing poker player. Again, this bears no semblance to reality.

An amazing poker player wins about five big blinds per 100 hands. *See* Alton Hardin, *Understanding Win Rates In Poker* (Apr. 30, 2021),

https://bit.ly/3gg4AYR. So an amazing poker player in a $1/$2 game will win $10 per 100 hands. But this does not mean that he will win $10 over the next 100 hands. That $10 figure is just the expected value of his win. If he played an infinite number of 100 hand sessions, he would average a $10 win per session.

The standard deviation measures the variance between this expected win and the actual win. For poker players, an average standard deviation is about forty-two big blinds. *See Poker Standard Deviation*, The Poker Bank, https://bit.ly/37XZVq5 (last visited Sept. 10, 2021). This average standard deviation means that an awesome poker player will lose money in about 40% of his 100-hand groupings.

But if this same poker player played 100,000 hands—well within the normal range for a professional poker player during the lookback period—there is only a 0.0083% chance that the player would lose money. There is over a 99.99% chance that the player would have a bigger bankroll at the end of the 100,000 hands than he had at the beginning. Yet none of this mattered to the Kentucky Supreme Court.

A fine tied to the phantom "harm" of a player's growing bankroll is both arbitrary and grossly dipropionate. At most, a player who won $92,523.02 during the lookback period should be considered a "zero" when calculating the civil penalty. Yet the Kentucky Supreme Court allowed that player to be a "loser." Such sleight of hand to avoid the Excessive Fines Clause warrants this Court's review.

II. REVIEW IS NEEDED TO CLARIFY DUE-PROCESS LIMITS ON PUNITIVE DAMAGES.

A. The "Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (citing *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)). So although not called one, the $580 million award on top of the $290 million in compensatory damages is treated like a punitive damages award. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000).

Many courts continue to ignore due-process limits on punitive damage awards, which were already "well established" two decades ago. *State Farm*, 538 U.S. at 416. Ignoring due-process principles deprives defendants of their right to "fair notice * * * of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (citations omitted). This leads to an "arbitrary deprivation of property" by punitive damages bearing no relation to the plaintiffs' injury. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). The decision here is particularly dangerous because it does not compensate the injured for the alleged harm. Rather, it just pads the plaintiffs' bar's pocketbooks and the Commonwealth's coffers.

In *State Farm*, the Court said that "[w]hen compensatory damages are substantial," a 1:1 ratio between compensatory damages and punitive damages may "reach the outermost limit of the due process guarantee." 538 U.S. at 425. Some courts have disregarded this guidance as nonbinding "dicta." *E.g.*,

Cote v. Philip Morris USA, Inc., 985 F.3d 840, 849 (11th Cir. 2021) (citation omitted). Other courts have taken this Court at its word and imposed a 1:1 limit on punitive damages when there is a substantial compensatory award. *E.g.*, *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1090 (7th Cir. 2019).

Although the exact line of what is substantial is blurry, the judgment here meets any standard for a substantial award. For example, the Tenth Circuit has held that a $630,000 award is substantial. *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1208 (10th Cir. 2012). In the Sixth Circuit, $400,000 suffices. *Bach v. First Union Nat. Bank*, 486 F.3d 150, 156 (6th Cir. 2007). The judgment here is 460 times the size of a substantial award in the Tenth Circuit and 725 times the size of a substantial award in the Sixth Circuit. So it qualifies as substantial under any test.

B. Despite the Court's prior reluctance to specify "a bright-line ratio," *State Farm*, 538 U.S. at 425, the Court should impose a firm 1:1 cap on the ratio of punitive to compensatory damages when compensatory damages are substantial. Such a cap would ensure that punitive damages bear some reasonable relationship to the harm and stay within constitutional bounds.

Developments after *State Farm* show why the Court should draw a bright-line ratio for punitive damages to substantial compensatory damages. Despite hopes that *State Farm* would ensure defendants knew of their punitive-damage exposure, it did not "reduce the inconsistency or unpredictability of punitive damages awards." Laura J. Hines & N. William Hines, *Constitutional*

Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma, 66 Hastings L.J. 1257, 1257 (2015).

To solve the problem in maritime suits, the Court held that a 1:1 ratio was the maximum permissible punitive damages award after a $500 million compensatory-damages award. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15 (2008) (citing *State Farm*, 538 U.S. at 425). The Court should also place a 1:1 cap on non-maritime punitive damage awards. This is the only way that defendants will have notice of potential liability—notice that is required by the Due Process Clause.

Exxon's concerns about predictability and fairness apply equally in non-maritime cases. *See* Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 B.Y.U. L. Rev. 1, 25 (2012). "The real problem" is "the stark unpredictability of punitive damage awards," which "leads to inconsistency because two cases involving very similar facts can produce dramatically different punitive awards." *Id.* at 4, 7 (cleaned up). The Kentucky Supreme Court's decision highlights those concerns. A third party suing after someone won money in a poker game can recover six figures if he sues someone who ran a poker game. But he cannot recover if he sues the winners in the poker game.

In *Exxon*, the Court said that the solution was a 1:1 ratio between punitive damages and substantial compensatory damages. *Exxon*, 554 U.S. at 514-15. This ratio was not based on unique aspects of maritime law. Rather, it was based on the median ratio of state-court awards. *See id.* at 512-13. This

shows that the 1:1 ratio that the Court adopted for maritime cases in *Exxon* is also appropriate in other civil cases.

This case presents a good vehicle for the Court to address the issue. It is undisputed that the judgment here is substantial. So the Court wouldn't have to decide that issue. And the blameworthiness of PokerStars's conduct is low. It operated under the mistaken belief that its actions were legal. Thus, the Court need not examine egregious factual findings. The Court should therefore grant the Petition to also clarify the constitutional limits on punitive damages.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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