

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALEJANDRO ROSALES-GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Anyone can go to prison, but not everyone can pay a fine. The district court here imposed a \$4,000 fine against Mr. Rosales-Gonzalez, an indigent, non-citizen defendant, without considering his present or future ability to pay the fine.

In *United States v. Bajakajian*, 524 U.S. 321, 335–36 (1998), this Court suggested that a defendant’s ability to pay a fine is a relevant consideration when assessing whether a fine is constitutional under the Excessive Fines Clause. The Court, however, left the question unresolved. *Id.* at 340 n.15. Recently, in *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019), the Court again suggested that a defendant’s ability to pay a fine is a relevant consideration under the Excessive Fines Clause but again left the question open.

Accordingly, the question presented, on which the circuits are split, is:

Whether a defendant’s ability to pay a fine is a relevant consideration when determining if a fine is excessive under the Eighth Amendment.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Rosales-Gonzalez, Case No. 6:19-cr-203-Orl-78EJK
(January 2, 2020) (corrected judgment)

United States Court of Appeals (11th Cir.)

United States v. Rosales-Gonzalez, No. 20-10018 (March 9, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Alejandro Rosales-Gonzalez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's unpublished opinion dismissing in part and affirming in part Mr. Rosales-Gonzalez's sentence, *United States v. Rosales-Gonzalez*, 850 F. App'x 668 (11th Cir. 2021), is provided in Appendix A.

JURISDICTION

The Eleventh Circuit entered its judgment on March 9, 2021. This Court's March 19, 2020 order extended the deadline for a petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

INTRODUCTION

This question presented implicates a circuit split on a question left open by this Court in *Bajakajian* and *Timbs*—whether a defendant’s ability to pay a fine is a relevant consideration when determining if a fine is excessive under the Eighth Amendment. Because the question presented is exceptionally important, outcome determinative, and the circuit courts are unwilling to resolve their disagreement, Mr. Rosales-Gonzalez respectfully requests that this Court grant his petition for a writ of certiorari.

STATEMENT OF THE CASE

1. In 2019, the Immigration and Custom Enforcement (ICE) agency determined Mr. Rosales-Gonzalez was likely in the country illegally and lodged an immigration detainer against him. According to ICE’s file, Mr. Rosales-Gonzalez has been granted voluntary departure three times and deported five times.

2. Mr. Rosales-Gonzalez pled guilty with a written plea agreement to an information charging him with illegally reentering the country after deportation, in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(1).

3. In anticipation of sentencing, Probation prepared a presentence investigation report. In it, Probation discussed Mr. Rosales-Gonzalez's background. Mr. Rosales-Gonzalez was born in Mexico and raised "in a dangerous neighborhood riddled with violence and drugs." At age seventeen, he came to this country to escape the crime and poverty in Mexico. He has four children, the youngest of which, V.J., lives with her mother, Wendy Cardoza Sanchez, in Virginia.

While in the United States, Mr. Rosales-Gonzalez worked to support Wendy and V.J., as well as his mom and stepfather, who are still in Mexico. Before his arrest, he worked in construction for about two months, making \$16 an hour. And before that, he spent six months working in irrigation, making \$850 per week. Before working in irrigation, he made about \$120 a day working as a cook. From this

modest income, Mr. Rosales-Gonzalez would send \$400 every month to Wendy and V.J. and \$650 every month to his parents.¹

Although Probation calculated Mr. Rosales-Gonzalez's guideline fine range as \$4,000 to \$40,000, it stated that "[g]iven his financial condition and pending deportation, it appears that Rosales-Gonzalez does not have the ability to pay a fine."

4. At sentencing, the district court adopted the PSR without change, including Probation's guidelines calculations and the fact that Mr. Rosales-Gonzalez did "not have the ability to pay a fine."

Defense counsel explained that Mr. Rosales-Gonzalez first came to the country almost twenty years ago to escape a life of crime and poverty. From 2007 until 2013, he was romantically involved with Wendy, and they had a daughter, V.J. It was during that time, defense counsel argued, that Mr. Rosales-Gonzalez sustained the bulk of his illegal reentry convictions. When Mr. Rosales-Gonzalez allocuted, he accepted

¹ The record shows that Mr. Rosales-Gonzalez had only one job in Mexico—a part-time job in a grocery store after school when he was twelve years old. As explained, Mr. Rosales-Gonzalez left Mexico to escape the crime and poverty. The government will return him to Mexico when he completes his term of imprisonment.

responsibility for his conduct and told the district court he came back to the country for his daughter because Wendy is sick.

The district court imposed a sentence of thirty-six months' imprisonment, with no supervision to follow, and a \$4,000 fine. The district court provided no reason for why it imposed the fine. After the court imposed its sentence, Mr. Rosales-Gonzalez objected to the fine because the court had previously found him to be indigent.²

5. On appeal, Mr. Rosales-Gonzalez argued, among other things, that the district court imposed the fine in violation of the Excessive Fines Clause given his inability to pay the fine. The Eleventh Circuit held that the Mr. Rosales-Gonzalez's ability to pay the fine was irrelevant under the Excessive Fines Clause and affirmed his sentence. *United States v. Rosales-Gonzalez*, 850 F. App'x 668, 671–72 (11th Cir. 2021)

² According to the judgment, Mr. Rosales-Gonzalez must pay interest on the fine unless he paid the entire \$4,000 within fourteen days of the judgment. The record does not show that Mr. Rosales-Gonzalez has paid the fine, and it is unlikely he did given his indigence. Moreover, Mr. Rosales-Gonzalez cannot earn money in prison because, as a noncitizen, he is ineligible for prison work programs. *See United States v. Hernandez-Guevara*, 448 F. App'x 39, 42 n.4 (11th Cir. 2011). Therefore, Mr. Rosales likely owes the government more than \$4,000.

(citing *Bajakajian*, 524 U.S. at 334, and *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009)).

REASONS FOR GRANTING THE WRIT

I. Although this Court has suggested that a defendant’s inability to pay a fine is a relevant consideration under the Excessive Fines Clause, the Court has left the question open.

This Court’s leading case on the Excessive Fines Clause is *Bajakajian*. There, a defendant tried to take \$357,144 out of the country without filing a report, in violation of 31 U.S.C. § 5316(a), and the government claimed that the entire amount was subject to forfeiture. 524 U.S. at 324–27. This Court pointed out that “[t]he touchstone” of the Excessive Fines Clause inquiry is “the principle of proportionality.” *Id.* at 334. After considering the defendant’s culpability, the relationship between the harm and the penalty, and the penalties imposed in similar statutes, the Court held that the forfeiture of the defendant’s money was an “excessive fine” barred by the Eighth Amendment. *Id.* at 337–40. As part of its holding, however, the Court noted that the defendant “[did] not argue that his wealth or income [were] relevant to the proportionality determination or that full forfeiture would

deprive him of his livelihood.” *Id.* at 339–40 n.15. Thus, given the defendant’s failure to assert the argument, the Court did not opine on whether a defendant’s current or future ability to pay a fine is a relevant consideration. The Court, however, suggested that such a consideration is appropriate under the original understanding of the Excessive Fines Clause. As it explained, the Excessive Fines Clause can trace its roots back to Magna Carta, under which a fine (also known as an amercement) could not: (1) be disproportional to the offense; or (2) “deprive a wrongdoer of his livelihood.” *Id.* at 335–36.

Recently, in *Timbs*, this Court addressed whether the Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment’s Due Process Clause. There, the defendant pled guilty to drug and theft offenses, and the government claimed his car was subject to forfeiture because he used it to transport drugs. 139 S. Ct. at 686. The Indiana Supreme Court held that the Excessive Fines Clause applied to only federal action, and this Court reversed, holding that the Due Process Clause incorporates the Excessive Fines Clause. *Id.* at 686–87. In coming to its holding, the Court traced the Excessive Fines Clause’s “venerable lineage” back to Magna Carta

and reiterated that “Magna Carta required that economic sanctions ‘be proportioned to the wrong’ and ‘not be so large as to deprive [an offender] of his livelihood.’” *Id.* at 688 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989)); *see also id.* (“[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear” (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 372 (1769)). Despite this history, the Court, citing *Bajakajian*, again left the question open. *Id.* (citing *Bajakajian*, 524 U.S. at 340 n.15). Still, the Court strongly suggested that under the original understanding of the Excessive Fines Clause, a court had to consider a defendant’s current and future ability to pay a fine.

II. The circuits are split on the question presented.

Although this Court has strongly suggested that a defendant’s ability to pay is a relevant consideration when determining if a fine is excessive under the Excessive Fines Clause, the circuits are split on the question. *Compare United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016) (“We therefore hold that, when analyzing a forfeiture’s proportionality under the Excessive Fines Clause, courts may consider .

. . . whether the forfeiture would deprive the defendant of his livelihood, i.e., his future ability to earn a living[.]” (internal quotation marks omitted)), *United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007) (“Given the history behind the Excessive Fines Clause, it is appropriate to consider whether the forfeiture in question would deprive [the defendant] of his livelihood.”), and *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998) (noting that ability to pay is factor when determining if fine complies with Excessive Fines Clause), with *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d at 1304, 1311 (11th Cir. 1999) (“[E]xcessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender.”), and *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998) (“[A]n Eighth Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender.”).³ See also *United*

³ State courts are also split on the question presented. Compare *Colorado Dep’t of Lab. & Emp. v. Dami Hosp., LLC*, 442 P.3d 94, 102 (Colo. 2019) (“We thus conclude that courts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment.”), and *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 189 (Pa. 2017) (“We find such consideration—whether the forfeiture would deprive the property owner of his or her livelihood, i.e., his current or ‘future ability to earn a living’ . . . to be

States v. Bikundi, 926 F.3d 761, 796 n.5 (D.C. Cir. 2019) (discussing the circuit split); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 834–37 (2013) (same); Colleen P. Murphy, *Reviewing Congressionally Created Remedies for Excessiveness*, 73 OHIO ST. L.J. 651, 700 (2012) (same). This Court should use this case, which squarely presents this important legal issue, to resolve the conflict.

A. The First, Second, and Eighth Circuits have held that a defendant’s inability to pay a fine is a relevant consideration under the Excessive Fines Clause.

The First, Second, and Eighth Circuits have held that a defendant’s ability to pay a fine is a relevant consideration under the Excessive Fines Clause.

The Eighth Circuit, for example, has 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.” *Lippert*, 148 F.3d at 978. In *Lippert*, the defendant pled guilty to knowingly and willfully soliciting and accepting

entirely appropriate and consistent with the teachings of *Bajakajian* . . .”), with *State v. Izzolena*, 609 N.W.2d 541, 551 (Iowa 2000) (“The manner in which the amount of a particular fine impacts a particular offender is not the focus of the [proportionality] test.”).

kickbacks. *Id.* at 975. The government later filed a civil action against the defendant seeking civil penalties and damages, and the district court awarded the government \$352,823.60. *Id.* at 975–76. The defendant appealed, arguing the judgment violated the Excessive Fines Clause, and the Eighth Circuit held the judgment was merely a compensatory remedy and was not grossly disproportionate to the gravity of the offense. *Id.* at 976, 978. Although the Eight Circuit affirmed the imposition of the fine because the defendant had a net worth of \$5051,015.15, the court acknowledged that a defendant’s ability to pay is a factor under the Excessive Fines Clause. *Id.* at 978.

The First Circuit has adopted a similar standard. *See Jose*, 499 F.3d at 113. In *Jose*, the defendant pled guilty to three offenses that stemmed from his attempt to smuggle \$114,948 out of the country. *Id.* at 106. The district court entered a forfeiture order as to the entire amount. *Id.* at 107–08. On appeal, the First Circuit first considered the same three proportionality factors that this Court considered in *Bajakajian*, reasoning that all three factors weighed against the defendant. *Id.* at 111–13. But “consideration of a fourth factor [made] it abundantly clear that there was no error.” *Id.* at 113. “Given the

history behind the Excessive Fines Clause, it [was] appropriate to consider whether the forfeiture in question would deprive Jose of his livelihood.” *Id.* The court ultimately determined that the forfeiture “was not related to efforts to maintain his livelihood” and held that the district court did not err when it entered the forfeiture order. *Id.*⁴

Most recently, the Second Circuit held that a district court should consider a defendant’s future ability to earn a living when imposing a fine. *Viloski*, 814 F.3d at 111. In *Viloski*, a jury found that the defendant was guilty of several offenses stemming from his involvement in a kickback scheme, and the district court issued a forfeiture order in the amount of \$1,273,285.50. *Id.* at 107. On appeal, the defendant argued the district court erred by not considering his personal circumstances. *Id.* at 108. The Second Circuit held that *Bajakajian* and its discussion of the original meaning of the Excessive Fines Clause makes clear that a court should consider whether a punishment would

⁴ Later, in *United States v. Levesque*, the First Circuit expressly recognized that its holding in *Jose* conflicted with the Eleventh Circuit’s position on the issue. 546 F.3d 78, 83 n.4 (1st Cir. 2008).

deprive an offender of his future ability to earn a living. *Id.* at 111.⁵ Applying that framework, the court held that the district court’s forfeiture order was not unconstitutionally excessive. *Id.* at 113–15. The traditional *Bajakajian* factors supported that the order was not grossly disproportionate to the offense, and the defendant presented no evidence that it would deprive him of his livelihood. *Id.*⁶

Thus, although the First, Second, and Eighth Circuits slightly differ in their reasoning, they are all firmly entrenched in the same camp—a defendant’s ability to pay a fine is a relevant consideration under the Excessive Fines Clause.

⁵ Although the Second Circuit agreed with the First Circuit that the deprivation of an individual’s livelihood is a relevant factor, it disagreed with the First Circuit on whether that factor was part of the proportionality inquiry or a separate inquiry. 814 F.3d at 112 n.12. In the Second Circuit’s view, “a defendant’s livelihood is a component of the proportionality analysis.” *Id.* at 112.

⁶ The Second Circuit rejected the notion that a court must consider a defendant’s personal circumstances, like age or health. 814 F.3d at 112. But the court recognized that a defendant’s personal circumstances may still be “indirectly relevant” if those circumstances impact the defendant’s livelihood. *Id.*

B. The Eleventh and Ninth Circuits have held that a defendant's inability to pay a fine is irrelevant under the Excessive Fines Clause.

The Eleventh and Ninth Circuits, on the other hand, have held that a defendant's ability to pay a fine is irrelevant under the Excessive Fines Clause.

The Eleventh Circuit, for instance, has held that the Excessive Fines Clause analysis concerns only the offense, not the offender. *See Wilton Manors*, 175 F.3d at 1311. In *Wilton Manors*, the government filed an *in rem* action seeking forfeiture against two parcels of land after the owner of the lots was convicted in state court for drug offenses. *Id.* at 1307. The district court granted the government's motion for summary judgment as to one of the lots. *Id.* On appeal, the owner argued that the court should consider the special hardship the forfeiture would impose on him because the property was his personal residence and he could not purchase another one given his lack of assets and permanent disability. *Id.* at 1311. The Eleventh Circuit rejected that argument, holding that the forfeiture's impact on the defendant was irrelevant. *See id.* ("In other words, excessiveness is determined in

relation to the characteristics of the offense, not in relation to the characteristics of the offender.”).⁷

The Ninth Circuit has aligned with the Eleventh Circuit. *See Dubose*, 146 F.3d at 1146. In *Dubose*, the Ninth Circuit consolidated the appeals of two defendants, each of whom the district court ordered to pay restitution. *Id.* at 1142. The defendants argued that the district court overlooked their inability to pay when it imposed the restitution. *Id.* at 1145. The Ninth Circuit held that “an Eighth Amendment gross proportionality analysis does not require an inquiry into the hardship the sanction may work on the offender.” *Id.* at 1146.

Thus, contrary to the First, Second, and Eighth Circuits, the Ninth and Eleventh Circuits have held a fine’s impact on a defendant is irrelevant under the Excessive Fines Clause.

⁷ The Eleventh Circuit has also applied this rule in criminal cases, including this one. *See Seher*, 562 F.3d at 1371 (“We do not take into account the impact the fine would have on an individual defendant.”); *Rosales-Gonzalez*, 850 F. App’x at 671–72 (“In conducting the three-pronged analysis of proportionality to determine whether a fine is excessive, we do not consider the impact the fine would have on an individual defendant.”).

III. The Eleventh Circuit’s ruling is wrong.

Respectfully, the Eleventh Circuit got it wrong. In Mr. Rosales-Gonzalez’s case, the Eleventh Circuit relied on *Seher*—which in turn relied on *Wilton Manors*—to hold that a defendant’s inability to pay a fine is irrelevant under the Excessive Fine’s Clause. *Rosales-Gonzalez*, 850 F. App’x at 671–72 (citing *Seher*, 562 F.3d at 1371); *see also Seher*, 562 F.3d at 1371 (citing *Wilton Manors*, 175 F.3d at 1311). *Wilton Manors*, in turn, relied on this Court’s decision in *Bajakajian*, reasoning that under *Bajakajian*, an offender’s ability to pay is irrelevant:

The Supreme Court . . . has made clear that whether a forfeiture is “excessive” is determined by comparing the amount of the forfeiture to the gravity of the offense, *see Bajakajian*, 524 U.S. at ----, 118 S. Ct. at 2036, and not by comparing the amount of the forfeiture to the amount of the owner’s assets. In other words, excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender.

Wilton Manors, 175 F.3d at 1311.⁸

But as explained *supra* in Section I, the *Bajakajian* Court not only left this question open, 524 U.S. at 340 n.15, but also suggested that a

⁸ The Eleventh Circuit relied on the same reasoning here. *Rosales-Gonzalez*, 850 F. App’x at 671 (citing *Bajakajian*, 524 U.S. at 334).

defendant's ability to pay was a relevant consideration under the original meaning of the Excessive Fines Clause, which dated back to Magna Carta. *Id.* at 335–36. And this Court's recent decision in *Timbs* also suggested an offender's ability to pay is a relevant consideration while leaving the question open. 139 S. Ct. at 688. Thus, the Eleventh Circuit's contrary holding is simply a product of the court's misreading of *Bajakajian*, and not from any in-depth analysis of the Excessive Fines Clause.

Indeed, the Eleventh Circuit failed to examine this Court's discussion of the Excessive Fines Clause's history. The First, Second, and Eighth Circuits, however, all considered this history. *See Viloski*, 814 F.3d at 111; *Jose*, 499 F.3d at 113; *Lippert*, 148 F.3d at 978. And when they did, each found that the impact a fine has on a defendant's livelihood is a relevant consideration under the Excessive Fines Clause. In fact, no court has considered this history and come to a contrary conclusion. Thus, had the Eleventh Circuit examined the original meaning of the Excessive Fines Clause—and not misread *Bajakajian*—it too would have likely concluded that a defendant's ability to pay is a relevant consideration under the Excessive Fines Clause. The Eleventh

Circuit, however, wrongly attributed its rule to *Bajakajian* and has reflexively perpetuated its flaw ever since.

IV. The question presented is extremely important.

Generally, the maximum statutory fine for a federal felony conviction, including a reentry conviction, is \$250,000. 18 U.S.C. § 3751(b)(3). And if a district court imposes a fine that is \$250,000 or lower, it is—at least in the Eleventh Circuit—presumptively constitutional. *See Rosales-Gonzalez*, 850 F. App'x at 672 (citing *Seher*, 562 F.3d at 1371). Needless to say, a fine of \$250,000 would certainly impact the livelihood of an indigent non-citizen—indeed, it could bankrupt most people.

The question presented, therefore, affects not only the constitutional rights of thousands of people, but also whether a federal district court can impose a dramatically life-altering fine without concern for the fine's impact on a defendant's livelihood. It is important that this Court resolve the split and clarify whether a defendant's ability to pay a fine is a relevant consideration under the Excessive Fines Clause.

V. This case is an excellent vehicle to resolve the conflict.

This case provides a particularly good opportunity to resolve the entrenched disagreement among the courts on the question presented. First, the parties fully litigated the question on appeal, and the Eleventh Circuit clearly decided it. Second, the split on the question presented is squarely implicated here, and this case does not involve unique or disputed factual findings. Finally, if this Court adopts the position of the First, Second, or Eighth Circuits, Mr. Rosales-Gonzalez may have a right to relief.

* * *

In *Bajakajian* and *Timbs*, this Court telegraphed the answer to the question presented: under the Eighth Amendment, a court must consider a defendant's ability to pay a fine. Still, there are appellate courts that refuse to consider the impact a fine has on a defendant's livelihood. That is clearly contrary to the original meaning of the Excessive Fines Clause. If Mr. Rosales-Gonzalez had been sentenced in New York or Puerto Rico, instead of Florida, the district court would have been constitutionally required to consider his inability to pay a fine before imposing one. The imposition of a fine that impacts a defendant's

livelihood should not depend on geographical happenstance. This Court's intervention is needed.

CONCLUSION

For the above reasons, Mr. Rosales-Gonzalez respectfully requests that this Court grant his petition for a writ of certiorari.

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