No. 21-5305

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**ALEJANDRO ROSALES-GONZALEZ,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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

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# REPLY BRIEF FOR PETITIONER

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

Cases:

Page

Constitution and Statutes:



Other Authorities:

## REPLY BRIEF OF PETITIONER

This case squarely presents a question of immense and recurring importance that has sharply divided both the federal circuits and state supreme courts: whether a defendant's current or future ability to pay—*i.e.*, his financial circumstances—is relevant when determining whether a fine violates the Eighth Amendment's ban on "excessive fines." This Court left that precise issue open in *United States v. Bajakajian*, 524 U.S. 321, 340 n.15 (1998), and *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019). Only this Court can resolve the deep and growing fracture in courts across the nation.

The government (at 11-12) disclaims the entrenched split only by drawing a perplexing line between fines that the defendant cannot pay, now or ever, and fines that would destroy the defendant's "future livelihood." In the government's view, the Eleventh Circuit blessed only unpayable fines and other courts reject only livelihood-destroying fines. That is doubly wrong. The Eleventh Circuit, along with the Ninth Circuit and three state supreme courts, categorically bars *any* consideration of the defendant's financial circumstances. That rule flatly contradicts the decisions of the Eighth Circuit and seven state supreme courts that recognize the relevance of defendants' financial circumstances generally, not limited to destruction of livelihood. That rule also contradicts decisions of the First and Second Circuits and Washington Supreme Court, which use a destruction-of-livelihood standard. That standard

speaks to *how* a defendant's financial circumstances are relevant and necessarily indicates that these circumstances *are* relevant.

This split has profound consequences for millions of indigent people, including petitioner. Petitioner, who lacks any assets, obviously cannot pay his fine now while in federal custody. Yet interest and penalties accrue. After release, the government will deport petitioner to Mexico, a country where he has only one recorded job—an after-school stint at a grocery store when he was twelve. In three circuits and eight States, sentencing courts could consider these facts to conclude that petitioner's fine is constitutionally excessive. In the Eleventh Circuit, along with the Ninth Circuit and three States, courts cannot consider these facts. The Eleventh Circuit's rule dooms petitioner and people like him to a cycle of poverty, perpetually burdened by ever-growing fines, in contravention of nearly a millennium of Anglo-American history. Only this Court can remedy that uneven treatment spanning five circuits and eleven States.

## I. The Federal Circuits and State Supreme Courts Are Deeply Divided

1. The government (at 12) asserts that other courts recognize excessive-fines claims only when the fine would destroy the defendant's livelihood and that the Eleventh Circuit has not weighed in on that issue. That assertion is demonstrably incorrect. The decision below sweepingly held that "[w]hether a fine is excessive is determined in relation to the characteristics of the offense, not the characteristics of the offender. . . . [W]e do not consider the impact the fine would have on an individual

defendant." Pet. App. 4. That unambiguous holding forecloses any consideration of a fine's impact on the individual, whether or not the fine is alleged to be livelihood-destroying. And that holding followed from Eleventh Circuit precedent, which squarely forecloses any argument based on the defendant's personal financial circumstances, including that a fine would deprive a defendant of "his entire livelihood." *United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999). In short, the Eleventh Circuit categorically forecloses any consideration of a defendant's ability to pay a fine. *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 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."); *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009) ("We do not take into account the impact the fine would have on an individual defendant.").

The Ninth Circuit likewise categorically bars *any* "inquiry into the hardship the sanction may work on the offender." *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998). The supreme courts of Iowa, South Dakota, and West Virginia also do not consider the defendant's personal financial circumstances. *See State v. Izzolena*, 609 N.W. 2d 541, 551 (Iowa 2000) ("The manner in which the amount of a particular fine impacts a particular offender is not the focus of the [excessive-fines] test."); *State v. Webb*, 856 N.W. 2d 171, 175-76 (S.D. 2014) (rejecting inability-to-pay argument because it "loses sight of the question at issue—whether the criminal fine is grossly disproportionate to the offense committed"); *State v. Murrell*, 499 S.E. 2d

870, 874 (W. Va. 1997) (agreeing that the Eighth Amendment does "not compel an inquiry into the ability to pay a fine prior to the imposition of that fine"). In all of those jurisdictions, the defendant's financial circumstances are categorically irrelevant.

Directly conflicting with the above decisions are decisions from the First, Second, and Eighth Circuits and eight state supreme courts, which recognize that a defendant's financial circumstances *are* relevant to the excessive-fines inquiry. These courts vary in their articulation of how those circumstances factor into the excessiveness analysis, but on the question presented—whether current or future ability to pay is *relevant* in the first place—all disagree with the categorical rule adopted by the Ninth and Eleventh Circuits and three state supreme courts above.

The Eighth Circuit and seven state supreme courts articulate ability to pay's relevance in broad terms. None of these courts limit the constitutional inquiry to whether the fine will deprive the defendant of his livelihood. Start with the Eighth Circuit, which recognizes that "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). The government (at 16 & n.2) manufactures "intracircuit tension" by pointing to post-*Lippert* cases involving *forfeitures* that do not consider ability to pay. But *Lippert* itself recognized that a defendant's personal circumstances are irrelevant when the government seeks to forfeit property. That rule is unique to the Eighth Circuit but

nonetheless unambiguous: for "fines, as opposed to forfeitures," courts must consider "the defendant's ability to pay." *Id.* at 978.

Moreover, three state supreme courts—California, Delaware, and Tennessee—squarely hold that the Eighth Amendment inquiry demands consideration of a defendant's ability to pay; none of these decisions even mention deprivation of livelihood. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421 (Cal. 2005) (relevant factors under the Eighth Amendment include "the defendant's ability to pay"); *Traylor v. State*, 458 A.2d 1170, 1178 (Del. 1983) (same); *Stuart v. State Dep't of Safety*, 963 S.W. 2d 28, 36 (Tenn. 1998) (courts should consider "the claimant's financial resources" in the Excessive Fines Clause inquiry).

Four other state supreme courts—Colorado, Indiana, Montana, and Pennsylvania—embrace the same broad rule, while also mentioning the relevance of livelihood-destroying fines. Although the Colorado Supreme Court has noted the historical tradition against fines that would "'deprive [a person] of his livelihood,'" that court holds broadly that "courts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment." *Colo. Dep't of Lab. & Emp't v. Dami Hosp., LLC*, 442 P.3d 94, 101, 102 (Colo. 2019) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)). The government (at 17) argues that the Colorado Supreme Court's decision is limited to livelihood-destroying fines because the court noted that a bankruptcy-inducing fine would be "substantially more onerous." 442 P.3d at 102. But the court's holding is

broader: "In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration." *Id.* at 103.

Similarly, although the Indiana and Montana Supreme Courts have discussed the historical rule against destroying an offender's livelihood, those cases hold that defendants' "economic means" or "financial resources" are relevant to the Eighth Amendment analysis. *State v. Timbs*, 134 N.E. 3d 12, 36 (Ind. 2019); *State v. Yang*, 452 P.3d 897, 904 (Mont. 2019). Critically, the Pennsylvania Supreme Court recognizes that a penalty can violate the Excessive Fines Clause based on either "financial or other consequences" *or* the penalty's tendency to "deprive the [defendant] of his or her livelihood." *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 188 (Pa. 2017). The government's distinction of *1997 Chevrolet* (at 17) totally ignores the first part of the court's holding.

The First and Second Circuits also recognize the relevance of defendants' financial circumstances by holding that livelihood-destroying fines can violate the Excessive Fines Clause. Pet. 11-13. The Washington Supreme Court endorsed the same rule shortly after this petition was filed. *City of Seattle v. Long*, 493 P.3d 94, 113 (Wash. 2021). The government (at 12-15) takes no issue with petitioner's characterization of the First and Second Circuit cases. Instead, it emphasizes these decisions' focus on the destruction of livelihood. But consideration of whether a fine would destroy a defendant's livelihood is undeniably irreconcilable with the Eleventh Circuit's rule that the defendant's personal circumstances are irrelevant. To consider whether

a fine would destroy the defendant's livelihood is to "consider the impact the fine would have on an individual defendant." *Contra* Pet. App. 4. The Eleventh Circuit rejects any claim based on personal circumstances, even if articulated in terms of destruction of livelihood. *Dicter*, 198 F.3d at 1292 n.11. Indeed, the First Circuit itself recognizes that it is "at odds with the Eleventh Circuit," *United States v. Levesque*, 546 F.3d 78, 83 n.4 (1st Cir. 2008), notwithstanding the government's assurances to the contrary.

In short, the split could not be clearer. Courts and commentators acknowledge the split on whether the Excessive Fines Clause "incorporates an inquiry regarding a defendant's ability to pay." *Yang*, 452 P.3d at 903 n.3; *see also* Pet. 9-10. This split is especially untenable because it produces divergent outcomes within the same State depending on whether the state or federal government imposes the fine. In Iowa and South Dakota, for example, state courts do not consider ability to pay, but federal courts do (under Eighth Circuit law). In California, Montana, and Washington, by contrast, state courts consider ability to pay, while federal courts do not (under Ninth Circuit law). That arbitrary regime demands correction.

2. The split is outcome determinative here. Petitioner's presentence report states that petitioner appears not to "have the ability to pay a fine" "[g]iven his financial condition and pending deportation." PSR ¶ 68. The government does not dispute that petitioner cannot currently pay while he sits in prison with no income or assets.

*See* PSR ¶ 66. Meanwhile, interest continues to accrue on the unpaid fine and petitioner already faces a 25% nonpayment penalty. *See* 18 U.S.C. §§ 3572(h), (i), 3612(f), (g). Any attempt to repay the fine from Mexico following deportation would jeopardize petitioner's ability to support himself and his family. *See* C.A. Reply Br. 12.

The government (at 11) highlights petitioner's "significant history of employment in both Mexico and the United States." But in Mexico—the country to which petitioner will be deported—petitioner's only recorded employment is an after-school job at a grocery store when he was twelve years old. PSR ¶ 65. The government's notion that petitioner, back in Mexico, can readily find gainful employment that would allow him to continue supporting himself and his family *and* pay off an ever-growing debt to the U.S. Treasury lacks any grounding in the record. Petitioner's diabetic mother in Mexico and ten-year-old daughter in Virginia both rely on him for financial support. *See* PSR ¶¶ 46, 52. At minimum, the district court should have the opportunity to weigh the evidence and determine whether petitioner's fine is constitutional in light of his financial circumstances. Yet, in the Eleventh Circuit, all of these facts are constitutionally irrelevant.

3. In all events, the government's distinction between unpayable fines and livelihood-destroying ones is meritless. As explained above, that distinction does not mitigate the split because the Eleventh Circuit squarely rejected any argument based on the defendant's personal financial circumstances while numerous courts consider those circumstances, including ability to pay. The government's distinction is also

befuddling on its own terms. By "ability to pay," the government does not mean "ability to pay today." The government (at 12) apparently accepts that the court of appeals rejected petitioner's claim based on petitioner's "inability to pay at the time of conviction or the possibility that he would be unable to pay the fine in the future." In other words, the government accepts that "ability to pay" claims, including the one here, ask courts to consider not just the defendant's *present* ability to pay but his *future* ability to pay as well.

That leaves the government to hypothesize a distinction between fines the defendant cannot pay, now or ever, and fines that would destroy the defendant's "future livelihood." The government never explains what "future livelihood" means, but based on its citation to petitioner's employment history, the government appears to think that a rule barring livelihood-destroying fines bars only those fines that would prevent the defendant from working. Br. in Opp. 11. Under that logic, the district court could have imposed a $250,000 fine (the statutory maximum) on petitioner so long as that fine would not prevent him from finding a job once he is released from prison and deported. That conception of the Excessive Fines Clause might protect people (like business owners) whose line of work depends on an asset (their business) that could be taken from them. And that conception might bar fines that leave a working person so destitute as to be unable to hold a job. But abusive fines that a defendant could spend his whole life failing to pay off while living in poverty would apparently be constitutionally permissible. That cannot be right.

## II. The Question Presented Is Important, Recurring, and Cleanly Presented

1. As petitioner's *amici* highlight, the question presented implicates "an urgent public policy problem that demands a resolution." DPA Br. 15-16. Criminal fines are non-dischargeable in bankruptcy, 11 U.S.C. § 523(a)(7), and can force defendants "to forego basic necessities like food, housing, hygiene, or medicine" just to keep up with payments, Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 8 (2018) (footnotes omitted). Failing to pay a fine often leads to more fines, producing a vicious cycle of "poverty penalties." *Id.* at 7. Likewise, forfeiting key assets like a car, house, or even a cell phone undermines individuals' ability to work, live healthy lives, or otherwise support themselves and their families. DPA Br. 17-21. The sheer number of federal appellate court and state supreme court cases to address the issue and the ubiquity of forfeitures and fines on individuals with limited means call out for this Court's intervention.

The government (at 18-19) brushes aside the "practical impact" of the question presented, on the ground that section 5E1.2 of the Sentencing Guidelines independently requires consideration of ability to pay for criminal fines. For three reasons, that provision does not diminish the importance of the question presented.

*First*, federal plea agreements routinely waive appeals of Guidelines objections while preserving constitutional challenges. *E.g.*, *United States v. Stuber*, 859 F. App'x 7, 8 (8th Cir. 2021); *United States v. Parenteau*, 506 F. App'x 430, 433 (6th Cir. 2012);

*United States v. Ramirez*, 448 F. App'x 727, 728 (9th Cir. 2011). The question presented here arose in that way: petitioner's appeal waiver in his plea agreement carved out Eighth Amendment challenges. Pet. App. 2. That waiver is standard in the Middle District of Florida.[1] Ninety-seven percent of federal convictions are obtained by guilty plea. *Missouri v. Frye*, 566 U.S. 134, 143 (2012). A substantial number of those cases will involve Guidelines appeal waivers. In such cases, the Excessive Fines Clause is the only protection against a court's imposition of excessive fines or monetary penalties.

*Second*, the Excessive Fines Clause "applies identically to both the Federal Government and the States." *Timbs*, 139 S. Ct. at 689 (cleaned up). States of course are not bound by the Guidelines, so the constitutional question frequently arises in States. After *Timbs* held that the Fourteenth Amendment incorporates the Excessive Fines Clause, these cases have proliferated. *E.g.*, *Dami Hosp.*, 442 P.3d 94; *Timbs*, 134 N.E. 3d 12; *Yang*, 452 P.3d 897; *Long*, 493 P.3d 94. Because the constitutional analysis is identical in state and federal court, this federal case cleanly presents the constitutional question.

*Third*, the Sentencing Guidelines do not require consideration of ability to pay for forfeiture, U.S.S.G. § 5E1.4, nor do they apply to civil penalties. But forfeitures

[1] *See* Aliza Hochman Bloom, *Sentence Appeal Waivers Should Not Be Enforced in the Event of Superseding Supreme Court Law*, 18 Fla. Coastal L. Rev. 113, 115 n.8 (2016).

and civil penalties are covered by the Excessive Fines Clause if they amount to "punishment." *Bajakajian*, 524 U.S. at 334; *Austin v. United States*, 509 U.S. 602, 610 (1993). Governments frequently pursue forfeiture against individuals with little or no ability to pay, to devastating effect. DPA Br. 11-15. The question presented thus routinely arises in those circumstances as well.

2. The government (at 6) claims that this Court has often denied petitions raising "similar questions." But neither case the government cites cleanly presented the question here. In *United States v. Viloski*, the Second Circuit recognized the relevance of "whether the forfeiture would deprive the defendant of his livelihood" but ruled against the defendant on the merits because the defendant "presented no evidence that [the forfeiture] would prevent him from earning a living upon his release from prison." 814 F.3d 104, 111, 114 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1223 (2017) (No. 16-508). *Colorado Department of Labor & Employment v. Dami Hospitality, LLC*, 140 S. Ct. 849 (No. 19-641), and 140 S. Ct. 900 (2020) (No. 19-719) (conditional cross-petition), likewise did not present the question cleanly because that case also involved the antecedent question of whether the Excessive Fines Clause even applied to the corporate defendant—a question on which the petitioner alleged no split. No. 19-641, Pet. 10-19. This case involves neither vehicle issue.

3. The government's lone vehicle objection presents no barrier to review. The government (at 19) argues that this case would be a "poor vehicle" because plain-error review purportedly applies. But petitioner objected to his fine in the district court on

the basis of "indigen[ce]." *See* Br. in Opp. 4. The Eleventh Circuit also "[a]ssum[ed] *arguendo*" that the issue was preserved and rejected petitioner's challenge by holding that the Excessive Fines Clause requires no consideration of a defendant's ability to pay a fine. Pet. App. 4. The question presented was accordingly "passed upon" below and is cleanly presented for this Court's review. *See Citizens United v. FEC*, 558 U.S. 310, 330 (2010) (citation omitted). The government's plain-error argument would arise, if at all, only on remand from this Court.

## III. The Decision Below Is Wrong

The government (at 11) all but concedes that the "principle in Magna Carta" controls the excessive-fines analysis. That conclusion warrants reversal. The "ancient understanding" embodied in Magna Carta requires courts setting fines to "account for a person's financial condition." Scholars Br. 3-4. Magna Carta required that fines "sav[e] to" a "Free-man" "his contenement," *i.e.*, "land used to support" himself; a merchant "his merchandise"; or "any other's villain than ours" "his wainage," *i.e.*, the "implements of husbandry" for a "serf." *Bajakajian*, 524 U.S. at 335-36 (quoting 9 Hen. III, ch. 14 (1225) (1762 ed.)); Contenement, *Black's Law Dictionary* (11th ed. 2019); Villein, *Black's Law Dictionary*; Wainage, *Black's Law Dictionary*. That principle—*salvo contenemento* in Latin—requires fines to leave a "free man" with enough to "maintain himself in his former condition," including his support of "those dependent on him." William Sharp McKechnie, *Magna Carta* 293 (2d ed. 1914); *see*

Scholars Br. 3. In short, a fine that the defendant cannot pay off without compromising his ability to support himself and his family violates Magna Carta.

Eight hundred years of experience illustrate the breadth of Magna Carta's principle. In the 1300s, a fined party's peers could reduce court-set penalties "in accordance with the party's ability to pay." *Browning-Ferris*, 492 U.S. at 289 (O'Connor, J., concurring in part and dissenting in part). In 1510, during the reign of Henry VIII, an offender was discharged "as from his poverty he could not pay the fine." John Southerden Burn, *The Star Chamber* 41 n.2 (1870). In the seventeenth century, opponents of the Stuart Kings decried fines "to the full extent of [the offender's] means." *Timbs*, 139 S. Ct. at 694 (Thomas, J., concurring in the judgment) (quoting 2 Henry Hallam, *Constitutional History of England* 46-47 (1827)); *see* Scholars Br. 6-8.

And in the New World, colonial and early American authorities recognized the relevance of the "situation, circumstances and character of the offender," *Commonwealth v. Morrison*, 9 Ky. 75, 99 (1819), including by granting relief where a defendant was presently "unable to pay the [fine]" and considering "poverty and ability to make any other satisfaction," Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Calif. L. Rev. 277, 331 (2014) (quoting 1784 Rhode Island act); Scholars Br. 12 (quoting colonial court records); *see also* Scholars Br. 10-22.

The Eleventh Circuit did not grapple with this history. The decision below simply cited *Bajakajian* for the proposition that "[w]hether a fine is excessive is determined in relation to the characteristics of the offense, not the characteristics of the

offender." Pet. App. 4. Earlier Eleventh Circuit opinions cite *Bajakajian* for the same point. *E.g.*, *Wilton Manors*, 175 F.3d at 1311. But *Bajakajian* took "no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine." *Timbs*, 139 S. Ct. at 688 (citing *Bajakajian*, 524 U.S. at 340 n.15). *Bajakajian* obviously did not decide a question the Court expressly reserved.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 29, 2021