No. 25-246

In the

Supreme Court of the United States

KENNETH JOHN JOUPPI,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF AMERICAN FREE ENTERPRISE CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether, in determining whether a fine contravenes the Excessive Fines Clause, courts may consider the gravity of the underlying offense purely in the abstract or should consider the gravity of the specific defendant's wrongdoing.

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INTEREST OF *AMICUS CURIAE*[1]

Formed in 2022, the American Free Enterprise Chamber of Commerce ("AmFree") is a business league organization that represents hard-working entrepreneurs and businesses across all sectors of the U.S. economy. AmFree's members are vitally interested in protecting the continued viability of our commercial republic, including by protecting their businesses from excessive monetary penalties. AmFree launched the Center for Legal Action to represent these interests in court.

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"A Free-man shall not be amerced[2] 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; and a Merchant likewise, saving to him his merchandise." Magna Carta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6–7 (1762 ed.). Proclaimed at Runnymede in 1215, those words shielded individuals and their business interests from the Crown's capricious imposition of ruinous fines. Centuries later, the Founders enshrined that same protection in the Eighth Amendment: "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII (emphasis added).

An unbroken line of historical practice, from Magna Carta to the Founding, shows that monetary penalties were not excessive if they satisfied two principles: proportionality and *salvo contenemento*. Proportionality required a reasonable relationship between the size of the fine and the severity of the defendant's offense. And *salvo contenemento* guaranteed offenders the right to be free from fines that would deprive them of their economic livelihood. Those principles required looking at the offender's specific conduct and circumstances, because any offense, viewed at a sufficient level of abstraction, could justify a catastrophic penalty. This Court has repeatedly reaffirmed that the Eighth Amendment's Excessive Fines Clause, as originally understood,

[2] Amercements were "the medieval predecessors of fines." *United States v. Bajakajian*, 524 U.S. 321, 335 (1998).

embraced those principles, which continue to constrain the size of fines that federal and state governments may impose.

The decision below ignored the Excessive Fines Clause's original meaning and upheld a grossly disproportionate penalty: an airplane forfeited for a six-pack of contraband beers. The Alaska Supreme Court reached this astonishing result because it measured proportionality without reference to the defendant's specific conduct, abstracted the offense to a high level of generality, and imputed to the defendant all its attendant society-wide consequences. *Cf.* C.S. Lewis, *Surprised by Joy* 45–46 (Harper ed., 2017) ("The ludicrous disproportion between such harangues and their occasions puts me in mind of the advocate in Martial who thunders about all the villains of Roman history while meantime *lis est de tribus capellis—'This case, I beg the court to note, Concerns a trespass by a goat*.'"). And the court below entirely disregarded *salvo contenemento*, upholding the forfeiture of the property by which the defendant earned his living. Our forebears knew better. The Alaska Supreme Court's approach cannot be squared with more than five centuries of history that led to the Eighth Amendment's Excessive Fines Clause or this Court's precedent embracing and continuing that history.

This Court should say so in the clearest terms. Reaffirming the original meaning of the Excessive Fines Clause has implications well beyond this airplane and this six-pack. The Clause's reach is not limited to criminal penalties or to individuals, but applies to civil fines and businesses alike. That protection matters now more than ever, as state and local governments increasingly seek to use the state judicial system to impose grossly disproportionate and enterprise-crippling penalties on a selection of politically disfavored businesses. Masquerading as routine applications of state laws, these suits threaten bankrupting liability for diffuse alleged public harms, often stacking per-violation statutory penalties into astronomical sums and then trebling them. State and local prosecutors weaponize this enforcement to line public coffers and often target core political speech for political ends that even proponents concede are unattainable through the democratic process. These penalties are, by design, disproportionate to the defendants' actual conduct and, if enforced, could destroy entire industries and restructure the American economy. Recognizing the existential threat these lawsuits pose to their operations, many businesses have little choice but to settle, regardless of the merits of the claims against them, which insulates this abusive practice from judicial review.

These concerns are precisely what motivated the Excessive Fines Clause, which was fashioned to curtail the King's excesses. The Constitution does not permit state and local governments to extort businesses with disproportionate fines for political purposes or to offset budget deficits. Properly applied, the Excessive Fines Clause and the principles delimiting its protections rein in these abuses. "For good reason," the Constitution prohibits overbearing and oppressive monetary sanctions disconnected from the underlying conduct causing the harm. *Timbs v. Indiana*, 586 U.S. 146, 153 (2019). This Court should reaffirm those protections and reverse the judgment below.

ARGUMENT

I. The Original Meaning of the Excessive Fines Clause Requires Reversal

The Excessive Fines Clause was not drafted on a blank slate but codified a preexisting right, dating back to at least Magna Carta, with a "historically fixed meaning." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28 (2022). Monetary penalties must be proportionate to the offender's actual conduct and not destroy the offender's livelihood, which this Court's Eighth Amendment jurisprudence affirms. The decision below honored neither history nor precedent and should be reversed.

A. Historical Practice Demonstrates that the Excessive Fines Clause Includes Proportionality and *Salvo Contenemento* Principles

The Excessive Fines Clause "traces its venerable lineage" to Magna Carta. *Timbs*, 586 U.S. at 151. Designed "to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown," *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 270–71 (1989), Magna Carta's prohibition on excessive fines contained two cardinal principles: proportionality and *salvo contenemento*. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 865–66 (2013); *United States v. Bajakajian*, 524 U.S. 321, 335–36 (1998).

Proportionality meant consideration of the specific defendant's conduct. Blackstone explained that the "aggravations or otherwise of the offence" and "the quality and condition of the parties" were relevant to the excessiveness inquiry. 4 William Blackstone, Commentaries on the Laws of England *371 (1769); *see also id.* at *373 (explaining that it was common practice to "tax and moderate the general amercement according to the particular circumstances of the offence and offender"). Subsequent provisions of Magna Carta reinforce that point. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 321 n.223 (2014) (citing Magna Carta chs. 21–22 (directing that amercements against earls and barons be issued "only in proportion to the measure of the offense," and the same treatment for clerks)).

Salvo contenemento—literally, "saving his contenement," *i.e.*, the means and property necessary to maintain one's social rank, was an "economic-survival principle," McLean, *supra*, at 860, that insulated offenders from oppressive penalties by ensuring "that their ability to maintain a livelihood be saved," Colgan, *supra*, at 321. This protection applied to all, from the "wainage" of "villeins" (feudal serfs), to the estates of freemen and nobles, to "Merchandise" of merchants, preserving for every rank "a minimum core level of economic viability." McLean, *supra*, at 855–56. Lord Coke explained that *salvo contenemento* protected business interests because "trade and traffique is the livelihood of a merchant, and the life of the commonwealth, wherein the king and every subject hath interest." 2 Edward Coke, *The Selected*

Writings and Speeches of Sir Edward Coke 814 (Steve Sheppard ed., 2003).

Critically, *salvo contenemento* operated in only one direction; a clause that saved the offender's livelihood from a ruinous fine could only reduce, not enlarge, the penalty. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427–28 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."). *Salvo contenemento* was also "complementary, but distinct" from the proportionality requirement. McLean, *supra*, at 836; *see also* Colgan, *supra*, at 321 (describing the principle as "a separate and distinct consideration from the proportionality"). Magna Carta set the amount of an amercement by "the manner of the fault," then further limited it: "saving to him his contenement." Magna Carta, *supra*, ch. 14. A lawful fine had to satisfy both principles.

Despite Magna Carta's twin guarantees of proportionality and *salvo contenemento*, by the seventeenth century, there were numerous "incidents of judicial abuse." Lois G. Schwoerer, *The Declaration of Rights, 1689*, at 90–91 (1981); *see also* 2 Coke, *supra*, at 815 & n.23 (quoting Cicero's maxim that "[w]e have a certain … enactment, but it lies buried in the tablets like a sword in its sheath") (translation by the editor). The notorious Court of Star Chamber imposed heavy fines on the king's enemies, which contemporary commentators decried as "inconsistent with the Law of England, which is the Law of Mercy" and "with Salvo Contenimento." *The Works of the Right Honourable Henry late L. Delamer, and Earl of Warrington* 574 (1694). Even after Star Chamber was abolished by statute in 1641, "the Mischief remain'd." *Id.* "[T]owards the end of Charles II's reign, the courts" continued to "impose[] ruinous fines on the critics of the crown" without regard to proportionality or the livelihoods of the offenders. Schwoerer, *supra*, at 91.

To address these abuses, Parliament recodified the prohibition against excessive fines in the Declaration of Rights of 1689, providing that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2 (1689), 3 Stat. at Large 440, 441 (1762 ed.). This provision "reaffirmed ancient law," Schwoerer, *supra*, at 92, including the principles of proportionality and *salvo contenemento*, McLean, *supra*, at 865–66. Commenting on this prohibition, Blackstone explained that any fine must take into consideration the defendant's specific conduct: "the aggravations or otherwise of the offense, the quality and condition of the parties, and … innumerable other circumstances." 4 Blackstone, *supra*, at *371. As a result of that fact-specific inquiry, the "quantity of [fines] must frequently vary, from the aggravations or otherwise of the offence." *Id.* The fine likewise could be no "larger … than" the offender's specific "circumstances or personal estate will bear," including "saving … to the traders his merchandize." *Id.* at *372. Notably, Parliament removed any reference to "freemen," "merchants," or "villeins," ensuring the protection from excessive fines would restrain the government in all circumstances.

American colonists imported this understanding of the prohibition against excessive fines into the New World. *See, e.g.*, Pennsylvania Frame of Government, Laws Agreed Upon in England, Art. XVIII (1682), *reprinted in* 1 *The Roots of the Bill of Rights* 141 (Bernard Schwartz ed., 1971) ("all fines shall be moderate, and saving men's contenements, merchandize, or wainage"); Charter of Liberties and Privileges, Oct. 30, 1683, *reprinted in* 1 *America's Founding Charters* 177, 178 (Jon L. Wakelyn ed., 2006) (similar). After the Revolution, Virginians preserved these limitations on government-imposed penalties in the Virginia Declaration of Rights. *See* Va. Decl. of Rts. § 9 (1776) ("nor excessive fines imposed"); *see also* Allan Nevins, *The American States During and After the Revolution*, *1775–1789*, at 146 (1924) ("In the main, [the Virginia Declaration of Rights] was a restatement of English principles," including Magna Carta and the Declaration of Rights of 1689). The Framers of the Federal Constitution, in turn, adopted language from the Virginia Declaration of Rights "almost verbatim" in the Excessive Fines Clause, "in tune" "with English law." *Timbs*, 586 U.S. at 152.

Importantly, the Framers left the measure of that guarantee to the courts. For example, Representative Livermore explained that the meaning of "excessive fines" "lies with the court to determine." 1 Annals of Cong. 782 (1789) (Joseph Gales ed., 1834); *see also* *Timbs*, 586 U.S. at 165 (Thomas, J., concurring in the judgment) ("when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives") (quoting Patrick Henry, 3 *Debates on the Federal Constitution* 447 (J. Elliot, 2d ed. 1854)). Otherwise, the prohibition would have been a parchment barrier, for the government would "both lev[y] the fine and, at least as a presumptive matter, determin[e] its constitutionality," which "[s]eems a bit like letting the driver set the speed limit." *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1318 (11th Cir. 2021) (Newsom, J., concurring).

This Court's precedents have consistently recognized this history and the centrality of the twin principles of proportionality and *salvo contenemento* in applying the Excessive Fines Clause. In *Browning-Ferris Industries of Vermont,* the Court explained that Magna Carta required "that the amount of the amercement be proportioned to the wrong" and "that the amercement not be so large as to deprive him of his livelihood." 492 U.S. at 271. Less than a decade later, this Court reaffirmed the primacy of proportionality in *Bajakajian*, reiterating that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." 524 U.S. at 334. The Court elaborated that a fine is unlawful "if it is grossly disproportional to the gravity of a *defendant's* offense." *Id.* (emphasis added). And more recently, this Court confirmed the Clause's historical pedigree, and the continuing vitality of the twin principles, in *Timbs*, 586 U.S. at 151 ("Magna Carta required that economic sanctions be proportioned to the wrong and not be so large as to deprive an offender of his livelihood.") (cleaned up).

B. The Decision Below Disregarded Original Meaning and Precedent

The Alaska Supreme Court's decision cannot be reconciled with the Excessive Fines Clause's "serious and unbroken historical pedigree," *SEC v. Jarkesy*, 603 U.S. 109, 153 (2024) (Gorsuch, J., concurring), or this Court's precedents affirming that history.

Petitioner Jouppi was found guilty of violating a dry-village statute for transporting a six-pack of beer that officers claimed was visible in his plane. *Jouppi v. State*, 566 P.3d 943, 948 (Alaska 2025). In upholding the forfeiture of his airplane, worth $95,000, the Alaska Supreme Court did not look to Mr. Jouppi's specific conduct but abstracted his offense to "[a]lcohol abuse in rural Alaska" and imputed to him the attendant society-wide consequences of that class of offenses: "increased crime; disorders such as alcoholism; conditions, such as fetal alcohol spectrum disorder; and death, imposing substantial costs on public health and the administration of justice." *Id.* at 957.

This makes Mr. Jouppi's case into a kind of legal synecdoche, where one small part of the problem (flying in with an illegal six-pack) is made to stand for the whole (alcohol smuggling leading to widespread societal alcohol abuse) and is punished as such. This cannot be squared with the proportionality requirements of English law that the Eighth Amendment codified. The punishment is not "after the manner of the fault," *i.e.*, Mr. Jouppi's own offense, Magna Carta, *supra*, ch. 14, and the decision below failed to weigh "the aggravations or otherwise of the offense, the quality and condition of the parties, and

… innumerable other circumstances," Blackstone, *supra*, at *371.

The Alaska Supreme Court also ignored this Court's precedent, which applies a fact-specific inquiry to proportionality. In *Bajakajian*, this Court did not ask how much currency-reporting violations *in toto* cost society but focused on the harms the defendant himself caused. *Bajakajian*, 524 U.S. at 339. The Court explained that a fine is unconstitutionally excessive if "it is grossly disproportional to the gravity of *a defendant's* offense." *Id.* at 334–35 (emphasis added). The Court then looked to the defendant's specific culpability for willfully failing to report the approximately $350,000 he was transporting outside the United States "to repay a lawful debt," conduct far removed from that of the offenders the reporting statute targeted: "tax evaders, drug kingpins, or money launderers." *Id.* at 338–39 & n.14 (emphasis added). This Court also found it "highly relevant" that the defendant's offense "was unrelated to any other crime," and looked to the defendant's individualized exposure under the Sentencing Guidelines. *Id.* at 337 n.12, 338–39 & n.14.

The Alaska Supreme Court deviated from *Bajakajian*'s defendant-focused inquiry and considered all the societal costs of alcohol abuse. But stated at that level of generality, any offense can be said to cause "grave societal harm" sufficient to justify exorbitant penalties. *Jouppi*, 566 P.3d at 957. A proportionality test at that breadth would render the Excessive Fines Clause a nullity.

The decision below is also inconsistent with *salvo contenemento*. The court held that Mr. Jouppi had not carried his evidentiary burden of proving that "the forfeiture forced him into retirement," *Jouppi*, 566 P.3d at 958, but the court's earlier acknowledgment that the State seized "an airplane that [Mr. Jouppi] piloted on behalf of his air taxi company," *id.* at 948, undermines that conclusion. Regardless, in future cases, this type of forfeiture—where the government takes the property by which the defendant earns his living—*will* implicate *salvo contenemento*. Such penalties deprive offenders of the "ability to maintain a livelihood," Colgan, *supra*, at 321, leaving them beneath the "minimum core level of economic viability" that the Excessive Fines Clause was meant to preserve. McLean, *supra*, at 855–56.

The decision below disregarded history and precedent. This Court should reverse and, as explained next, should do so with clear reference to these underlying principles.

II. The Excessive Fines Clause Protects American Businesses from Ruinous Civil Penalties

The Excessive Fines Clause's protection against targeted economic injury extends well beyond individual defendants in criminal cases, like Mr. Jouppi, and so too do the implications of this Court's decision. The need for that protection is especially acute now, as States and municipalities increasingly seek to impose devastating fines on singled-out companies, often for generalized claims of public harms. Their theories frequently multiply statutory penalties, generating enormous fines disconnected from any actual harm the defendant allegedly caused. The point of these litigation campaigns is often twofold: to line the strained coffers of state and local governments and to target disfavored businesses to achieve policy changes that have not succeeded at the ballot box.

These suits "can only be explained as serving in part to punish." *Austin v. United States*, 509 U.S. 602, 610 (1993). The Excessive Fines Clause therefore constrains the penalties that governments may seek in them. Properly applied, the Clause limits monetary sanctions in proportion to the harm a defendant actually caused and prevents fines from destroying enterprises, securing for American businesses the constitutional protection the Eighth Amendment guarantees them.

A. State and Local Governments Are Targeting Disfavored Businesses with Ruinous Civil Penalties to Achieve National and Global Policy Changes

"[T]he government regularly imposes a wide array of monetary penalties, both civil and criminal, on corporations." *Colo. Dep't of Lab. & Emp't v. Dami Hosp., LLC*, 442 P.3d 94, 100 (Colo. 2019). States and local governments use these fines as "a source of revenue," sometimes for legitimate purposes and sometimes "to retaliate against or chill the speech of political enemies." *Timbs*, 586 U.S. at 153–54 (cleaned up). These penalties can be effective political tools for the same reason that "[a] right to tax, without limit or control, is essentially a power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 391 (1819).

Although these abuses are not new, *see Timbs*, 586 U.S. at 152; *supra*, Part I.A, they have accelerated in recent years at an alarming rate. Specifically, States and localities have begun to leverage an assortment of state laws—consumer protection statutes, campaign finance registration laws, and common law torts—to impose collective liability on a handful of disfavored companies. Many of these laws set statutory penalties for each technical violation, sometimes even applying a separate penalty for each day that a violation occurs. *Cf.* Robert H. Jackson, Att'y Gen. of the U.S., *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940) at 4–5 ("With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."). It is therefore very easy for government plaintiffs to make the penalty "scale," multiplying a modest per-violation figure by thousands of alleged violations to reach enterprise-destroying statutory penalties far larger than any harm the government could prove. A survey of recent cases illustrates the magnitude of the problem.

For instance, in *State v. Grocery Manufacturers Ass'n*, the State of Washington sought an "unprecedented base penalty of $14,622,820, trebled to $43,868,460" from a food-industry trade group for failing to comply with state campaign registration and disclosure requirements. *State v. Grocery Mfrs. Ass'n*, 461 P.3d 334, 353 (Wash. 2020). The record indicated, however, that the State chose to penalize the trade group not to rigorously enforce campaign finance law, but to "harass [its] political foe[]." *Timbs*, 586 U.S. at 152; *see Grocery Mfrs. Ass'n*, 461 P.3d at 354–55 (Johnson, J., concurring in part and dissenting in part). "The trial court ultimately imposed a smaller, but still apparently unprecedented, base penalty of $6 million, trebled to $18 million," *id.* at 353, which the Washington Supreme Court upheld, *State v. Grocery*

Mfrs. Ass'n, 502 P.3d 806 (Wash. 2022). Eventually, the trade group settled, agreeing to pay $9 million in exchange for not pursuing review before this Court. Stip. & Agreed Am. J., *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Wash. Super. Ct. Thurston Cnty. Mar. 2, 2022).

The State of Washington recently ran the same playbook against Meta and secured "a sanction totaling $35 million—the highest sanction ever in the history of [Washington] or this country for noncompliance with reporting laws." *State v. Meta Platforms, Inc.*, 590 P.3d 1099, 1125 (Wash. 2026) (Gordon McCloud, J., dissenting).

Other examples abound. The District of Columbia is seeking civil penalties from four energy companies under its consumer protection statute for allegedly misleading District consumers about the role those companies' products play in causing climate change. Compl., *District of Columbia v. Exxon Mobil Corp.*, No. 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020). Rather than plead compensatory damages for purported harms, the District seeks up to $10,000 per violation, a demand limited only by the creativity of the District in how it chooses to count individual consumer communications. D.C. Code § 28-3909(b). *See also* Compl., *State v. Am. Petroleum Inst.*, No. 62-CV-20-3837 (Minn. Dist. Ct. Ramsey Cnty. June 24, 2020) (similar, $25,000 per violation); Minn. Stat. § 8.31, subdiv. 3; Compl., *City of Hoboken v. Exxon Mobil Corp.*, No. HUD-L-003179-20 (N.J. Super. Ct. Sept. 2, 2020) (similar).

Dozens of States also sued Meta under various consumer protection laws, contending that each minor's use of Meta's platforms was a separate violation—regardless of whether that user was harmed—a theory that yielded an estimated $1.4 trillion in exposure. *See* Meta's Submission Regarding State AG Penalty and Disgorgement Charts and Supporting Materials at 19–23, *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, No. 4:22-md-03047-YGR (N.D. Cal. July 6, 2026), Dkt. No. 3237. Faced with such astronomical liability—approaching its entire market capitalization—Meta was effectively forced to settle, regardless of the merits of the claims against it, and for a still-enormous $17 billion. *See* Press Release, Cal. Dep't of Justice, Off. of the Att'y Gen., *Attorney General Bonta Secures Transformative $17 Billion Settlement with Meta, Proposed Settlement Includes Fundamental Changes to Instagram and Facebook* (Aug. 26, 2026), https://perma.cc/7RWT-REJU.[3]

When statutory penalties are multiplied into astonishing sums of money that would be unattainable through compensatory damages, "[i]t makes sense to scrutinize governmental action more closely." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.). These lawsuits deserve such scrutiny.

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[3] This is not to say that there is no legitimate interest these states have in protecting children from harmful social media. What the Excessive Fines Clause (and, more generally, the Due Process Clause) teaches is that such interests should be protected through *ex ante* legislation and *ex post* litigation tailored to remedying discrete, concrete harms.

B. The Clause's Protections Extend to Civil Penalties Against Businesses

The Excessive Fines Clause provides a crucial check on these abuses, but only if courts faithfully apply it. This Court has repeatedly held that, in addition to criminal penalties, "[t]he Eighth Amendment protects against excessive civil fines." *Hudson v. United States*, 522 U.S. 93, 103 (1997); *Austin*, 509 U.S. at 609–11. That makes sense, because the character of a sanction imposed as punishment "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603, 611 (1881); *cf. Toth v. United States*, 143 S. Ct. 552, 553 (2023) (Gorsuch, J., dissenting from denial of certiorari) ("Really, the notion of 'nonpunitive penalties' is 'a contradiction in terms.'").

The penalties that States and localities are seeking against businesses "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." *United States v. Halper*, 490 U.S. 435, 448 (1989). This is true for several reasons.

First, in many instances, government plaintiffs seek treble damages. *See, e.g.*, Compl., *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Wash. Super. Ct. Thurston Cnty. Oct. 16, 2013); Compl., *State v. Facebook, Inc.*, No. 20-2-07774-7 (Wash. Super. Ct. King Cnty. Apr. 14, 2020). "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). Relatedly, state and municipal plaintiffs often "stack" penalties by counting every transaction as a separate violation, resulting in wildly disproportionate civil fines that bear no relationship to any specific loss suffered. *See, e.g.*, *supra*, Part II.A.

Second, these penalties plainly serve "to retaliate against or chill the speech of political enemies." *Timbs*, 586 U.S. at 153–54. The suits single out a few politically disfavored companies and demand that they answer for diffuse alleged public harms that no one company could have caused. They also seek to penalize companies for what is overwhelmingly speech—advertisements, public statements, and participation in policy debate—and find ways to multiply the penalty into astronomical sums. *See supra*, Part II.A. And the suits seek to accomplish by judicial decree what is unattainable by political will in the democratic process. As counsel for one municipal climate plaintiff has admitted, "Congress is [not] likely to take on climate change anytime soon. So [tort liability] is a rather convoluted way to achieve the goals of a carbon tax." The Federalist Soc'y, *Can State Courts Set Global Climate Policy?*, YouTube (Oct. 8, 2025), at 33:30, https://youtu.be/1wyxaE4TC-A?si=Q3WrfVZpKF7AmDcW&t=2007.

Third, these lawsuits seek to dismantle, or at the very least fundamentally restructure, entire enterprises—indeed, entire industries—and their proponents say so openly. The same attorney quoted above explained that a final, non-appealable judgment would force the "defendants in all of these cases [to] immediately declare bankruptcy," after which it becomes "the court's job … to make sure that the assets are then used for the benefit of the creditors," *i.e.*, the state and local governments that brought the suits. *Can State Courts Set Global*

Climate Policy?, *supra*, at 34:10, 35:15. An advisor to plaintiffs' counsel in those cases has put the point more bluntly still: if these suits "all go to their logical extreme, [the oil companies] all go bankrupt…. They should." Alex Brown, *Some Cities, States Say Big Oil Should Pay for Climate Damage*, Stateline (Apr. 13, 2022) (quoting Pat Parenteau), https://perma.cc/7VCW-F7F3; *see also* David Arkush & Donald Braman, *Climate Homicide: Prosecuting Big Oil for Climate Deaths*, 48 Harv. Envtl. L. Rev. 45 (2024) (urging state and local prosecutors to seize the assets of energy companies and "then auction the property to competitor [fossil fuel companies] that agreed to terms more beneficial to the public").

These "[e]conomic penalties imposed to deter" "are fines by any other name. And the Constitution has something to say about them: They cannot be excessive." *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 649–50 (2023) (Gorsuch, J., concurring).[4] As legal extortion gambits multiply *ex ante*, doctrinal clarity is

[4] That protection extends to individuals and businesses alike. Although this Court has left open whether corporations may invoke the Excessive Fines Clause, lower courts that have squarely confronted the question unanimously agree that they may. *See Retail Prop. Tr. v. Nassau Cnty. Dep't of Assessment*, 2026 WL 2263300, at *3–7 (2d Cir. Aug. 6, 2026); *Robson 200, LLC v. City of Lakeland*, 593 F. Supp. 3d 1110, 1119 (M.D. Fla. 2022); *Dami Hosp.*, 442 P.3d at 99–100; *Duling Enters., LLC v. Dep't of Lab. & Indus.*, 573 P.3d 936, 942–43 (Wash. Ct. App. 2025). That makes sense, because the Excessive Fines Clause "prohibit[s] punitive confiscation of private property, which is a type of punishment that may injure a corporation in the same way it injures an individual." *Retail Prop. Tr.*, 2026 WL 2263300, at *3 (cleaned up).

paramount. Indeed, *ex post* remedies will not always be available. Because of the scope of the fines threatened in some of these cases, it is doubtful that many companies would even be able to pay an appeal bond without declaring bankruptcy.

As these lawsuits demonstrate, the risk of grossly disproportionate, livelihood-destroying fines is pronounced for businesses, whose resources and impersonal identities make them ideal deep pockets, political targets, or scapegoats "to shoulder what should be public burdens." Jessica L. Asbridge, *Fines, Forfeitures, and Federalism*, 111 Va. L. Rev. 67, 70 (2025). Left unchecked, States and localities will continue to leverage "coercive prosecutorial tactics designed to induce" politically unpopular businesses to settle, effectively insulating excessiveness from review. *Hunter v. United States*, 146 S. Ct. 1702, 1715 (2026) (Gorsuch, J., concurring).

C. A Robust Excessive Fines Clause Would Mitigate This Abuse

A ruling by this Court reaffirming the Excessive Fines Clause's twin principles—proportionality and *salvo contenemento*—would go a long way toward mitigating these excesses.

Properly understood, the Excessive Fines Clause's proportionality requirement provides an invaluable check on governments seeking to justify enormous economic penalties because courts must measure the penalty against the gravity of the offender's own conduct, not the diffuse harms attributed to an entire industry. Likewise, the principle of *salvo contenemento* supplies a meaningful check on governments seeking windfall civil penalties because, however serious the violation, governments may not use fines to selectively extort politically disfavored businesses or drive them into bankruptcy.

None of this prevents States and localities from pursuing legitimate enforcement of their laws. Where a government proves that a defendant caused actual injury, it remains free to recover the full measure of damages, including punishment for the violation in proportion to the offender's own conduct. *See Smith v. Condry*, 42 U.S. (1 How.) 28, 35 (1843) ("It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages."). The Clause forbids only penalties that are untethered from any harm the defendant caused or large enough to fundamentally disrupt the enterprise.

Those constitutional guarantees, however, remain critical and should be enforced. "Ours is a world filled with more and more civil laws bearing more and more extravagant punishments." *Sessions v. Dimaya*, 584 U.S. 148, 184 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). The Framers anticipated as much and enshrined a mechanism in our Constitution to curb those abuses. Honoring the original meaning of the Excessive Fines Clause will help mitigate these targeted economic injuries and provide the vital protections to businesses that the Constitution secures.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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