No. 25-95

In the Supreme Court of the United States

MICHAEL PUNG, PERSONAL REPRESENTATIVE OF THE ESTATE OF TIMOTHY SCOTT PUNG, PETITIONER,

v.

ISABELLA COUNTY, MICHIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have a substantial interest in the issues presented in this case. Respondent advocates an interpretation of the Takings Clause that would all but invite governments to implement tax-sale schemes that would completely undermine the Fifth Amendment's protections and deprive citizens of just compensation. Beyond that, respondent urges the Court to adopt a radical interpretation of the Excessive Fines Clause that would grant governments carte blanche to impose grossly disproportionate civil penalties and fines against U.S. businesses—in the tax-sale context and numerous others—without the necessary check of the Eighth Amendment.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioner owed $2,242 in taxes, and a local government seized his home and sold it for $76,008—less than 40% of its $194,400 value—to satisfy the debt. Put another way, the government assessed a penalty of nearly $120,000—more than 50 times its alleged financial harm. Under the Fifth and Eighth Amendments, that was an unlawful Taking and an Excessive Fine.

I. Petitioner demonstrates that history and precedent require that when the government takes a citizen's property, "just compensation" means placing the owner in the same position they would have occupied if the property had not been taken. *Amicus* submits this brief to underscore that the protection is particularly needed in the context of tax sales. Unlike the private mortgage foreclosure process, State and local tax-sale laws typically lack adequate protections for property owners and are designed merely to recover the amount of taxes owed, unmoored from the value of the property. The government is incentivized to sell quickly and on the cheap, frequently resulting in catastrophic losses for property owners: their property, or a lien on the property, often is sold for only a few thousand dollars (the amount of the tax debt) regardless of the fair market value.

In *Tyler* v. *Hennepin County, Minnesota*, 598 U.S. 631, 638 (2023), this Court held that, while the government may seize and sell property to satisfy past due taxes along with the costs of collecting them, any surplus "remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State." But the Takings Clause "would be a craven watchdog indeed if it retreated to its kennel," *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010), whenever a State or local government could simply avoid *any* surplus by setting the sales price or minimum bid at only a pittance. Yet under many tax-sale laws, the government can do just that. See

Pennymac Loan Servs. v. *Roosevelt Assocs., RIGP*, 311 A.3d 1270, 1277 (R.I. 2024) (Takings Clause not violated where town sold property worth $300,000 "exclusively for unpaid taxes and fees in the amount of $1,213.54" because town "did not retain any excess value."). The Fifth Amendment demands more.

II. The taking here also violated the Eighth Amendment. The Excessive Fines Clause "traces its venerable lineage" to Magna Carta and the English Bill of Rights, and this Court has held that "[p]rotection against excessive punitive economic sanctions" is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" *Timbs* v. *Indiana*, 586 U.S. 146, 151, 154 (2019) (quoting *McDonald* v. *City of Chicago, Ill.*, 561 U.S. 742, 767 (2010)). Nevertheless, respondent and the United States (in its *amicus* brief in *Tyler*) have taken the position that the Excessive Fines Clause presents *no limitation whatsoever* on grossly disproportionate governmental fines or penalties *unless* they are a "sanction for criminal conduct after an adjudication of guilt in a criminal proceeding" or imposed in a civil action "brought after the property owner had already been convicted of a crime"—*i.e.*, that the constitutional safeguard has no applicability where the government imposes fines or penalties in civil actions unconnected to a criminal proceeding. Br. of the United States as *Amicus Curiae* at 26, *Tyler*, 598 U.S. 631 (No. 22-166); see Br. in Opp. 10-11.

Petitioner demonstrates why that view clashes with this Court's jurisprudence and that the Excessive Fines Clause applies fully to entirely civil monetary exactions, such as where real property forfeited to satisfy a tax debt is sold for a fraction of its value. *Amicus* submits this brief to highlight how the protection of the Excessive Fines Clause is needed well beyond the tax-sale context of this case.

Recent years have seen "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). From federal laws imposing 1,900% civil fines for pharmaceutical manufacturers' lawful noncompliance with an agency's pricing wishes, to crippling "per incident" penalties for unintentional state consumer protection law infractions, to staggering local government penalties for minor building code transgressions, protection from the pursuit of overly aggressive civil fines and penalties is needed more than ever.

The proliferation of disproportionate fines and forfeitures is not only contrary to the Eighth Amendment, but also undermines economic growth. "At a time when the use of economic sanctions has such dire consequences and is so widespread, the Eighth Amendment's Excessive Fines Clause is of critical importance." Beth A. Colgan, *Reviving the Excessive Fines Clause,* 102 Cal. L. Rev. 277, 295 (2014). The Court should reiterate that the Excessive Fines Clause applies to civil penalties regardless of whether they are connected to a criminal proceeding, and that a fine is unconstitutional when it is disproportionate to the harm caused by the underlying civil violation.

ARGUMENT

I. THE TAKINGS CLAUSE PROVIDES NEEDED PROTECTION FROM GOVERNMENT TAX SALES THAT ROUTINELY SELL PROPERTY FOR GROSSLY DEPRESSED AMOUNTS

The Takings Clause states that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. "[T]he Fourteenth Amendment * * * incorporates the Takings Clause against the States." *Sheetz* v. *County of El Dorado, Cal.*, 601 U.S. 267, 276 (2024).

This Court in *Tyler* held that, while the government may seize and sell property to satisfy past due taxes along with the costs of collecting them, any surplus "remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State." *Tyler*, 598 U.S. at 638.

But that protection is illusory if the government can simply set the price of the property so low at auction or other tax sale that there will never be any surplus—destroying an owner's home equity in the process. As the Court observed in *Tyler*, "property rights cannot be so easily manipulated." *Id.* at 645 (quoting *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139 , 155 (2021)). Yet they are every day in government tax sales throughout the country.

A. All states have laws permitting governments to sell property to satisfy tax debts of the owners. While the laws vary significantly state-to-state, generally, "a delinquent tax foreclosure entails one of two methods that a state or local government authority may employ to collect taxes due on a property: tax lien sales and tax deed sales." Lawrence Ponoroff, *The Curious Case of* Tyler *v.* Hennepin County, 43 Va. Tax Rev. 131, 141 (2023).

"In a tax lien foreclosure scenario, typically, a 'certificate' or 'lien certificate' representing the underlying lien is auctioned off for the taxes due plus a specified rate of interest that accrues in the event of a subsequent redemption." *Id.* If the property owner does not pay off the certificate within the designated period of time, "then the certificate holder has the right to foreclose on the property." *Id.* at 142.

By contrast, "in a tax deed sale, the property itself, rather than the lien right, is sold. The sale occurs through an auction with a minimum bid of the amount of back taxes owed, plus interest, as well as the costs associated with selling the property." *Id.*

The structure of these types of laws "makes it far more likely that a homeowner will suffer a devastating loss of home equity as compared with other auction sales." John Rao, *The Other Foreclosure Crisis: Property Tax Lien Sales* at 8, Nat'l Consumer L. Ctr. (Jul. 2012). "Unlike a home mortgage foreclosure where the owner typically owes the lender an amount close to the value of the property, a tax lien sale may be started over nonpayment of a tax bill of only a few hundred or thousand dollars." *Id.* at 8-9. "In many states the property will be sold simply for the amount of the taxes owed, based on the bidding procedures used at tax-sale auctions. Thus, a $200,000 home may be sold at a tax lien sale for $1,200." *Id.* at 9.

Michigan's tax-sale scheme is a paradigmatic example of the problem. Michigan's General Property Tax Act, Mich. Comp. Laws §§ 211.1 et seq., permits sales at a "minimum bid" that need only "include all delinquent taxes, interest, penalties, and fees on the property," rather than the property's fair value. *Id.* § 211.78m(16)(c). In Michigan, as in many states, "the minimum bid (the taxes owed) is effectively also the maximum bid," even if the property's actual value is a hundred times higher. Rao, *supra*, at 38. This occurs because "[t]ax sale laws are generally designed to provide recovery of only the taxes owed to the local taxing authority." *Id.* The problem is compounded after *Tyler* because governments have no incentive to recover any value beyond the tax debt since they are now required to return any surplus to the owner.

The federal government's tax-sale laws, see, *e.g.*, 26 U.S.C. § 6335, likewise allow for minimum bids that fall well under the property's fair value. "[Section] 6335(e) requires only that a minimum price be set and that no lower bid be accepted. It does not require the IRS to determine fair market value or to base the minimum bid price on such value * * *. [T]he minimum bid is capped at the sum of taxes owed, interest, penalties and expenses of sale."

Kabakjian v. *United States*, 92 F. Supp. 2d 435, 440 (E.D. Pa. 2000).[2]

The end result is that property is often foreclosed for the amount of the tax debt, which bears no relation to the value of the home, destroying an owner's home equity. And this is just one of the many documented shortcomings of tax-sale laws. *E.g.*, Rao, *supra*, at 9-19.

B. Courts have thus repeatedly recognized that tax-sale procedures provide inadequate protection to owners and result in sales well below fair value. Under the Bankruptcy Code, for instance, a trustee can void a transfer of property made through a tax sale if the debtor received less than "a reasonably equivalent value" from the sale. Ponoroff, *supra*, at 143. This Court has held that, with respect to private mortgage foreclosures, "a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 545 (1994). But the Court also explicitly recognized that "other foreclosures and forced sales (to satisfy tax liens, for example) may be different." *Id.* at 537 n.3.

Lower courts have found that tax-sale laws are indeed different, and often do not result in a fair and proper price (the "reasonably equivalent value"). See Ponoroff, *supra*, at 153-56; Laura B. Bartell, *Tax Foreclosure as Fraudulent Transfers - Are Auctions Really Necessary?*, 93 Am. Bankr. L.J. 681, 688 (2019). Assessing Michigan's tax foreclosure process, for example, the Sixth Circuit found that Michigan's procedures, which allowed the sale of a property for only the amount of the tax debt

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[2] Though, as petitioner observes, the federal government's tax-sale procedures would not have permitted the sale at issue here. See Pet. Br. 39.

notwithstanding the vastly higher fair market value, was not fair value and remanded for the court to consider whether the sale should be set aside. *In Re Lowry*, 2021 WL 6112972, at *4 (6th Cir. Dec. 27, 2021). The court explained that "[t]he tax foreclosure process here was * * * significantly different from the mortgage foreclosure system in *BFP*. The debtor's home in *BFP* was sold for $433,000 in a foreclosure sale that provided sufficient procedural protections under state law. In contrast, the Michigan foreclosure law here permitted the local government to purchase the property without a public auction, for the 'minimum bid.'" *Id.* (internal citation omitted). The result was that the city was able to buy the debtor's "property for $14,496 (the amount of the taxes due), an amount that had no apparent relation to the value of the property and was only about ten percent of the alleged fair-market value." *Id.*[3]

The Sixth Circuit acknowledged that "[i]t is true that the foreclosure sale in *BFP* did not necessarily result in fair market value, but it was at least somewhat correlated to the value of the property in the non-purely-market conditions of a statutory foreclosure sale. This simply is not the case when a tax foreclosure sale focuses on the value of the taxes owed rather than on the value of the property." *Id.*; accord *In re Smith*, 811 F.3d 228, 238 (7th Cir. 2016) ("Illinois's tax sale method is not designed to produce bids that could fairly be called 'reasonably equivalent value.' * * * [I]n an Illinois tax sale, there is no correlation between the sale price and the value of the property.");

[3] Thus, the Sixth Circuit's decision below results in the absurd situation where a person whose property is sold for well under fair market value has no recourse under the Takings Clause, but if the owner were to file for bankruptcy, the sale could be set aside as not reflecting "reasonably equivalent value." In other words, the owner of the property has no ability to set aside the sale for themselves, but once bankrupt the sale can be set aside for the benefit of creditors.

Gunsalus v. *County of Ontario, N.Y.*, 37 F.4th 859, 865 (2d Cir. 2022) ("[T]he strict foreclosure procedures under [New York's tax-sale law] offer far fewer debtor protections than the mortgage foreclosure procedures at issue in *BFP*."); *In re Sherman*, 223 B.R. 555, 559 (B.A.P. 10th Cir. 1998) (citing cases) (setting aside tax sale because "[t]he tax sale was conducted in accordance with Wyoming law, which the parties agree mandated that the property be sold to a person selected in a random lottery for an amount of the outstanding taxes; in this case less than $500"); but cf. *In re Tracht Gut, LLC*, 836 F.3d 1146, 1149 (9th Cir. 2016) (presuming price sold was reasonably equivalent value because "California tax sales have the same procedural safeguards as the California mortgage foreclosure sale at issue in *BFP*.").

C. Without Takings Clause protections, similar inequities will occur under tax-sale procedures that, by design, all but ensure that property will be sold for a fraction of its value. And post-*Tyler*, the problem is even worse: governments now have no incentive to collect anything more than the amount of taxes owed since they can no longer keep the surplus. This is not hyperbole. The Rhode Island Supreme Court recently concluded that the Takings Clause offered no protection to an owner whose property had a market value of $300,000 and was sold for $1,213. The court reasoned that *Tyler* merely held that the government "could not retain the excess value in the home," and the town "[s]old the subject property exclusively for unpaid taxes and fees in the amount of $1,213.54 and did not retain any excess value." *Pennymac Loan Servs.* v. *Roosevelt Assocs. RIGP*, 311 A.3d 1270, 1277 (R.I. 2024).

If the decision below is upheld, States and local governments will have perverse incentives to adopt procedures and laws where the government can set the minimum bid or sales price just high enough to recover

taxes owed—ensuring that there will be no surplus to return to the owner. *Rafaeli, LLC* v. *Oakland County, Mich.*, 952 N.W.2d 434, 486 (Mich. 2020) (Viviano, J., concurring) ("[T]he foreclosing unit would have little incentive to conduct a sale that earns anything more than the delinquent tax sum.").

The Takings Clause should provide a uniform, nationwide check on tax-sale schemes that regularly deprive property owners of just compensation.

II. THE PROLIFERATION OF DISPROPORTIONATE FORFEITURES AND FINES UNDERMINES ECONOMIC GROWTH

"The purpose of the Eighth Amendment * * * was to limit the government's power to punish," with the Excessive Fines Clause forming an integral part of the Amendment's framework by "limit[ing] the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin* v. *United States*, 509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

This Court has thus not limited the protection to fines and penalties in criminal proceedings. Rather, "[t]he Eighth Amendment protects against excessive civil fines * * *." *Hudson* v. *United States*, 522 U.S. 93, 103 (1997). "Some provisions of the Bill of Rights are expressly limited to criminal cases * * * . The text of the Eighth Amendment includes no such limitation." *Austin*, 509 U.S. 607-08; *Tyler*, 598 U.S. at 648 (Gorsuch, J., concurring) ("[T]he Excessive Fines Clause applies to *any* statutory scheme that 'serv[es] *in part* to punish.'" (quoting *Austin*, 509 U.S. at 610)).

Nevertheless, respondent (and the United States in *Tyler*) have taken the view that the Clause provides absolutely *no protection* in the multitude of contexts

where the government seeks grossly disproportionate civil penalties. That is contrary to fundamental constitutional principles of proportionality, and would defeat the broader goals behind the Eighth Amendment.

A. Massive Civil Fines Are Increasingly Common and Problematic

Tax sales like the one that forfeited petitioner's home have devastating consequences for individuals, many of whom are elderly, poor, or otherwise not well-positioned "to defend their interests in forfeiture proceedings." *Leonard* v. *Texas*, 580 U.S. 1178 (2017) (statement of Thomas, J., respecting denial of certiorari). They also impact American businesses, including many small businesses. In Michigan alone last year, well over 100 commercial properties were sold by the state in tax sales.[4]

But tax sales that impose grossly disproportionate punishments for non-criminal—and only minimally culpable, or nonculpable—conduct are just the tip of the iceberg.

Government actors "increasingly depend heavily on fines and fees as a source of general revenue." *Timbs*, 586 U.S. at 154 (quotation source omitted). This incentivizes "more and more civil laws bearing more and more extravagant punishments." *Dimaya*, 584 U.S. at 184 (Gorsuch, J., concurring in part and concurring in the judgment).

1. The most prominent example is the "booming business" of civil forfeiture. *Culley* v. *Marshall*, 601 U.S. 377, 395 (2024) (Gorsuch, J., concurring). "[B]ecause the law enforcement entity responsible for seizing the property often keeps it, these entities have strong incentives to pursue forfeiture." *Leonard*, 580 U.S. at 1178 (statement of Thomas, J., respecting denial of certiorari).

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[4] https://bit.ly/4pnHvoM.

"These cash incentives * * * influence which laws police enforce, how they enforce them, and who they enforce them against." *Culley*, 601 U.S. at 405 (Sotomayor, J., dissenting); accord *id.* at 396 (Gorsuch, J., concurring) ("[It] seems that, when local law enforcement budgets tighten, forfeiture activity often increases."). Though these forfeitures are civil proceedings, this Court has not hesitated to apply the Eighth Amendment as a protection against them. See *Austin*, 509 U.S. at 622; *Timbs*, 586 U.S. at 156. Similar protection under the Eighth Amendment is warranted for other non-criminal penalty schemes.

2. Government actors often interpret federal laws expansively to seek penalties from U.S. businesses that bear no reasonable relationship to the alleged wrongdoing or harm. For instance, the federal government has used the Inflation Reduction Act to seek an "excise tax" of up to 1,900% of a medication's revenues if a pharmaceutical company declines to participate in a mandatory drug-pricing program. See 26 U.S.C. § 5000D(a); see also Cong. Rsch. Serv., R47202, *Tax Provisions in the Inflation Reduction Act of 2022* (H.R. 5376) (2022). Under this punitive regime, a company that sells 500,000 doses of a $10 medication would earn $5 million in gross revenue—but it would face liability of $95 million. Yet a criminal-only view of the Excessive Fines Clause would provide no protection from that excessive sanction for entirely non-culpable conduct, "triggered by the lawful choices of the [manufacturer]" in declining to sell the drug at the government's preferred price. Defendants' Mot. to Dismiss at 64, *Dayton Area Chamber of Com.* v. *Becerra*, No. 3:23-cv-156 (S.D. Ohio filed Dec. 15, 2023).

Another example: the Consumer Financial Protection Act imposes penalties up to $1,000,000 *per day* for any ongoing violation of the federal consumer financial laws, depending on the responsible party's level of knowledge. See 12 U.S.C. § 5565(c); 12 C.F.R. § 1083.1.

The federal government has used the law to seek drastic financial liability even for minimally culpable actions, such as utilizing a business practice that fails to achieve "maximum possible accuracy of consumer information * * *." See Consent Order, *In re Equifax Inc.*, CFPB No. 2025-CFPB-0002 (Jan. 17, 2025) (explaining company's $15-million settlement with the Consumer Financial Protection Bureau). Yet again, the criminal-only view would provide no protections whatsoever for such excessive punishment.

Myriad other federal laws—the False Claims Act, the Federal Trade Commission Act, the Clean Air Act, the Occupational Safety and Health Act, the Bank Secrecy Act, and the Health Insurance Portability and Accountability Act, to list just a few—are used by government actors to seek devastating liability for only minor offenses. For example, the Securities and Exchange Commission recently fined 26 businesses more than $390 million for what the agency described as "recordkeeping failures."[5]

And it's not just companies that face exorbitant fines. The Internal Revenue Service recently imposed a civil penalty of $2.1 million and $1 million in late fees and interest because an 80-year-old woman had failed to report her foreign bank account—a penalty of more than half the account's balance. The court of appeals held that the Constitution's protection against excessive fines did not apply because the IRS's assessment against her was "not tied to any criminal sanction" and served in part a "remedial" purpose, an outcome "difficult to reconcile with [the Court's] precedents." *Toth* v. *United States*, 143 S. Ct. 552 (2023) (Gorsuch, J., dissenting from the denial of certiorari).

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[5] https://bit.ly/48Cb4vI.

3. Government actors also use State laws to seek disproportionate financial penalties for minimally culpable conduct. Consider several states' consumer data-privacy laws. Under the California Consumer Privacy Act, California can fine businesses up to $2,500 *per incident* for "unintentional errors," and provides "[n]o leniency for first-time offenders."[6] See Cal. Civ. Code § 1798.155 (2025). Virginia can fine businesses up to $7,500 *per violation*. See Va. Code Ann. § 59.1-584 (2022). Texas likewise can fine businesses up to $7,500 *per violation*. See Tex. Bus. & Com. Code Ann. § 541.155(a) (2023). And Florida can fine businesses up to $1,000 *per day* for the first 30 days—and then up to $50,000 *per day*. See Fla. Stat. § 501.171(9)(b)(1) (2025).

4. Local governments also are seeking excessive civil penalties under zoning and building code ordinances for low-level violations. For example, a Florida city recently fined a homeowner more than $160,000 for various minor code infractions, such as a downed fence and cracked driveway. See *Martinez* v. *City of Lantana, Fla.*, 410 So.3d 15, 19 (Fla. App. 2025). Such municipal fines can grow to gargantuan sums in part because they are often assessed on a per-day basis. See, *e.g.*, Jessica L. Asbridge, *Fines, Forfeitures, and Federalism*, 111 Va. L. Rev. 67, 127 (2025) ("Although the daily fine ($500) may not seem unreasonable, considering only the daily amount ignores the magnitude of the actual fine, which reflects the total for the number of days involved. That latter amount—here, $28,500—was the fine assessed and the amount of the lien that attached to the property."); see also Harry M. Hipler, *Conflicting Parameters of Code Enforcement Fines and Liens Pursuant to Chapter 162 of the Florida Statutes,* Timbs*, and the Eighth Amendment: How Much*

[6] https://bit.ly/3KuxNli.

Is Too Much?, 52 Stetson L. Rev. 669, 695-96 (2023) (discussing problem of per-diem fines for code violations).

Chicago's regulations authorize fines ranging from $350 to $15,000 per sign per day for small businesses that display unpermitted window signs—everyday notices such as "ATM Inside" or "Breakfast, Lunch & Dinner" in the window of a convenience store or restaurant. April Leachman, *When It Come to Sign Violations in Chicago, It's All About the Dollar Signs*, ChicagoNow.com (Sept. 11, 2017), https://bit.ly/4ixb7xt. One dry cleaner was threatened with a $1,000 daily fine for a window sign that advertised wedding dress cleaning and leather repair. Alisa Hauser, *City Slaps Fines on Businesses for Putting Signs on Windows Without Permits*, DNAInfo.com (July 28, 2017), https://bit.ly/4at2NfQ. Although that business removed its sign, others did not—and as a result owed substantial amounts in penalties, interest, and administrative and collection fees. Alisa Hauser & Tanveer Ali, *As Sign Violations Spike, "Erratically Enforced" Law Questioned*, DNAInfo.com (Sept. 11, 2017), https://bit.ly/4rviqJM. Residents and community leaders questioned why the city was aggressively enforcing storefront-sign rules despite Chicago's many other pressing challenges. See Leachman, *supra*; see also Dick Carpenter et al., *The Price of Taxation by Citation* at 20-22, Inst. for Just. (Oct. 2019) (discussing problems and examples of abuses when local governments view citations as revenue to solve budgetary issues).

5. Without any constitutional check, governments exploit "per incident" and "per day" provisions to raise the stakes and pressure companies to settle even baseless claims. For instance, under state consumer protection laws, States tend to "seek 'per violation' civil penalties based on every prescription filled, letter sent, product sold, or advertisement published or aired for the longest period allowed under the statute of limitations." U.S.

Chamber Inst. for Legal Reform, *Unfair Practices or Unfair Enforcement?* at 24 (Oct. 2016). Because government actors pursue "violations" in such an aggressive and granular way, "businesses are subject to extraordinary civil penalties for a single action even when the conduct did not mislead anyone or cause an economic loss." *Id.*

Similar problems arise when government actors seek fines on a per-day basis. Under the federal Clean Water Act, for instance, violators of certain requirements can be subject to a maximum fine of $68,445 "*per day* for *each violation*." Tony Francois, *Modernizing Water Regulation* at 148, in Competitive Enter. Inst., *Modernizing the EPA* (Daren Bakst et al. eds., 2025) (emphasis added); see also 40 C.F.R. § 19.4. Because the Clean Water Act compounds the aggregate fine by both the number of violations and the number of days the violations are ongoing, fines imposed under the law can quickly become exorbitant. See Br. for Chamber of Com. of the United States of America as *Amicus Curiae* at 19, *Sackett* v. *EPA*, 598 U.S. 651 (2023) (No. 21-454) ("EPA has wide discretion in the penalties it can seek in enforcement actions, and those penalties can be crippling.").

Moreover, individuals and businesses are repeatedly subjected to multiple fines—by different government actors—for the same alleged conduct. See U.S. Chamber Inst. for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines* at 1 (Oct. 2015). When Congress tasks a federal agency with "tightly regulating the conduct at issue," "it makes little sense for states to duplicate those efforts." U.S. Chamber Inst. for Legal Reform, *Enforcement Gone Amok: The Many Faces of Over-Enforcement in the United States* at 11 (May 2016). This duplicative enforcement would make little sense because, "[a]fter all, it would be virtually

impossible for a business to simultaneously comply with the federal regulatory scheme and disparate requirements imposed by 50 state mini-[agencies]." *Id.*

Litigation against the pharmaceutical industry provides another example of this "pile-on effect": To resolve allegations that the company improperly marketed a drug, one company entered a multi-state settlement agreement for $62 million, settled with nine individual states for a total of $196 million, settled with the federal government for $1.415 billion, and settled approximately 26,000 individual products liability suits for $1.2 billion—in addition to litigating a class action and several shareholder derivative suits. See U.S. Chamber Inst. for Legal Reform, *Unfair Practices or Unfair Enforcement?*, *supra*, at 29.

B. Excessive Fines, and the Legal Uncertainty Surrounding Whether They May Be Imposed, Hinder Beneficial Economic Activity

Absent a check on disproportionate fines, and clarity that the Excessive Fines Clause applies where fines are unconnected to a criminal proceeding, beneficial economic activity is stifled.

1. "Over-punishment can * * * lead to over-deterrence, where businesses become too cautious and refrain from undertaking competitive activity because of fear that the activity may be deemed" a violation of law. John Terzaken & Pieter Huizing, *How Much Is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels*, at 6 (Spring 2013). This over-deterrence "chills economic activity and threatens citizens' ability to access often necessary and desirable products (e.g., pharmaceuticals, oil and gas, foods, etc.)." U.S. Chamber Inst. for Legal Reform, *French Fries to Fossil Fuels: The Misplaced Reliance on Unfair and Deceptive Practices Laws to Pursue Policy Agendas* at 2 (Aug. 2023). All of this imposes significant

opportunity costs on American businesses. The capital that businesses have to spend paying excessive fines could otherwise have been spent "expand[ing] their operations, buy[ing] new equipment that would have been them more efficient or would have improved the safety of their operations, or hir[ing] additional employees." Neil Bradley, *How Excessive Regulation Hurts the Economy*, U.S. Chamber of Com. (Jan. 16, 2025).

"Excessive fines or penalties, for instance, may cause enterprises to close, which would result in job losses and a downturn in the economy." *Beyond the Rules: The Human Cost of Regulatory Enforcement*, Regulatory Compliance News (Sept. 4, 2024).

Excessive fines against businesses also hurt consumers, raising their costs and reducing their market choices. See James Cooper & Joanna Shepherd, *State UDAP Laws: An Economic & Empirical Analysis*, 81 Antitrust L. J. 947, 974 (2017). "Excessive fines, designed to punish corporations, will more likely than not hurt consumers by requiring an excessive increase in prices as well as an excessive diversion of resources to prevention activities." Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. Rev. 395, 402 (1991). "[E]xcessive fines may lead to insolvency * * *, which in certain markets may significantly weaken competition and ultimately hurt consumers in that market." Terzaken & Huizing, *supra*, at 6.

2. With governments taking a crabbed interpretation of the Eighth Amendment, see *supra*, and with only a few Excessive Fines decisions from this Court, businesses face uncertainty in the legal landscape. "With such unpredictability inevitably comes a chilling effect, as businesses respond to unknown liability with retreat." U.S. Chamber Inst. for Legal Reform, *French Fries to Fossil Fuels*, *supra*, at 33; see also U.S. Chamber Inst. for

Legal Reform, *Unfair Practices or Unfair Enforcement?*, *supra*, at 25 ("Due to the lack of notice as to the legality of conduct under [state consumer-protection statutes], the unpredictability of the potential penalty, and the lack of proportionality in many cases between the size of the fine and the conduct or harm, these civil penalties raise serious constitutional concerns * * *.").

These uncertainties further increase businesses' transaction costs, hinder their entrepreneurial investments, and deter other economically productive activities. Moreover, all this uncertainty creates its own opportunity costs. Businesses have to spend significant capital trying to navigate—and insure themselves against—these legally murky excessive-fines regimes. Businesses and consumers would be better off if financial penalties were more foreseeable and if each penalty's size was constitutionally limited, thereby allowing businesses to better predict risk and thus invest more of their money in themselves. See U.S. Chamber Inst. for Legal Reform, *French Fries to Fossil Fuels*, *supra*, at 33-34.

To optimize their activities, businesses "require the decisions of the courts on commercial issues to be predictable so that they know where they stand." L. S. Sealy & R. J. A. Hooley, *Commercial Law: Text, Cases and Materials* at 10 (5th ed. 2003). Indeed, in today's commercial environment, predictability is a prerequisite for economic growth. Most businesses operate across multiple jurisdictions, some of which reliably apply the Eighth Amendment to limit the size of fines imposed on businesses, while others do not. An important "consequence of unpredictable enforcement and litigation" is "disengagement by businesses from commerce in certain jurisdictions" with less predictable rules, resulting in "less consumer access to products and services in those jurisdictions." U.S. Chamber Inst. for Legal Reform, *French Fries to Fossil Fuels*, *supra*, at 33.

3. The Court should address the uncertainty by reaffirming the applicability of the Eighth Amendment in these contexts.

First, the Court should reiterate that the Excessive Fines Clause protects against not only excessive fines connected to criminal proceedings, but also excessive civil fines and penalties. Contrary to respondent's and the United States's view, that is already the prevailing view of the courts of appeals. See, *e.g.*, *Myrie* v. *Comm'r, N.J. Dep't of Corr.*, 267 F.3d 251, 262 (3d Cir. 2001); *United States ex rel. Bunk* v. *Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 408 (4th Cir. 2013); *WCI, Inc.* v. *Ohio Dep't of Pub. Safety*, 774 F. App'x 959, 967 (6th Cir. 2019); *Towers* v. *City of Chicago, Ill.*, 173 F.3d 619, 624 (7th Cir. 1999); *Hays* v. *Hoffman*, 325 F.3d 982, 992 (8th Cir. 2003); *Pimentel* v. *City of Los Angeles, Cal.*, 974 F.3d 917, 921 (9th Cir. 2020); *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1308 (11th Cir. 2021). But see *United States* v. *Toth*, 33 F.4th 1, 19 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 552 (2023).

Second, the Court should reiterate that proportionality is the touchstone of whether a fine is excessive. When reviewing fines imposed under federal law, this Court has already held that the "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." *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998).

Bajakajian's holding "is deeply rooted and frequently repeated in common-law jurisprudence," *Solem* v. *Helm*, 463 U.S. 277, 284 (1983) (collecting authorities), and it was grounded in the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems* v. *United States*, 217 U.S. 349, 367 (1910). This Court has

"repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment," including in proceedings arising under state law. *Atkins* v. *Virginia*, 536 U.S. 304, 311 (2002).

Yet the federal, State, and local governments' increasing pursuit of disproportionate civil fines and penalties illustrates how far they have strayed from these fundamental principles. The Court should find that the tax-sale penalty here—and civil fines and penalties more generally—are protected by the Eighth Amendment.

CONCLUSION

The Court should reverse the decision below.

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