SUPREME COURT SATE OF COLORADO 2 East 14th Ave., Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2016CA249	
Petitioner, COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF WORKERS' COMPENSATION, v. DAMI HOSPITALITY, LLC, AND INDUSTRIAL CLAIM APPEALS OFFICE, Respondents.	▲COURT USE ONLY▲
Attorneys for *Amici Curiae*: David B. Kopel, #15872 Independence Institute 727 E. 16th Ave. Denver, CO 80203 (303) 279-6536 david@i2i.org Ilya Shapiro,* *Not admitted in this Court Trevor Burrus,* Mathew Larosiere,* Cato Institute 1000 Massachusetts Ave. NW Washington DC, 20001 (202) 842-0200 ishapiro@cato.org	Case No. 17SC200
BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND INDEPENDENCE INSTITUTE IN SUPPORT OF RESPONDENTS	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 29, and including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limits set forth in C.A.R. 29(d).

It contains 3,228 words. Accordingly, this amicus brief does not exceed one-half the 9,500 word limit of the principal brief.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29, 29, and 32.

S/David B. Kopel

David B. Kopel, #15872

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INTEREST OF THE *AMICI CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government, which are the foundation of liberty. To defend those principles, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The Independence Institute is a public policy research organization created in 1984 and founded on the eternal truths of the Declaration of Independence. The Institute has participated as an amicus or party in many constitutional cases in federal and state courts. Its amicus briefs in *District of Columbia v. Heller* and *McDonald v. Chicago* (under the names of lead amicus ILEETA, the International Law Enforcement Educators & Trainers Association) were cited in the opinions of Justices Alito, Breyer, and Stevens.

The present case interests *amici* because it concerns the proper application of an essential constitutional safeguard.

SUMMARY OF THE ARGUMENT

The Colorado Department of Labor and Employment, Division of Workers' Compensation ("the Department") asserts that it can impose excessive fines on corporations. Pet. Br. 16. However, the text of the Eighth Amendment shows that the Excessive Fines Clause is an absolute limit on government. There is no loophole that empowers a government to impose excessive fines on selected defendants. The text of the Eighth Amendment is structurally similar to the text of the First and Fourth Amendments, which also forbid certain government actions, regardless of whether those actions are directed at a natural person or a corporate person.

The Department's analogy to the Fifth Amendment Self-Incrimination Clause is inapposite, because the text that clause prevents its application to corporations or unions.

Obedience to the Excessive Fines Clause does not impede government regulation of business. Nor is application of the clause in cases involving a corporate person beyond the competence of the judicial branch.

The historical background of the Eighth Amendment is consistent with the Amendment's plain text: no government ever has a legitimate interest in imposing an *excessive* fine.

ARGUMENT

I. THE TEXT OF EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE HAS NO EXCEPTIONS OR LOOPHOLES.

A. The text of the Eighth Amendment applies to corporations.

The Eight Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Amendment is phrased as an absolute prohibition on certain types of government conduct. In other words, *the government* may not impose excessive fines. The text encompasses all fines, not just fines imposed on certain categories of persons.

Similarly, the Fourth Amendment creates a general rule that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Thus, "[t]he Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes." *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (requiring warrant for inspections of a corporation's premises).

The First Amendment contains a similar broad rule forbidding certain government actions: "Congress shall make no law . . ." U.S. Const. amend. I. Thus, the First Amendment has been correctly interpreted as a general prohibition on censorship by government; the Court has long rejected that notion that the government acquires the power to censor just because the censorship is directed a

corporate person. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

B. U.S. Supreme Court precedent has declined to insert anti-corporate loopholes into clear constitutional text.

Supreme Court precedent has consistently held that strong constitutional provisions prohibiting certain government conduct do not vanish when the conduct is directed at a corporation. For example, according to the Contracts Clause, "No State shall. . .pass any. . .Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. So in *Dartmouth College v. Woodward*, the Court pointed out that most charities are organized as corporations. "The framers of the constitution did not deem them unworthy of its care and protection." 17 U.S. (4 Wheat.) 518, 646 (1819).

The Court's decision in *Dartmouth College* and other cases not to create corporate exceptions to generally applicable constitutional law was a catalyst for the rise of the American business corporation. *See* R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (2007). If the Court had invented constitutional loopholes depriving people of constitutional rights just because they chose to associate via the corporate form, the loopholes would have gravely discouraged the most efficient form for much business activity.

The Court adhered to its traditional approach when another broad rule against certain government conduct was added to the Constitution: "No State Shall. . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Court was not interested in fabricating a judicial pseudo-amendment that would have made the Fourteenth Amendment say ". . . any natural person, but not corporate persons." In *Santa Clara Cty. v. S. Pac. R.R. Co.* the Court made it clear that it "does not wish to hear argument on the question whether" the Equal Protection Clause "applies to these corporations. We are all of the opinion that it does." 118 U.S. 394, 396 (1886).

In *Hale v. Henkel*, the U.S. Supreme Court explained that a corporation has constitutional immunities "appropriate to such body":

> [W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination.

201 U.S. 43, 76 (1906) .

Two years later, in *Armour Packing Co. v. United States*, the Court discussed how a corporation's right to trial by jury under the Sixth Amendment was not

violated by the trial being in the district where the offense allegedly occurred, instead of in the district where the corporate headquarters was located. 209 U.S. 56 (1908). The *Armour Packing* Court did not struggle with whether the corporation enjoyed the protection of the Sixth Amendment, rather it seemed to the Court a forgone conclusion. *Id.* at 73.

Decades later, the Court likewise recognized that corporations have a Seventh Amendment right to a civil trial by jury. *Ross v. Bernard* 396 U.S. 531, 532–33 (1970) ("[T]he right to a jury trial attaches to those issues in derivative actions to which the corporation, if it had been suing in its own right, would have been entitled to a jury."). After all, the Seventh Amendment states that "the right to trial by jury shall be preserved." U.S. Const. amend. VII. Not "the right to trial by jury shall be preserved, except for corporate persons."

The Department's brief argues at length about whether corporations should have Eighth Amendment rights. The argument is inapt for the same reason that a similar argument was rejected in the First Amendment context. In *First National Bank v. Bellotti*, Bellotti had argued that the First National Bank had not been granted any rights by the First Amendment. The Court responded that the issue was not "whether corporations 'have' First Amendment rights," but whether the law at issue "abridges expression that the First Amendment was meant to protect." *Bellotti*,

435 U.S. at 776. The First Amendment "protects interests broader than those of the party seeking their vindication," because the Amendment serves "significant societal interests." *Id*.

Accordingly, "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United v. FEC*, 558 U.S. 310, 365 (2010). Concurring, Justice Scalia noted that the dissent "never shows why 'the freedom of speech' that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form." *Id.* at 386 (Scalia, J., concurring).

The Constitution contains many broad rules about certain government activities—*e.g.*, "make no law" concerning the freedom of speech; not impair the obligation of contracts, not conduct warrantless searches, not deny equal protection, not deny "the accused" a criminal jury trial, must "preserve the right" to civil jury trials.

The rule is that if a government may not do X, the government is not allowed to do X just because the government targets a corporate person rather than a natural person. The same general rule is equally applicable to the prohibition on government imposing excessive fines.

C. The Court's precedents on self-incrimination are consistent with the general rule.

As the Court explained in *Hale v. Henkel*, while general constitutional rules do apply to corporations, the rules must be "appropriate to such body." 201 U.S. at 76. Some constitutional provisions simply cannot have application in a corporate context. For example, the Cruel and Unusual Punishment Clause prohibits physical torture. It would be impossible to apply the rule against physical torture to a corporation, because corporations do not have physical bodies. Similarly, the Excessive Bail Clause could not be applied to a corporation, because it is impossible to hold a corporation in jail pending trial.

The Fifth and Fourteenth Amendments prohibit deprivation of "life, liberty, or property, without due process of law." The word "life" cannot apply to a corporation, since it is not alive. Corporations can own property, so the prohibition on taking property without due process does apply to corporations.

The Fifth Amendment Grand Jury Clause controls prosecutions for "capital or otherwise infamous crimes." U.S. Const. amend. V. Capital punishment by definition involves a natural body on which to inflict mortal punishment, and thus is

inapplicable to corporations.[1] Because corporations can be criminally prosecuted for infamous crimes, the Grand Jury Clause of the Fifth Amendment applies to such prosecutions. Corporations cannot serve in the militia, so the grand jury exception for "the Militia, when in actual service in time of War or public danger," does not affect corporations.

The Department places great reliance on precedents holding that the privilege against self-incrimination cannot be invoked by corporations or unions. Defendant extrapolates from these precedents a theory that constitutional restrictions on government power vanish when directed at a corporation—or more precisely, the restrictions vanish when the restriction at issue is more like Fifth Amendment self-incrimination than it is like First Amendment free speech. The Department argues at length about why the Eighth Amendment is like the Fifth Amendment and different from the First Amendment.

The Department overcomplicates the question. The self-incrimination cases simply apply the constitutional text. As with capital punishment or bail, the Court

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[1] Etymologically, the term "capital" comes from the Latin term for "head," as there was deemed a connection between the "head" and one's natural life. *See Capital (adj.),* Online Etymology Dictionary, https://www.etymonline.com/word/capital (last visited June 27, 2018).

found that that the text itself cannot logically be applied in a corporate context. According to *Hale*, the Self-Incrimination Clause "operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge." 201 U.S. at 67. Because the Clause "is limited to a person who shall be compelled in any criminal case to be a witness against *himself*; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation." *Id.* at 70. Given the text, the Court concluded that the Self-Incrimination Clause, "was never intended to permit [a corporate officer] to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person." 201 U.S. at 66. The Fifth Amendment text leads to the same result for labor unions. *See United States v. White*, 322 U.S. 694 (1944).

Hale and *White* are grounded in the constitutional text. As they elucidate, the Self-Incrimination Clause textually cannot have application in a corporate context. The text of the Eighth Amendment is different. No one can dispute that it *is* possible to impose "fines" on a corporation. When the words of constitutional text logically can encompass a government action against a corporation, the Court has always enforced that text as written and has never invented anti-corporate loopholes. This

Court should decline the Department's invitation to create a novel loophole in the Excessive Fines Clause.

II. APPLYING THE EXCESSIVE FINES CLAUSE DOES NOT HARM LAW ENFORCEMENT OR BURDEN THE COURTS; INDEED, ADHERENCE TO CLAUSE PROTECTS THE LEGITIMACY OF GOVERNMENT.

A. Effective enforcement of business regulations will not be undermined.

The Department worries that application of the Eighth Amendment would "preclude effective enforcement of . . . business regulations." Pet. Br. 22. The Department points out the Court's concern about business enforcement in one of the self-incrimination cases. *Id.* (citing *White*, 322 U.S. at 700).

If the Court had failed to follow the text of the Self-Incrimination Clause, then the Court would have created a very serious enforcement problem. The invention of a corporate self-incrimination privilege would put an impenetrable cloak over much corporate evidence. As *Hale* recognized, the invention of such a privilege would seriously impair the practical use of the state's police powers against any organized defendant.

Hale and *White* do not stand for a general principle that the constitutional text may be disregarded whenever business regulation would be affected. If such a

principle existed, *Marshall v. Barlow's* would have been decided the other way; any corporate premises could always be searched without a warrant.

Necessarily, anything that constrains government will have some effect in impeding some government action, including government regulation of business. Well-meaning government officials may sometimes take a short-sighted view that their desires to enforce regulations without constraint are more important than fundamental limits on government misconduct. But enforcement of the constitutional text as written does not throttle business regulation. *Marshall*'s decision not to insert a corporate exception into the Fourth Amendment text did not spell the end of government inspections of businesses. The warrant requirement simply requires the government to go through an additional step before searching corporate property.

The Excessive Fines Clause poses no threat at all to effective regulation of businesses. The clause allows the government to impose fines, which punish and deter misconduct. The clause merely prohibits *excessive* fines. By definition, such fines are grossly disproportionate to the conduct at issue. Accordingly, they are never necessary or appropriate to any system of regulation.

B. There is no insurmountable difficulty in determining what is "excessive" in the case of a corporation.

The Department also worries claims that courts would have difficulty applying the Excessive Fines doctrine of proportionality to corporations. Pet. Br. 31.

In particular, the Department asks, "Would a larger corporation be evaluated based on the officer or employee that committed the violation? Must the culpability take into account the culpability of other officers? Should the proportionality of the sentence take into account the harm of the fine on each of the individual shareholders?" *Id.* The questions are not relevant to the instant case, which involves a tiny business with a single owner.

Moreover, these sorts of questions already arise in cases where a defendant argues that punitive damages violate the Fifth or Fourteenth Amendment Due Process Clauses. The courts have demonstrated themselves capable of addressing such questions when necessary.

The U.S. Supreme Court has provided generally applicable guidance for excessive fines cases. *See United States v. Bajakajian*, 524 U.S. 321 (1998). The *Bajakajian* factors include the essence of the defendant's crime in relation to other criminal activity, whether the defendant fits into the class of persons at which the statute was directed, the maximum fine that could have been imposed, and the nature of the harm caused by the defendant's conduct. *Id*. at 336–37 ("If the amount of the

forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.").

The defendant bears the burden of proving that the fine was grossly disproportional. *See, e.g., United States v. Castello*, 611 F.3d 116, 120 (2d Cir. 2010).

"Bajakajian does not mandate the consideration of any rigid set of factors" in disproportionality review. *United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003). Instead, proportionality analysis inherent is necessarily fact-based, and is not amenable to hard, bright-line rules. *United States v. Bieri*, 21 F.3d 819, 824 (8th Cir. 1994).

Courts have centuries of experience in applying complicated constitutional law to corporations in other contexts. Courts are hardly ill-equipped to conduct the same *Bajakajian* analysis for corporate persons that courts already conduct for natural persons. Indeed, the Department's argument in its brief that the fine in this case is *not* excessive demonstrates by example that the excessive fines question is no more complicated or difficult than many other issues that courts resolve every day.

C. No government has the lawful power to impose an excessive fine.

By arguing that the Excessive Fines Clause can never apply to corporations, the Department is essentially claiming the power to fine corporations *excessively*. The result would be contrary to our constitutional heritage, which comes from historical experience that governments with the power to impose excessive fines harm the rule of law.

The language of the Eighth Amendment was based on a similar provision in the Virginia Declaration of Rights of 1776, which in turn was based on a provision of the English Bill of Rights of 1689, which in turn had roots in chapter 14 of Magna Carta, which in turn had even older roots in English law. *See* Nicholas McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833 (2013) (also explaining that the Eighth Amendment was intended and understood to include the English rule that a fine could not destroy a person's livelihood, such as by taking a workman's tools or all of a merchant's lawful merchandise).

Justice Story explained that American provision "was ... adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts." Joseph Story, 3 *Commentaries on the Constitution of the United States*

§ 1896, at 750-51 (1833). In the seventeenth century, under the despotic Stuart kings, "[e]normous fines and amercements were . . . sometimes imposed." *Id.* As the bad Stuart kings demonstrated, government that can impose excessive fines can enrich itself unjustly and can terrorize its subjects into submission.

According to the Eighth Amendment, there can never be a legitimate government interest in imposing an *excessive* fine. Government regulations, including those that apply to business, are to uphold ordered liberty. *See, e.g.*, *People v. Shearer*, 181 Colo. 237, 245, 508 P.2d 1249, 1254 (1973) ("Our constitutional goal is to provide for ordered liberty."). A government that could impose excessive fines would not be defending law and order, but instead would be a danger to the rule of law—able to ruin persons who do not deserve to be ruined. The danger of such excessive power does not vanish simply because the person(s) to be ruined have chosen to associate in a corporation. Any fine that is "excessive" necessarily exceeds the powers the people granted to a government bound by the rule of law. This Court should not create a loophole that would allow government to impose excessive fines.

The issue in this case is not whether the Department has the power to impose an excessive fine, for no legitimate government could have such a power. Rather, the issue is whether the Department's fine actually was excessive.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted this 2nd day of July, 2018.

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ATTORNEY FOR *AMICI*

Pursuant to C.R.C.P. 121 §1-26(9), a printed copy of this electronically-filed document with original signatures is being maintained at the Independence Institute and is available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 2018, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND INDEPENDENCE INSTITUTE IN SUPPORT OF RESPONDENTS** and the related **MOTION FOR LEAVE TO FILE** with the Clerk of the Court using ICCES, which will send electronic notification of such filing to the following:

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