No. 15-600

In The
Supreme Court of the United States

ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC.,
FKA JANSSEN PHARMACEUTICAL, INC.,
AND/OR JANSSEN, L.P., ET AL.,

Petitioners,

v.

SOUTH CAROLINA, EX REL. ALAN WILSON,
ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the imposition of a $124 million civil penalty, without any showing of actual deception, reliance, or injury, violates the Eighth Amendment's Excessive Fines Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION:

OTHER AUTHORITIES:

INTEREST OF *AMICUS CURIAE*[1]

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 Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato *Supreme Court Review*, and files *amicus* briefs.

This case is important to Cato because of its significance for liberty and limited government. State and federal regulators are increasingly securing ever-higher civil penalties as punishments for ill-defined violations of statutes, often with zero showing of harm, touching upon nearly every corner of human activity. Even if those penalties need not fit the crime (or civil violation), the Constitution does not permit the former to be grossly disproportional to the latter. And the Constitution requires more than blind deference to onerous penalties imposed under statutes that provide no meaningful constraints on their amount or computation. This Court's intervention is necessary to restore the important check on government power afforded by the Eighth Amendment's Excessive Fines Clause.

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[1] This brief is filed with the consent of all parties through letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Fool me once, shame on you; fool me twice, shame on me. In this case, South Carolina, following the lead of other state and federal regulators, has added a new twist to that old saying: fool no one, pay $124 million to the treasury.

The South Carolina Supreme Court concluded that a nine-figure fine was not constitutionally excessive—despite *no* proof of actual deception or injury—because the fine was purportedly within the per-violation limits set by the legislature. Pet. App. 62. The court gave no consideration to the fact that the legislature did not instruct whether one statement on an FDA-approved prescription-drug label counts as 1 violation or 272,000 violations. And it then invoked "deference" to those non-existent "legislative judgments" as a reason to allow this massive penalty to evade meaningful review under the federal Constitution. That abdication of judicial responsibility was possible only because of the sparseness of this Court's precedents applying the Excessive Fines Clause. Because the decision below is neither correct nor an outlier, this Court should grant review.

Indeed, the ease with which large fines survive challenge under the Excessive Fines Clause has not been lost on state and federal regulators. Proving large damages is hard; securing press-release-worthy statutory penalties by counting one statement or act thousands of times, much less so. Eye-popping fines have become commonplace, imposed with or without

proof of any harm, against large corporations and ordinary individuals alike. Because of the huge numbers that can be achieved by multiplying even modest per-violation fines by hundreds of thousands of ill-defined "violations," state and federal regulators are often able to secure settlements and thereby insulate their fines from judicial review. In the absence of this Court's intervention, that trend is unlikely to abate.

This case presents a rare example where a civil penalty has been fully litigated to judgment rather than settled under pressure of extraordinary liability. The Court should take this opportunity to reaffirm that the Eighth Amendment's Excessive Fines Clause imposes a meaningful and judicially enforceable limit on grossly disproportional fines.

ARGUMENT

I. THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THE COURT TO CLARIFY THE LIMITS IMPOSED BY THE EXCESSIVE FINES CLAUSE.

A. The Eighth Amendment exists "to limit the government's power to punish." *Austin v. United States*, 509 U.S. 602, 609 (1993); *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-267 (1989). Included among its commands is the rule that "excessive fines" "shall not be" "imposed." U.S. CONST. amend. VIII. There is no question that the $124 million "penalty" (Pet. App. 59) levied in a "penalty order" (Pet. App. 131) is a "fine" within the meaning of the Amendment. *See, e.g.*, *Austin*, 509 U.S. at 609-610, 621-622. The only

question is whether that fine was "excessive"; that is, whether the fine was "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 337 (1998).

This Court's guidance concerning how that question should be answered has been sparse. The "grossly disproportional" standard was first announced and applied in *Bajakajian*, a case decided in 1998. Until then, this Court had "never actually applied[] the Excessive Fines Clause" to assess the constitutionality of a fine. 524 U.S. at 327. In the 17 years since *Bajakajian*, this Court has cited the opinion in only two cases, neither of which applied the "grossly disproportional" standard.[2]

With only one decision of this Court applying the "grossly disproportional" standard and few concrete rules on how that standard should apply, the federal courts of appeals and state courts of last resort have regularly upheld fines based on purported compliance with statutory maximums without engaging in meaningful review of the disproportionality of the fine. *See* Pet. 32 (collecting cases). In effect, the lower courts have allowed the Excessive Fines Clause to become a dead letter, of import only in the rare instance when no statute governs the imposition of a financial penalty. At the same time, the need for the

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[2] *See Paroline v. United States*, 134 S. Ct. 1710, 1726 (2014) (avoiding constitutional question via statutory interpretation); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001) (discussing standard for reviewing determination of whether punitive damages award was excessive).

Clause's protection has grown for businesses and individuals alike. *See* Part II, *infra*.

The lack of more definite standards under the Clause warrants this Court's intervention. In *BMW of North America, Inc. v. Gore*, for example, this Court granted certiorari "to illuminate the 'character of the standard that will identify unconstitutionally excessive awards' of punitive damages," a question of substantive due process. 517 U.S. 559, 568 (1996) (citation omitted). The Excessive Fines Clause—an important and express limitation on the government's power to punish—merits the same degree of consideration and elaboration. And the fully litigated judgment in this case provides an ideal vehicle for such consideration and elaboration.

B. Although this Court has not often applied the Clause, the decision below is nonetheless irreconcilable with this Court's guidance concerning the Clause's meaning. As the Petition explains more fully, the result reached below is unjustifiable because the fine is grossly disproportional to the conduct and harm at issue, and deference to the statute's per-violation formula is unwarranted in light of the statute's failure to define what makes a separate "violation." Pet. 28-35. The rationale proffered to reach that result is likewise untenable because it effectively allowed a nine-figure penalty to evade meaningful constitutional scrutiny based on blind deference to non-existent "legislative judgments."

The South Carolina Supreme Court recognized that Petitioner's "conduct likely had little impact"

and resulted in no "significant actual harm." Pet. App. 58. But the court gave short shrift to those material facts based on three premises: (i) whether a fine is excessive is a subjective question, so courts should "be hesitant to substitute their opinion for that of the people"; (ii) "legislative pronouncements regarding the proper range of fines represent the collective opinion of the American people"; and (iii) "the penalty awards" assessed here "are within the range set by the" South Carolina "legislature." *Id.* at 62 (citation and internal quotation marks omitted).

But the desire of South Carolina officials to extract large monetary payments, empowered by the South Carolina legislature's expansive and amorphous standards for statutory penalties, does not warrant a free pass under the Excessive Fines Clause. Indeed, this Court has made plain that compliance with a federal statute cannot inoculate a fine against a challenge under the Clause. *Bajakajian*, 524 U.S. at 343. It follows that a fine levied in purported compliance with a statute from a single state is no more immune.

A return to the rationale of *Bajakajian* bolsters the point. The "grossly disproportional" standard adopted in *Bajakajian* was borrowed from this Court's precedents under the Cruel and Unusual Punishments Clause, which requires courts to evaluate whether a statutorily authorized penalty is nonetheless "grossly disproportional" to the offense under a national constitutional standard. 525 U.S. at 336-337. While South Carolina is hardly alone in threatening businesses and individuals with large fines (*see* Part II, *infra*), the decision below makes no

effort to look beyond South Carolina law or to provide meaningful *constitutional* scrutiny of the penalty award. In other words, the decision below overlooks even the minimal guidance this Court has provided.[3]

Allowing state regulators to seek refuge in ill-defined state legislation is especially dubious, "because the State's self-interest is at stake." *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977). As this Court has explained in another context, deference to a legislature is less justified when that legislature is lining its own pockets; after all, "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised." *Id.* Consequently, when the amount of a fine is at issue, a single state's freewheeling legislative authorization should not be rubber-stamped as constitutionally sufficient.

In any event, this Court made clear in *Bajakajian* that the deference owed to even federal legislative judgments is subsumed within the gross disproportionality standard itself. It is precisely because "judgments about the appropriate punishment for an offense belong *in the first instance* to the legislature" that review is for *gross* disproportionality, rather than disproportionality of a milder form. *Bajakajian*, 524 U.S. at 336 (emphasis

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[3] When discussing the law of other states in a different context, the South Carolina Supreme Court acknowledged that "there are jurisdictions that," unlike South Carolina and some others, "require the state to show an injury-in-fact as an element of unfair trade practice type claim." Pet. App. 27 n.17.

added). But such judgments do not belong in *all instances* to the legislature; they are subject to judicially enforceable limits. This Court should thus review the decision below to keep the Excessive Fines Clause from being rendered toothless whenever a statute authorizes a fine.

II. THERE IS A PRESSING NEED TO INTERVENE IN LIGHT OF THE INCREASING PREVALENCE OF EXCESSIVE FINES AGAINST BOTH CORPORATIONS AND INDIVIDUALS.

Given the dearth of precedent from this Court applying the Excessive Fines Clause, state and federal regulators have been emboldened to seek and secure exorbitant fines under a wide variety of statutes, against a wide variety of companies and individuals, without regard for any showing of actual harm.

The magnitude of these fines is breathtaking. Petitioner's suggestion that a $1 billion penalty could have been imposed to punish it without a showing of any harm, Pet. 34, is no mere hypothetical. An Arkansas court imposed a *$1.2 billion* penalty for purported misstatements about the same drug at issue here, on the theory that the Arkansas Medicaid Fraud False Claims Act was violated *each time* the drug was prescribed or re-filled, for a total of 238,874 violations at the minimum statutory fine of $5,000 per violation. *See Ortho-McNeil-Janssen Pharms., Inc. v. State*, 432 S.W.3d 563, 569-570 (Ark. 2014). That fine was reversed on appeal as a matter of state law because the claim did not satisfy the statute's

elements, so the Arkansas Supreme Court did not reach the question of whether the fine was constitutionally excessive. *Id.* at 574. If the Arkansas Supreme Court had followed the constitutional analysis of the South Carolina Supreme Court, however, then the $1.2 billion fine would not have been deemed grossly disproportional; after all, it was within the per-violation statutory maximum before being multiplied by hundreds of thousands of purported "violations." Pet. App. 62.

Such fines are not one-offs imposed only against corporations. As this Court is well aware, civil penalties assessed by the EPA against homeowners who "filled in part of their lot with dirt and rock" can run to $75,000 per day. *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012). Those penalties add up quickly; a rancher in Wyoming has sued to enjoin enforcement of an EPA compliance order that would result in a potential fine exceeding $20 million (and counting) for the construction of a stock pond on his property. *See* Complaint, *Johnson v. EPA*, No. 2:15-cv-00147-SWS (D. Wyo. filed Aug. 27, 2015).

Individual corporate officers likewise have been subject to multi-million dollar strict-liability penalties under state environmental regulations, without proof of "awareness of some wrongdoing." *See, e.g.*, *People v. Roscoe*, 169 Cal. App. 4th 829, 839 (Ct. App. 2008) (affirming $2.5 million penalty against two officers for a leak from an underground storage tank); *Comm'r, Ind. Dep't of Envtl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556 (Ind. 2001) (upholding $3.2 million penalty against corporate officer for litter at a landfill site, failure to submit a statistical

analysis, failure to submit an adequate groundwater plan and closure plan, and the presence of organics in groundwater). Individuals have been subject to state penalties that far exceed any proven harm in other contexts as well.[4]

When businesses are involved, the fine amount often skyrockets, regardless of actual harm caused by the relevant conduct. For example, Toyota agreed to pay $1.2 billion to resolve a one-count wire fraud charge that it withheld information related to unintended acceleration, even though a National Highway Traffic Safety Administration study determined that crashes from unintended acceleration were largely the result of drivers pressing the accelerator when they intended to press the brakes.[5] Even when the overall amounts are not

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[4] *See* Press Release, N.J. Div. of Consumer Affairs, New Jersey Division of Consumer Affairs Obtains $6.34 Million Default Judgment Against Bergen County-Based Home Improvement Contractor (June 2, 2015) (reporting a $5.7 million penalty against a contracting business owner, compared to about $585,000 in restitution), http://www.njconsumeraffairs.gov/News/Pages/06022015.aspx; Press Release, Ohio Att'y Gen., Settlement Reached in Spam Text Message Case (Oct. 23, 2014) (reporting a $25,000 fine imposed against an individual in a case involving text messages to phone numbers on the do not call list, compared to $2,400 in consumer damages), http://www.ohioattorneygeneral.gov/Media/News-Releases/October-2014/Settlement-Reached-in-Spam-Text-Message-Case.

[5] *See* Walter Olson, *The Justice Department's Unjust Toyota Fine*, WALL ST. J., Mar. 23, 2014, http://www.wsj.com/articles/SB10001424052702303802104579451960850045676. In another example, Google agreed to pay the FTC a $22.5 million fine to settle claims that Google made misrepresentations to

so staggering, violations of expansive strict-liability statutes—such as those prohibiting calls to phone numbers on the do-not-call list—rack up penalties that far outpace the number of complaints received by regulators.[6] Moreover, because of per-violation multiplication, fines are often double-digit (or greater) multiples of actual damages or restitution, assuming any such damages exist. In one case, a company was ordered to pay penalties that were 46 times the loss suffered by consumers.[7] In another,

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Safari users about the placement of advertising tracking cookies. Press Release, Fed. Trade Comm'n, Statement by FTC Bureau of Consumer Protection Director David Vladeck Regarding Judges Approval of Google Safari Settlement (Nov. 20, 2012), https://www.ftc.gov/news-events/press-releases/2012/11/statement-ftc-bureau-consumer-protection-director-david-vladeck.

[6] *See, e.g.*, Press Release, Mo. Att'y Gen., AG Announces Landmark Settlement for Violations of Missouri's No-call Law (Oct. 19, 2015) ($575,000 fine after Attorney General's office received more than 275 complaints about calls to phone numbers on no-call list), https://www.ago.mo.gov/home/ag-announces-landmark-settlement-for-violations-of-missouri-s-no-call-law; Press Release, Kan. Att'y Gen., California Company Ordered to Pay Nearly $700,000 for Violating Kansas No-Call Act (May 20, 2014) ($691,500 in penalties and fees after 34 complaints to state and federal regulators), http://ag.ks.gov/media-center/news-releases/2014/05/20/california-company-ordered-to-pay-nearly-700000-for-violating-kansas-no-call-act.

[7] Press Release, Wash. State, Office of the Att'y Gen., AG Makes Crowdfunded Company Pay For Shady Deal (July 27, 2015) (imposing fine of $31,000 compared to $668 in damages to consumers), http://www.atg.wa.gov/news/news-releases/ag-makes-crowdfunded-company-pay-shady-deal.

the fine was 20 times the harm caused.[8] These lopsided fines are not outliers.[9]

Fines and penalties are "big business" for federal and state regulators, bringing in billions a

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[8] Press Release, Office of the W. Va. Att'y Gen., Attorney General Patrick Morrisey Announces $393,000 Judgment Against Synthetic Drug Manufacturer (Apr. 2, 2015) (reporting imposition of fine of $375,000 compared to $18,357 in restitution for mislabeling of chemicals sold online), http://www.ago.wv.gov/pressroom/2015/Pages/Attorney-General-Patrick-Morrisey-Announces-$393,000-Judgment-Against-Synthetic-Drug-Manufacturer.aspx.

[9] In other examples, Arkansas imposed a $100,000 penalty for "robo calls" on the owners of a telemarketing company—29 times the $3,395 in restitution. Press Release, Ark. Att'y Gen., Owners of Telemarketing Company Found in Violation of Law (Dec. 12, 2013), http://arkansasag.gov/news-and-consumer-alerts/details/owners-of-telemarketing-company-found-in-violation-of-law. A $190,000 civil penalty was imposed on a marketing company for billing businesses 19 times, between $600 and $800 each (at most $15,200 in damages total), for advertising that the businesses did not agree to buy. Press Release, Ark. Att'y Gen., Rutledge Obtains Judgment Against Electronic Media Marketing Group Inc. (July 28, 2015), http://arkansasag.gov/news-and-consumer-alerts/details/rutledge-obtains-judgment-against-electronic-media-marketing-group-inc. And a furniture company was subject to a $1.2 million civil penalty for acts that caused only about $66,000 in damages to consumers, a 17-to-1 ratio of fine to harm. Press Release, N.J. Dep't of Law & Public Safety, New Jersey Division of Consumer Affairs Awarded $1.26 Million Judgment Against Home Furniture and Furnishings Company That Committed Fraud Against Consumers (Aug. 1, 2014), http://nj.gov/oag/newsreleases14/pr20140801a.html.

year to federal and state treasuries.[10] Although the Excessive Fines Clause should operate as an outer limit on those fines, numerous examples demonstrate that there is little check on fines that are grossly disproportional to the gravity of the offense or any resulting harm. Because many fines are agreed to in settlements—under the threat of even more draconian statutory maximum "per-violation" fines—opportunities for judicial review are rare. The Court should take advantage of this one.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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[10] *See* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 854-855 (2014) (describing $2.8 billion in recoveries by the SEC in fiscal year 2011, $4.15 billion in fiscal year 2012 recoveries by three other federal agencies, and a $25 billion settlement between state attorneys general and several banks).