EIGHTH AMENDMENT — EXCESSIVE FINES CLAUSE — COLORADO SUPREME COURT EXTENDS EXCESSIVE FINES CLAUSE PROTECTIONS TO CORPORATIONS AND REQUIRES ABILITY TO PAY BE CONSIDERED. — *Colorado Department of Labor & Employment v. Dami Hospitality, LLC*, 442 P.3d 94 (Colo. 2019).

The Eighth Amendment starts with a flash and ends with a bang, but its overlooked center deserves attention too.[1] The Supreme Court recently obliged, spotlighting the Excessive Fines Clause in *Timbs v. Indiana*,[2] where it finally held that the clause constrains the states.[3] A number of flaws in excessive fines jurisprudence persist, however, including an unanswered question of whether the clause applies to corporations and an ahistorical failure to consider a defendant's ability to pay.[4] Recently, in *Colorado Department of Labor & Employment v. Dami Hospitality, LLC*,[5] the Colorado Supreme Court tackled these two issues. It extended excessive fines protections to corporations and held that an inquiry into excessiveness must consider a corporation's ability to pay the fine assessed.[6] The court's mandate to consider a defendant's ability to pay helps steer excessive fines jurisprudence toward a faithful, historically rooted understanding of the clause, but lower courts will play a major role in fleshing out the doctrine.

Despite a Colorado requirement that employers maintain workers' compensation insurance, Dami Hospitality, the owner-operator of a small Denver motel, let its insurance lapse from August 2006 through June 2007 and again from September 2010 until July 2014.[7] The Colorado Division of Workers' Compensation (DWC) applied Colorado's statutory framework and ordered Dami pay a total of $841,200, the sum total of 1698 daily fines of $250 to $500.[8] Dami, whose annual payroll totaled

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[1] U.S. CONST. amend. VIII ("Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted." (emphasis added)).

[2] 139 S. Ct. 682 (2019).

[3] *Id.* at 687.

[4] *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 283 (2014); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 835–36, 843–44 (2013); *The Supreme Court, 2018 Term — Leading Cases*, 133 HARV. L. REV 242, 342–51 (2019); *see also* David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 562–65 (2017).

[5] 442 P.3d 94 (Colo. 2019).

[6] *Id.* at 96, 99.

[7] *Id.* at 96.

[8] *Id.* at 97. The Colorado statute assesses daily fines for failure to maintain coverage. *See* COLO. REV. STAT. § 8-43-409(1)(b) (2019). Fines begin at $250 per day for the first 20 days, and gradually increase to $500 per day for days 41 and counting. Rule 3-6(D), 7 COLO. CODE REGS. § 1101-3 (2019). The DWC twice provided notice of the impending fine, requested an explanation, and informed Dami of its right to a hearing. *Dami*, 442 P.3d at 96–97. Dami, which had paid a fine for a previous lapse in the same coverage, failed to explain the noncompliance. *Id.*

under $50,000, rejected a settlement offer and challenged the fine.[9] It alleged, inter alia, that the fine violated the Eighth Amendment's prohibition on excessive fines.[10] The DWC ultimately concluded that the fines passed constitutional muster under a three-prong test established by a Colorado court in *Associated Business Products v. Industrial Claim Appeals Office*.[11] The Industrial Claim Appeals Office (ICAO) affirmed,[12] and Dami appealed to the Colorado Court of Appeals.[13] After applying the Excessive Fines Clause to corporations,[14] the court found the fine constitutionally excessive because the DWC both "failed to apply the *Associated Business Products* factors . . . to Dami's specific circumstances"[15] and neglected to consider Dami's ability to pay.[16] It directed the DWC recalculate Dami's fine.[17] The DWC appealed.[18]

The Colorado Supreme Court reversed and remanded.[19] Writing for the majority, Justice Hart[20] outlined a semi-novel excessive fines analysis and directed the DWC to develop a record to which this analysis could be applied.[21] The court first asked whether the Excessive Fines Clause applied to corporations. The court held unanimously that it did, based on "both the purpose of the clause and the appropriateness of applying it to corporations."[22] As Justice Hart explained, the clause aims to "prevent the government from abusing its power to punish

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[9] *Dami*, 442 P.3d at 97–98. The DWC offered to settle for $425,000. *Id.* at 98.

[10] *Id.* at 98. Dami also argued that it had reasonably believed itself to be in compliance with the statute, that it had immediately procured insurance upon receiving notice of the lapse, and that the DWC's notice was inadequate. *Id.* The DWC initially dismissed Dami's claims and declined to address the constitutional argument. *Id.* Dami appealed to the Industrial Claim Appeals Office (ICAO), which dismissed all but Dami's constitutional argument and remanded for the DWC to review the aggregated per diem fines' constitutionality. *Id.*

[11] 126 P.3d 323 (Colo. App. 2005); *see Dami*, 442 P.3d at 98. That test, adapted from a gross disproportionality test for punitive damages, *see* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 434 (2001), requires a court to consider (1) the "reprehensibility of the defendant's misconduct," (2) "the disparity between the harm . . . suffered" and damages, and (3) "the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases." *Associated Bus. Prods.*, 126 P.3d at 326. The DWC ultimately determined that the regulatory framework did not run afoul of the *Associated Business Products* test." *Dami*, 442 P.3d at 98.

[12] Div. of Workers' Comp. v. Dami Hosp., LLC., FEIN 84-1545878 (Colo. Indus. Claim Appeals Office Jan. 20, 2016) (final order).

[13] *Dami*, 442 P.3d at 98.

[14] Dami Hosp., LLC v. Indus. Claim Appeals Office, No. 16CA0249, 2017 WL 710497, at *10 (Colo. App. Feb. 23, 2017).

[15] *Id.* at *17.

[16] *Id.* at *15–16.

[17] *Id.* at *18.

[18] *Dami*, 442 P.3d at 99.

[19] *Id.* at 103.

[20] Justice Hart was joined by Chief Justice Coats and Justices Márquez, Boatright, and Gabriel. Justice Samour concurred in part. Justice Hood did not participate. *Id.*

[21] *Id.* at 103 ("[T]he test we announce today is a new one in Colorado.").

[22] *Id.* at 100.

through the imposition of fines."[23] Despite the fact that the Excessive Fines Clause is sandwiched between two clauses ill-fitted to corporations,[24] the court held that because the government *can* and *does* fine corporations, it must do so in compliance with the clause.[25]

Having extended excessive fines protections to corporations, the court next determined the meaning of "excessive." It held that corporations must show a fine is "*grossly* disproportional to the gravity of the . . . offense" to win an excessive fines challenge.[26] To justify applying this onerous standard, the court acknowledged both the legislature's primacy in determining punishments and the judiciary's inability to precisely gauge the "gravity of an offense."[27]

The court declared that the gross disproportionality test must include an assessment of ability to pay.[28] Though noting that the U.S. Supreme Court neither addressed the issue in *United States v. Bajakajian*,[29] its leading excessive fines case,[30] nor anywhere else,[31] the Colorado Supreme Court found "persuasive evidence" in "historical precursor[s]" of the Eighth Amendment that fines exceeding a person's ability to pay may violate the Excessive Fines Clause.[32] Both the Court of Appeals and the ICAO therefore erred in applying the *Associated Business Products* test without an ability-to-pay assessment.[33]

Finally, even though it required consideration of Dami's ability to pay, the majority held that the DWC must evaluate each daily fine, not

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[23] *Id.* (citing Austin v. United States, 509 U.S. 602, 610–11 (1993)).

[24] The Excessive Bail Clause precedes the Excessive Fines Clause, and the Cruel and Unusual Punishment Clause follows it. U.S. CONST. amend. VIII.

[25] *Dami*, 442 P.3d at 100. The court interpreted the Excessive Fines Clause independently of the rest of the Eighth Amendment, which applies only to individuals, because the Supreme Court had already found in *Austin v. United States*, 509 U.S. 602 (1993), that the Excessive Fines Clause applies in both the civil and criminal contexts even though the Cruel and Unusual Punishment Clause applies only in the criminal one. *Dami*, 442 P.3d at 100.

[26] *Dami*, 442 P.3d at 101 (omission in original) (emphasis added) (quoting United States v. Bajakajian, 524 U.S. 321, 337 (1998)). The gross disproportionality standard, plucked from the Court's Cruel and Unusual Punishment Clause jurisprudence, requires courts to consider whether a defendant was treated more harshly than (1) others in the same jurisdiction and (2) similarly situated defendants in all other jurisdictions. *Id.* (citing Solem v. Helm, 463 U.S. 277, 303 (1983)).

[27] *Id.* (citing *Bajakajian*, 524 U.S. at 336).

[28] *Id.* at 102.

[29] 524 U.S. 321.

[30] *See* McLean, *supra* note 4, at 834 n.4 (calling *Bajakajian* "the leading case on the Excessive Fines Clause"). In *Bajakajian*, the Supreme Court declared a fine unconstitutional without considering a defendant's ability to pay, instead assessing (1) the relation of the crime to other illegal activities; (2) the type of defendant the statute was intended to cover; (3) the maximum permissible criminal punishment; and (4) the scope and severity of the harm caused by the defendant. *See Bajakajian*, 524 U.S. at 337–40.

[31] *Dami*, 442 P.3d at 101.

[32] *Id.* (citing Timbs v. Indiana, 139 S. Ct. 682, 688 (2019)) (pointing to the Supreme Court having "cited with approval" the Magna Carta and Blackstone's *Commentaries on the Laws of England*).

[33] *See id.*

the aggregate sum, for constitutional excessiveness.[34] It justified this holding in four ways. First, the court emphasized that the Colorado statute labels each day without workers' compensation insurance "a separate and distinct violation."[35] Second, it analogized to the criminal context, where the court typically refuses to aggregate sentences for a punishment's proportionality analysis.[36] Third, it emphasized that responsibility for the "staggeringly" high fine fell "squarely on the shoulders of Dami," which understood its obligations and had a history of noncompliance.[37] Finally, it explicated "good and practical reasons" for requiring the employer ensure compliance,[38] including efficiency[39] and the desire to avoid both negligent noncompliance[40] and gamesmanship.[41] The court found the record insufficient to conduct a proportionality analysis consistent with its decision, especially because no reviewing body had seen evidence regarding Dami's ability to pay.[42] It remanded with instructions to develop a record that would permit a complete evaluation of whether the daily fines violated the Excessive Fines Clause.[43]

Justice Samour concurred in part and dissented in part.[44] Though agreeing with the bulk of the majority's Eighth Amendment inquiry, he would have focused the proportionality analysis on the total fine ($841,200) rather than the daily fines ($250–$500).[45] The majority's individuated proportionality inquiry, according to Justice Samour, would "render[] the entire constitutional analysis an exercise in futility."[46] Not only did the majority's opinion ignore "reality,"[47] but its decision also opened the door to counterintuitive results by making "the total amount of the fine imposed completely inconsequential."[48]

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[34] *Dami*, 442 P.3d at 103.

[35] *Id.* at 102 (quoting COLO. REV. STAT. § 8-43-305 (2019)).

[36] *Id.* The court saw "no principled justification" for deviating from its criminal practices. *Id.*

[37] *Id.*

[38] *Id.*

[39] Because workers' compensation is private insurance purchased independently from a private company, the employer is better positioned than the government to know whether it has obtained the requisite coverage. *Id.* at 103.

[40] Negligent noncompliance: when an employer should have known that it lacked coverage. *Id.*

[41] Gamesmanship: when an employer *does* know that it lacks coverage but nonetheless continues to accrue fines in order to challenge a larger aggregate fine as constitutionally excessive. *Id.*

[42] *Id.* Dami claimed the fine would cause bankruptcy. *See* Dami Hosp., LLC v. Indus. Claim Appeals Office, No. 16CA0249, 2017 WL 710497, at *2 (Colo. App. Feb. 23, 2017).

[43] *Dami*, 442 P.3d at 103.

[44] *Id.* at 104 (Samour, J., concurring in part and dissenting in part).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 105. Justice Samour said that the DWC "imposed a one-time, aggregate fine retroactively," *id.*, and Dami challenged only the single fine and not the daily assessment, *id.* at 104.

[48] *Id.* at 104. Justice Samour noted that "[s]o long as the daily fine amount is not excessive, it matters not whether the Director imposes a $ 1,000 fine or a $ 10,000,000 fine." *Id.* at 104–05.

The court's mandate to consider a defendant's ability to pay helps steer excessive fines jurisprudence toward a faithful, historically rooted doctrine, but other courts will play a large role in fulfilling the potential of this decision. First, appellate courts following *Dami*'s example of historical fidelity should revise excessive fines jurisprudence to consider ability to pay separately from the proportionality analysis. Second, lower courts will bear the responsibility of developing workable standards for assessing a corporation's ability to pay, and existing tests will provide little help. Finally, lower courts may be left to fill in doctrinal gaps left by higher courts that, like the *Dami* court, avoid outlining broadly applicable rules or standards for this inherently fact-specific inquiry.

The Colorado Supreme Court restored the Excessive Fines Clause to its roots by mandating an ability-to-pay inquiry.[49] Though the U.S. Supreme Court has thus far ducked the ability-to-pay question,[50] such assessments are deeply rooted in the Anglo-American tradition that permeates the clause. States in the early republic required ability-to-pay assessments to avoid defendant impoverishment,[51] a practice consistent with the Virginia Declaration of Rights on which the clause was based.[52] English jurists were similarly unequivocal, enshrining this assessment in the Magna Carta[53] and then reemphasizing it during the Enlightenment[54] by, among other things, explicitly including it in the English Bill of

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[49] *See* McLean, *supra* note 4, at 850 ("[H]istorical sources overwhelmingly suggest that a central purpose of historical excessive fines provisions was to protect against fines that were excessive in relation to a defendant's estate . . . ."). Other recent scholarship examining the clause's history has championed an ability-to-pay inquiry. *See* Colgan, *supra* note 4, at 344; Pimentel, *supra* note 4, at 580–81.

[50] *See* United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998); Austin v. United States, 509 U.S. 602, 622 (1993) (declining to delineate a test for determining when a fine is constitutionally excessive). *But see* United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999) (citing *Bajakajian* for the proposition that "excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender").

[51] Colgan, *supra* note 4, at 330–32 (showing how several states in the early Republic treated inability to pay as a mitigating factor, prohibited defendant impoverishment, and forbade forfeiture of estates).

[52] *See* McLean, *supra* note 4, at 869.

[53] *See* Magna Charta, ch. 14 (1215), *reprinted in* Magna Carta Translation, NAT'L ARCHIVES (2007), https://www.archives.gov/exhibits/featured-documents/magna-carta/translation.html [https://perma.cc/E7PK-XN7Y]. The English judicial system did in fact consider a person's ability to pay. *See* McLean, *supra* note 4, at 856 ("[I]t is clear that the practice of regularly assessing fines according to ability to pay was widespread throughout [thirteenth-century England]." (quoting Alfred N. May, *An Index of Thirteenth-Century Peasant Impoverishment? Manor Court Fines*, 26 ECON. HIST. REV. 389, 398 (1973))).

[54] *See* McLean, *supra* note 4, at 858–63 (describing early English cases decided on similar economic-survival principles and reviewing contemporaneous legal scholars like Blackstone); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *372–73 ("[I]t is never usual to assess a larger fine than a man is able to pay . . . ." *Id.* at *373.).

Rights.[55] The Colorado Supreme Court correctly understood the Supreme Court's approving citations to historical precedent as an invitation to explore the clause's historical roots and reinvigorate its original meaning.[56] In hewing closely to historical precedent, *Dami* properly breaks from modern excessive fines jurisprudence.[57] Other courts would do well to follow suit.

To expand upon this success, other appellate courts seeking to effectuate the clause's history should recalibrate excessive fines jurisprudence in a way that does not subsume ability to pay within a proportionality analysis. The *Dami* court fell short in this regard, seeming to consider ability to pay as a proportionality factor by querying "whether the Eighth Amendment proportionality assessment can or should include consideration of the ability of the person being fined to pay" and citing "[t]he concept of 'proportionality'" as a justification for its ability-to-pay test.[58] Similarly, the Supreme Court seemed to conflate the two principles in its sole mention of ability to pay.[59] But this logical relation misreads the history. The Excessive Fines Clause incorporates two distinct principles: "(1) a proportionality principle . . . , and (2) an *additional limiting principle* linking the penalty imposed to the offender's economic status and circumstances."[60] Older courts assessed a fine's proportionality in relation to the offense and then, *after* finding the fine

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[55] *See* Bill of Rights 1688, 1 W. & M. sess. 2 c. 2; *see also* McLean, *supra* note 4, at 857–65 (proving that the English Bill of Rights included an ability-to-pay principle).

[56] *See Dami*, 442 P.3d at 101 ("We see in the Court's citation to these historical predecessors of the Excessive Fines Clause, and their consideration of ability to pay, persuasive evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment."). Beyond the historical mandate, Professor Beth Colgan argues that an ability-to-pay inquiry would comport with the spirit of the Excessive Fines Clause, which "resounds with quite remarkable humanity and pragmatism." Colgan, *supra* note 4, at 350.

[57] The "large majority" of lower courts have misread *Bajakajian* as foreclosing an ability-to-pay inquiry and neglected to engage with the clause's history. McLean, *supra* note 4, at 846; *see id.* at 846–47. Some circuits expressly forgo an ability-to-pay inquiry. *See id.* at 846; *see also* United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999) ("[E]xcessiveness is . . . not [determined] in relation to the characteristics of the offender."); United States v. Dubose, 146 F.3d 1141, 1146 (9th Cir. 1998) ("[A]n Eighth Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender."). Even the First Circuit's historically rooted inquiry deals only narrowly with a defendant's "future ability to earn a living," and not a defendant's ability to pay the fine at the time it is levied. *See* McLean, *supra* note 4, at 850–53; *see also* United States v. Levesque, 546 F.3d 78, 85 (1st Cir. 2008); United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007).

[58] *Dami*, 442 P.3d at 101.

[59] *See* United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998) ("Respondent does not argue that his wealth or income are relevant *to the proportionality determination* or that full forfeiture would deprive him of his livelihood . . . ." (emphasis added) (citation omitted)).

[60] McLean, *supra* note 4, at 836 (emphasis added); *see id.* at 864 (calling proportionality and ability to pay "the dual principles . . . [that] reinforced each other"); *see also* Colgan, *supra* note 4, at 345 (indicating that the Founders would have considered the economic impact of the fine separately from the fine's proportionality); Pimentel, *supra* note 4, at 562–63 (indicating that the proportionality and ability-to-pay analyses were historically distinct).

proportional, capped the fine based on ability-to-pay considerations.[61] Modern courts interpreting the Excessive Fines Clause with a *Dami*-like fidelity to history should remove the ability-to-pay analysis from proportionality's shadow.

Lower courts will also be charged with establishing a workable corporate ability-to-pay assessment. Because other courts have yet to explicitly extend excessive fines protections to corporations, courts may try to adapt other ability-to-pay tests for the corporate context. One potential model is the First Circuit's excessive fines test, which requires courts to consider "whether [a] forfeiture would deprive the defendant of his or her livelihood."[62] A second option might be looking to punitive damages, where in some jurisdictions a corporate defendant's ability to pay, often discussed in terms of its "wealth," affects the penalty's size and could theoretically bear on the "reasonableness" of an award.[63] Finally, courts may look to familiar criminal indigency inquiries as a starting point.[64] In indigency tests, which courts use to tailor judicial processes to a defendant's financial status, courts consider a defendant's income, assets, and existing debt.[65] And courts can reduce court-ordered payments based on additional factors like a defendant's education, employment status, employment prospects, and family circumstances.[66]

However, none of these tests will prove useful models for a corporate ability-to-pay inquiry. Two important corporate characteristics complicate any analysis.[67] First, corporations have the unique ability to make structural alterations that affect how a fine would impact them. A corporation can flirt with illiquidity,[68] in which case a fine might push it

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[61] *See supra* notes 52, 54 and sources cited therein.

[62] *Levesque*, 546 F.3d at 83.

[63] *See* Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257, 1306–07 (2015).

[64] *See* Colgan, *supra* note 4, at 347 & n.351 (proposing courts individually consider both "offense and offender characteristics" and "the effect of the fine on the defendant," which could be gathered in an indigency assessment); McLean, *supra* note 4, at 892 n.217 (discussing the relationship between indigency doctrines and Eighth Amendment protections).

The Supreme Court has allowed judicial assessment of indigency to affect a defendant's constitutional protections related to forfeiture. *See* Bearden v. Georgia, 461 U.S. 660, 667–68 (1983) (holding that a defendant who willfully failed to pay a fine may be imprisoned, but an indigent defendant who non-willfully failed to pay may not); Fuller v. Oregon, 417 U.S. 40, 45 (1974) (upholding an Oregon statute requiring previously indigent defendants to reimburse the State).

[65] *See, e.g.*, Ragsdale v. State, 19 S.W.3d 622, 624 (Ark. 2000); State v. Coburn, 294 N.W.2d 57, 60–61 (Iowa 1980); *In re* Frank, 647 A.2d 1337, 1343 (N.J. Super. Ct. App. Div. 1994).

[66] *See, e.g.*, N.M. STAT. ANN. § 31-17-1 (West 2018).

[67] In addition to the two differences discussed here, corporations have theoretically unlimited lifespans, professional managers, and dispersed owners, and many have tremendous access to capital, utilizing both debt (taking loans and issuing bonds) and equity (selling shares). *See Characteristics of Corporations*, ACCOUNTINGTOOLS (Sept. 8, 2019), https://www.accountingtools.com/articles/2018/1/27/characteristics-of-corporations [https://perma.cc/KX47-F7VT].

[68] This not-uncommon strategy is practiced by several successful businesses including Amazon, which continually reinvests earnings, and Uber, which chooses to sacrifice short-term profits for

into insolvency, bankruptcy, and dissolution. Tests developed for individuals[69] need not grapple with amorphous financial structures, and even punitive-damage determinations of corporate "wealth" are so easily manipulated that courts appear not to reduce damage awards for ability-to-pay considerations alone.[70] Second, corporations enjoy no right to life.[71] They die frequently — and society often celebrates their death as a sign of progress.[72] Individual-focused tests, however, presuppose a right to life. The justifications undergirding such tests evaporate in the corporate excessive fines context, where snuffing out a defendant's existence is an acceptable option.[73] Courts will have to look beyond established precedent to assess a corporation's ability to pay.

Finally, federal circuit courts and state supreme courts may, like *Dami*, decline to articulate broadly applicable rules or standards, leaving lower courts with significant discretion in corporate excessive fines cases. The *Dami* majority outlined an excessive fines test but based its ultimate action — reversing and remanding — on narrow justiciability concerns.[74] The court recognized the fact-specific nature of ability-to-pay inquiries and responded to the difficulty of formulating a corporate ability-to-pay test.[75] These same concerns will animate many corporate excessive fines challenges, likely leading to more fact-specific decisions and paving the way for significant lower court discretion.

Interesting cases lie along the path charted by *Dami*. Corporations, which are notoriously litigious, frequent recipients of regulatory fines, and uniquely adept at financial smoke and mirrors, will likely probe the limits of their new excessive fines protections. Academics and appellate jurists may have set the stage for the Excessive Fines Clause's recent revival, but lower courts will write its next act.

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long-term market share. *See* Mike Isaac, *Which Tech Company Is Uber Most Like? Its Answer May Surprise You*, N.Y. TIMES (April 28, 2019), https://nyti.ms/2voXQQF [https://perma.cc/397E-W6RH]. Importantly, these are strategic decisions. A company aware that a fine is imminent could artificially reduce the size of a fine that could be successfully challenged under the Excessive Fines Clause.

69 The First Circuit's "livelihood" test and various indigency tests serve as examples.

70 *See* Bankhead v. ArvinMeritor, Inc., 139 Cal. Rptr. 3d 849, 860–61 (Cal. Ct. App. 2012) (refusing to reduce a punitive damage award based on a corporation's financial status because "net worth alone is an untrustworthy standard, because it is so easily manipulated," *id.* at 860). The author was unable to find a single instance of a court reducing a punitive damage award solely because it exceeded a corporation's ability to pay.

71 Instead, they "derive the privilege of acting as artificial entities" from their beneficial impact upon society. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

72 *See, e.g.*, ARTHUR DIAMOND, OPENNESS TO CREATIVE DESTRUCTION: SUSTAINING INNOVATIVE DYNAMISM 14–15 (2019).

73 If "snuffing out" a corporation's existence seems harsh, consider some exceptional cases like Enron, Theranos, or the Madoff Ponzi scheme. These demonstrate that allowing *some* government fines to force a company into bankruptcy and dissolution may be in society's interest.

74 *See Dami*, 442 P.3d at 103 (reversing and remanding to develop a sufficient record).

75 *See id.*