No. 23-6888

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEMMERICK BROWN,
Plaintiff-Appellant,

v.

KAREN STAPLETON, ET AL.
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Virginia at Roanoke
No. 7:22-cv-00349 (Hon. Robert S. Ballou, U.S. District Judge)

APPELLANT'S OPENING BRIEF

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January 19, 2024

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INTRODUCTION

Demmerick Brown is a prisoner in the custody of the Virginia Department of Corrections. In August 2020, while at Red Onion State Prison, he went to the prison barbershop to have a shave and a haircut. Because of the pandemic, he was wearing a face mask, and the barber told him to remove it for the shave. Brown did. On this basis, a guard filed a disciplinary charge against Brown, Brown was convicted of a rule violation, and he was fined fifteen dollars.

Brown filed this action, alleging that the fine violated his constitutional rights. The district court dismissed the complaint, 1) reasoning that Brown did not have a property interest in his fifteen dollars and so was not entitled to due process, and 2) without considering whether the fine was constitutionally excessive.

In both respects, the district court erred. 1) Though prisons are sometimes allowed to constrain prisoners' liberties without first providing extra process, the Constitution does not provide them the same latitude when it comes to seizing prisoners' money. Brown has a property interest in his fifteen dollars for the simple reason that he has a legal entitlement to it, and the disciplinary hearing failed to provide him with the process he was due. 2) The fifteen dollar fine was also constitutionally excessive, because it was disproportionate—in relation to, among other things, Brown's culpability, the harm done, and his individual financial situation. Courts are obligated to consider any plausible constitutional violation in a

pro se complaint and so this Court should reverse and remand for the district court to consider it in the first instance.

JURISDICTIONAL STATEMENT

Brown appeals the district court's order granting Defendants' motion to dismiss on August 3, 2023. JA 74. The district court had jurisdiction under 28 U.S.C. § 1331. Brown brought claims under the Eighth and Fourteenth Amendments of the United States Constitution, U.S. Const. amend. VIII, XIV. Brown filed a timely notice of appeal on August 21, 2023. JA 75. *See* Fed. R. App. P. 4(a). This Court has jurisdiction over the appeal of the district court's final judgment under 28 U.S.C. § 1291.

STANDARD OF REVIEW

This Court reviews dismissals under Rule 12(b)(6) *de novo*. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). It "accept[s] the well-pled allegations of the complaint as true, and [construes] the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Id.* "[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

STATEMENT OF THE ISSUES

I. Whether a fifteen dollar fine implicates a property interest and so gives rise to procedural due process protections.

II. Whether a fifteen dollar fine for removing a face mask to receive a shave at a prison barbershop is constitutionally excessive.

STATEMENT OF THE CASE

I. Factual History

Demmerick Brown is a prisoner in the custody of the Virginia Department of Corrections. On or around August 8, 2020, he left his cell in Red Onion State Prison and walked to the barbershop to have "a facial shave and haircut." JA 45. Because of the pandemic, Brown wore a face mask, and when he sat down in the barber chair, the barber (who was also a prisoner) instructed Brown to remove it. *Id*. Brown did. *Id*.

"[D]irectly in front of the barber shop" was a guard office, where a prison guard, D.R. Branham sat, "talking [to another guard] and observing the pod." *Id*. Branham never told Brown to put his face mask back on, or advised him that he "must have on the face mask during barber service." *Id*. But later, Branham wrote up a disciplinary charge against Brown for "failure to follow post institutional rules" because he did "not wear[] a mask." *Id*.

A staff member[1] served that disciplinary charge on Brown on August 9, and "read [Brown his] rights" related to a disciplinary hearing. *Id*. Of those rights, Brown requested to present "documentary" and "audio evidence," to "have witnesses," and to "cross examin[e]" the charging officer. JA 45–46. Staff told him that in order to

[1] Brown named this officer as Sergeant Jones but context makes clear this was a typo. The ticket itself shows that Officer Farmer served him the ticket, *see* ECF 24-2 at 1, and Brown listed Farmer and not Jones as a defendant in the case.

do those things, he first needed to fill out certain "necessary forms." JA 46. Sgt. Jones did not provide the forms, but said the "floor office" would; the floor office later told Brown that "none of the forms [were] available in the office." *Id*.

In the run-up to the hearing, Brown tried to get the forms in other ways. On August 10, 11, and 12, he sent Inmate Request Forms to Defendant Officer L.A. Mullins, the guard who would be his Hearing Officer, and asked for the necessary forms. *Id*. Mullins did not respond, and so Brown sent another Inmate Request Form on August 13, this time to the Warden, Assistant Warden, Warden's Secretary, Chief of Housing, Chief of Security, and Unit Manager. JA 46–47. He received no response from those officials, either. JA 47.

Brown's hearing was scheduled for August 26, 2020, and he "was brought before" Mullins on that date. *Id*. Brown "immediately … requested that the hearing be postponed, and explained" why: he had been unable to request, let alone collect, any support for his side. *Id*. Mullins denied that he had ever "received any Inmate Request Form from" Brown. *Id*.

Mullins denied Brown's request for a postponement and "proceeded with the hearing." *Id*. Brown—unable to "call witness[es], present evidence in my favor, … [or] cross examine the accuser"—"pleaded not guilty." *Id*. In the hearing, he tried to explain what had happened: when he removed his facemask, he "was not participating in … recreational activities in the pod." *Id*. Instead, he "was in the

barbershop chair getting a shave and haircut." JA 47–48. He also "had recently arrived" at Red Onion, and "was not aware that face guards had to be on [one's] face during barber service" because "no one ever advised [him] of this rule." JA 48. Concerning a memo that had been circulated to the general population and "made clear [that] face guards must be worn at all times irregardless of barber service," Brown explained that he was not at Red Onion "at the time the memo was issued." JA 49.

But Mullins found Brown guilty, fined him fifteen dollars, and ordered that he "lo[se] all incentives." JA 48–49.[2] Brown was also denied parole. JA 49.

Brown tried to appeal the decision and requested an "appeal package" from Mullins in order to so do. *Id*. Mullins did not provide one, so, on April 15, 2021, Brown tried sending a complaint to Chief of Operations David A. Robinson. JA 50. Defendant Disciplinary Unit Manager Karen Stapleton responded on May 12, 2021, stating incorrectly that Mullins had in fact presented Brown with an appeal package and that Brown had "refused to sign the certificate of service form" acknowledging receipt. JA 50–51. Stapleton also told Brown that the time to file an appeal had expired. JA 51. Brown "immediately responded," stating that he was never given the

[2] There is conflicting evidence in the record about the amount that Brown was fined. The district court based its decision on a fifteen dollar fine, because that is the amount alleged in the complaint, and the court decided the case on a motion to dismiss. *See* JA 69.

appeal package and had never "refuse[d] to sign the certificate of service." JA 51–52. He also pointed out that "there is not a staff witness to verify that" he had refused to sign, and that "the service office claimed" to have delivered the appeal package at 1:00 am—even though VADOC policy "prohibits any disciplinary action" from taking place outside of "normal operation hours." JA 52.

Brown followed up with another letter on May 15, 2021, this time addressed to Harold W. Clarke, the Director of the Virginia DOC. *Id*. The letter explained the situation with Mullins and now also Stapleton. JA 52–53. Another staff person, Zachary Davis, responded by sending Brown the appeal package. JA 53. Brown then tried to "proce[ed]with the appeal," but Stapleton "intervened and blocked [his] appeal from being filed." *Id*.

II. Procedural History

On May 6, 2022, Brown filed this *pro se* action in federal district court, alleging a violation of his constitutional due process rights, and naming as defendants Mullins, Stapleton, and Farmer. As relief, he sought reimbursement of the "$15.00 in fines with interest," as well as compensatory and punitive damages. JA 63–64. Brown's complaint also included claims based on separate events that happened while he was incarcerated at Nottoway, against defendants employed at that prison.

On June 28, 2022, the district court screened his complaint, severing the Nottoway claims from his Red Onion ones, and docketing the latter as a separate civil action. *See* JA 67. On December 16, 2022, the Defendants to this lawsuit filed a Motion to Dismiss. The court granted the motion on August 3, 2023, reasoning that Brown had "fail[ed] to allege a protected liberty or property interest" that would implicate constitutional due process. *Id*. Brown timely appealed. JA 75.

SUMMARY OF ARGUMENT

I. A) The district court erred in determining that Brown did not have a property interest in his fifteen dollars, and so was not entitled to due process. The court reached this conclusion by applying the test in *Sandin v. Conner*, which states that process is due where the prison imposes an "atypical and significant hardship" as compared to ordinary prison life. 515 U.S. 472, 483 (1995). But *Sandin* is about liberty interests, not property ones. And the majority of circuits, including this one in an unpublished opinion, determine whether a prisoner has a property interest by asking whether an independent source of law gives them a legal entitlement to it. Virginia law gives Brown an entitlement to his fifteen dollars, so he had a property interest in it. Even under the *Sandin* standard, the financial conditions of prison make a fifteen dollar fine a qualifying hardship. B)

Prison officials failed to provide Brown with required due process. At the very least, he was entitled to an appeal, which he was denied.

II. Brown also alleged a plausible Excessive Fines claim. The Excessive Fines Clause prohibits fines that are disproportionate, including in relation to the defendant's culpability, harm done, and individual financial circumstances. Obeying a request to remove a face mask to receive a shave in a barbershop that is operated by the prison is hardly culpable; Brown caused no harm, and his financial means, because he is incarcerated and as indicated by his status as a litigant proceeding in this matter *in forma pauperis*, is extremely limited. Especially considering the limited constitutional protections that apply to prisoner-defendants convicted of rule violations, Brown's fifteen dollar fine is plausibly constitutionally excessive.

ARGUMENT

I. Brown Was Denied Constitutional Due Process.

The district court held that Brown did not allege a property interest in his fifteen dollars. The court erred, and Brown stated a plausible due process violation.

a) Brown has a property interest in his fifteen dollars.

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S.

Const. amend. XIV, § 1. For the procedural protections of the Clause to apply to a prisoner, the challenged state action must deprive that prisoner of a protected property or liberty interest. *See, e.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). Asserted property and liberty interests are analyzed under different standards, and the district court's first error was in conflating the two.

The standard for protected *liberty* interests, which the district court applied to Brown's complaint, is described in *Sandin v. Conner*, and asks whether the prison imposed an "atypical and significant hardship" as compared to daily prison life. 515 U.S. at 483. The basis of the *Sandin* test is the fact that lawful incarceration inherently limits many of the liberties of daily life. So *Sandin* aims to allow prisons to restrict liberty in those inherent ways without providing process first, while also requiring officials to provide extra process before imposing constraints that go a step beyond, i.e., create a "dramatic departure" from normal prison life. *Id.* at 485.

The Court has never applied this atypical-hardship test to property interests, and with good reason: while the loss of liberty is inherent to the punishment of prison, the seizure of money is manifestly not. That means that the constitutional question of whether a prison must provide due process before, for instance, revoking a prisoner's visiting privileges or even placing them in solitary confinement, is different in kind rather than degree from the question of whether a prison must provide process before seizing money from a prisoner's bank account.

Consistent with this reasoning, and in the absence of other controlling law from the Court, most circuits have held or assumed that *Sandin* does not govern due process protections for money in prison trust accounts. The Second and Fifth Circuits have expressly held that *Sandin* does not apply in this context. *See Handberry v. Thompson*, 446 F.3d 335, 353 n.6 (2d Cir. 2006); *Bulger v. U.S. Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995). The Third, Sixth, Eighth, and Ninth Circuits have also declined to use *Sandin* to analyze whether prisoners have property interests in the funds in their institutional accounts. *See Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 286, 290 n.8 (3d Cir. 2008); *Jennings v. Lombardi*, 70 F.3d 994, 995–96 (8th Cir. 1995); *Mahers v. Halford*, 76 F.3d 951, 954 (8th Cir. 1996); *Vance v. Barrett*, 345 F.3d 1083, 1088 n.6 (9th Cir. 2003); *Pickelhaupt v. Jackson*, 364 F. App'x 221, 225 (6th Cir. 2010) ("Both this Court and the Ninth Circuit have suggested but not directly held that *Sandin* does not apply to *Hewitt*-type property interests."). Other circuits have not expressly addressed the issue but described *Sandin*'s atypical-hardship requirement as governing only liberty interests. *See McGuinness v. Dubois*, 75 F.3d 794, 797 n.3 (1st Cir. 1996); *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1182 (6th Cir. 1997), *rev'd on other grounds*, 523 U.S. 272 (1998); *Jacoby v. Baldwin Cty.*, 835 F.3d 1338, 1346 (11th Cir. 2016); *Aref v. Lynch*, 833 F.3d 242, 252 (D.C. Cir. 2016).

These circuits, instead of following *Sandin*, analyze prisoners' asserted interests by asking whether they "have a legitimate claim of entitlement to" the property. *See, e.g.*, *Bulger v. U.S. Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995) (quoting *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972)). An entitlement arises, not from the Due Process Clause itself, but instead "from an independent source such as state law." *Castle Rock v. Gonzales,* 545 U.S. 748, 756 (2005); *see also Mallette v. Arlington Cty. Supplemental Ret. Sys. II*, 91 F.3d 630, 634–35 (4th Cir. 1996) (quoting *Roth*, 408 U.S. at 577). So the issue under the majority approach is whether an independent source of law gives a prisoner, like Brown, an entitlement to their property that the prison is seeking to seize or has seized already.

The majority approach is the appropriate one, and indeed, this Court has already adopted it—although in an unpublished decision. *See Burks v. Pate*, 119 F. App'x 447, 450 (4th Cir. 2005) (per curiam) ("A prisoner has a protected property interest in his prison trust account" and "may not be deprived of those funds without minimum due process.")[3] Under that approach, Brown has an entitlement to his fifteen dollars. Several Virginia statutes expressly grant incarcerated people an entitlement to the funds held in their accounts. *See e.g.*, Va. Code. § 53.1-43.1); *id.* § 53.1-44 ("[T]he funds held by the Director or by any state correctional facility . . .

[3] *Cf. Slade v. Hampton Roads Regional Jail*, 407 F.3d 243, 253 (4th Cir. 2005) ("The Jail concedes that Slade has a property interest in the one dollar per day that it removed from his account.").

belong to prisoners"); *id.* § 53.1-43.1 ("[A]n inmate may direct the Department to transfer funds from his personal trust account to any other account maintained for him."). Brown therefore has a property interest in his fifteen dollars and is entitled to procedural due process protections before the prison can seize it as a fine.

Even if this Court were to extend the *Sandin* approach to property, Brown has alleged a property interest because a fifteen dollar fine "imposes atypical and significant hardship on [Brown] in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. When applying *Sandin* in the liberty context, this Court and those across the country compare the hardship imposed by the state action to prison life generally. *See, e.g.*, *Prieto v. Clarke*, 780 F.3d 245, 249 (4th Cir. 2015) ("to garner the protection of the Due Process Clause an inmate must also establish that the nature of [the] conditions themselves, in relation to the ordinary incidents of prison life, impose an atypical and significant hardship") (cleaned up); *Williams v. Secretary*, 848 F.3d 549, 566 (3d Cir. 2017) (relying on "[t]he robust body of scientific research on the effects of solitary confinement … [to] inform[] our inquiry into Plaintiffs' claim that they had a liberty interest in avoiding the extreme conditions of solitary confinement on death row"); *Harden–Bey v. Rutter*, 524 F.3d 789, 792 (6th Cir. 2008) ("In deciding whether changes to an inmate's conditions of confinement implicate a cognizable liberty interest, both *Sandin* and [*Wilkinson*] considered the nature of the more-restrictive confinement *and* its duration in relation

to prison norms and to the terms of the individual's sentence."); *see also Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005) (considering whether state action imposes "an atypical and significant hardship within the correctional context."); *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006) (noting the importance of "carefully examining the conditions of the prisoner's confinement").

Thus, *Sandin* requires consideration of the economic and financial realities of life in prison when assessing whether a fine poses a "significant hardship." Prisoners face unique difficulties earning and spending money, which the district court failed to consider in its cursory analysis of this legal question. JA 72. Answering this question within the four corners of the complaint would be difficult given the context-specific nature of the question, and reversal and remand for discovery would be appropriate. *See Incumaa v. Stirling*, 791 F.3d 517, 527 (4th Cir. 2015) ("Whether confinement conditions are atypical and substantially harsh in relation to the ordinary incidents of prison life is a necessarily ... fact specific comparative exercise." (internal quotation marks and citation omitted)). Alternatively, were this Court to consider the question anew on an empty record, it should look to the amply available empirical data on the financial conditions in prisons in the Fourth Circuit

provided by *amicus curiae*. Anchoring typicality judgments in empiricism would provide direction to district courts on the proper application of the standard.[4]

b) Brown was denied due process.

While the district court did not reach the issue and this Court need not do so on appeal, Brown has also alleged that he was denied constitutionally adequate process. Due process requires, at a minimum, that a prisoner have the ability to appeal a decision. *See, e.g.*, *Wilkinson*, 545 U.S. at 226–27. And Brown alleged that his disciplinary proceeding was deficient because, among other things, he was not permitted to appeal the issue. JA 50–52.

Brown has stated a plausible due process violation, and the district court erred by dismissing his claim.

II. The Fine Was Constitutionally Excessive.

Brown also stated a plausible violation of the Excessive Fines Clause.

[4] In several other areas of the law, courts rely on data-driven context to inform their judgment on whether a particular set of circumstances constitutes a sufficient hardship. *See, e.g., US Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002) (noting that, under the Americans with Disabilities Act, the employer's "undue hardship inquiry focuses on the hardships imposed … in the context of the particular [employer's] operations" (alterations in original) (quoting *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 258 (1st Cir. 2001)); *see also* 42 U.S.C. § 1211(10)(B) (instructing that "the overall financial resources of the [employer]" be considered in "determining whether an accommodation would impose an undue hardship" on the employer).

District courts are required to examine *pro se* complaints in order to determine "whether the facts alleged … could very well provide a basis for recovery under any of the civil rights acts … for redress of constitutional deprivation." *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978) (internal quotation and citation omitted). Brown did not name the Excessive Fines Clause in his complaint, but under *Gordon*, the district court was obliged to consider that claim if Brown's factual allegations stated a plausible constitutional violation, and this Court may do the same on de novo review. Because the allegations did, this Court should reverse and remand for Brown's claim under the Excessive Fines Clause to proceed.

The Eighth Amendment prohibits "excessive fines," which are "understood to mean a payment to a sovereign as punishment for some offense." *See Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 265 (1989); *see also United States* v. *Bajakajian*, 524 U.S. 321, 327–328 (1998). Many kinds of penalties are "fines" for constitutional purposes, including "civil fines designed at least in part to punish" like the one VADOC imposed on Brown. *See Wemhoff v. City of Baltimore*, 591 F. Supp. 2d 804, 808–09 (D. Md. 2008) (citing *Austin v. United States,* 509 U.S. 602, 609–10 (1993)); *see also Grashoff v. Adams*, 65 F.4th 910, 916 (7th Cir. 2023).

The protections guaranteed by the Excessive Fines Clause are animated by concerns about the potential for abuse with this particular kind of punishment. As

the Supreme Court has pointed out, while other forms of punishment "cost a State money," "fines are a source of revenue." *Harmelin* v. *Michigan*, 501 U.S. 957, 979, n.9 (1991) (plurality opinion of Scalia, J.); *see also Timbs v. Indiana*, 139 S. Ct. 682, 687–89 (2019). Indeed, fines are not only a source of revenue, but a particularly appealing one, because they are "politically easier to impose than generally applicable taxes." *Timbs*, 139 S. Ct. at 687–89 (internal quotations and citation omitted). This feature of fines makes the state want to use them "in a measure out of accord with the penal goals of retribution and deterrence," *Harmelin*, 501 U.S. at 979, n.9 (plurality opinion of Scalia, J.), including for small and "dubious offenses," *see Timbs*, 139 S. Ct. at 687–89 (citation omitted).

Fines also raise different equality concerns than other kinds of punishments. Defendants range more according to the dollars in their bank account than in years of life, so a fine that is reasonable to impose on one person may be too much to "bear" for another. *Id*. As the Indiana Supreme Court explained in *State v. Timbs*, on remand from the Supreme Court: "taking away the same piece of property from a billionaire and from someone who owns nothing else" does not punish "each person equally." 134 N.E.3d 12, 36 (Ind. 2019). In sum, fines also may not serve their intended, legitimate purpose (whether deterrence, retribution, etc.) without attention to the individual defendant's situation.

The test for determining whether a fine is constitutional or impermissibly "excessive" is proportionality: courts ask whether a fine "bear[s] some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 327–28. To determine whether a fine is proportional, courts in turn generally consider four factors: 1) "the nature and extent of illegal activity" that is the basis for the fine; 2) "whether the defendant fit into the class of persons for whom the statute was principally designed" to sanction; 3) "the maximum penalties that a court could have imposed for the offense"; and 4) "the harm caused by the offense." *Id*. at 337–40; *see also United States v. $134,750 U.S. Currency*, 535 F. App'x 232, 239 (4th Cir. 2013).

Those four factors are not exhaustive, and most courts—including several Courts of Appeals and nearly every state court that has reached the issue—also consider a fifth: the defendant's individual financial circumstances. *See, e.g.*, *United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016) (explaining that the *Bajakajian* factors are not exhaustive); *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 188 (Pa. 2017); *City of Seattle v. Long*, 493 P.3d 94, 114 (Wash. 2021); *Colo. Dep't of Labor & Emp. v. Dami Hosp., LLC*, 442 P.3d 94, 102 (Colo. 2019); *State v. Yang*, 452 P.3d 897, 904 (Mont. 2019); *County of Nassau v. Canavan*, 802 N.E.2d 616, 622 (N.Y. 2003); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420–21 (Cal. 2005); *State v. Taylor*, 70 S.W.3d 717, 723 (Tenn. 2002); *State v.*

Real Prop. at 633 E. 640 N., Orem, Utah, 994 P.2d 1254, 1260 (Utah 2000). Weighing a defendant's financial situation also aligns with the Supreme Court's jurisprudence on prison sentencing, which directs courts to "consider[] *all* of the circumstances of the case" when imposing a punishment, including facts about the particular defendant. *Graham v. Florida*, 560 U.S. 48, 59 (2010).

Applying these factors to the allegations in Brown's complaint indicates that DOC's fifteen dollar fine was constitutionally excessive. 1) Brown's "level of culpability" was minimal, if not nonexistent. *Bajakajian*, 524 U.S. at 337–40. His offense, after all, was removing his face mask at a barber's request in order to receive a shave. As he could not possibly have received the shave with the mask on, and as DOC permitted him to go to a barbershop—indeed, operated the barbershop where he went—one wonders what else VADOC would have had Brown do. 2) Second, Brown did not fall under a "class of persons" targeted by a "statute," because his offense—unlike most offenses—was not stipulated in a statute, or even DOC regulations. The prohibition against removing masks was, if anywhere, only in a memo circulated by Red Onion before Brown arrived there. JA 49. 3) For the same reason, a court could not have imposed any fine on Brown: the mask requirement was only Red Onion policy, and that policy is not a legal basis for a criminal or civil matter in court. 4) Fourth, "[t]he harm that [Brown] caused was also minimal," if he caused any at all. *Bajakajian*, 524 U.S. at 337–40. Brown removed his face mask

only for the time required to receive a shave; he does not describe any harm that happened because of this, and is entitled to the reasonable inference that there was none. 5) Finally, Brown's finances are also extremely limited. Brown is proceeding in this lawsuit *in forma pauperis*, meaning he is legally indigent. JA 65. Also, because he is incarcerated at the Virginia DOC, he will not be able to improve his financial situation anytime soon. Prisoner wages at Red Onion are around 45 cents per hour. *See, e.g.*, *Ross v. Virginia*, No. 7:22-CV-00179, 2022 WL 1913438, at *1 (W.D. Va. June 3, 2022), *aff'd,* No. 22-6700, 2022 WL 12325033 (4th Cir. Oct. 21, 2022), *cert. denied,* 143 S. Ct. 1032 (2023). Unlike in the free world, Brown may only obtain a job and earn money with the permission of the Department of Correction itself. If Brown is able to obtain a job that pays the 45 cents per hour rate, he would need to work for 33 hours to pay off his fine.

Finally, the Excessive Fines proportionality test should be applied with a consideration of the unique legal environment in which prison discipline operates. *Bajakajian* and other Excessive Fines Clause jurisprudence has developed in the context of criminal prosecutions and free-world civil proceedings. The case law thus presumes the presence of constitutional protections that, although standard, do not apply to prisoners like Brown. These background differences fall into three categories, which make the fifteen dollar fine even more constitutionally suspect.

The first difference is the scope of liability. Unlike in the free world, there is almost no limitation to the liability that the state can impose on a person in prison. For instance, prisons can prohibit conduct that is normally constitutionally protected—like, for instance, "engaging in sexual acts with others by consent," OP 861.1.209,[5] or using "vulgar or insolent language or gestures … towards an employee," OP 861.1.222. Prison rules are also not subject to the usual constitutional tests for vagueness, meaning that liability can expand through blurriness about what is, and is not, prohibited conduct. *See, e.g.*, *Sovereign v. Clarke*, No. 7:21-CV-00449, 2022 WL 327740, at *6 (W.D. Va. Feb. 3, 2022). Prisoners are also in many instances unable to limit their exposure to liability. For instance, Virginia DOC imposes liability for "refusing to work or attend school"—but also for "failure to perform work or program assignment as instructed." OP 861.1.200. The result is that unlike those in the free world, prisoners cannot reduce their potential liability by opting out of activities.

The second background consideration is that, once charged with an offense, prisoners receive far less due process protections, even when process is constitutionally guaranteed. For instance, the Excessive Fines proportionality test presumes that a fine is contestable in court (factor 3), where defendants are

5 https://www.law.umich.edu/special/policyclearinghouse/Documents/Virginia%20-%20Offender%20Discipline--Institutions.pdf

guaranteed at a minimum a neutral fact-finder and the ability to present evidence in their own defense. In prison disciplinary proceedings, however, due process requires neither of these things: prisoners are not guaranteed an adversarial process, the ability to call witnesses, or a decision-maker who is not a prison employee or even not a guard. *Wilkinson v. Austin*, 545 U.S. 209, 225–28 (2005). As argued *supra*, Brown had a property interest in his fifteen dollars, and was not provided with the process he was entitled to before Defendants deprived him of that property. Still, it is true that even a prisoner, like Brown, who is entitled to due process receives far less process than defendants in other criminal or even civil proceedings.

The third background consideration is about finances. Prisoners, uniquely among the state's subjects, can be forced to work for extremely low wages, or for no wages at all. *See, e.g.*, *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993). This means that paying off fines is particularly difficult for prisoners, and a fine that seems small to someone outside prison (like a fine for fifteen dollars) represents a significant loss to someone who is incarcerated.

The sum total of these three background considerations is that in the prison context, it is plausible that even a small monetary fine is plausibly constitutionally excessive. Brown has stated a plausible claim under the Excessive Fines Clause, and this Court should remand to the district court for consideration of this claim.

CONCLUSION

This Court should reverse the district court's dismissal of Brown's claims and remand to the district court for further proceedings.

Date: January 19, 2024

/s/ Samuel Weiss
Samuel Weiss

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,237 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word with a Times New Roman 14-point font.

Date: January 19, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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Date: January 19, 2024

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