No. _____

In The

Supreme Court of the United States

CITY OF KENT,

Petitioner,

v.

ADRIAN JACOBO-HERNANDEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington, Division I

PETITION FOR A WRIT OF CERTIORARI

BIJAN T. HUGHES
Counsel of Record
CITY OF KENT
OFFICE OF THE CITY ATTORNEY
220 Fourth Avenue South
Kent, WA 98032-5838
(253) 856-5770
BHughes@KentWA.gov

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Excessive Fines Clause provides a livelihood preservation protection which can prevent the forfeiture of the instrumentality of a felony?

PARTIES TO THE PROCEEDINGS

Petitioner is the City of Kent. Respondent is Adrian Jacobo-Hernandez.

LIST OF ALL PROCEEDINGS

The Supreme Court of Washington
City of Kent v. Adrian Jacobo Hernandez
No. 100392-7 (March 2, 2022)

Court of Appeals of the State of Washington (Division I)
Adrian Jacobo Hernandez v. City of Kent
No. 81783-3-I (October 25, 2021)

Superior Court of the State of Washington, County of King
Adrian Jacobo-Hernandez v. City of Kent
No. 19-2-26343-1 KNT (August 7, 2020)

Before the Hearing Examiner Kent Department of Public Safety
City of Kent v. 2008 Dodge Charger; VIN #2B3KA43RX8H199624 Adrian Jacobo-Hernandez
No. 18-9624F

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INTRODUCTION

This case is a vehicle to squarely address the intersection of the livelihood protection rights provided by our legal tradition, with the legislature's ancient prerogative to declare a felon's chattel forfeit.

In *Austin v. United States*, the Court held forfeitures were punishment and therefore subject to Excessive Fines Clause analysis. 509 U.S. 602, 622 (1993). In *Timbs v. Indiana*, this Court held that the Excessive Fines Clause was incorporated to the states by the Fourteenth Amendment as a fundamental right. 139 S. Ct. 682, 688-89 (2019). In *United States v. Bajakajian*, the court held that a gross disproportionality standard applied to a forfeiture of money, which the court noted was not an instrumentality. 524 U.S. 321, 340 (1998).

This case would be a vehicle for this Court to, for the first time, apply the Excessive Fines Clause to the instrumentality of a felony – and explain what ancient protections, if any, apply to the forfeiture of such an item from an indigent felon.

Respondent violated the social contract by transporting with his car a "significant amount of methamphetamine." App. 16, 37. This was a felony. 21 U.S.C. § 841. He used the gas tank of the car at issue to conceal the transgression. App. 14. The item was "clearly an instrument" of the drug felony. App. 15. The legislature has specified that for such chattel "no property right exists in them." RCW 69.50.505.

The lower court held that legislative determination, as applied to this car, to be unconstitutional – reasoning that the punishment of extinguishing property rights in it would be "illogical" given the Respondent's indigency. App. 18. The court relied on the "meticulous[]" evaluation of the Magna Carta's livelihood preservation principle by the Washington State Supreme Court in *City of Seattle v. Long*, 198 Wn.2d 136, 168 (2021) (finding $50 a month repayment plan unconstitutionally excessive in relation to a parking infraction). App. 17. Under this claimed authority, the lower court applied a seemingly inviolable personal property right to the felon's last possession (resembling a judicially created bankruptcy exemption); the lower court held that the punishment of forfeiting the $3,000 car was "grossly disproportionate" to the felony it was used to commit. App. 22. A felony for which the culpability sensitive standards of the U.S.S.G. recommended up to a $10,000,000 fine. App. 24, 32.

This case offers the Court a vehicle to clarify the applicability of the historical record to the realities of modern forfeitures.

The Excessive Fines Clause is a near duplicate of the English Bill of Right of 1689's § 10. The sole reference to this clause in major legal treatises available to the colonies in 1776 is Blackstone's fourth commentary. *E.g.*, Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning*, 57 CAL. L. REV. 839, 861-62 (1969) (reviewing historic legal encyclopedias for references to limitations on punishment).

Therein, the *Commentaries*[1] contextualize the governing principle of § 10 with something old, and something new. First, a reference to Magna Carta Chapter 20. 4 William Blackstone, *Commentaries on the Laws of England* 373 (1769) (explaining the "great charter" directs the moderation of amercements "according to the particular circumstances of the offence and the offender"). Second, to a violation of norms worth documenting decades later. *See id.* at 372 (referring to "unprecedented proceedings" during reign of King James II). The theme of both pieces of context is that those subject to a "merely pecuniary" judgment, are not the same as those transgressors that the law has called felon since "time whereof the memory of man runneth not to the contrary." *Cf.* Introduction William Blackstone, *Commentaries on the Laws of England* 67 (1765); 4 Blackstone, *Commentaries* 370.

In 1215, England was an agrarian society aspiring to subsistence. Many people paid rent by "ploughing the lord's land." *See* 2 William Blackstone, *Commentaries on the Laws of England* 61, 79 (1766) (describing "tenures in focage"). That year through Magna Carta Chapter 20, twenty-five landowners and the King agreed not to amerce workers to the point of unproductively. The protection resonates with how "tools of the

[1] A brief note on citations to Blackstone's *Commentaries* in this petition: for ease of reading, instances of a long "ſ" have been replaced with a contemporary "s;" page numbers refer to the first edition, hosted by The Avalon Project. Avalon Project – Blackstone's commentaries on the Laws of England, https://avalon.law.yale.edu/subject_menus/blackstone.asp (last visited May 19, 2022).

trade" are treated in modern bankruptcy. *See* 11 U.S.C. § 522(d)(6).

Regardless, amercements and fines were not the type of punishment designed to permanently disable – that's what the long list of felonious crimes was for. *See* 4 Blackstone, *Commentaries* 18; Craig S. Lerner, *Does the Magna Carta Embody a Proportionality Principle?* 25 GEO. MASON U. CIV. RTS. L.J. 271, 299 (2015) (concluding Magna Carta "Chapters 20 to 22 are of little or no *legal* relevance to us, most notably because they are not addressed to the question of criminal punishment").

The law reserved little for felons, who were outside its protection. *See* 2 Blackstone, *Commentaries* 421. Once "law and fact conspire to prove him completely guilty," including through confession, forfeiture of chattel followed *Cf.* 4 Blackstone, *Commentaries* 330, 374, 378.

In 1681, England was less prone to famine, and concerns relating to fines had shifted. Generally speaking, fines were fixed with some room for discretion. *Id.* at 371-72. When a penalty exceeded a person's networth, a problem arose. In lieu of the modern bankruptcy code, debt was repaid with coerced physical labor. *See id.* at 373. A large enough fine could result in indefinite imprisonment – a punishment beyond that which was authorized by law. *Cf.* Granucci, *supra* at 859.

In discussing this type of abuse, Blackstone vaguely references a case which is now understood to

be that of the lethal conspiracy theorist, Titus Oates. *Id.* at 856. *See also infra*, p. 36. The cleric's perjury was unlawful, but it was not felonious, such that he was still within the municipal law's protection. *Cf.* 1 William Blackstone, *Commentaries on the Laws of England* 289 (1765) (describing social contract theory of forfeiture). An indeterminate length of imprisonment was improper. 4 Blackstone, *Commentaries* 371.

Where a judge infamously failed to extend a protection owed to Titus Oates, a misdemeanant, the lower court here has extended a protection not owed to a felon by the authorities cited by it.

Felony has been "synonymous" with forfeiture for centuries. 4 Blackstone, *Commentaries* 97. "[I]f a statute makes any new offence felony, the law implies it shall be punished . . . with forfeiture." *Id.* at 98. The penalty used to default to total loss of chattel at conviction. 2 Blackstone, *Commentaries* 421.

Tying the forfeiture power to the "Instrumentality" of the crime, is a modern concept. *Bajakajian*, 524 U.S. at 333 n.8. So too is a publicly funded prosecution with a wide mandate. Lerner, *supra* at 291 (noting that in 13th century England, "[t]here were no police, no prosecutors, and for most criminals, a vanishingly small chance of being charged and convicted, assuming they were not caught red-handed").

The scope of property rights lost as a penalty for prohibited conduct is a matter of legislative discretion. *Bajakajian*, 524 U.S. at 332 n.7 (noting legislative intent to revive common law power); *see also* U.S. Const.

art. III, § 3 (limiting "Forfeiture" for treason, "except during the Life of the Person attainted"). Given the upper limit of the power, it would seem difficult to formulate a standard for excess – unless the extinguishing of property rights in chattel as the result of felonious conduct was actually a pecuniary penalty authorized by analogy to admiralty law. *Cf. Austin*, 509 U.S. at 614 n.7 (equivocating "forfeiture" and "fine" with 18th Century dictionaries); *Bennis v. Michigan*, 516 U.S. 442, 453 (1996) (rejecting due process challenge by innocent owner, based on *stare decisis* of revenue law violation forfeitures).

Even maintaining the fiction that the forfeiture of this used car is a pecuniary penalty equivalent to an amercement. *But see infra*, p. 29. And assuming that Respondent's felony status would not be disabling. *But see infra*, p. 32. The one-time relinquishment of this used car is not the ruination of Titus Oates, or its facsimile. *Infra*, p. 37.

Confusion on the import of livelihood preservation in an Excessive Fines Clause analysis is evidenced by the myriad splits amongst the Circuits and states *Fourteenth Amendment – Due Process Clause – Incorporation Doctrine – Timbs v. Indiana*, 133 HARV. L. REV. 342, 348-49 (2019). There is one U.S. Excessive Fines Clause and one shared legal history, but the degree to which the livelihood preservation principle is applied (if at all) depends on where proceedings are brought. Only this Court has the power to set a uniform standard for practitioners. Only this Court can ensure the separation of powers be maintained and

that the legislature's century spanning prerogative be respected. *See* 4 Blackstone, *Commentaries* 98. For these reasons, this Court should grant certiorari here.

Separately and more contemporaneously, the lower court's holding is contrary to this Court's precedent.

In *Bajakajian*, this Court identified deference to the legislature as a guiding principle of review. 524 U.S. at 336. Here the lower court found the forfeiture of a $3,000 car grossly disproportionate to a crime with a U.S.S.G. recommended fine of $10,000,000. App. 22.

In *Solem v Helm*, this Court identified the gross disproportionality standard as being holistic, and relied on "no single criterion." 463 U.S. 277, 289-90 n.17 (1983). Here, the lower court allowed a single factor to outweigh the rest. App. 18.

In *Luis v. United States*, *Bennis*, and *Bajakajian*, this Court identified the instrumentalities of a felony as subject to forfeiture as a matter of tradition. 578 U.S. 5, 12-13; 516 U.S. at 453; 524 U.S. at 333. Here, the lower court identified the items as an "instrument" of the crime and proceeded to label the City's claim to it unconstitutional. App. 15.

This case is a perfect vehicle to squarely address both the protection provided by the Excessive Fines Clause, and the inapplicability of such protection to the instrumentality of a felony.

OPINIONS BELOW

The Washington State Supreme Court's denial of review is reported at 199 Wn.2d 1003 (Wash. 2022). App. 1. The opinion of the Washington State Court of Appeals is reported at 19 Wash. App. 2d 709, 497 P.3d 871 (2021). App. 2. The opinions of the King County Superior Court and Kent Police Department Hearing Examiner are unpublished, but included at App. 23 and App. 30.

JURISDICTION

The Washington State Supreme Court denied petitioner's request for review on March 2, 2022. Petitioners request a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT

1. On June 22, 2018, Jacobo-Hernandez ("Respondent") arrived at a sting operation in a 2008 Dodge Charger. App. 31. Within a covered garage, Respondent

unloaded from the gas tank and delivered to law enforcement: eight heat-sealed and zip locked baggies containing approximately 8 lbs of methamphetamine, valued between $25,000 and $30,000. App. 25-26. He admitted to having made several other deliveries prior to being caught. App. 16. Subsequently, Respondent entered a plea of guilty to 21 U.S.C. § 841, Possession with Intent to Distribute Methamphetamine. App. 24. The Dodge Charger was placed in the custody of the City of Kent and is stipulated to be valued at $3,000. App. 24.

2. The recommended penalty to Respondent's offense level of 26 was a fine of up to ten million dollars ($10,000,000.00). App. 24. In entering the plea, Respondent acknowledged that "a consequence of pleading guilty may include the forfeiture of certain property either as a part of the sentence imposed by the Court, or as a result of civil judicial or administrative process." App. 32. The District Court sentenced Respondent to 24-month imprisonment and waived nonmandatory fines. App. 32.

3. The City of Kent initiated forfeiture proceedings under RCW 69.50.505, and a hearing was held before a Hearing Examiner on August 7, 2019. Respondent, through counsel, asserted the affirmative defense that the forfeiture violated the Excessive Fines Clause of the U.S. Constitution. The Hearing Examiner concluded the forfeiture was constitutional, as it was proportional to the crime and there was no evidence that it was necessary for Respondent's livelihood. App. 36-39. The Hearing Examiner

noted that there appeared to be no legal requirement to provide Respondent with "a 'clean start' with the sale of a tangible asset properly seized in violation of state law." App. 38.

4. On October 8, 2019, Respondent, through counsel, appealed to the King County Superior Court, reasserting his excessive fine argument. The Superior Court conducted a proportionality analysis and considered each factor in tandem, noting that it could not focus on a single factor. App. 27. The Court concluded that forfeiture was not grossly disproportionate and affirmed the Hearing Examiner's decision. *Id.*

5. The matter was subsequently brought to the Court of Appeals. App. 2. On October 25, 2021, an opinion was published reversing the Superior Court. App. 22. The Court of Appeals acknowledged that the "vehicle was clearly an instrument" which was used to hide and transport "a significant amount of methamphetamine." App. 15-16. That all but one of the factors weighed towards proportionality. App. 18. Nonetheless, because Respondent was indigent and the car was his sole asset, the court concluded that the forfeiture of Respondent's vehicle was grossly disproportionate and violated the Eighth Amendment. App. 22.

6. The City of Kent filed a Petition for Certiorari to the Washington State Supreme Court, challenging the Court of Appeals' decision as inconsistent with precedent and ahistorical in its application of the livelihood protection principles. The Washington State

Supreme Court denied the request for discretionary review without comment.

REASONS FOR GRANTING THE PETITION

This case presents a pure question of law – one which the Court has explicitly left open. The attempts by lower courts to resolve this question has resulted in intractable splits. Stemming from this confusion, the lower court's holding here is contrary to this Court's precedent. Resolving this confusion and providing clarity as to our historical rights is of great national importance. For these reasons, this Court should grant certiorari.

I. The lower court's decision deepens existing splits on the applicability of a livelihood preservation principle to the Excessive Fines Clause.

The idea of a livelihood preservation principle has its roots in Magna Carta Chapter 20, which provides, in relevant part that:

> A free man is not to be amerced for a small offence except in proportion to the nature of the offence, and for a great offence he is to be amerced in accordance with its magnitude, saving to him his livelihood, and a merchant in the same manner, saving to him his stock in trade, and a villein is to be amerced in the

> same manner, saving to him his growing crops, if they fall into our mercy.

J.C. Holt, *Magna Carta* 448-73 (2d 1992).

Scholars have speculated as to the reach and effect of this chapter on the Excessive Fines Clause. *See generally* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014).

This Court has contributed to the speculation, by referring to the livelihood protection principle, but leaving its effect as an open question. *Timbs v. Indiana*, 139 S. Ct. 682, 688-89 (2019); *United States v. Bajakajian*, 524 U.S. 321, 335-36 (1998) (noting but not reaching); *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 271 (1989) (acknowledging historic limitation "that [an] amercement not be so large as to deprive [one] of his livelihood").

Under the permissive framework announced in *Bajakajian*, the application of the livelihood preservation principle has percolated amongst the lower courts and resulted in a myriad of irreconcilable conclusions. What has developed is a series of splits amongst the courts that cannot be resolved without this Court's intervention and guidance.

A. There is a four-way split amongst the circuits and state courts on the application of the principle.

A full treatment of the doctrinal nonuniformity would be difficult to capture here; instead the petition will proceed by grouping holdings into four illustrative categories: (1) courts that acknowledge effect on livelihood as a gross disproportionality factor; (2) courts that acknowledge effect on livelihood, but as a separate inquiry from gross disproportionality; (3) courts that acknowledge effect on livelihood, but limit it to pecuniary penalties and not forfeiture of seized assets; and (4) courts that have rejected effect on livelihood as a consideration in the Excessive Fines Clause analysis.

1. The Second and Fourth Circuits, along with at least five states, acknowledge effect on livelihood as a gross disproportionality factor.

Courts in this group have taken this Court's previous discussions of the Magna Carta's livelihood preservation principle as a signal to consider an individual's circumstances as part of the gross disproportionality analysis. Some courts are permissive of the consideration, while others mandate it. Within this group of decisions there is variance as to whether courts consider the present financial condition of an individual, as opposed to considering only the forward-looking effects of a forfeiture.

Second Circuit. The Second Circuit has acknowledged that effect on livelihood is legally cognizable under the Excessive Fines Clause, and permits trial courts to consider it, as an additional factor of the gross disproportionality test. *United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1223 (2017) (upholding forfeiture order of $1,273,285.50). In describing its livelihood inquiry, the Second Circuit has emphasized it is forward looking. *Id.* at 112 (explaining "that asking whether a forfeiture would destroy a defendant's *future* livelihood is different from considering as a discrete factor a defendant's *present* personal circumstances, including age, health, and financial situation. While hostility to livelihood-destroying fines is deeply rooted in our constitutional tradition, consideration of personal circumstances is not."). As a result, the Second Circuit's formulation bars "the separate consideration of personal circumstances as a distinct factor." *Id.* at 113.

Fourth Circuit. In evaluating a $14,000,000 forfeiture judgment, the Fourth Circuit acknowledged effect on livelihood but held that "to the extent that it is an appropriate consideration, it is merely one factor to be weighed with all other factors. Standing alone, the fact that Bennett did not have sufficient assets to satisfy the forfeiture judgment is insufficient to render the judgment unconstitutional." *United States v. Bennett*, 986 F.3d 389, 400 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 595 (2021).

Indiana. After proceedings on remand from this Court, the Supreme Court of Indiana agreed with the

lower court's determination that "it's appropriate to evaluate the market value of the forfeiture relative to the owner's economic means." *State v. Timbs*, 169 N.E.3d 361, 373 (Ind. 2021) (remanding to determine if forfeiture of $35,000 car was grossly disproportionate to a crime with a $10,000 maximum penalty).

Minnesota. The Supreme Court of Minnesota has looked to the income of an individual in analyzing gross disproportionality, but has not held it to be a mandatory consideration. *Compare State v. Rewitzer*, 617 N.W.2d 407, 414 (Minn. 2000) ("We further note that at Rewitzer's current rate of repayment, it will be well over 300 years before his fines are paid off."), *with Miller v. One 2001 Pontiac Aztek*, 669 N.W.2d 893, 896 (Minn. 2003) (describing gross disproportionality standard without reference to livelihood or economic impact on defendant).

Pennsylvania. The Supreme Court of Pennsylvania's formulation of the gross disproportionality test looks to a person's ability to pay as part of a calculation of the "non-pecuniary subjective valuation" which is used to determine an item's "comprehensive value," which is then compared to the gravity of the offense. *Commonwealth v. 1997 Chevrolet & Contents Seized From James Young*, 639 Pa. 239, 297-98 (2017).

Utah. The Supreme Court of Utah has held that "[i]n judging the harshness of the forfeiture . . . a court should look at: (a) the fair market value of the property; (b) the intangible, subjective value of the property, *e.g.*, whether it is the family home; and (c) the hardship

to the defendant, including the effect of the forfeiture on defendant's family or financial condition." *State v. 633 E. 640 N.*, 994 P.2d 1254, 1260 (Utah 2000), *cert. denied*, 530 U.S. 1262 (2000).

Washington. In applying the gross disproportionality standard to a tow impoundment proceeding, the Supreme Court of Washington held that "a person's ability to pay the fine[,]" was a relevant factor. *City of Seattle v. Long*, 198 Wn.2d 136, 173 (2021) (remanding after holding that a payment plan of $50 a month was a punishment grossly disproportionate to the severity of a minor parking infraction citation).

2. The First Circuit acknowledges effect on livelihood, but as a separate inquiry from gross disproportionality.

The First Circuit's approach is similar to the previous, except that its consideration of the effect on livelihood is a stand-alone inquiry – such that a forfeiture may be proportional to the crime committed but nonetheless be unconstitutional because of its interference with an individual's ability to earn a livelihood.

First Circuit. The First Circuit has held that effect on livelihood is legally cognizable under the Excessive Fines Clause and requires its consideration by trial courts. *United States v. Levesque*, 546 F.3d 78, 84 (1st Cir. 2008) (remanding and holding "a court should consider a defendant's argument that a forfeiture is excessive under the Eighth Amendment when

it effectively would deprive the defendant of his or her livelihood"). The First Circuit considers whether a forfeiture would deprive an individual of their livelihood, as a separate inquiry from the question of gross disproportionality – such that a forfeiture may theoretically be proportional to the crime yet still violate the Excessive Fines Clause. *Id.* Under the First Circuit's formulation, the ability to pay a forfeiture at the time of issuance is not relevant, and consideration instead looks to whether a full forfeiture order would "constitute the type of 'ruinous monetary punishment' that might conceivably be 'so onerous as to deprive a defendant of his or her future ability to earn a living[.]'" *United States v. Chin*, 965 F.3d 41, 58 (1st Cir. 2020) (holding that $500,000 penalty for person with ~$423,000 net worth did not disable livelihood).

3. The Eighth Circuit, California, and Colorado acknowledge effect on livelihood, but limit the inquiry to pecuniary penalties and not to forfeitures of seized assets.

Courts in this group acknowledge that effect on livelihood may be considered for pecuniary penalties – but that ability to pay is not relevant for forfeitures of seized assets, because by definition the asset cannot exceed the size of the owner's estate. *But see* McLean, *supra* at 896.

Eighth Circuit. The Eighth Circuit has acknowledged effect on livelihood as a relevant consideration

under the Excessive Fines Clause, which it evaluates as a factor of the gross disproportionality determination for pecuniary penalties. *United States v. Smith*, 656 F.3d 821, 828-29 (8th Cir. 2011), *cert. denied*, 565 U.S. 1218 (2012) (upholding forfeiture imposed on an indigent defendant). The Eighth Circuit does not require fact finding on ability to pay. *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014) (noting issue was not addressed by District Court, despite it being raised, but proceeding to hold forfeiture was constitutional). The Eighth Circuit has noted that "ability to pay" is an appropriate consideration for fines but not for forfeitures of seized assets. *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998).

California. The Supreme Court of California has characterized *Bajakajian* as including "the defendant's ability to pay" in the gross disproportionality analysis. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421 (Cal. 2005). *See also People v. Cowan*, 260 Cal. Rptr. 3d 505, 519-21 (2020), *cert. granted*, 466 P.3d 843 (2020) (reviewing cases and determining that "in the context of forfeiture orders, where the issue of ability to pay is often irrelevant in any event because the issue there generally is confiscation of identified assets rather than imposition of a monetary sanction").

Colorado. The Supreme Court of Colorado held that "ability to pay is an appropriate element of the Excessive Fines Clause gross disproportionality analysis," and that this analysis appropriately applied to a corporate entity. *Colo. Dep't of Labor & Emp't, Div. of*

Workers' Comp. v. Dami Hosp., LLC, 442 P.3d 94, 101 (Colo. 2019), *cert. denied*, 140 S. Ct. 849 (2019) (remanding where $841,200 statutory fine exceeded company's gross annual income). *See also People v. Pourat*, 100 P.3d 503, 507 (Colo. App. 2004) (noting that "[i]n a forfeiture of existing assets, there is no need for the court to consider the defendant's ability to pay because the assets seized are sufficient to satisfy the sanction") *cert. denied*, 2004 Colo. LEXIS 886 (2004).

4. The D.C. Circuit, Sixth Circuit, Ninth Circuit, Eleventh Circuit, and two states explicitly do not consider effect on livelihood in gross disproportionality analysis.

Courts in this group have rejected consideration of effect on livelihood as part of the Excessive Fines Clause analysis.

D.C. Circuit. The D.C. Circuit in reviewing for plain error, rejected a challenge to the District Court's failure to consider defendant's ability to pay $40 million forfeiture which defendant argued would effectively sentence them "to lifetimes of bankruptcy." *United States v. Bikundi*, 926 F.3d 761, 796 (D.C. Cir. 2019), *cert. denied*, 141 S. Ct. 150, and 141 S. Ct. 457 (2020). *See also Duckworth v. United States*, 705 F. Supp. 2d 30, 48-50 (D.D.C. 2010) (holding penalty constitutional where defendant had negative net worth and cash flow).

Sixth Circuit. The Sixth Circuit in reviewing for plain error, found no clear authority for there being a prohibition on forfeiture orders which would be "financially ruinous." *United States v. Bradley*, 969 F.3d 585, 592 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2763 (2021) (commenting that even if a "financially ruinous" standard existed, that it was not clear that a judgment that resulted in a debt of ~$250,000 would qualify).

Ninth Circuit. The Ninth Circuit has held that "an Eighth Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender." *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998), *cert. denied*, 525 U.S. 975 (1998). *See also United States v. Beecroft*, 825 F.3d 991, 997 n.5 (9th Cir. 2016).

Eleventh Circuit. The Eleventh Circuit in evaluating forfeitures for violation of the Eighth Amendment does "not take into account the personal impact of a forfeiture on the specific defendant. . . ." *United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999), *cert. denied*, 531 U.S. 828 (2000). *See also United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009)

South Dakota. The Supreme Court of South Dakota rejected the argument that "consideration of [the defendant's] ability to pay was necessary." *State v. Webb*, 856 N.W.2d 171, 176 (S.D. 2014).

Iowa. The Supreme Court of Iowa in describing its formulation of the gross disproportionality test, has noted that "[t]he manner in which the amount of a particular fine impacts a particular offender is not the

focus of the test." *State v. Izzolena*, 609 N.W.2d 541, 551 (Iowa 2000).

B. The protection afforded by the Excessive Fines Clause depends on where proceedings are brought.

Not all the approaches above can be simultaneously correct – their differences are irreconcilable. Some courts look at the effect of forfeiture on owners, some do not. Some consider present financial condition, some look only to the future. Some do not consider hundreds of thousands of dollars of debt to be financially ruinous, whereas at least one court considers forfeiture of a $3,000 car as depriving a person of their livelihood. App. 19. This case is a good vehicle to end the variance, and level set the relative import of the livelihood preservation principle.

Resolving these questions in a nationally uniform way is of practical importance to law enforcement and accused criminals alike.

The cost of doing business for inter-state criminal enterprises depends in part on the predictable consequences of crime. An overly broad application of the Excessive Fines Clause has the practical effect of lowering transaction costs for criminals, thereby making those jurisdictions more attractive to illicit enterprises. Under the law as stated in this case, a gig worker in the contraband transportation industry need not even risk his personal car in the furtherance of a major

criminal enterprise, so long as they can establish indigency.

The doctrinal confusion adds uncertainty for law enforcement agencies and prosecutors, as they attempt to use the tools provided to them by the legislature to combat criminal enterprises. If the present net worth of an individual becomes a dispositive legal question – as opposed to one of many factors, which might tip the scales in a close call – then that transforms routine forfeiture proceedings into quasi-bankruptcy proceedings. The Excessive Fines Clause would effectively become a judicially created quasi-personal property exemption, which goes beyond the legislated bankruptcy process for shielding assets from financial ruin. *See* 11 U.S.C. 362(b)(4) (excluding items subject to police power from automatic stay).

Only this Court can resolve these deepening splits. Only this Court can provide a uniform framework for this Clause, which has been marked as "deeply rooted in this Nation's history and Tradition." *Timbs*, 139 S. Ct. at 688-89. This case is a perfect vehicle to end the confusion and clarify how this "Tradition" should be considered.

II. The lower court's holding conflicts with this Court's precedent.

In deciding an issue based on the meaning of the U.S. Constitution, the lower court's treatment of the Excessive Fines Clause here is inconsistent with this Court's precedent. The lower court's decision: offered

no presumption of constitutionality to a forfeiture valued well below the financial penalty authorized by Congress; it made a single factor dispositive in the gross disproportionality balancing test; and it failed to afford appropriate weight to the forfeited object's status as the instrumentality of a felony. This Court should take certiorari to correct these misapplications.

A. The lower court's decision fails to grant a strong presumption of constitutionality in degradation of *Bajakajian*.

A strong presumption of constitutionality should be applied when the legislature has spoken. In "deriving a constitutional excessiveness standard" this Court declared, "judgments about the appropriate punishment for an offense belong in the first instance to the legislature [and r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining . . . questions of legislative policy." *Bajakajian*, 524 U.S. at 336.

It is the role of the legislature to set the bounds of appropriate punishment for criminal behavior. "In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." *E.g.*, *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983).

Here, the legislature exercised its power to determine an appropriate penalty; it has declared that "no

property rights exist," in an item like the Respondent's car. RCW 69.50.505. The lower court's holding invalidates that determination.

In the proportionality analysis, deference to the legislature is generally borne out by looking to the maximum penalty allowable by the violated statute, or preferably the penalty recommended by the U.S. Sentencing Commission Guidelines, due to the Guideline's assessment of culpability. *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197 (9th Cir. 1999).

Here, that number is the same, $10,000,000, because the guidelines defer to the statute for fines greater than $500,000. U.S.S.G. § 5E1.2(c)(4). The lower court briefly acknowledged this amount, but failed to discuss, analyze, or give weight to the authorized amount's numeric relationship to the $3,000 value of the forfeiture. App. 16. Under the proper analysis, the relationship between the $10,000,000 authorized and the $3,000 forfeiture should have granted a strong presumption of constitutionality under *Bajakajian*. The lower court's holding failed to heed this Court's warning that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Bajakajian*, 524 U.S. at 336. *E.g.*, App. 19 n.14.

This Court should grant certiorari to reaffirm the legislature's prerogative in setting penalties.

B. In nominatively applying a balancing test, the lower court's analysis subordinated established factors in favor of a single criterion.

The lower court's holding explained that "[e]ven given all the other proportionality factors weighing against Jacobo Hernandez, it seems illogical that the Constitution would allow the State to deprive him of his only asset, a $3,000 vehicle, when he has been found to be indigent." App. 18-19. This is inconsistent with the wholistic approach that this Court has described as governing a multi-pronged gross disproportionality analysis.

The gross disproportionality standard adopted in *Bajakajian* borrowed from this Court's treatment of proportionality under the Cruel and Unusual Punishment Clause. 524 U.S. at 336. *See Solem*, 463 U.S. at 289-90 n.17. In that Eighth Amendment context, the Court expressly stated that "no one factor will be dispositive in a given case," and that "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment." *Id.* There is no compelling reason to think that this wholistic approach to using a multi-factored test should not apply to the Excessive Fines Clause.

By letting a single unestablished factor outweigh all of the established factors, the lower court subordinated the controlling authority established by this Court in *Bajakajian* and *Solem*. *Id.*

If this Court finds that the Excessive Fines Clause provides a livelihood protection principle, then this case presents a perfect vehicle to resolve the split between the First and Second Circuits. These Circuits differ on whether to consider effect on livelihood as part of the gross disproportionality standard, or as a separate overriding concern. *Compare United States v. Levesque*, 546 F.3d 78, 84 (1st Cir. 2008), *with United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016). S*ee also United States v. King*, 231 F. Supp. 3d 872, 904-05 (W.D. Okla. 2017) (discussing split between First and Second Circuits, and determining fact finding was necessary on whether $231,432,686.73 forfeiture money judgment would deprive from ability to earn a livelihood).

This Court should grant certiorari to clarify that even if effect on future livelihood is a cognizable consideration, it would be but a single part of the gross disproportionality test – for it to override every other factor, the disability would need to be far more ruinous than the one-time relinquishment of a used car.

C. The car's status as the instrumentality of a felony was not given sufficient weight.

The lower court's analysis did not give sufficient import to the fact that the "the vehicle was clearly an instrument of Jacobo Hernandez' crime," in that Respondent "admitted to hiding methamphetamine in his gas tank[.]." App. 15. Compelling the return of such an

item to a felon is inconsistent with this Court's prior discussions.

In *Austin v. United States*, the Court rejected the "Government's attempt to characterize the[] properties as 'instruments'" in arguing that the forfeiture was remedial and not punitive – a question of whether the Excessive Fines Clause applied. 509 U.S. 602, 621 (1993). The Court did not reach whether the status as an instrumentality was significant in the actual application of the Clause.

When the Court did apply the Clause in *Bajakajian*, its analysis noted that the property at issue, money, was not an instrumentality of the crime but implied that that determination would be significant in an *in rem* proceeding. 524 U.S. at 333 n.8.

In *Bennis v. Michigan*, this Court upheld the forfeiture of a car with an innocent owner, because the vehicle was used to facilitate a crime. 516 U.S. 442, 453 (1996) (involving due process challenge).

In *Luis v. United States*, this Court again distinguished between untainted assets as, "differ[ing] from a robber's loot, a drug seller's cocaine, a burglar's tools, or other property associated with the planning, implementing, or concealing of a crime." 578 U.S. 5, 12-13 (2016).

To the extent that the livelihood protection principle is legally cognizable – it should be inapplicable to the instrumentalities of a felony. *See infra*, p. 32. To compel the return of an instrumentality, as the lower

court's formulation of the Excessive Fines Clause test does, is to upend the traditional underpinnings of forfeiture. *See Luis v. United States*, 578 U.S. 5, 31 (Thomas, J., concurring) ("Tainted assets fall within this tradition because they are the fruits or instrumentalities of crime."). *See also State v. Timbs*, 134 N.E.3d 12, 40 (Ind. 2019) (Slaughter, J., dissenting) (describing preference for an "instrumentality" test). If such a framework was permissible, arsonists should be returned their lighters; poachers their rifles; forgers their printing presses – so long as they do not have any other possessions at the time of the forfeiture hearing.

This Court should grant certiorari to clarify the legal significance of an object's status as the instrumentality of a felony.

III. It is an issue of national importance that our rights be understood; there is scant historical basis for a livelihood preservation consideration in evaluating the forfeiture of a felon's property.

The lower court found that Respondent's "[e]state clearly will not bear the forfeiture of his only asset[.]" App. 19. The Court of Appeals deemed the forfeiture unconstitutional, in reliance of a livelihood protection principle purported to be found in the historic record. The historical context of that right has been lost in the telephone game of analogizing 'amercements made upon free men' to 'excessive fines' to 'forfeitures of the instrumentalities of felonies.' It is an issue of national

importance that there is clarity as to our rights, and our shared legal tradition. This Court should grant certiorari to clarify the historic record.

A. Felony forfeiture and "merely pecuniary" penalties are distinct concepts.

In the process of recognizing the legal cognoscibility of both forfeitures and fines under the Excessive Fines Clause, the analysis suggested that historic concerns and treatments of the two concepts are interchangeable. *See Austin v. United States*, 509 U.S. 602, 623 (1993) (Scalia, J., concurring) ("I consider this forfeiture a fine[.]"). *See also id.* at 628-29 (Kennedy, J., concurring) ("we risk anachronism if we attribute to an earlier time an intent to employ legal concepts that had not yet evolved"). But pecuniary penalties and the confiscation of a felon's chattel through forfeiture were distinct punitive concepts for which relevant historical documents identify different limitations.

1. The Court's equivocation between "fines" and "forfeiture" is at odds with the text of the English Bill of Rights of 1689 and the Magna Carta.

In the process of finding forfeitures to be punishment, the Court in *Austin v. United States* noted that dictionaries suggested the terms "fines" and "forfeiture" were colloquially interchangeable in the late 18th century. 509 U.S. at 614 n.7. The Court then proceeded to analyze the English Bill of Rights and related

history with that apparent understanding. But this construction is incomplete – an equivocation between "fines" and "forfeiture" renders the English Bill of Rights § 12 partially superfluous: If "forfeitures" are "fines," and vice versa, why list both in one section, and only one in another, unless the document is referring to separate concepts? *Compare* English Bill of Rights of 1689, § 10 (baring against "Bail fees, excessive fines, and unusual punishments" without use of the word "forfeiture"), *with* English Bill of Rights of 1689, § 12 (making "promises of fines and forfeitures of particular persons before conviction" illegal). Is the $10,000 fine for treason what U.S. Const. art. III, Sec. 3's limitation on "Forfeiture" concerned with? *See* 18 U.S.C. § 2381.

The Court in *Austin* did not address this in reaching the holding that forfeitures are punishment. The linguistic drift of "forfeiture" to sometimes refer to a pecuniary penalty, as evidenced by the dictionaries, should not be taken to mean that all forfeitures have always been considered fines, or that all discussions about fines are referring to forfeitures. The historical record abundantly demonstrates that since before the birth of English written law, the extinguishment of a felon's property rights in chattel and real property has been understood to be a separate concept from a "merely pecuniary" penalty. *Compare* Magna Carta Chapter 20 (concerning amercements for minor transgressions), *with* Magna Carta Chapter 32 (concerning distribution of property forfeit by felons). *See* 4 Blackstone, *Commentaries* 370.

2. Blackstone's *Commentaries* evidence forfeiture and "merely pecuniary" penalties were distinct concepts.

Further, forfeitures are identified by Blackstone as distinct streams of revenue for the King's courts. 1 Blackstone, *Commentaries* 279; 2 Blackstone, *Commentaries* 408 (maintaining distinction between "forfeitures, fines, and amercements" three times). In the *Commentaries'* chapters concerning the transfer of property to the state, "Title by Forfeiture" has a separate chapter from "Title by Prerogative, and Forfeiture." Compare 2 Blackstone, *Commentaries* 267 (identifying felony forfeiture), *with id.* at 408 (describing "antient prerogative" and "particular modern statutes" as distinct sources of revenue that melded in the royal coffer).

In describing types of judgment in criminal matters, Blackstone separately notes that "[s]ome extend to confiscation, by forfeiture of lands, or moveables, or both," while others "are merely pecuniary, by stated or discretionary fines." 4 Blackstone, *Commentaries* 370. The terms are not always equivalent, even if forfeitures occasionally take a lesser form that resembles a pecuniary penalty. *E.g.*, *id.* at 379 ("I here omit the particular forfeitures created by the statutes . . . because I look upon them rather as a part of the judgment and penalty, inflicted by the respective statutes, then as consequences of such judgment; as in treason and felony they are.").

This case is a perfect vehicle to address the historical record, which evidences that the forfeiture of a

felon's chattel was a distinct concept with different protections than "merely pecuniary" penalties. 4 Blackstone, *Commentaries* 370. The two concepts applied to different levels of social transgression. Craig S. Lerner, *Does the Magna Carta Embody a Proportionality Principle?* 25 GEO. MASON U. CIV. RTS. L.J. 271, 283-91 (2015) (distinguishing amercements from serious penalties).

B. Common law felony forfeiture was absolute, with limitations on process and not degree.

At the common law, by definition, if the punishment is forfeiture then the crime is a felony – the terms were "synonymous." 4 Blackstone, *Commentaries* 95, 97. Forfeiture meant all property returned to the Crown. 1 Blackstone, *Commentaries* 289. *See also The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (noting that at common law "in many cases of felonies, the party forfeited his goods and chattels to the crown"). Reserving a portion of that property for a felon's future livelihood would have been inconsistent with a legal system which "takes no farther care of him than barely to see him executed," once "law and fact conspire to prove him completely guilty." 4 Blackstone, *Commentaries* 373-74. *See also id.* at 330 (noting attainder by confession).

The total loss of property rights as a punitive measure has long been part of our legal tradition – used as a punishment against jurors in the 1300s

through the civil appellate process of Writs of Attaint. 3 Blackstone, *Commentaries* 402-04 (citing to reign of Edward III, who ruled until his death 1377); *see also* John H. Langbein, Renee Lettow Lerner & Bruce P. Smith, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN INSTITUTIONS 417-19 (2009). Further, felony was what the authority said it was – in 1644 Sir Coke describes the felonious act of "conveying a living sheep from the Realm," as resulting in total loss of property. 3 E. Coke, The Institutes of the Laws of England 104 (London 1644). Conversely, a legislature can choose relative restraint in its exercise of the forfeiture power, as the fledging U.S. federal government did. *See generally* Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1505 (2019) (reviewing hundreds of proceedings between 1789 and 1809 and finding no instances of constitutional challenge to the extinguishment of rights in chattel, even in the face of disproportionality).

The limitations on forfeiture were limitations on process and not degree. *Cf.* 2 Blackstone, *Commentaries* 421 (no chattel transferred until conviction); 4 Blackstone, *Commentaries* 373-74 (no real property transferred until attainder); English Bill of Rights of 1689, § 12 (barring forfeiture until conviction); Magna Carta Chapter 32 (setting division of property forfeit by felons). *But see also Bennis v. Michigan*, 516 U.S. 442, 453 (1996) (rejecting innocent owner's due process challenge of forfeiture due to weight of *stare decisis*).

Once the process ran its course, the law no longer provided its protection, and the property became "forisfacta, that is . . . the property is gone away or departed from the owner." 1 Blackstone, *Commentaries* 289. *See also* 4 Blackstone, *Commentaries* 373 (noting loss of the "right of transferring or transmitting property to others").

As Blackstone explained, property rights are "[d]erived from society" and flow from the "municipal law." 1 Blackstone, *Commentaries* 289. The "municipal law" is a term of art which encompasses "the supreme power in a state" to establish rules and rights, and includes the written law (*e.g.*, the Magna Carta and the English Bill of Rights). Intro § 2 Blackstone, *Commentaries* 44; Intro § 3 Blackstone, *Commentaries* 63, 85.

A felon was considered to have transgressed the "municipal law" and therefore "forfeits his right to such privileges as he claims by that contract," and as a result, "the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him." 1 Blackstone, *Commentaries* 289; 4 Blackstone, *Commentaries* 375. To the extent Magna Carta Chapter 20 provides a livelihood protection right which is relevant in modern times, it is ahistorical to extend it to forfeitures of a convicted felon's chattel – never mind, the instrumentality of his felonious act. *But cf.* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014) ("While any statute that calls for the full forfeiture of estate appears to violate the principles of the Magna Carta, the reality may be more complex.").

This case is a good vehicle to squarely address the significance of felony status in our legal tradition. *See also District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

C. To the extent a livelihood preservation principle exists for penalties, it applies to pecuniary penalties which escalate to ruination.

Under the municipal law, free men were obliged, restricted, and supported by statute and unwritten customs. *See* 1 Blackstone, *Commentaries* 119 (describing reciprocity between "duties" and "rights"). In resolving disputes over the "relative nature" of "social duties," a low literacy population relied on "living oracles" – the "depositary of the laws," who had access to records and resources accrued over centuries. *See* 1 Blackstone, *Commentaries* 119; Intro Blackstone, *Commentaries* 69. Those vested in determining validity looked to records of the past, reviewed the concerns expressed, and made new decisions which then in turn "form part of the common law" as "the principal and most authoritative evidence." 1 Blackstone, *Commentaries* 69.

Magistrates were responsible for punishing breaches of the social contract – failures to act when required, and for failures to abstain. *See* 1 Blackstone, *Commentaries* 118. The duties varied. *See id.* at 357 (describing natural allegiance to King owed from birth); *id.* at 120 (noting that the duty of "private

sobriety is an absolute duty," which a tribunal "can never enforce" because violations occur in private); 2 Blackstone, *Commentaries* 79-80 (describing landed servant "ploughing the lord's land for three days" as rent).

Magistrates were responsible for being in tune with the socially acceptable penalty for an action. *See also* 4 Blackstone, *Commentaries* 98 ("if a statute makes any new offence felony, the law implies it shall be punished . . . with forfeiture").

Magistrates were responsible for ensuring that obligations owed under the social contract were respected – that the order of things did not violate the three "primary" groups of rights: "the right of personal security, the right of personal liberty; and the right of private property." 1 Blackstone, *Commentaries* 125.

It is with this backdrop of expectations that the inspiration of the Excessive Fines Clause should be understood – as a reaction to the "temporal judgment" of the infamous Judge Jeffreys. *See* Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning*, 57 CAL. L. REV. 839, 859 (1969) (citing A. Gray, Debates in the House of Commons from the Year 1667 to the Year 1694, at 287 (1763)).

The case of Titus Oates has been identified as illustrative of the impetus for our legal system's prohibitions on excess. *See Timbs v. Indiana*, 139 S. Ct. 682, 695 (Gorsuch, J., concurring) (2019); *see generally* Nicholas M. McLean, *Livelihood, Ability to Pay, and the*

Original Meaning of the Excessive Fines Clause, 40 HASTINGS CONST. L.Q. 833, 858-59 (2013). It is a case which involves the interplay between duties, prohibitions, and benefits.

The year was 1681. There was a positive duty of allegiance owed to the state, which implied a duty to tell the truth. *See* 1 Blackstone, *Commentaries* 363. There was also a prohibition from lying in official proceedings. 4 Blackstone, *Commentaries* 136-37. But how breaches of those norms were viewed, had changed.

Those that lied in official proceedings no longer were put to death. *Id.*

They no longer had their tongues cut out. *Id.*

They were no longer banished. *Id.*

They no longer lost the right to own property. *Id.*

They were fined or imprisoned for a definite term. *Id.*

So, when in an official proceeding Titus Oates falsely spread conspiracy theories, the penalty for the breach of the social contract was clear. Perjury was not a felony and Judge Jeffreys could not sentence the cleric to death. *E.g.*, Granucci, *supra* at 859.

Instead, the Judge assessed the misdemeanant a pecuniary penalty which "perpetually disabled him" – 2000 marks. *Dominus Rex v. Oates*, reprinted in 1 The Manuscripts of the House of Lords, 1689-90, 81 (1889). This "amount[ed] to imprisonment for life,"

an outcome the law disfavored. *See* 4 Blackstone, *Commentaries* 372-73.

Titus Oates was still within the municipal law's protection, having not been assigned the disabling status of felon. *See id.* at 373. The system ran on assurances and guarantees. *See* 1 Blackstone, *Commentaries* 119. The judgment exceeded the judge's authority. *Cf.* Granucci, *supra* at 859.

Titus received a pardon. *See Timbs*, 139 S. Ct. at 695 (Gorsuch, J., concurring).

The attempt to turn the ratchet back towards tongue cutting was notable enough to be described as "unprecedented proceedings" decades later. 4 Blackstone, *Commentaries* 372. The social contract had changed, as it does and has. *Id.* at 138 (discussing perjury that leads to death). *See also id.* at 157-58 (noting shift in punishment for breaching food regulation from the "pillory" to "fine and imprisonment"); *id.* at 61 (noting a shift from felony to "a year's imprisonment, and standing four times in the pillory.").

Tragically, Titus Oates' lies caused people to die. *See Harmelin v. Michigan*, 501 U.S. 957, 969 (Scalia, J., dissenting) (1991) (discussing Granucci). Nonetheless, Titus was given a "lifetime pension." *See* William Hughes Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639, 641 (1979) (disagreeing with Granucci). Even to the most "indigent or wretched," the municipal law "furnishes him with every thing necessary for their support[,]"

such that they may "demand a supply sufficient for all the necessities of life[.]" *E.g.*, 1 Blackstone, *Commentaries* 127.

That the judge personally found the conduct shameful did not matter, he had been in error to subject the cleric to the social death reserved for felony.

In apparent response to this egregious violation of norms, where a judge ignored established law and used a judgment to advance a personal preference, Parliament included within the English Bill of Rights § 10, a clause against judicial excess. Similar concerns were enshrined in our Excessive Fines Clause.

Here, in 2022, the social contract provided benefits which Respondent enjoyed: access to public roads, and recognition of exclusive rights to his car.

In exchange, the law provided a prohibition against transporting poison intended for human consumption.

Here, Respondent confessed to violating that prohibition.

As penalty, the established law provided for the rescission of rights which had been misused – to include property rights in Respondent's former car. A penalty which is not ruination.

Where Judge Jeffreys erred by failing to extend a protection owed to a misdemeanant, the lower court erred by extending a protection not owed to a felon.

This case is an ideal vehicle to assess and properly place the livelihood preservation consideration in its historic context, and reject as ahistorical its application to the instrumentality of a felon's willfully committed crime. *E.g.*, *Bajakajian*, 524 U.S. at 333 n.8. *See Luis v. United States*, 578 U.S. 5, 12-13 (2016). This case offers the Court a vehicle to answer these questions, and clarify the applicability of historical concerns to the realities of modern forfeitures. This issue need not percolate further without this Court weighing in.

CONCLUSION

In recent years, this Court has endeavored to "rescue[ ] from obscurity" the Excessive Fines Clause. *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 803 n.2 (1994) (Scalia, J., dissenting). One court has described the resulting development of caselaw as state and federal courts joining a "chorus of legal scholars[.]" *City of Seattle v. Long*, 198 Wn.2d 136 (2021). In preparing this petition and reviewing the nature and extent of the splits, the City posits the state of caselaw in this area is a cacophony in need of harmony. Only this Court has the ability to end the confusion and

create a uniformly applicable standard. This Court should grant certiorari and do so.

Respectfully submitted,

BIJAN T. HUGHES
Counsel of Record
CITY OF KENT
OFFICE OF THE CITY ATTORNEY
220 Fourth Avenue South
Kent, WA 98032-5838
(253) 856-5770
BHughes@KentWA.gov