No. 21-1491

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF 1

1. The nature of the Court's past errors in its Excessive Fines forfeiture cases are foundational 3
2. The reasoning of *Austin* relies on a false equivalency 6
3. "Gross disproportionality" is not a workable standard 9
4. The error has had dire effects on other areas of law 11
5. There are no concreate reliance interests 12

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801 (1993) ..... *passim*

Bennis v. Michigan, 516 U.S. 442 (1996) 11, 12

Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) ..... *passim*

Glossip v. Gross, 576 U.S. 863 (2015) 1

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 1, 11

Roe v. Wade, 410 U.S. 113 (1973) 1, 4, 5

Solem v. Helm, 463 U.S. 277 (1983) 2, 10

The Palmyra, 25 U.S. (12 Wheat.) 1, 6 L.Ed. 531 (1827) 11

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 2, 11

Timbs v. Indiana, 139 S. Ct. 682 (2019) 4, 6, 11

United States v. Bajakajian, 524 U.S. 321 (1998) ..... *passim*

United States v. Mann, 26 F. Cas. 1153 (C.C.D.N.H. 1812) (No. 15,718) (Story, J.) 8

CONSTITUTIONAL AUTHORITY

U.S. Const. amend. VIII ..... *passim*

U.S. Const. art. III, § 3 7

TABLE OF AUTHORITIES – Continued

Page

CODES, STATUTES AND RULES

Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 5

Bill of Rights of 1689, 1 William & Mary Sess. 2, c. 2.....11

Wash. Rev. Code § 69.50.505 (2013).....3, 5

OTHER AUTHORITIES

Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449 (2019).....5

1 William Blackstone, *Commentaries on the Laws of England* (1765).....1

3 E. COKE, THE INSTITUTES OF THE LAWS OF ENGLAND (London 1644).....1

3 William Blackstone, *Commentaries on the Laws of England* (1768).....7

4 William Blackstone, *Commentaries on the Laws of England* (1769).....3, 7

Craig S. Lerner, *Does the Magna Carta Embody a Proportionality Principle?* 25 GEO. MASON U. CIV. RTS. L.J. 271 (2015).....10

Anthony F. Granucci, *'Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning*, 4 CAL. L. REV. 839 (1969).....9

SUPPLEMENTAL BRIEF

On June 24, 2022, this Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). That case presented a question of whether *stare decisis* should be maintained when predicate authority was inconsistent with the history of the common law. Using a five-part test, the Court found that the step of review created by the Court in *Roe v. Wade*, 410 U.S. 113 (1973), and maintained in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), was infirm because such review was unfaithful to the legislature's historically unfettered punitive power.

Indeed, in the history of our common law: the most serious class of crime could be anything; 3 E. COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 104 (London 1644) (describing felonious crime of "conveying a living sheep from the Realm"); and the punishment could be everything. 1 William Blackstone, *Commentaries on the Laws of England* 289 (1765) (describing social contract theory of forfeiture of estate). *See also Glossip v. Gross*, 576 U.S. 863, 895 (2015) (describing argument that the Eighth Amendment prohibited the death penalty of a convicted defendant as "gobbledy-gook") (Scalia, J., concurring).

This case cleanly presents a vehicle to address whether the Court's historically questionable creation of a step of judicial review for the forfeiture of a felon's chattel under the Excessive Fines Clause should also be discarded. *See United States v. Bajakajian*, 524 U.S.

321, 340 (1998); *Austin v. United States*, 509 U.S. 602, 622 (1993).

In light of the Court's decision in *Dobbs*, the already-strong case for certiorari here to address the circuit splits created by *Austin* and *Bajakajian*, Pet.8-14, is now all the more compelling as these splits flow from decisions which are "remarkably loose in [their] treatment of the constitutional text." *Dobbs*, 142 S. Ct. at 2245. "The Court must not fall prey to such an unprincipled approach." *Id.* at 2248. Here, "it is therefore important to set the record straight." *Id.* at 2249.

Respondent admitted to hiding 8 pounds of methamphetamine in his car and transporting that car across state lines, with the intention to distribute the drugs in Petitioner's community. Pet.App.14-15, 37. The lower court has held that the U.S. Constitution **requires** the man be returned his car, so that he may be better equipped to resume his life after incarceration and deportation. Pet.App.22. In doing so, the lower court engaged in an "unrestrained imposition of its own extraconstitutional value preferences." *See Dobbs*, 142 S. Ct. at 2271, citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting).

In our system, there is a separation of powers. The legislature is vested with responsibility to make decisions of preemptive authorization – to set penalties for hypothetical conduct. *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983); *Bajakajian*, 524 U.S. at 336 ("judgments about the appropriate punishment for an offense

belong in the first instance to the legislature"). The executive is vested with responsibility to take action – to effectuate the law through investigation, enforcement, incarceration, and re-entrance. *Cf.* R.C.W. 69.50.505. The judiciary is vested with responsibility to evaluate whether those actions and authorizations align. *Dobbs*, 142 S. Ct. at 2278 ("Our sole authority is to exercise 'judgment' – which is to say, the authority to judge what the law means and how it should apply to the case at hand."). The judiciary intrudes on the legislature when it limits its power, at a step in the process that it was not asked to intervene in.

Under the five-part analysis used in *Dobbs*, both *Austin* and *Bajakajian* should be overruled.

1. The nature of the Court's past errors in its Excessive Fines forfeiture cases are foundational.

Since before written law, in our legal tradition the total alienation of a felon from their property has been definitional. 4 Blackstone, *Commentaries* 95, 97. Felony and forfeiture are "synonymous." *Id*. Yet here, the lower court has found that the history of the common law compels the conclusion that an instrumentality of a felony must be returned to the convicted felon, because it is his last possession. Pet.App.22.

This anomalous outcome is the result of the judiciary having created a step of review in a punitive process, which it did not historically possess. "But we

cannot exceed the scope of our authority under the Constitution. . . ." *Dobbs*, 142 S. Ct. at 2278.

Austin, Bajakajian, and *Timbs*, feature lengthy citations to relevant history of limitations on pecuniary penalties, but much of their discussion is irrelevant, and the Court made no effort to explain how limits on pecuniary penalties connected to chattel forfeit as a consequence of a crime. *See also Dobbs*, 142 S. Ct. at 2267 ("*Roe* featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included."). Indeed historically, the total alienation of a felon's chattel property is a consequence within the legislature's punitive power. Pet.24-26.

The fact that the state and federal governments in the 18th through early 20th century did not fully utilize the punitive forfeiture power does not mean that anyone thought the legislatures lacked the authority to do so. *See also Dobbs*, 142 S. Ct. at 2255 ("the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so").

Forfeiture is nothing new. *Cf.* Magna Carta Chapter 32. It has been addressed by the common law for centuries, and the fundamental moral questions that it poses is ageless. *See also Dobbs*, 142 S. Ct. at 2258 ("Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless."). The limited use of

this authority by the federal government was a mutable policy decision of the First Congress. *See* Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117. *See generally*, Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1505 (2019) (discussing use of discretion of early federal government in revenue forfeiture cases). In passing the Comprehensive Drug Abuse Prevention and Control Act of 1970, the U.S. legislature decided to tap this font of power for drug crimes. *Bajakajian*, 524 U.S. at 332 n.7 (noting legislative intent to revive common law power). The Washington legislature followed in suit. R.C.W. 69.50 ("Uniform Controlled Substances Act").

Respondent and the lower court make important policy arguments, but support of continued use of *Austin* and *Bajakajian* requires a showing that this Court has the authority to weigh those arguments and decide how the legislature may exercise its punitive power. *See also Dobbs*, 142 S. Ct. at 2259 ("Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States.").

The nature of the error is a violation of the separation of powers. History does not support a judicial review of excess for the forfeiture of a felon's chattel. Pet.24-26. Fabricated within living memory, the *Bajakajian* test is sold as an ancient relic. *See Dobbs*, 142

S. Ct. at 2246-47.[1] This case is a good vehicle to revisit the reasoning of this test and "set the record straight." *Id.* at 2249.

2. The reasoning of *Austin* relies on a false equivalency.

The quality of the reasoning in *Austin* does not support its continued use – the thin reed on which the decision rests is a false equivocation that "Fines" implicitly includes all forms of forfeiture. 509 U.S. at 614 n.7; *see also id.* at 334 ("the forfeiture of respondent's currency constitutes punishment and is thus a 'fine' "). The over inclusiveness of this interpretation is easily spotted upon review of the entirety of the Magna Carta and the English Bill of Rights of 1689. Pet.21-24.

In *Dobbs* the Court advised that:

> Constitutional analysis must begin with 'the language of the instrument,' *Gibbons v. Ogden*, 9 Wheat. 1, 186-89 (1824), which offers a 'fixed standard' for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United

[1] In *dicta* in *Dobbs* this Court stated that "*Timbs* . . . concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights." 142 S. Ct. at 2246-47. This case presents an opportunity to correct this statement by noting that a right to judicial review of forfeit chattel is, in fact, not expressly set out in the Bill of Rights. Such a right has been implicitly read into the document by the Court – notwithstanding nearly 700 years of Anglo-American common law tradition allowing for the total alienation of property from a convicted felon.

> States §399, p.383 (1833). The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

142 S. Ct. at 2245.

So too here, the text of the Constitution only presents a single explicit protection from forfeiture of a felon's property – in the case of treason, where the defendant has already died. U.S. Const. art. III, § 3. Anyone who would claim that the Constitution provides additional protections to the chattel of felons, "must show that the right is somehow implicit in the constitutional text." *Dobbs*, 142 S. Ct. at 2245.

The Court in *Austin* used weak reasoning to find this implicit right – it read "Fines" to implicitly include "forfeiture," on the basis that sometimes the word "forfeiture" was used in the context of pecuniary penalties. 509 U.S. at 614 n.7.[2] This ignored that the English Bill

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[2] In addition to this false equivocation, the Court in *Austin* did not meaningfully distinguish between penal forfeitures related to non-criminal revenue laws, and criminal forfeitures made pursuant to the longstanding legal tradition of forfeiture as a consequence of felony. 509 U.S. at 615-18 (discussing forfeiture cases based on penal statute violations, in deciding the justiciability of forfeiture based on criminal conduct). *Compare* 4 Blackstone, *Commentaries* 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."); *with* 3 Blackstone, *Commentaries* 262 (describing forfeitures under "a penal statute." Noting "forfeitures of the goods

of Rights of 1689, which the founders copied in creating the Excessive Fines Clause, refers to "forfeitures" and "fines" as distinct concepts, in different sections of the document. Pet.22.

The Court in *Austin* found an implicit protection by equivocating terms which had distinct and separate meanings within the primary historical document being reviewed by the Court.

The text of the instrument does not support a right to judicial review of forfeitures of chattel for excess, where a felon has been convicted and the legislature has provided authority.

With "Fines" serving as a too wide of an umbrella, the Court in *Bajakajian* then "adopt[ed] the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents." 524 U.S. at 336.

Despite very different historical pedigrees, the Excessive Fines Clause shares a test with the Cruel and Unusual Punishment Clause, but "the basis for this test [is] obscure." *See Dobbs* at 2271. "Excessive Fines" is a term originating from the English Bill of Rights of 1689, which was transposed into colonial documents,

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themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise"). *See also e.g.*, *United States v. Mann*, 26 F. Cas. 1153, 1154 (C.C.D.N.H. 1812) (No. 15,718) (Story, J.) (distinguishing between "pecuniary forfeitures" and "seizures," as well as "penal statutes from criminal statutes," and noting as true that "the court of exchequer ha[d] no criminal jurisdiction").

and was considered "constitutional boilerplate." *E.g.*, Granucci, Anthony F., *'Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning*, 4 CAL. L. REV. 839 (1969).

A clause with roots in the Magna Carta and the English Bill of Rights of 1689 shares a 20th century created test for a clause which derived from the founders' misreading of a 18th century legal encyclopedia. *E.g.*, Granucci, *supra* at 840. The equivocating between an arbitrary term and a term of art has broadened the latter's meaning. The Excessive Fines Clause protects from the perils of abuse possible when pecuniary penalties have no upper limit – but by sharing a standard with the more open-ended protection of the "cruel and unusual punishment" the Court has expanded the clause beyond its text or historical roots.

3. "Gross disproportionality" is not a workable standard.

From 1993 onward, courts for the first time in the history of the common law were asked to determine whether seizure of the chattel of felons was "excessive." But this is a determination for the legislature, which preemptively authorizes the executive to take action in response to conduct, and which is capable of identifying questions and opportunities for the judiciary to consider. *Bajakajian* acknowledges this, yet nonetheless created an ambiguous standard to limit that legislative power based on the general principle of proportionality. 524 U.S. at 336 ("judgments about the

appropriate punishment for an offense belong in the first instance to the legislature").

By opening the door to review of felony chattel forfeiture in *Austin* and *Bajakajian*, the Court has invited a decision like the lower court's which relies on non-specific historical citations, without firm examples of application.

The lower court's decision relies on *Bajakajian*'s progeny, and in turn offers no guidance or specificity. Pet.App.20-22. The lower court had no test with limiting principles or meaningful parameters to apply, despite the authority its relying on being supposedly of ancient vintage, because there is no historic test to apply to a felon's seized chattel.

The guarantee of the Magna Carta relied on by the lower court and the sources which it cites to relates to "amercements," which were utilized by the state to correct minor social transgressions and not felonies. 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); *but see Solem*, 463 U.S. at 284, (citing to Magna Carta 20, to support review of criminal sentence).

The "gross disproportionality" standard is inherently imprecise and seems only to serve as a potential judicial veto of punishment which offends a reviewing court's sensibilities, notwithstanding the judgment of the legislature. It is not carefully crafted to produce consistent results. The Court's limitation of state

legislative power through an ambiguous "undue burden" standard in *Casey*, is not functionally different than the Court's limitation of the state's legislative power through an ambiguous "gross disproportionality" standard in *Bajakajian.* They were both an "exercise of raw judicial power," which curtailed powers historically held be the legislature. *See also Thornburgh*, 476 U.S. at 794 (White, J., dissenting).

4. The error has had dire effects on other areas of law.

The error made in *Austin* has been used to justify the degradation of historic rights. The English Bill of Rights is not only a set of enumerated rights but is a recitation of unwritten rights that had existed long before its creation. *Timbs v. Indiana*, 139 S. Ct. 682, 695, (Gorsuch, J., concurring) (2019). The English Bill of Rights of 1689 § 12 guarantees no forfeiture prior to conviction – a clear due process right. Pet.24-26. *See also The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (limiting holding that conviction was not necessary for forfeitures in "cases of this nature," i.e., matters historically heard in Exchequer for non-criminal, penal violations of revenue laws).

Nonetheless, citing to *Austin* the Court in *Bennis* found that a forfeiture made against a non-convicted, innocent owner, did not violate the Due Process Clause. *Bennis v. Michigan*, 516 U.S. 442, 451-53 (1996) ("cases authorizing actions of the kind at issue are 'too firmly fixed in the punitive and remedial jurisprudence of the

country to be now displaced.' "); *id.* at 454 (Thomas, J., concurring) ("This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable.").

However, "[w]hen vindicating a doctrinal innovation requires courts to engineer exceptions to long-standing background rules, the doctrine has failed to deliver the principled and intelligible development of the law that *stare decisis* purports to secure." *Dobbs*, 142 S. Ct. at 2276 (quotations and citations omitted).

5. There are no concreate reliance interests.

There are no concrete reliance interests here. The forfeiture of property is generally "unplanned activity," which is reactive to the commission of a crime. *Id*. at 2276. Such that future proceedings "could take virtually immediate account of any sudden restoration of state authority" to alienate felons from their property to the degree the people see fit. *Id.*

CONCLUSION

This case is an ideal vehicle to squarely flesh out under which circumstances the Court is able to create limitations on the state legislature's exercise of its historic punitive powers. The total alienation of an individual of their chattel property is more engrained in the historical record as a legislative power than the ability to regulate gestation, such that *stare decisis*

need not be observed in a similar situation where the judiciary has unilaterally altered long standing rules as to the executive's use of a legislatively authorized power.

"There are occasions when past decisions should be overruled . . . this is one of them." *Id.* at 2261. "When one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake." *Id.* at 2262. Only this Court can correct its errors; it should grant certiorari here and do so.

Respectfully submitted,

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