No. 25-246

In the Supreme Court of the United States

KENNETH JOHN JOUPPI,
Petitioner,
v.
STATE OF ALASKA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF PROFESSOR BETH A. COLGAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

H. HUNTER BRUTON
Counsel of Record
JOHN L. GIBBONS
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, LLP
150 Fayetteville Street
Suite 2300
Raleigh, NC 27601
hbruton@smithlaw.com
jgibbons@smithlaw.com
(919) 821-1220

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Beth A. Colgan is Professor of Law at the UCLA School of Law. She is one of the country's leading experts on constitutional and policy issues related to the use of financial sanctions as punishment, and particularly on the Eighth Amendment's Excessive Fines Clause.

[1] Pursuant to this Court's Rule 37.2 and 37.6, Professor Colgan states that all counsel of record received timely notice of Professor Colgan's intent to file this brief, this brief was not authored in whole or in part by counsel for any party, and no entity or person, aside from Professor Colgan and her counsel, made a monetary contribution intended to fund the brief's preparation or submission.

ARGUMENT SUMMARY

The Excessive Fines Clause's protections are "'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and traditions.'" *Timbs* v. *Indiana*, 586 U.S. 146, 154 (2019). As detailed herein, a guarantee of protection against disproportionate fines dates back millennia, codified in Magna Carta, reaffirmed in the English Bill of Rights, and ultimately preserved in the Eighth Amendment. Early American courts upheld that guarantee in facial challenges by weighing the severity of authorized fines against the generalized policy considerations leading lawmakers to codify an offense, and in as-applied challenges by weighing the severity of the fine actually imposed against the specific facts of the underlying offense.

By focusing on broad policy concerns in assessing Petitioner's as-applied challenge, the Alaska Supreme Court diverged from both this traditional approach and the guidance of this Court. To be sure, that guidance has been limited. Since 1791, this Court has provided instruction on conducting an excessiveness inquiry in only one case: *United States* v. *Bajakajian*, 524 U.S. 321 (1998). In the over quarter century since, the lower courts have endeavored to establish mechanisms for assessing what constitutes disproportionality, resulting in a mish-mash of approaches that risks leaving the protection against excessive fines dependent upon jurisdictional luck. This is particularly problematic for the legitimacy of criminal justice in the United States both because financial sanctions are the most common punishment imposed in offenses great and small, and because of the inherent risk that they will be used "in a measure out of accord with the penal goals of retribution

and deterrence" given their revenue-generating capacity. *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.).

To correct this error and ensure it is not repeated, the Court should grant the petition and clarify that in determining whether a fine is excessive as applied, a court must weigh the fine's severity against the defendant's culpability for a specific offense—including the actual harm caused, if any, the defendant's scienter or lack thereof, whether the conviction was for a single or numerous offenses, whether the offense was tied to other criminal activity, and so on—rather than weighing the fine against the broad and generalized societal ills that gave rise to the penal statute.

ARGUMENT

In *Bajakajian*, for the first and only time, the Court conducted an excessiveness review pursuant to the Excessive Fines Clause. 524 U.S. at 337–40. As Petitioner's case shows, much work remains to guide courts on how to enforce the prohibition against excessive fines. The Court should grant certiorari to provide that guidance and bolster this fundamental right.

To highlight the importance of the petition, this brief provides additional perspective on the Alaska Supreme Court's missteps with a special focus on historical practice and tradition. Specifically, the decision below conflicts with a core historical principle underlying the Clause: its proportionality guarantee. The proportionality guarantee is of ancient vintage extending even before 1215, when King John was forced to submit to Magna Carta. The guarantee is fundamental to how the framers understood the Clause in 1791. And it is clearly present in early American court opinions addressing as-applied challenges to excessive fines. Yet the Alaska Supreme Court's approach for evaluating Petitioner's as-applied challenge falls far short of that guarantee. The Court should therefore grant certiorari to provide direction on this "important federal question." Sup. Ct. R. 10.

I. The Excessive Fines Clause's Proportionality Guarantee Has Ancient Roots.

Protection against disproportionate (or excessive) fines dates back millennia. Even before protections against excessive fines were codified in Magna Carta, when an amercement (the predecessor of a fine) "was disproportionately large in relation to the offense," courts remedied that mismatch through writs *de*

moderata misericordia. Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1259–60 (1987).

This traditional protection became "one of the cardinal limitations" in Magna Carta, *id.*, whose authors "sought to reduce arbitrary royal power" by guaranteeing that pecuniary sanctions would be set according to the offense's seriousness, *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 270–71 (1989). "A free man," Magna Carta guaranteed, "shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude." Magna Carta, ch. 20, in A. Howard, *Magna Carta: Text & Commentary* 42 (rev. ed. 1998). Likewise, "[e]arls and barons shall be amerced … only in proportion with the degree of the offence" and members of the clergy "after the manner of the other persons aforesaid." *Id.* at ch. 21–22.

Magna Carta, including its proportionality guarantee, was recodified forty-four times in the two centuries after its adoption. Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300–1629* 10 (1948). The first Statute of Westminster extended its protections to all. 3 Edw. 1 Ch. 6 (1275); see also *Timbs*, 586 U.S. at 161 (Thomas, J., concurring in judgment) (describing early English cases enforcing Magna Carta's prohibition on immoderate amercements).

This is not to say, of course, that the English crown faithfully adhered to the proportionality principle without interruption. But the breaches confirm the rule. Henry VII and his ministers, for example, were "industrious in hunting out persecutions upon old or

forgotten laws, in order to extort money from the subject," and so "[t]o this end the Court of Star Chamber was remodelled, and armed with powers the most dangerous and unconstitutional over the persons and properties of the subject." John Southerden Burn, *The Star Chamber: Notices of the Court and Its Proceedings; with a Few Additional Notes of the High Commission* 30 n.1 (J. Russell Smith, London, 1870). Though the Star Chamber's oppressions ebbed and flowed over time, its infamous abuses—including its excessive fines—ultimately led to its abolition in 1641. *Id.* at 30–163. The abolishing statute, like Magna Carta, once again forbade excessive fines. Habeas Corpus Act, 16 Car. 1, c. 10 (1641); Lois Schwoerer, *The Declaration of Rights, 1689* 90–92 (1981). Nevertheless, some courts loyal to the Crown continued imposing crushing fines "arbitrarily, illegally, and partially," and without "any Regard to the Nature of the Offences." 9 Journals of the House of Commons 692, 698 (Dec. 23, 1680); see also Schwoerer 91-92; *Timbs*, 586 U.S. at 162–64 (Thomas, J., concurring in judgment) (discussing exorbitant fines against Titus Oates, Sir Samuel Barnadiston, and John Hampton).

Ultimately, the "conflict between Parliament and the Crown culminat[ed] in the Glorious Revolution of 1688 and the English Bill of Rights of 1689," through which the proportionality principle was reinvigorated. *Powell* v. *McCormack*, 395 U.S. 486, 502 (1969); see John Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 Wm. & Mary Bill Rts. J. 989 (2019). The Declaration of Rights of 1688, presented to William and Mary, demanded "[t]hat excessive Baile ought not be required, nor

excessive Fines imposed, nor cruell and unusuall Punishments inflicted." By enacting the English Bill of Rights in 1689, Parliament constitutionalized those prohibitions. 1 Wm. & Mary, 2d Sess., ch. 2, § 10, in 3 Stat. at Large 441 (1689). Critically, neither the Declaration nor the Bill of Rights created a *new* right against disproportionate fines. Both were understood to reaffirm what was "indisputably an ancient right of the subject" guaranteed by Magna Carta. Schwoerer 90–91.

As subjects of the Crown, the American colonists enjoyed these legal protections from disproportionate fines. Colonial legislatures, as Parliament had repeatedly done, reaffirmed and codified Magna Carta's proportionality guarantee. The Pennsylvania Frame of Government of 1682, for example, provided that "all fines shall be moderate." Penn. Frame of Gov't, *Laws Agreed Upon in England &c.*, art. XVIII (1682). One year later, New York's Charter of Liberties and Privileges guaranteed "[t]hat A freeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof." N.Y. Charter of Liberties and Privileges, art. 16 (1683). A South Carolina statute "to put in force" English laws, including "The Great Charter. A Confirmation of Liberties," replicated the first Statute of Westminster and mandated no "man be amerced, without reasonable Cause, and according to the quantity of his Trespass." 1712 S.C. Acts 331.

Influential treatises confirmed proportionality's relevance to constitutional guarantees against excessive fines. Jeremiah Dummer—a prominent defender of the early colonial charters that preceded state constitutions—observed that "[t]he Subjects Abroad

claim the Privilege of *Magna Charta*, which says that no Man shall be fin'd above the Nature of his Offence." Jeremiah Dummer, *A Defence of the New-England Charters* 16–17 (1721). Blackstone explained at length that the "quantity of [fines] must frequently vary, from the aggravations or otherwise of the offence." 4 William Blackstone, *Commentaries on the Laws of England* *378–80 (1795). The English Bill of Rights, Blackstone wrote, "has particularly declared, that excessive fines ought not to be imposed," a guarantee that "was only declaratory of the old constitutional law." *Id.* at *378–79. Whether a punishment was excessive depended on "[t]he age, education, and character of the offender; the repetition (or otherwise) of the offence; the time, the place, the company wherein it was committed," and "a thousand other incidents, [which] may aggravate or extenuate the crime." *Id.* at *15–16.

In the revolutionary era, the new states embraced protections against disproportionate fines. Virginia's Declaration of Rights adopted verbatim the English Bill of Rights' language: "nor excessive fines imposed." Va. Decl. of Rts., § 9 (1776). Between independence and 1791, twelve states adopted constitutional prohibitions either including identical or analogous phrasing, or declaring that their citizens continued to enjoy the rights of English subjects. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 323 n.238 (2014). Other state statutes specifically referenced Magna Carta's proportionality guarantee. 1786 Va. Acts ch. 64 ("the amercement which ought to be according to degree of the fault"); 1787 N.Y. Laws ch. 1 (requiring that any "fine or amerciament shall always be according to the quantity of his or her trespass or offence"); see also

Northwest Ordinance of 1787, § 14, art. 2 ("[a]ll fines shall be moderate").

In 1791, the Eighth Amendment incorporated the well-worn language, "nor excessive fines imposed." The Excessive Fines Clause was "adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts." 3 Joseph Story, *Commentaries on the Constitution of the United States* 750–51, § 1896 (1833). Key treatises again confirmed the constitutional imperative that fines be proportionate considering "[t]he peculiar circumstances of each case, the contrition or general good character of the offender." William Rawle, *A View of the Constitution of the United States* 130 (Philip H. Nicklin, 2d ed. 1829). As one noted, "[i]f therefore a law should be passed, imposing a ruinous fine upon an inconsiderable offence, or otherwise wholly disproportionate to the magnitude of it, it would be inconsistent with the spirit of [the Eighth] amendment." Benjamin L. Oliver, *The Rights of an American Citizen* 185 (1832). "The merciful spirit of" the Excessive Fines Clause was understood to arise from Magna Carta's proportionality guarantee. Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 329 (1868).

As in England, American courts sometimes fell short of faithfully implementing the proportionality guarantee, though the principle continued to be recognized. One notorious example comes from the Black Codes, penal laws applicable explicitly or through practice only to Black people and used "to subjugate

newly freed slaves and maintain the prewar racial hierarchy." *Timbs*, 586 U.S. at 153; *id.* at 167–69 (Thomas, J., concurring). Following sham trials, Black defendants unable to pay "draconian fines" were ordered to provide "involuntary labor" instead—effectively imposing enslavement. *Timbs*, 586 U.S. at 153; see Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008). Yet as in England, these violations of the proportionality guarantee still confirm the rule: despite the Black Codes' patent injustice, justification for the fines imposed was ostensibly tied to their purported proportionality in comparison to the underlying offense. See *State* v. *Manuel*, 4 Dev. & Bat. 20, 34–35 (N.C. 1838) (stating in an antebellum Black Code case that "[w]hether a fine be reasonable or excessive ought to depend on the nature of the offence, and the ability of the offender").

In short, the Clause's proportionality guarantee is an ancient right, predating and immortalized in Magna Carta. Its promise, if not its practice, remained constant throughout early English history, in the American colonies and the new nation, in the Clause's ratification, and beyond. That guarantee is central to the Clause's ability to serve as a "constant shield" from government overreach today. *Timbs*, 586 U.S. at 153–54.

II. Early American Proportionality Review in As-Applied Excessiveness Challenges Focused on the Specifics of the Underlying Case.

Consistent with its historical pedigree, "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *Bajakajian*, 524 U.S. at 334.

Importantly, in assessing proportionality, early American courts differentiated between facial and as-applied challenges.

Before turning to the distinction between proportionality considerations in facial and as-applied challenges, a brief preliminary note on the historical record is warranted. There are relatively few published appellate cases involving excessive fines issues from the eighteenth and nineteenth century American courts. Further research is necessary to better understand why this is so and why such cases arose more frequently in the latter half of the 1800s.[2] Of the cases that do exist, some contain little (if any) analysis helpful for understanding historical views about excessiveness. E.g., *Cagle* v. *State*, 25 Tenn. (6 Hum.) 391, 394 (1845) (per curiam) (stating only: "Let the judgment be affirmed."). With that important caveat in mind, the cases set forth below provide support for the conclusion that the lower court's proportionality analysis was faulty.

In early American jurisprudence, as now, facial challenges presented an uphill climb, requiring a showing that the statute at issue could not be constitutionally applied in any circumstance. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)

---

[2] One reason for this dearth may be that statutes or initial sentencing adequately addressed proportionality considerations. Cf. Colgan 323–36. Another may be jury nullification or refusal to impose harsh fines. See Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 346 (1982). Yet another reason may be the availability of other mechanisms to address excessive pecuniary sanctions. See Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449 (2019).

(describing a facial challenge as "the most difficult challenge to mount successfully"). For example, the Virginia Supreme Court in 1895 distinguished between facial challenges on the one hand, in which legislative "discretion and judgment" are afforded "the widest latitude" unless the crime and penalty are "plainly disproportioned," and as-applied challenges on the other, which "do[] not affect the validity of the statute" but for which "the corrective hand of the court will annul" disproportionate fines. *S. Express Co.* v. *Commonwealth ex rel. Walker*, 92 Va. 59, 66–67 (1895); see also *Commonwealth* v. *Morrison*, 9 Ky. (2 A.K. Marsh) 75, 99 (1819) (explaining that "vacat[ing] the legislative act" required "a flagrant transcension by the legislature in fixing the fine of that just relative proportion between offense and fine").

To be sure, courts assessing facial challenges engaged in a limited form of proportionality analysis, which included considering public policy rationales for the codification of an offense. See *State* v. *Main*, 37 A. 80, 85 (Conn. 1897) (holding that a statute was "not so clearly disproportioned to the offense as to come necessarily within the constitutional prohibition" and rejecting a facial challenge); *People ex rel. Robison* v. *Miner*, 37 N.W. 21, 26–28 (Mich. 1888) (relying on Magna Carta in striking down a statute as excessive because it was "not measured by any standard of proportion or amount"), abrogated on other grounds, *Burroughs* v. *Eastman*, 59 N.W. 817, 818 (Mich. 1894). But in the context of a facial challenge, the proportionality inquiry focuses on the legislature's intent to address broad and generalized public implications of an offense in toto, rather than actual

harms resulting from a particular offense by a specific individual.

For example, in two nineteenth-century cases the Maine Supreme Court upheld fines for illegal lobster fishing (lobstering) against facial challenges, taking into account "the importance and magnitude of the public interest sought … to be protected." *State* v. *Lubee*, 45 A. 520, 521 (Me. 1899). First, the court held that a $1 fine per lobster was not excessive in light of the legislature's objective of "preserv[ing] a necessary and valuable source of food." *State* v. *Craig*, 13 A. 129, 130 (Me. 1888). A few years later, the same court upheld a $5 fine per under-length lobster, given fisheries' "great importance to the state" for "furnishing … employment to many people, and supplying great quantities of wholesome and nutritious food." *Lubee*, 45 A. at 521–22. In both facial cases, the relevant potential harms were those caused by offenses en masse and in the abstract.

But that is not how early American courts analyzed as-applied challenges like Petitioner's here. As-applied cases involved considering the defendant's culpability for their own conduct. For example, in 1799, Virginia's Supreme Court of Appeals considered whether joint fines imposed on co-defendants were excessive. *Jones* v. *Commonwealth*, 5 Va. (1 Call) 555 (1799). The lead opinion relied on the longstanding principle, dating back to Magna Carta, that in assessing excessiveness "the fine should be according to the degree of the fault and the estate of the offender." *Id.* at 556–57 (opinion of Roane, J.). Reasoning that a joint fine would punish a defendant not only for his own actions, but for those of "all who may chance to be with him," the lead opinion held that the joint fine would be "so unjust and contrary

to the spirit of the constitution" that it likely could not survive an as-applied challenge, let alone the facial challenge at hand. *Id.* at 557. The second opinion followed suit, agreeing that fines must be "according to the degree of the fault" of each defendant, meaning "that no addition, under any pretext whatever was to be imposed, upon the offender, beyond the real measure of his own offence." *Id.* at 557–58 (Carrington, J.).[3]

The treatment of fines imposed in response to nineteenth century liquor law violations illustrates how the question of proportionality differed between facial and as-applied challenges. The success of temperance movements led lawmakers to restrict the manufacturing, sale, and possession of alcohol to combat "the evils which confessedly result from the excessive use of ardent spirits." *Mugler* v. *Kansas*, 123 U.S. 623, 661–62 (1887). Much like the goals of the Alaska legislature today in restricting the transportation of alcohol to dry villages, nineteenth-century lawmakers believed "that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks," which was tied to the 'idleness, disorder, pauperism, and crime existing in the country.'" *Id.* at 662.

When considering as-applied challenges regarding the excessiveness of fines imposed for liquor law violations, however, early American courts focused on the specifics of the underlying case rather than those

[3] The lone dissenter agreed that fines must be according to "the degree of the offence," thus requiring differentiation between defendants who have varying degree of culpability, but dissented on procedural grounds. *Jones*, 5 Va. (1 Call) at 560 (Pendleton, Pres., dissenting).

generalized concerns about public health, morality, and safety. Courts paid close attention to factual records, including summaries compiled by trial courts and testimonial accounts, highlighting the importance of case specifics. For example, when upholding a fine against an as-applied challenge for violating laws prohibiting gambling in businesses licensed to sell liquor, the North Carolina Supreme Court quoted at length from the trial court's summary of facts, including that the defendant "caused the front of his building"—which was directly across from the federal courthouse and post office—"to be painted a glaring red, to advertise his business by day, and an electric light is suspended to point the way by night," done in "open and notorious defiance of the law." *State* v. *Miller*, 94 N.C. 904, 906–07 (1886). See also *State* v. *Harris*, 20 N.W. 439, 441 (Iowa 1884) (describing witness testimony regarding a druggist's use of a "library" room for illicit liquor sales); *State* v. *Little*, 42 Iowa 51, 55–56 (1875) (quoting at length from a witness who described observing and participating in illegal liquor consumption at a drug store).

Courts assessing the constitutionality of fines imposed for liquor law violations also considered evidence in aggravation and mitigation of the defendant's culpability for the offense. For example, the Iowa Supreme Court upheld a fine due to evidence of a druggist's awareness that his customers would illegally consume purchased liquor as a beverage. *State* v. *Price*, 39 N.W. 291, 293 (Iowa 1888). The court noted that had there been proof that the druggist sold the liquors "for the actual 'necessities of medicine,' and that he was simply mistaken as to the law … we might be disposed to modify the judgment in respect to the amount of the

fine." *Id.* See also *State* v. *Mercer*, 32 Iowa 405, 406, 408–09 (1871) (upholding a fine against a defendant who created the "Winterset Social Club" in a "crafty and bold attempt" to sidestep liquor laws); cf. *State* v. *Huff*, 40 N.W. 720, 722–23 (Iowa 1888) (explaining that a judge looking outside the facts in evidence at the trial regarding "number and amount of [illicit liquor] sales" when imposing punishment "may be the ground of an application to reduce the punishment as excessive").

A particularly relevant form of evidence that could either aggravate or mitigate was whether a defendant had committed a single or multiple liquor law violations. For example, the Iowa Supreme Court upheld a fine because the record showed that the defendant engaged in "a large number of sales of beer," behavior that, by his own admission, he had engaged in over a course of years. *State* v. *Maloney*, 44 N.W. 693, 693 (Iowa 1890). See also *State* v. *Four Jugs of Intoxicating Liquor*, 2 A. 586, 593 (Vt. 1886) (upholding a fine, reasoning that "[i]f [the defendant] has subjected himself to a severe penalty, it is simply because he has committed a *great many* [liquor] offenses"), aff'd on other grounds, *O'Neil* v. *Vermont*, 144 U.S. 323, 331–32 (1892); *Little*, 42 Iowa at 56–57 (upholding fine given that illegal sale of liquor at a drug store "was no small part of defendant's business").

That focus on a specific offense rather than abstract policy concerns applied well beyond liquor offenses. For all manner of offenses, courts attended to the underlying factual record. See *Stone* v. *State*, 42 Ind. 418, 419–20 (1873) (relying on victim and witness testimony regarding what occurred during assault); *Swinney* v. *State*, 22 Ark. 215, 216 (1860) (same); *Powers*

v. *People*, 42 Ill. App. 427, 429–30, 433 (1891) (considering "uncontradicted testimony" regarding defendant's attempts to shoot victim). Courts also considered mitigating and aggravating evidence, including evidence of scienter, motivation, and the number of offenses committed. See *State ex rel. Garvey* v. *Whitaker*, 19 So. 457, 533 (La. 1896) (holding that separate fines for 72 distinct crimes—destruction of plants and other items in public squares—were excessive because each "offense follow[ed] after the other immediately and consecutively" and thus effectively constituted single offense); *State* v. *Belvel*, 56 N.W. 545, 549 (Iowa 1893) (upholding fine after "examin[ing] the entire record with care," and determining "[t]he libel was grossly offensive and … without any provocation which can justly be urged in mitigation of the punishment"); *State* v. *Roseman*, 12 S.E. 1039, 1040 (N.C. 1891) (upholding fine imposed on jailer for beating inmate with a horsewhip in response to the inmate singing, given that inmate "was in prison and helpless"); *Vallery* v. *State*, 60 N.W. 347, 348–49 (Neb. 1894) (upholding fine for libel where "the vile and abusive language used" showed defendant "was actuated by malice"); *McCain* v. *State*, 57 Ga. 390, 391 (1876) (upholding fine for maintaining a lewd house because "[t]he facts show a very bad case; the lewdness approximated as near to open and notorious defiance of decency as well as law, as any case of the kind could well be open and defiant"); *State* v. *Blennerhassett*, 1 Miss. 7, 17–18 (1818) (upholding fine because "the offence was highly atrocious and aggravated" given that "[t]he circumstances attending the assault, and the weapons used, [left] no doubt of the intention of the defendants"); *Young* v. *State*, 19 S.W. 431, 432 (Tex. Crim. App. 1892) (upholding fine as "severe, but deserved" based on

details of defendant's "lascivious touch[ing]" of sleeping woman "without the slightest provocation"); *Powers*, 42 Ill. App. at 429–30, 433 (upholding fine for assault with deadly weapon with intent to inflict bodily injury given evidence "as to plainly indicate that the appellant was possessed of fierce and malevolent passions to which, on that occasion, he gave full reign in reckless disregard of human life"); *De Beukelaer* v. *People*, 25 Ill. App. 460, 462–65 (1888) (striking down fine and jail term as disproportionate to charge of contempt of court where woman hired a surgeon to remove an identifying birthmark on a child during a custody dispute because her acts were "impelled … by her great fear of being separated from the object of her affection"); *Miller* v. *People*, 10 Ill. App. 400, 401 (1882) (per curiam) (striking down $200 contempt fines for removing papers from a clerk's office as excessive because "while [defendants] acted improperly … they did so without evil motive or design").

Importantly, the exact nature of the harm—who was harmed, in what manner, and to what extent, as opposed to generalized harm for all such offenses—was a central part of early American as-applied analyses. See *State* v. *Reid*, 11 S.E. 315, 316 (N.C. 1890) (noting that in committing assault with a deadly weapon "the defendant owed it to a kind of providence, which was not on the side of his guilty intent, that the wound was not fatal"); *Stone*, 42 Ind. at 419–20 (noting that screams of victim of attempted rape could be heard "seventy or eighty yards from the house"); *Chandler* v. *Commonwealth*, 64 Ky. (1 Bush.) 41, 42 (1866) (holding fine was not excessive where the defendant "stamped [the victim] with his feet greatly to her injury"); *Swinney*, 22 Ark. at 216 (upholding fine "[i]n view of the

relentless ferocity" used by the defendant when whipping "a very small boy … 'unmercifully,' his back and arms so severely bruised as to endanger his life"); *Teague* v. *State*, 4 Tex. App. 147, 149–50 (1878) (upholding fine because "the evidence show[ed] an unprovoked and violent attack" resulting in serious injury). For financial crimes, courts focused on the victim's monetary losses and the defendant's ill-gotten gains. See *Hathcock* v. *State*, 13 S.E. 959, 961 (Ga. 1891) (considering monetary value obtained through defendant's fraud). For example, in striking down a fine as excessive, the Virginia Supreme Court stated: "No man can doubt, but that a fine … imposed on an officer who has committed no fault, for the benefit of a creditor who has sustained no injury, is superlatively excessive, unconstitutional, oppressive, and against conscience." *Bullock* v. *Goodall*, 7 Va. (3 Call) 44, 49–50 (1801).

In fact, in cases where the record provided on appeal did not contain case-specific evidence, early American appellate courts found themselves unable to evaluate as-applied challenges. The South Carolina Supreme Court, for example, explained that judicial discretion to impose a fine "is to be measured by the circumstances of each particular case" and so, in light of the record's inadequacy, it had "no means of ascertaining whether such discretion has been properly exercised." *State* v. *Sheppard*, 32 S.E. 146, 147–48 (S.C. 1899). Other courts agreed; to assert an as-applied challenge to an excessive fine, the defendant had to place sufficient case-specific details in the record to enable appellate review. See *Blydenburgh* v. *Miles*, 39 Conn. 484, 497 (1872) (upholding daily fine for allowing industrial pollutants to escape into harbor because whether the fine was "excessive or not must depend materially upon the

circumstances and the nature of the act for which it is imposed," whereas the record failed to include information regarding "the business carried on by these defendants"). Without such a record, a court could only engage in a facial assessment. See *Wingfield* v. *Commonwealth*, 1 Ky. Op. 585, 585–86 (Ky. Ct. App. 1867) (noting it was limited to a facial assessment of "the constitutionality of the act" because "the history of the trial is not preserved and presented in a bill of exceptions").

In short, when assessing as-applied challenges that fines were unconstitutionally excessive, early American courts focused their analyses on the specifics of the underlying cases, rather than broad policy concerns. The Alaska Supreme Court's departure from this practice is addressed below.

III. The Alaska Supreme Court Departed from Early American Excessiveness Analyses.

In assessing whether the forfeiture of Petitioner's plane was disproportionate to his offense and therefore excessive, the Alaska Supreme Court's approach was reminiscent of early American facial challenges, despite the as-applied nature of the challenge at hand. As detailed below, that resulted in a gross overstatement of Petitioner's culpability for the harm caused by the offense, if any, which in turn led the court to discount evidence in mitigation.[4]

---

[4] In addition to the problems detailed here, lower courts have struggled with how to interpret *Bajakajian*'s consideration of the statutorily available punishments for the offense, and the smaller maximum penalties applicable to the respondent when calculated under the U.S. Sentencing Guidelines. 524 U.S. at 338–39 & n.14.

The lower court's most egregious departure stems from its analysis of the offense's harm. The court discussed the broad and generalized problem of "[a]lcohol abuse in rural Alaska," noting that it "leads to increased crime; disorders such as alcoholism; conditions, such as fetal alcohol spectrum disorder; and death, imposing substantial costs on public health and the administration of justice." Pet. App. 24a. In other words, the court took the collective implications of all alcohol abuse in all of rural Alaska and imputed them to Petitioner. In so doing, the opinion incorrectly used an analytical framework that a nineteenth-century court would have used in the context of a *facial* challenge—such as the considerations related to food supply and employment in the Maine lobstering cases—instead of facts regarding the defendant's culpability for the actual offense, which was the historical approach to *as-applied* challenges like Petitioner's.

The lower court's misdirected harm analysis is indicative of the need for additional guidance from this

---

The Court appears to have understood the various penalties to be relative to the gravity of the offense because the penalty ranges suggested Congressional intent to allow for different sentences based on a defendant's relative culpability. *Id.*; compare *Powers*, 42 Ill. App. at 433 (noting range of fines and a jail term in the statute, which allowed the court "to adjust the punishment according to the circumstances of each particular case"). *Bajakajian* also emphasized that a guideline permitting a forfeiture if mandated by statute "cannot override the constitutional requirement of proportionality review." Lower courts, including the Alaska Supreme Court, however, appear to have taken this discussion to require a comparison of how many multiples higher a forfeiture is compared to maximum available fines. Pet. App. 16a–27a & n.89. Clarity on this issue, along with the individualized nature of excessiveness review in as-applied cases, would be useful.

Court. *Bajakajian* did conduct a harm analysis, considering both who was harmed when the respondent failed to report currency he intended to transport overseas (only the government) and how significant the harm was ("relatively minor" and involving "no loss to the public fisc"). 524 U.S. at 339. But should this Court grant certiorari here, it could provide further clarification that by eschewing the specific harm, if any, caused by Petitioner, and focusing instead on the broad public policy implications of alcohol abuse in rural Alaska, the lower court erred.

Further, that mistaken focus on public policy concerns infected the remainder of the lower court's proportionality analysis. To its credit, the court presented a description of the underlying case facts and testimony from which the trial court had determined the forfeiture of Petitioner's plane would be grossly disproportionate. Pet. App. 3a–7a. It also noted that Petitioner knew of (or was at least willfully blind to) his passenger's intent to transport a six-pack of beer on the plane. Pet. App. 20a.

Turning to the nature of the crime, however, the court discounted key mitigating evidence—that Petitioner was "convicted of only one instance of alcohol importation" and the relatively small quantity of alcohol at issue—"because of the harm that a single instance of aircraft-facilitated alcohol importation has on rural communities." Pet. App. 19a, 26a. Put another way, the court apparently thought that due to the broad societal implications of alcohol abuse in Alaska's rural communities, someone who willfully transported a six-pack of beer one time would be equally culpable to a bootlegger who brought planeloads of alcohol into dry

communities over and over again. That cannot be correct.

The lower court's discounting of the fact that Petitioner was not "part of a larger pattern of criminal activity," is similarly problematic. *Bajakajian* emphasized this point, reasoning that while the respondent had violated the law, he "does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader." 524 U.S. at 338. In other words, *Bajakajian* recognized that a range of behaviors, some more serious than others, might violate the same statute. A similar sentiment can be observed in a nineteenth-century case upholding a fine imposed for illegal liquor sales because the defendant not only possessed alcohol, but also ran an illegal saloon and therefore "belong[ed] to a class of violators of the criminal law who, according to the current history of this state, are in certain counties defying the law, and resisting its enforcement by mobs, violence, and murder." *State* v. *Fertig*, 30 N.W. 633, 633–34 (Iowa 1886). In contrast, the Alaska Supreme Court decided that any person who transported alcohol via plane—no matter the mens rea, quantity of alcohol, or any other detail of the offense—must be treated identically simply because lawmakers mandated forfeiture. Pet. App. 20a–22a. This not only renders the class-of-persons consideration a nullity, it leaves the legislature as the last word on constitutionality, rather than the courts.

CONCLUSION

This Court should grant certiorari to make clear that the decision below misunderstood and misapplied the Excessive Fines Clause.

October 17, 2025

Respectfully submitted,

H. HUNTER BRUTON
Counsel of Record
JOHN L. GIBBONS
SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, LLP
150 Fayetteville Street
Suite 2300
Raleigh, NC 27601
hbruton@smithlaw.com
jgibbons@smithlaw.com
(919) 821-1220

Counsel for Amicus Curiae