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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, in determining whether a fine contravenes the Excessive Fines Clause, courts may consider the gravity of the underlying offense purely in the abstract or should consider the gravity of the specific defendant's wrongdoing.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Cato's interest in this case arises from its mission to prevent government overreach and preserve the protection of constitutional rights. The Eighth Amendment prohibits excessive fines; more generally, it prohibits abusive exactions of fines that result in excessive punishment. But lower courts have applied the Eighth Amendment inconsistently, leading to insufficient protection of a fundamental right. That right must be protected against government infringement.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

The Eighth Amendment prohibits the imposition of excessive fines; more broadly, it prohibits the abuse of government power. Long before the founding of the United States, the Anglo-American legal system protected people from such exactions by government. *See Timbs v. Indiana*, 586 U.S. 146, 151 (2019) ("The Excessive Fines Clause traces its venerable lineage back to at least 1215."). The Framers understood the dangers of such abuse. *See Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 267 (1989). But the Alaska Supreme Court's view is that challenges to excessive fines "should rarely succeed." Pet. App. 18a. That dismissive view led the Alaska Supreme Court to conclude that there is nothing excessive about the forfeiture of an airplane worth "only 9.5 times the maximum fine" and over 60 times more than the fine that was imposed. *Id.* at 23a; *see also* Pet. Br. 8. This forfeiture cannot be reconciled with this Court's precedent or with the original understanding of the Excessive Fines Clause.

In English Common Law, the evaluation of a punishment's excessiveness originally took into account both the circumstances of the defendant and the circumstances of the conduct at issue. From Magna Carta through Blackstone's time, the "concept of proportionality was far broader than just that between the punishment and severity of the offense." Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 322 (2014). Early American courts also followed this view, noting that fines should be proportioned "to the offense committed, the situation, circumstances and character of the offender." *Commonwealth v. Morrison*, 9 Ky. 75, 99 (1819). In contrast, the Alaska

Supreme Court adopted a relatively myopic method of analysis, which takes only the abstract definition of the offense into account rather than the particular defendant's conduct. This method of determining excessiveness is at odds with the original meaning of the Excessive Fines Clause. And this newfangled method will routinely lead courts to wrongly uphold excessive fines.

This Court has declined the invitation to create a rigid multifactor test for excessiveness. *Austin v. United States*, 509 U.S. 602, 622 (1993). Nor has this Court limited the factors it may consider in its own analysis of excessiveness. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). But in the past 27 years, lower courts have become mired in the creation of different multifactor tests. Many jurisdictions have traveled far away from both the original understanding of the Eighth Amendment and the law this Court has established. Such variance across lower courts results in the watering down of a fundamental right. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022).

The weakening of the Excessive Fines Clause is especially inopportune today. The Eighth Amendment was adopted because the Framers "were aware . . . of the abuses" that arise when a sovereign collects fines for improper ends. *Browning-Ferris*, 492 U.S. at 267. Those abuses continue. Billions of dollars have been generated for the government through civil and criminal forfeitures. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HAR. L. & POL'Y REV. 541, 549 (2017). And because it is expensive and time-consuming for defendants to

challenge forfeitures in court, successfully asserting Eighth Amendment rights is difficult. It shouldn't be. This Court, through its decisions, should encourage strong and consistent protection of this constitutional right throughout the nation.

ARGUMENT

I. ALASKA'S MYOPIC STANDARD FOR EXCESSIVENESS CANNOT BE RECONCILED WITH THE ORIGINAL UNDERSTANDING OF THE EIGHTH AMENDMENT.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. While the Amendment did not spark much discussion or debate when it was proposed, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." *Browning-Ferris*, 492 U.S. at 265. But despite the ease with which the Eighth Amendment was adopted, it was not an afterthought. Rather, "the principle was so well-entrenched that debate was not deemed necessary when the Amendment was brought to the floor of Congress." John T. Holden, *Exploring the "Excess" in Excessive: Reimagining the Eighth Amendment's Excessive Fines Clause in the Wake of* Stars Interactive, 65 ARIZ. L. REV. 877, 892 (2023).

Historical analysis has been central to every decision of this Court involving the Excessive Fines Clause. *See* Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures after* Timbs, 129 YALE L.J. F. 430, 434 (2020) ("The Court has repeatedly drawn on the Clause's historical roots."). In

Alaska, however, the value of historical context has been overlooked; as a result, a key constitutional protection has been undercut. This case presents an ideal opportunity for the Court to demonstrate how an originalist perspective on the Excessive Fines Clause protects the rights of the people.

Excessive fines have been disallowed as far back as 1215, when Magna Carta constrained King John. *See Timbs*, 586 U.S. at 151. Magna Carta required amercements (fines) to "'be proportioned to the wrong' and 'not so large as to deprive [an offender] of his livelihood.'" *Id*. (quoting *Browning-Ferris*, 492 U.S. at 271). The promises of Magna Carta were not consistently enforced, however, and excessive fines were regularly imposed during the reign of the Stuart kings who "were criticized for using large fines to raise revenue." *Id*. at 152. The Eighth Amendment's familiar language first appeared in the English Bill of Rights of 1689 before it made its way into the States. *See* Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 420 (1998).

By the time the Eighth Amendment was ratified, most of the original States "had some equivalent of the Excessive Fines Clause . . . in their respective Declarations of Rights or State Constitutions." *Browning-Ferris*, 492 U.S. at 264. The Virginia Declaration of Rights borrowed heavily from its English predecessor. *Timbs*, 586 U.S. at 152. In turn, the language of the Eighth Amendment was adopted verbatim from Virginia. *See* Holden, *supra*, at 893. Even though the prohibition against excessive fines was widespread in the states at the founding, the Framers had an inherent "distrust of power, and they insisted on constitutional limitations against its abuse." *Weems v. United States*,

217 U.S. 349, 372 (1910). The Eighth Amendment, and the entire Bill of Rights, was ratified because the Framers "would take no chances" on the abuse of power. *Id.*

At the time of the founding, "the phrase 'excessive fines' was—like the phrase 'cruel and unusual punishments'—understood to be linked in important ways to the meaning of analogous legal protections in English history." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 840 (2013). This Court's extensive historical analysis in its previous Excessive Fines Clause cases demonstrates not only that "'[f]reedom from excessive fines' was considered 'indisputably an ancient right,'" but also that historical context is central to understanding the Eighth Amendment. *Timbs*, 586 U.S. at 163 (Thomas, J., concurring).

Webster's 1828 Dictionary supplied several contemporaneous definitions of the word "excessive." In *Bajakajian,* this Court reproduced a portion of that dictionary's first definition: "beyond the common measure or proportion." *Bajakajian*, 524 U.S. at 335. The same dictionary also contains a second definition: in relevant part, it is "beyond the bounds of justice, fitness, propriety, expedience, or utility; as *excessive* indulgence of any kind." Noah Webster, *An American Dictionary of the English Language* (1828);[2] *see* McLean, *supra*, at 838 n.14. Notably, the first clause of the Eighth Amendment is the example of "excessive" that this definition provides. Webster, *supra*.

Historically, fines were calculated "according to the quantity of [one's] trespass." *Timbs*, 586 U.S. at 161

[2] Available at https://tinyurl.com/nhkepzj2.

(Thomas, J., concurring). Courts took into account both "the magnitude *and manner* of th[e] offense," *id.* (emphasis added), as well as the defendant's ability to pay. McLean, *supra*, at 865. This Court has noted that the Clause's protection against excessive fines has traditionally included the right to be free from fines that would deprive the offender of his or her livelihood. *Browning-Ferris*, 492 U.S. at 271. The consideration of ability to pay was not a "short-lived, 14th century English practice." *See Bruen*, 597 U.S. at 35. Rather, it is a "long, unbroken line of common law precedent" stretching from Magna Carta to Blackstone to the Colonies. *Id*; *see* McLean, *supra*, at 865–70 (describing how a defendant's ability to pay was a common consideration in the colonial era). That English courts considered a fine's effect on an individual is evidence that their calculation of excessiveness originally included consideration of the particular circumstances of the offense, rather than just the offense in the abstract.

William Blackstone, when commenting on discretionary fines, noted that the amount "of pecuniary fines neither can, nor ought to be, ascertained by any invariable law." 4 WILLIAM BLACKSTONE, COMMENTARIES *378. To prevent exacting wholly arbitrary fines, the amount of a fine "must frequently vary." *Id.* Furthermore, the assessment should consider "the aggravations or otherwise of the offense, the quality and condition of the parties, and . . . innumerable other circumstances." *Id.* Blackstone had the same understanding of proportionality as Magna Carta, one that was "far broader than just that between the punishment and severity of the offense." Colgan, *supra*, at 322. During Blackstone's time, it was the usual practice to consider the characteristics of a specific violation. *Id.* And when this practice made its way into the

Colonies, early colonial courts also "did, in practice, tend to take into account individual characteristics of defendants when determining the level of fines." McLean*, supra*, at 867.

A focus on the defendant and his or her specific violation permeates the common-law understanding of the prohibition against excessive fines. But when lower courts fail to consider the original meaning of the Excessive Fines Clause, ordinary people then face fines that would have been found excessive under the standard courts originally applied. The Eleventh Circuit, for example, has held that "excessiveness is determined in relation to the characteristics of the *offense*, not in relation to the characteristics of the *offender*." *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999) (emphasis added). This myopic view cannot be reconciled with the way that the Anglo-American legal system has treated excessive fines—or with the way that the Framers understood their rights.

Unfortunately, this myopic view is also the one that the Alaska Supreme Court has chosen to adopt in upholding the forfeiture of an airplane as punishment for transporting a six-pack of beer. That court has decided that the forfeiture of Kenneth Jouppi's airplane is justified on the theory that the sum of all illegal transportation of alcohol leads to "grave societal harm[s]" like alcoholism, fetal alcohol spectrum disorder, and death. Pet. App. 24a. That justification runs contrary to our tradition: "early Americans had an expansive understanding of relevant factors when it came to the fair imposition of fines, including . . . the amount of harm *caused*." Colgan, *supra*, at 324 (emphasis added). The appropriate focus cannot be the harm caused by all

potential offenders in the aggregate; rather, it is the harm caused by one particular defendant in a set of particular circumstances.

The Alaska Supreme Court's willful blindness to the particular conduct at issue led it to bless a forfeiture that would rightly have been condemned as excessive in the Founding Era. The court failed to prevent the kind of unrestrained government action that the Eighth Amendment was meant to protect against. The Framers, in adopting the Eighth Amendment, "learned several centuries ago" that excessive fines "undermine other constitutional liberties." *Timbs*, 586 U.S. at 153–54. This Court should ensure that this lesson is not forgotten. It should require lower courts to follow the original understanding of the Eighth Amendment, so that the people will be protected from the abuse of power that excessive fines allow.

II. THIS COURT SHOULD DISCOURAGE THE PROLIFERATION OF UNGROUNDED EXCESSIVENESS STANDARDS.

The right to be free of excessive fines is essential to ordered liberty. Because governments throughout history have repeatedly abused the power to extract monetary penalties, the Eighth Amendment requires courts to police these fines and to end these abuses. This case presents the perfect vehicle for this Court to ensure that lower courts will appropriately attend to this Court's holdings. If this Court fails to act, the people will continue to suffer from inconsistent and inadequate protection of a fundamental right.

A. In the 27 years since *Bajakajian*, lower courts have strayed from its basic principles by creating newfangled and insupportable multifactor tests.

Despite the Eighth Amendment's venerable history, it took more than 200 years for this Court to interpret the Excessive Fines Clause. *Browning-Ferris*, 492 U.S. at 265. In the handful of excessive fines cases this Court has heard, only once has it explained the nature of excessiveness at any length. *Bajakajian*, 524 U.S. at 334. However, "the *Bajakajian* opinion has resulted in some confusion." Colgan, *supra*, at 321. That confusion has led lower courts to create various multi-factor tests, and many of those multi-factor tests function in a manner that departs from *Bajakajian* and fails to protect ordinary people from excessive fines.

This Court's Eighth Amendment precedents have largely focused on the reach of the Amendment's protections. In *Browning-Ferris*, this Court held that the prohibition against excessive fines did not apply to punitive damages awards in cases between private parties. *Browning-Ferris*, 492 U.S. at 260. In 1993, this Court held that the Excessive Fines Clause applied to civil *in rem* forfeitures and that *in personam* criminal forfeitures are no different from traditional fines. *Austin*, 509 U.S. at 604; *Alexander v. United States*, 509 U.S. 544, 588–89 (1993). And in *Timbs v. Indiana*, this Court incorporated the Excessive Fines Clause against the states through the Fourteenth Amendment's Due Process Clause. *Timbs*, 586 U.S. at 150. However, in each case, this Court declined to analyze the nature of excessiveness, instead leaving that job to the lower court.

The one exception came in *United States v. Bajakajian*. In that case, the government required Hosep Bajakajian to forfeit over $350,000 because he failed to report the cash he carried when leaving the United States. *Bajakajian*, 524 U.S. at 324–25. That decision's reasoning focused on the defendant's specific violation in a manner that was consistent with the original understanding of the Eighth Amendment. *Id.* at 336–41 (taking into account the harm caused by the defendant compared to worst-case offenders like "tax evaders, drug kingpins, or money launderers"). But this Court's method has not been reflected in the decisions of lower courts, including the decision by the Alaska Supreme Court at issue here. As Petitioners note, the Alaska Supreme Court's abstract, offense-centered framework "breaks with [*Bajakajian*'s] mode of analysis at every turn." Pet. Br. 27. One academic has argued that "the embrace of *individual* culpability . . . and a probing inquiry of excessiveness suggested in *Bajakajian* have been abandoned by lower courts applying the decision." Yan Slavinskiy, *Protecting the Family Home by Reunderstanding* United States v. Bajakajian, 35 CARDOZO L. REV. 1619, 1642 (2014) (emphasis added). And even if lower courts have not entirely "abandoned" *Bajakajian*, there is strong evidence that, in recent years, those courts have accorded its principles insufficient attention.

In the 27 years since this Court's decision in *Bajakajian*, lower courts have created a plethora of multifactor tests in their attempt to "distill" factors from the holding. *See, e.g.*, Pet. App 18a; *State v. Timbs*, 134 N.E.3d 12, 26 (Ind. 2019). However, this Court has expressly declined to adopt a "multifactor test for determining whether a forfeiture is constitutionally 'excessive.'" *Austin*, 509 U.S. at 622 (stating that this Court

declined Austin's invitation to establish a multifactor test). *Bajakajian*'s violation-centered analysis also indicates a reluctance to rely on any rigid set of factors. But while this Court "may have hoped that lower courts would sort out a reasonable and straightforward approach to applying [the] 'grossly disproportional' test," many of them have failed to do so. Pimentel, *supra*, at 543.

By focusing too much on creating multifactor tests, lower courts have become mired in problems of their own making. For example, when applying *Bajakajian*, the Second Circuit inferred that it should produce "a comprehensive list of factors required for the proportionality analysis." Gregoire Ucuz, *New Considerations under the Eighth Amendment's Excessive Fines Clause When Determining Criminal Forfeiture*, 23 SUFFOLK J. TRIAL & APP. ADVOC. 334, 346 (2018); *see United States v. Viloski*, 814 F.3d 104, 110 (2d Cir. 2016). Its attempt to produce that list of factors came even after it recognized that this Court in *Bajakajian* "never prescribed . . . factors as a rigid test." *Viloski*, 814 F.3d at 110.

The Second Circuit was not the only freelancer. Other courts have also strayed from *Bajakajian*'s focus on the defendant's particular circumstances. The Tenth Circuit relies on *Bajakajian* to employ a nine-factor test. *United States v. Wagoner Cnty. Real Est.*, 278 F.3d 1091, 1101 (10th Cir. 2002). The Sixth Circuit interpreted *Bajakajian* as using five factors, but noted that any factors would be fact-specific to each case. *United States v. Carpenter*, 317 F.3d 618, 627–28 (6th Cir. 2003). Although the circuit courts begin at the same place—interpreting *Bajakajian*—some of them have produced methodologies that distort *Bajakajian*'s

focus. And state courts have generated newfangled methodologies of their own. The Indiana Supreme Court, on remand from this Court, used four "severity of the offense" factors to determine that the forfeiture of Tyson Timbs's Land Rover was excessive. *Timbs*, 134 N.E.3d at 37. Indiana's holding was largely consistent with the original understanding of the Eighth Amendment and with *Bajakajian*. States like Utah and Pennsylvania use a similar analysis. *See State v. Real Prop.*, 994 P.2d 1254 (Utah 2000); *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153 (Pa. 2017). But the Alaska Supreme Court treated this Court's refusal to adopt a multifactor test as an invitation to create its own, thus departing from the historical principles underlying the Excessive Fines Clause. *See* Pet. App. 18–19a (gauging excessiveness based on an abstract view of the offense rather than the defendant's specific violation).

The nation's courts are supposed to safeguard our constitutional rights, not generate regional variations on them. Such variation is difficult to reconcile with the Supremacy Clause's requirements for the "supreme Law of the Land." U.S. CONST. art. VI., cl. 2. Indeed, such variation threatens to undermine the proper understanding of the Eighth Amendment itself. In the past, this Court has corrected lower courts when judge-made frameworks have differed from the original understanding of a fundamental right. *See Bruen*, 597 U.S. at 19 (explaining that the lower courts' popular two-step approach in Second Amendment cases was "one step too many"). A similar intervention is needed here.

In short, the landscape of lower court decisions reveals that *Bajakajian*'s illumination of the nature of

Eighth Amendment protections—that is, a broader focus on particular circumstances—was sometimes overlooked. This case provides a perfect opportunity to clarify for lower courts the appropriate method of protecting a fundamental Eighth Amendment right. Even though this Court found a fine to be excessive in *Bajakajian*, "only four courts of appeals applying *Bajakajian* found a forfeiture to be excessive" in the first 15 years after it was decided. Pimentel, *supra*, at 544. That is not the level of protection the Framers envisioned. It is time for a course correction.

B. Without intervention, ordinary people are likely to be left with weak and inconsistent protection of a fundamental right.

"For good reason," the Constitution prohibits excessive fines. *Timbs*, 586 U.S. at 153. Unlike other forms of punishment, asset forfeiture is both "punitive for those whose property is confiscated; and profitable for the government." *Timbs*, 134 N.E.3d at 21. In such an environment, consistent protection for a fundamental right cannot be a mere afterthought — just as the Bill of Rights was no afterthought for the Framers. But if this Court does not act, ordinary people will continue to be at the mercy of a regional array of cobbled-together theoretical frameworks that usurp the original understanding of the Eighth Amendment.

When different tests are employed in different courts, how can people know what level of protection they will receive? In states like Indiana, a person may expect the court to follow the original understanding of the Eighth Amendment by taking a conduct-centered view of excessiveness. But Petitioners accurately point out that Tyson Timbs "unquestionably would have lost his Land Rover had he been in Alaska

instead of Indiana." Pet. Br. 3. And because Alaska breaks with the Ninth Circuit, the outcome would have been different again had the case been in federal court. *See Thomas v. County of Humboldt*, 124 F.4th 1179, 1193 (9th Cir. 2024) ("It is critical, though, that the court review the specific actions of the violator rather than by taking an abstract view of the violation."). These inconsistencies weaken the protection individuals should receive from their constitutional rights. The right to be free from excessive fines, like the right to bear arms, "is not 'a second-class right.'" *Bruen*, 597 U.S. at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)). But as long as this right's level of protection varies depending on state and forum, the Eighth Amendment will have second-class status.

Perpetuating the status quo is especially dangerous when the potential for government abuse is higher than ever. Law enforcement agencies at the state and federal level get to keep seized assets, creating "a conflict of interest, if not a moral hazard." Pimentel, *supra*, at 550. A 2019 study found a link between property seizures and "weak economic conditions," suggesting that "agencies seize more when budgets are tight." Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST., at 34 (2020)[3]; *see* Brian D. Kelly, *Fighting Crime or Raising Revenue? Testing Opposing Views of Forfeiture*, INST. FOR JUST., at 3 (2019).[4] Such incentives even affect criminal forfeitures like the one at hand. *Id.* The outcome is not surprising: Governments have captured billions of dollars through civil and criminal forfeitures. Pimentel, *supra*, at 550. Indeed, these incentives change the

[3] Available at https://tinyurl.com/4mafcx6c.
[4] Available at https://tinyurl.com/vte23wc4.

behavior of law enforcement agencies by guiding them to divert resources away from "nonfinancial crimes" to "more lucrative drug cases." *Id.*

The Eighth Amendment was created to check this kind of abuse. "Failure to strictly enforce the Excessive Fines Clause inevitably gives the government an incentive to investigate criminal activity in situations involving valuable property" and to ignore crimes that do not "provide financial gain for the government." *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 735 (C.D. Cal. 1994). When fiscal incentives encourage the government to violate constitutional rights, this Court should intervene to ensure that such rights are enforced vigorously and consistently.

Successful challenges to Eighth Amendment violations are rare, but they shouldn't be. Not when excessive forfeiture of property is "routinely imposed and . . . routinely graver than [the] associated . . . misdemeanor crimes." *Sessions v. Dimaya*, 584 U.S. 148, 184 (2018) (Gorsuch, J., concurring). This Court's proper role is to ensure that the Excessive Fines Clause checks the government's ability to police for profit. Furthermore, such guidance can smooth out the troubling phenomenon of doctrinal variance among lower courts. The Court should take this case so that anyone can walk into any court in this country with the confidence that comes from the full protection of the Eighth Amendment.

CONCLUSION

For the foregoing reasons, and those described by Petitioner, this Court should grant the petition.

Respectfully submitted,

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