

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TYSON TIMBS,)
)
) Petitioner,)
)
) v.) No. 17-1091
)
INDIANA,)
)
) Respondent.)

Pages: 1 through 64

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TYSON TIMBS,)

Petitioner,)

v.) No. 17-1091

INDIANA,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, November 28, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

WESLEY P. HOTTOT, ESQ., Seattle, Washington; on behalf of the Petitioner.

THOMAS M. FISHER, Indiana Solicitor General, Indianapolis, Indiana; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 17-1091, Timbs
5 versus Indiana.

6 Mr. Hottot.

7 ORAL ARGUMENT OF WESLEY P. HOTTOT

8 ON BEHALF OF THE PETITIONER

9 MR. HOTTOT: Mr. Chief Justice, and
10 may it please the Court:

11 The freedom from excessive fines
12 applies to the states because it is deeply
13 rooted in our nation's history and traditions
14 and fundamental to our scheme of ordered
15 liberty.

16 The State of Indiana appears not to
17 dispute that straightforward answer to the
18 actual question presented. And for good
19 reason. The freedom from excessive fines
20 easily warrants incorporation alongside the
21 Eighth Amendment's other protections. This
22 Court has said just that five times over the
23 last 30 years.

24 Without addressing the incorporation
25 question directly, the State asked whether the

1 clause applies to the states the same way that
2 it applies to the federal government. But 50
3 years of incorporation precedent holds that
4 incorporated Bill of Rights protections apply
5 to the states the exact same way that they
6 apply to the federal government.

7 There's no reason to adopt the
8 so-called two-track approach at this late stage
9 of the incorporation doctrine, especially --

10 JUSTICE GINSBURG: Is that so of all
11 incorporations? What about the non-unanimous
12 jury in -- in criminal cases?

13 MR. HOTTOT: Justice Ginsburg, as the
14 Court recognized in McDonald, the non-unanimous
15 jury in criminal cases is an anomalous decision
16 that results from a one-justice concurrence in
17 the Apodaca case, and there's no reason, as the
18 Court recognized in McDonald, for that to
19 control when there's over 50 years of
20 precedent, beginning in Malloy versus Hogan,
21 Mapp, Aguilar, again in McDonald, rejecting
22 that two-track approach.

23 Adopting the two-track approach at
24 this late stage would only invite further
25 litigation about rights that are already

1 incorporated. When this Court interpreted the
2 Fourth Amendment right to be free from having
3 your cell phone tracked in the Carpenter case,
4 if my friend's argument were correct, we would
5 have to relitigate whether that right applies
6 to the states.

7 Virtually all of the Bill of Rights,
8 with the one exception noted by Justice
9 Ginsburg, has been incorporated on the
10 right-by-right approach used in McDonald, not
11 on the application-by-application approach
12 proposed --

13 JUSTICE ALITO: There are a few others
14 that have not been incorporated, isn't that
15 right?

16 MR. HOTTOT: Oh, that's true,
17 absolutely. But that's either because they
18 haven't been addressed by this Court, like in
19 the case of the Third Amendment right against
20 quartering soldiers, or because, as the Court
21 recognized in McDonald, they long predate the
22 era of selective incorporation.

23 So I think it's possible that if the
24 rights at issue in Bombolis and Hurtado were to
25 come before this Court today, the results might

1 be different. But we don't have to get into
2 that history here because the history on the
3 question presented of whether the Excessive
4 Fines Clause applies to the states is clear.

5 JUSTICE ALITO: Well, what is the
6 provision in the Constitution that you rely on?

7 MR. HOTTOT: The Section 1 of the
8 Fourteenth Amendment, Your Honor.

9 JUSTICE ALITO: It's a component of --
10 of the liberty that's substantively --
11 substantively protected by the Fourth
12 Amendment's Due Process Clause?

13 MR. HOTTOT: Yes, Your Honor. And we
14 also have an alternative argument under
15 Section 1's Privileges Or Immunities Clause.
16 And --

17 JUSTICE GINSBURG: That would leave
18 out non-citizens?

19 MR. HOTTOT: Yes, textually, Justice
20 Ginsburg, that would leave out non-citizens,
21 but, of course, Petitioner is a citizen, and
22 that could be a decision for another day. It's
23 also true that the fundamental and deeply
24 rooted rights that are currently incorporated
25 under the Due Process Clause apply to

1 non-citizens and they would continue to do so
2 regardless of the Court's reasoning in this
3 case.

4 CHIEF JUSTICE ROBERTS: Well, but you
5 can see there's different arguments about
6 whether -- and this, I gather, is the State's
7 primary submission -- whether excessive fines
8 are prohibited and whether civil in rem
9 forfeitures are.

10 And I certainly understand the
11 argument that the disproportion and
12 excessiveness arguments would be quite
13 different with respect to forfeiting the
14 instrumentalities of the crime. I mean, an
15 argument could be made, well, that's always
16 proportionate since it's the way the crime is
17 accomplished.

18 MR. HOTTOT: I don't agree, Your
19 Honor, because whatever might be said of
20 historic in rem forfeiture practices,
21 forfeitures today, like this one, are fines
22 within the meaning of the clause.

23 The Court was unanimous on that point
24 in Austin, and since then, it has reaffirmed
25 that point in the Bajakajian case, in the

1 Hudson case, and most recently in Kokesch, all
2 of which rely on Austin.

3 As a result, state and federal courts
4 today are --

5 CHIEF JUSTICE ROBERTS: Well, of
6 course, the -- the argument there was not for
7 the purposes we're talking about today in terms
8 of incorporation. And if the test is, as it
9 has been, you know, whether it's essential,
10 fundamental, and all that, you can see a
11 distinction between saying, okay, you're going
12 to be fined \$500,000 and saying, you know,
13 you're going to -- I mean the action is not
14 against the individual. It's against the
15 asset. And so you will lose assets that you
16 use in crime.

17 MR. HOTTOT: Well, that --

18 CHIEF JUSTICE ROBERTS: The first one
19 sounds, yeah, that's pretty excessive. The
20 second one, you can certainly argue, well, that
21 makes a lot of sense.

22 MR. HOTTOT: Doubtless, Your Honor,
23 but these questions go to the excessiveness
24 analysis, not to the incorporation analysis
25 that is currently before the Court.

1 When -- when the Court incorporated
2 the Second Amendment right to keep and bear
3 arms in the McDonald case, it had rejected that
4 right for 140 years, until the Heller decision,
5 and then, just two years later, incorporated it
6 against the states.

7 So there's no reason to require, as my
8 friend suggests should be required, that --
9 that litigants show a historic pattern of the
10 right being enforced. And, in any event, as
11 the Court recognized in Austin and Bajakajian
12 and most recently in -- in Kokesh, we're
13 dealing with a different animal.

14 It uses the same name, civil in rem
15 forfeiture, but it's a different animal in that
16 it's not just about personal jurisdiction and
17 pirate ships anymore; it's about every person's
18 property, and every officer on the street now
19 has the power to strip people of their
20 property.

21 JUSTICE ALITO: Well, your client was
22 convicted of an offense that was punishable by
23 a maximum of 10 years imprisonment; am I
24 correct?

25 MR. HOTTOT: Twenty years

1 imprisonment.

2 JUSTICE ALITO: Twenty years
3 imprisonment. And he was sentenced to six, but
4 it was -- it was suspended, right?

5 MR. HOTTOT: That's correct, Your
6 Honor. He was sentenced to home detention for
7 one year and then five years of probation, the
8 minimum on that scale.

9 JUSTICE ALITO: So, if he had been
10 sentenced to six years of actual imprisonment,
11 would that have been a violation of the Eighth
12 Amendment?

13 MR. HOTTOT: Possibly, Your Honor. We
14 would have to look at the -- the
15 proportionality to the gravity of the offense.
16 And for what it's worth, Judge Todd in rural
17 Grant County, Indiana, looked at this offense
18 and the impact on the community and determined
19 that it would be grossly disproportionate to
20 strip Petitioner of his property or even to
21 send him to prison.

22 And I think that's significant,
23 especially given that the Indiana -- the
24 Indiana Court of Appeals affirmed that
25 decision. And the Indiana Supreme Court didn't

1 even address it because it didn't have an
2 opportunity to reach the excessiveness
3 question.

4 JUSTICE ALITO: Well, what have we
5 said about application of the grossly
6 disproportionate standard?

7 MR. HOTTOT: Well, Your Honor, as you
8 know, the -- the Court in Bajakajian
9 articulated that standard for the first time,
10 and it hasn't had an opportunity to address it
11 again since.

12 JUSTICE ALITO: Well, I mean in the
13 context of -- of imprisonment, not fines.

14 MR. HOTTOT: Oh, absolutely, Your
15 Honor. Well, under the Cruel and Unusual
16 Punishment Clause, the -- the Court has
17 articulated a very similar standard: Is -- is
18 the punishment grossly disproportionate to the
19 gravity of the offense?

20 And there's nothing -- there's nothing
21 radical about allowing trial judges at the end
22 of a proceeding to assess under all of the
23 circumstances, as this Court emphasized in
24 Bajakajian they should, even with respect to in
25 rem forfeitures. That's something that trial

1 judges do every day.

2 CHIEF JUSTICE ROBERTS: But -- but
3 your assumption is that you assess the
4 particular circumstances of the case. I mean,
5 I suppose if you ask people do you think six
6 months is an excessive sentence for whatever it
7 was, three counts of dealing in, you know,
8 hazardous illegal drugs, many people might say
9 no.

10 It's only when you say, well, is six
11 months too much for the -- whatever the
12 circumstances were here, the much -- I don't
13 want to say insignificant, but lighter
14 quantities involved, what do you look at? The
15 particular circumstances or what the crime is?
16 The crime is not dealing with tiny amounts of
17 drugs. The crime that he's convicted for is
18 much broader than that.

19 MR. HOTTOT: Your Honor, excessiveness
20 is "necessarily fact-intensive." That's from
21 the Bajakajian case. Excuse me, Your Honors,
22 that's -- that's actually from the Second
23 Circuit's van Hofe case, which attempts to
24 apply Bajakajian to the real world
25 circumstances of an in rem forfeiture. But

1 Blackstone recognized that as well.

2 There -- there's no way to assess the
3 disproportionality to the gravity of the
4 offense in the abstract. By contrast, the
5 incorporation question that's before the Court
6 today is easy to assess in the abstract.

7 We ask ourselves not whether civil in
8 rem forfeitures, a right against excessive in
9 rem forfeitures is somehow deeply rooted and,
10 hence, can be incorporated. We ask whether the
11 -- the freedom from excessive fines, which has
12 been recognized since the 13th Century, is
13 incorporated.

14 And it's important to recognize that
15 the Indiana Supreme Court's decision in this
16 case did not adopt my friend's suggestion of
17 simply saying that it doesn't apply to in rem
18 forfeitures. The citizens of Indiana today
19 don't enjoy protection from excessive fines of
20 any kind.

21 And that's true of the citizens of
22 three other jurisdictions, as we pointed out in
23 our petition for certiorari.

24 JUSTICE ALITO: If we were to assume
25 for the sake of argument that imprisonment for

1 six years would not be an Eighth Amendment
2 violation for this offense, what would that say
3 about a fine of \$42,000? Is it possible that
4 six years imprisonment is not an Eighth
5 Amendment violation, but a fine of \$42,000 is
6 an Eighth Amendment violation?

7 MR. HOTTOT: Well, Your Honor, we'd
8 have to know all of the circumstances of the
9 case. And if we're talking about this
10 particular case, I think it's clear that the
11 judge on the ground that was closest to this
12 crime felt that it was grossly disproportionate
13 to the gravity.

14 This is a first-time offender who was
15 caught dealing a small amount of drugs. And
16 the vehicle here was not --

17 JUSTICE ALITO: But we're talking
18 about a federal Constitutional standard, not --

19 MR. HOTTOT: Of course.

20 JUSTICE ALITO: -- whatever sentencing
21 philosophy any one of the thousands of judges
22 in the United States who impose sentences might
23 think is the right sentence for a particular
24 crime and a particular offender.

25 MR. HOTTOT: Absolutely, Your Honor.

1 But the question presented here is merely
2 whether a defendant in any case has the right
3 to interpose a defense under the excessive
4 fines clause.

5 We're not asking the Court to
6 articulate a new standard of excessiveness.
7 We're not asking the Court to determine that
8 this forfeiture was or was not excessive.

9 We're merely emphasizing that part of
10 the purpose of the Fourteenth Amendment was to
11 guarantee to all 330 million Americans a right
12 to a defense under the excessive fines clause.
13 Indiana denied Petitioner that defense, and the
14 Court should reverse and remand.

15 Two state courts here struck down this
16 forfeiture, held that it was punitive under
17 Austin, believing that the clause already
18 applies to the states, and believing that this
19 forfeiture would be excessive. The Indiana
20 Supreme Court did not address the excessiveness
21 question. It "declined to find or assume
22 incorporation" until this Court
23 "authoritatively holds that the clause
24 applies."

25 JUSTICE SOTOMAYOR: Is there any in

1 rem forfeiture, not this one, which relied on
2 the criminal activity of this defendant, but
3 let's say that Austin -- that the state did
4 away with innocent owner defense so that the
5 forfeiture was against the innocent owner.

6 Would that be punishment? I think
7 under our -- my reading of Austin, it was that
8 only those forfeitures that are punitive count
9 under the clause. So what can a state do to
10 take it out of its punitive nature?

11 MR. HOTTOT: Well, it's important to
12 recognize that Austin says that, if the
13 forfeiture is at least partly punitive, it
14 comes within the confines of the clause. So a
15 forfeiture --

16 JUSTICE SOTOMAYOR: So they do away
17 with the innocent owner defense, and the
18 innocent owner comes in and says, this is my
19 property, I didn't commit a crime. They say
20 it's too bad.

21 MR. HOTTOT: Well, I --

22 JUSTICE SOTOMAYOR: The property did.

23 MR. HOTTOT: I think, Your Honor, it's
24 -- it's safe to say that that could be deemed
25 excessive. If -- if we look at the Bennis

1 case, that case is about a co-owner who didn't
2 commit the crime. And the Court held that, as
3 a matter of federal substantive due process,
4 that co-owner did not have a -- an innocent
5 owner defense.

6 But that does not dictate that the --
7 that that co-owner couldn't articulate an
8 excessive fines defense. Indeed, three --

9 JUSTICE SOTOMAYOR: Why?

10 MR. HOTTOT: Well, three --

11 JUSTICE SOTOMAYOR: If it's not
12 punitive against him, it's the property that is
13 being charged with having been involved in a
14 crime.

15 MR. HOTTOT: I see your question, Your
16 Honor.

17 I think that if someone had done
18 nothing wrong, let us say that someone steals
19 my car as I'm walking into a Target, commits a
20 bank robbery, and the police seize that vehicle
21 quite righteously, I mean, as a practical
22 matter, of course, the police are going to
23 return the vehicle to me.

24 But, if the State were to go so far as
25 to institute forfeiture proceedings against

1 that person, as Justice Kennedy recognized in
2 his Austin concurrence, there would be several
3 serious constitutional problems with that.

4 And it -- it may be that in those
5 circumstances, where I'm entirely blameless,
6 that the Court would hold that there is a
7 substantive due process right to reject that
8 forfeiture, or the Court would find it to be
9 grossly disproportionate to the gravity of the
10 nonexistent defense.

11 So I think Bennis can be easily
12 reconciled with this case, particularly when --
13 when the Court looks at Justice Stevens'
14 dissent in Bennis, which with two other
15 Justices points out that Mrs. Bennis didn't
16 bring an excessive fines defense. Had she done
17 so, at least those three Justices would have
18 been inclined to rule in her favor.

19 JUSTICE ALITO: So you're saying even
20 if it's a classic in rem forfeiture of a kind
21 that's been known for centuries, that would
22 potentially violate the excessive fines clause?

23 MR. HOTTOT: Yes, Your Honor. This
24 Court has rejected the idea that states can
25 work their way around the excessive fines

1 clause based on nothing more than a label.

2 This is not a labeling game. The
3 Court looks to the substance of what's
4 happening. It emphasized that most recently in
5 the Kokesh decision, that, you know, fines,
6 penalties, they sometimes serve several
7 purposes.

8 But, with respect to civil in rem
9 forfeitures, if any of those purposes are
10 punitive in nature, then the defense can be
11 raised. And that makes sense.

12 JUSTICE BREYER: What is the situation
13 with jail, prison? I have a vague recollection
14 -- often such recollections are incorrect.

15 (Laughter.)

16 JUSTICE BREYER: But I have a vague
17 recollection that there was a case in which
18 California's three-strike law was applied to
19 sentence to life a person whose final offense
20 was stealing an \$80 golf club. And I think the
21 majority said, no, we're not going to look at
22 that because it's too complicated.

23 Am I right? Does that ring a bell?

24 If -- if that still is the law, which
25 I think it is, it's something anomalous about

1 saying, by the way, if you took his Mercedes,
2 we will look to see whether that's
3 disproportionate to taking a golf club, but if
4 you send him to jail for life, we won't.

5 Now have -- have I stated this
6 correctly and, if so, how do we -- how do we
7 deal with it?

8 MR. HOTTOT: Well, Your Honor, I think
9 the most relevant authority here is the
10 Harmelin decision in which this Court, similar
11 to the situation you're describing, allowed a
12 person to be sentenced from -- a person from
13 Michigan to be sentenced to life without the
14 possibility of parole for having 650 grams of,
15 I believe it was cocaine.

16 And the Court reasoned that, look,
17 that amount of cocaine could be broken up and
18 easily used for distribution, so it's
19 appropriate in these circumstances to punish
20 that harshly.

21 Here, we're dealing with two grams --

22 JUSTICE BREYER: My question really
23 is, are there cases where we have said that the
24 punishment is disproportionate, where it's
25 simply a question of the degree of punishment,

1 i.e., life imprisonment, and the nature of the
2 offense, e.g., stealing a golf club?

3 And do you see what I -- I'm not sure
4 there are, and, if there are not, it seems odd,
5 and I think I'd have to think about it, or
6 maybe we should address in some way your
7 argument, as to why there is that difference.

8 MR. HOTTOT: Your Honor, I -- I -- I
9 think if we posit that difference, yes, it's --

10 JUSTICE BREYER: Am I right, you're
11 saying there is a difference?

12 MR. HOTTOT: Between sentencing a
13 person for stealing a golf club to a life --

14 JUSTICE BREYER: Yeah.

15 MR. HOTTOT: -- a life sentence?

16 JUSTICE BREYER: Uh-huh.

17 MR. HOTTOT: I -- I think that, no,
18 there is no difference, and that if -- if there
19 is that tension between the excessive fines
20 clause and the cruel and unusual punishment
21 clause, that in an appropriate case this Court
22 should resolve it. But, here, the question --

23 JUSTICE GINSBURG: I thought the --
24 the three strikes, it wasn't simply stealing a
25 golf club, it was the third -- the third

1 offense, so it was -- it was a punishment for
2 recidivist.

3 MR. HOTTOT: Absolutely, Your Honor,
4 and thank you for that.

5 JUSTICE BREYER: Yeah. But also
6 robbed a chicken coop.

7 (Laughter.)

8 MR. HOTTOT: Well --

9 JUSTICE ALITO: This gets me back to
10 the question I was asking before. If six
11 years' imprisonment is not a violation of the
12 Eighth Amendment, and, you know, you said it
13 might be, I think you might have something of
14 an uphill fight to prove that, but three years,
15 two years? How -- how low would the ceiling of
16 permissible term of imprisonment have to go in
17 order to justify a holding that a fine of
18 \$42,000 is a violation of the Eighth Amendment?

19 What is the equation between the --
20 the monetary -- between dollars in -- in a fine
21 and time imprisonment?

22 MR. HOTTOT: Your -- Your Honor,
23 although it might be unsatisfying, the Court
24 has said repeatedly that there is no equation
25 and that there can be no equation because these

1 situations are inherently real-world in nature
2 and that courts have been directed,
3 specifically with respect to in rem forfeitures
4 in the Bajakajian case, to assess all of the
5 circumstances.

6 And -- and as Justice Ginsburg was
7 assisting me, it -- it's absolutely the case
8 that the court has to look at not just the
9 value of the property, not just the gravity of
10 the offense, but also the offender himself and
11 his effect, potentially, on the community if he
12 remains at large.

13 There -- there's nothing new about
14 that. Trial judges every day assess in all of
15 the circumstances what is an appropriate
16 punishment. And all we're saying in this
17 case -- we're several step -- steps removed
18 from the question presented right now. All
19 we're saying is that you have an excessive
20 fines defense that you may raise.

21 JUSTICE KAGAN: So we are several
22 steps removed, but I think that the import of
23 some of these questions is, look, we've made it
24 awfully, awfully hard to assert a
25 disproportionality claim with respect even to

1 imprisonment. And if it's at least equally
2 hard to assert a disproportionality claim with
3 respect to fines, we could incorporate this
4 tomorrow and it would have no effect on
5 anybody.

6 MR. HOTTOT: That's potentially true,
7 Your Honor, but the standard of assessing this
8 type of economic sanction, it's important to
9 recognize, is being developed as we speak in
10 the lower courts.

11 This Court's decision in *Bajakajian*
12 has prompted the lower courts to try to
13 articulate factors. And some courts use some
14 factors; other courts use others. In an
15 appropriate case with full briefing and -- and
16 comment from amici, this Court can and should
17 decide that important question.

18 But this case merely insists that
19 Petitioner, like every other American, has the
20 right to raise the excessive fines defense and
21 that the Indiana courts can then assess the
22 situation.

23 CHIEF JUSTICE ROBERTS: Well, but
24 you're asking us to, you know, buy a pig in a
25 poke; in other words, you're saying incorporate

1 this, but, you know, we're -- we don't even
2 know whether it means we're going to decide
3 whether \$10,000 is enough or \$20,000, or if
4 we're simply going to say something along the
5 lines of Harmelin, which it's not just that
6 it's whatever so many grams; it's that it's the
7 third offense, and so that's -- that's what's
8 the -- protection against that is fundamental
9 to a civilized society or whatever the standard
10 is that we've been applying.

11 MR. HOTTOT: Well --

12 CHIEF JUSTICE ROBERTS: And you say
13 don't worry about what it means; just
14 incorporate it and then figure it out later on.

15 MR. HOTTOT: Your Honor, I'm not
16 saying don't worry about it. I think that this
17 is a pressing question, and in an appropriate
18 case, I -- I think that the Court does need to
19 take it up.

20 But if we look to the Harmelin
21 decision, Justice Scalia's opinion in that case
22 points out that there is special reason to be
23 concerned when the government uses economic
24 sanctions to punish a person because, unlike
25 all other forms of punishment, whether it be

1 life imprisonment, Justice Alito, or -- or a
2 three strikes law, those cost the government
3 money.

4 But these types of forfeitures and
5 fines raise revenue. And there's good reason,
6 there's good history, for being concerned about
7 the sovereign power to raise revenue using
8 punishment.

9 JUSTICE ALITO: Well, let me give you
10 two examples. What -- suppose your client,
11 instead of using a -- a Land Rover, was it?

12 MR. HOTTOT: Yes.

13 JUSTICE ALITO: Yes, a Land Rover, had
14 been using a 15-year-old Kia or, at the other
15 extreme, suppose that he used a Bugatti, which
16 costs like a quarter of a million dollars.
17 Would the Excessive Fine Clause apply
18 differently in those three cases?

19 MR. HOTTOT: No, Your Honor. It
20 applies the same. The same test --

21 JUSTICE ALITO: Well, would the result
22 be different? If he had been driving a -- a
23 car with a -- a book value of \$1500, would the
24 result be different?

25 MR. HOTTOT: Well, Your Honor, we

1 would have to know more. We would have to know
2 what the gravity of the offense was.

3 JUSTICE ALITO: We know. It is --
4 it's the offense we have here.

5 MR. HOTTOT: Okay.

6 JUSTICE ALITO: We know what the
7 offense is.

8 MR. HOTTOT: I -- I think in this
9 instance, any forfeiture of the vehicle would
10 be excessive because this vehicle was not
11 instrumental to this crime. It was incidental.

12 It's no surprise that -- in rural
13 Indiana that a -- a person might drive
14 somewhere to -- to meet with someone. And that
15 doesn't make this vehicle somehow like a pirate
16 ship that had been sailing the high seas.

17 CHIEF JUSTICE ROBERTS: Well, that's
18 contrary to a lot of civil forfeiture law. I
19 mean, this was an instrumentality of the crime.
20 This is how he got to the -- the deal place and
21 how he carried the drugs. Normally, I mean,
22 you're carrying the -- the drugs in your car, I
23 think it's pretty well established your -- your
24 car can be forfeited.

25 MR. HOTTOT: Potentially, Your Honor.

1 It's -- it's well established that the car is
2 subject to forfeiture. It is not, however,
3 well established that that would necessarily
4 not be excessive. So if we look --

5 CHIEF JUSTICE ROBERTS: Well, does it
6 make a difference -- we've been talking about
7 the value of the -- the item. What if the --
8 the person doing this, you know, was a
9 multimillionaire? Forty-two thousand dollars
10 doesn't seem excessive to him.

11 MR. HOTTOT: Well --

12 CHIEF JUSTICE ROBERTS: And -- and
13 yet, if someone is impoverished, it is
14 excessive? Does that matter?

15 MR. HOTTOT: Well, Your Honor, if the
16 Court looks to the brief of the Eighth
17 Amendment scholars, filed in support of neither
18 party, they discuss this. Magna Carta had the
19 principle of salvo contenmento, the idea that
20 you can't take from a man so much that he would
21 be destitute.

22 And the Court has suggested that -- in
23 -- in -- in the Bajakajian case, that that
24 might be a factor, but it -- but it
25 specifically declined in Bajakajian to

1 articulate factors, recognizing that this is
2 highly contextual, highly fact-intensive, and
3 something that ought to be developed in the
4 lower courts before this Court pronounces any
5 particular test.

6 JUSTICE KAGAN: What is the -- on the
7 federal side, how does this work? What kind of
8 forfeitures have been held unconstitutional?
9 Have any?

10 MR. HOTTOT: Yes, Your Honor. The
11 Second Circuit's von Hofe decision is helpful.
12 That case dealt with a wife who was unaware
13 that her husband was cultivating marijuana in
14 the family home. And the Second Circuit
15 wrestled with that case, articulated factors
16 for assessing excessiveness, and determined
17 that that wife was entitled to return of a
18 portion of the property.

19 And -- and that's important to
20 recognize too. This isn't an all-or-nothing
21 thing. It may be that the Bugatti that Justice
22 Alito was talking about would be forfeited in
23 part and not in full, or that a person who was
24 particularly dependent on their vehicle, say
25 they're a mother and it's the -- the minivan

1 that they use to get their children to school,
2 that a trial judge might determine that that is
3 constitutionally excessive.

4 Your Honors, if there are no further
5 questions, I'd like to reserve the balance of
6 my time.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 General Fisher.

10 ORAL ARGUMENT OF THOMAS M. FISHER

11 ON BEHALF OF THE RESPONDENT

12 MR. FISHER: Mr. Chief Justice, and
13 may it please the Court:

14 In rem forfeitures have been a feature
15 of the Anglo-American judicial system for
16 hundreds of years, but until about 25 years
17 ago, no court had held that they were subject
18 to a proportionality limitation. While other
19 constitutional doctrines may limit --

20 JUSTICE GORSUCH: General, before we
21 get to the in rem argument and its application
22 to this case, can we just get one thing off the
23 table? We all agree that the Excessive Fines
24 Clause is incorporated against the states.
25 Whether this particular fine qualifies because

1 it's an in rem forfeiture, another question.

2 But can we at least get the -- the
3 theoretical question off the table, whether you
4 want to do it through the Due Process Clause
5 and look at history and tradition, you know,
6 gosh, excessive fines, guarantees against them
7 go back to Magna Carta and 1225, the English
8 Bill of Rights, the Virginia Declaration of
9 Rights, pretty deep history, or whether one
10 wants to look at privileges and immunities you
11 might come to the same conclusion. Can we at
12 least -- can we at least agree on that?

13 MR. FISHER: I have two responses to
14 that. First --

15 JUSTICE GORSUCH: Well, I -- I think
16 -- I think a "yes" or "no" would probably be a
17 good starting place.

18 (Laughter.)

19 MR. FISHER: Well, I think, with
20 respect to in personam, the answer is yes, but
21 you -- you have to take into account -- and
22 this is the methodology of McDonald. You have
23 to take into account the history and traditions
24 of the right being claimed.

25 Now the right being claimed here is a

1 right of proportionality as to in rem
2 forfeitures. The Court has to grapple with
3 that history, which is really not seriously
4 contested that that was never subject to
5 proportionality --

6 JUSTICE GORSUCH: Well, whatever the
7 Excessive Fine Clause guarantees, we can argue,
8 again, about its scope and in rem and in
9 personam, but whatever it, in fact, is, it
10 applies against the states, right?

11 MR. FISHER: Well, again, that
12 depends.

13 JUSTICE GORSUCH: I mean, most -- most
14 of the incorporation cases took place in like
15 the 1940s.

16 MR. FISHER: Right.

17 JUSTICE GORSUCH: And here we are in
18 2018 --

19 MR. FISHER: Right.

20 JUSTICE GORSUCH: -- still litigating
21 incorporation of the Bill of Rights. Really?
22 Come on, General.

23 MR. FISHER: My -- well, I think what
24 you have to take into account, though, is the
25 history, and you have to take into account all

1 the history, not just the in personam history,
2 the in rem history.

3 JUSTICE KAVANAUGH: Well, for the
4 clause, why do you have to take into account
5 all of the history, to pick up on Justice
6 Gorsuch's question? Isn't it just too late in
7 the day to argue that any of the Bill of Rights
8 is not incorporated?

9 MR. FISHER: The Court has never
10 incorporated a right against the states where
11 it could not conclude that there was a
12 relationship that was fundamental or -- and
13 deeply rooted in our history and tradition.

14 JUSTICE KAVANAUGH: But aren't -- but
15 aren't all -- all the Bill of Rights at this
16 point in our conception of what they stand for,
17 the history of each of them, incorporated?

18 MR. FISHER: Well, with fairness, not
19 with your -- respect to your concession --
20 conception on excessive fines, and Austin's
21 what stands in the way of that. Austin is --
22 had been undermined by subsequent cases,
23 including *Ursery*, including *Bajakajian*, which,
24 by the way, was --

25 JUSTICE GINSBURG: *Bajakajian* cited it

1 in a footnote with seeming approval.

2 MR. FISHER: Well, that would --
3 that's -- one thing that's interesting about
4 that footnote is that it's as weak an
5 endorsement as I think we can imagine. It says
6 that Austin was justified by reference to some
7 difference between common law forfeitures and
8 so-called modern forfeitures.

9 Well, Austin didn't depend on that
10 distinction. And that distinction does not
11 exist. The so-called modern-day forfeitures
12 are materially the same with respect to the
13 conceptual nature of them, that they are
14 against the property and not the person, with
15 respect to the procedural nature -- nature,
16 which is civil and not criminal.

17 JUSTICE KAGAN: If I -- if I
18 understood your response to Justice Gorsuch, it
19 was essentially that we can't answer the
20 question wholesale, that we have to look at the
21 particular right being invoked.

22 So I guess the question is, do you
23 have a theory about how we go about dividing up
24 rights? You know, how do we decide that we're
25 looking at a particular right against in rem

1 forfeitures as opposed to a general right
2 against excessive fines?

3 MR. FISHER: Well, I think McDonald
4 gives us some instruction on that. McDonald
5 talked about not simply the Second Amendment
6 but about the right to self-defense in the
7 home.

8 Other cases of incorporation this
9 Court has decided have approached, for example,
10 reasonableness under the Fourth Amendment as
11 distinguished from, you know, the exclusionary
12 rule.

13 There are -- there are precedents that
14 do that, but there is no precedent where the
15 Court has incorporated a right that was not
16 deeply rooted or fundamental.

17 JUSTICE KAGAN: I mean, that seems to
18 make the incorporation question sort of
19 indistinguishable from the substantive
20 question.

21 MR. FISHER: I think you have to come
22 to grips with the history, whether you just --
23 whether you call it incorporation or you call
24 it the substantive merits question. We've
25 given you three different ways to do this.

1 The most historically sound way is to
2 overrule Austin. If you don't want to do that,
3 you can --

4 JUSTICE GORSUCH: Well, counsel, you
5 know, if -- if -- just -- just to pause on that
6 for a second, you know, the Indiana Supreme
7 Court didn't address the merits questions,
8 didn't address any of this forfeiture, in rem,
9 in personam. It just said that the Excessive
10 Fines Clause is not incorporated, period.

11 Why isn't that just wrong? And then
12 you can go make these arguments about why it
13 doesn't apply to this case on remand.

14 Do you really want us to answer the
15 merits questions too?

16 MR. FISHER: Well, the problem with
17 relying on lower court percolation on the
18 merits question, in terms of whether Austin is
19 correct, is that Austin binds the lower courts.
20 They don't have an opportunity to revisit that.

21 This Court does. The matter has
22 been -- has been --

23 JUSTICE GORSUCH: Let's say this
24 Court's not inclined to revisit Austin. You're
25 going to lose not just the incorporation

1 question but the merits question too.

2 Could these work?

3 MR. FISHER: Well, I'm not sure what
4 you mean by the -- the merits question in that
5 regard. With respect to whether this
6 forfeiture is excessive, certainly, that
7 discussion would -- and that argument would
8 take place back in the Indiana Supreme Court.

9 With respect to the meaning of Austin,
10 whether Austin remains good, I think, you know,
11 that's only something this Court can effect.

12 And I think, with respect to the
13 broader question, even if the question, Justice
14 Kagan, is -- is -- is the Excessive Fines
15 Clause as a whole, and not something where
16 we're going to slice and dice the rights, we
17 still have to take into account that history of
18 in rem forfeiture.

19 And we don't have any examples of
20 incorporation where there is this substantial
21 history that calls into question the
22 fundamental or deeply rooted nature of a -- a
23 -- a very large, you know, area where that
24 right would be applied.

25 JUSTICE GINSBURG: But we do have

1 relatively recent history calling into question
2 the division between in rem and in personam.
3 Certainly, in the area of personal
4 jurisdiction, there was once quasi in rem
5 jurisdiction and personal jurisdiction, and
6 yet, in Shaffer against Heitner, the Court said
7 we're not going to do that anymore. Due
8 process controls both.

9 So, whether you label it in rem or in
10 personam, let's remember that it's -- things
11 don't have rights or obligations in and of
12 themselves. It's people that have rights or
13 obligations with respect to things.

14 MR. FISHER: Well, with respect to
15 Shaffer, I think what's critical there is the
16 word "quasi" because, of course, it was not a
17 straight-up in rem proceeding.

18 We're talking about the ability to
19 seize assets for a case where there had been an
20 in personam judgment. And that is -- that
21 distinguishes that category of cases from the
22 historical in rem forfeitures we're talking
23 about.

24 In rem is still critical for
25 jurisdictional reasons, for -- it comes up in

1 sovereign immunity. It binds the states there
2 that we can't assert sovereign immunity the
3 same way when we've got an in rem proceeding.
4 You've got other situations. Double jeopardy.
5 We already have a distinction in the double
6 jeopardy context where in rem is critical. So
7 I don't think we can just wave -- you know,
8 wave it away.

9 JUSTICE ALITO: What is the difference
10 between the approach that you're advocating
11 here and the way the court used to address the
12 question whether rights protected by the Bill
13 of Rights apply to the states, before it began
14 the process of incorporating provisions of the
15 Bill of Rights one by one, and it said that
16 what applied to the states were those rights
17 that were implicit in the concept of ordered
18 liberty.

19 So there was a two-tiered system. And
20 that seems to be what you're asking us to go
21 back to with respect to the Excessive Fines
22 Clause.

23 MR. FISHER: We don't --

24 JUSTICE ALITO: Is there a difference?
25 I -- I don't -- could you explain what is the

1 difference between those two approaches?

2 MR. FISHER: Yes, indeed. We're not
3 suggesting some sort of systematic differential
4 treatment. In McDonald, the Court acknowledged
5 that the differences that exist between the
6 Bill of Rights rights that apply to the federal
7 government and the states are as a matter of
8 stare decisis.

9 Now, here, what we're saying is if
10 that -- if the -- in the analysis, because of
11 the lack of historical roots of the in rem
12 proportionality right, there ends up being a
13 difference, that has to be based on the stare
14 decisis of Austin.

15 If Austin remains good law only
16 because of stare decisis, that puts it in the
17 same category as those other cases. It's not a
18 systematic federalism discount, if you will, on
19 -- on the right.

20 JUSTICE ALITO: But, if Austin were
21 overruled, then the rule as applicable to the
22 federal government would change as well?

23 MR. FISHER: That's right. That's
24 right. We would be in the same --

25 JUSTICE ALITO: So I'm still not

1 seeing the difference between them.

2 MR. FISHER: Well, the difference
3 would be, if -- if you look at Austin -- if you
4 were to look at Austin and say, you know what,
5 Austin was dead right, historically -- this is
6 historically rooted and it is fundamental, then
7 I don't think there's any grounds for us to say
8 that there should be -- that the outcome should
9 be any different between the states and the
10 federal government.

11 If you look at Austin and you say, you
12 know what, that's questionable, but we don't
13 want to overturn it because stare decisis
14 principles counsel against that, that's a --
15 that's a different analysis, and that's more
16 like *Hurtado*, more like *Bombolis*.

17 JUSTICE ALITO: Well, isn't that
18 pretty much what the dissent in *McDonald* said?
19 We don't like *Heller*, but at least let's just
20 keep it applicable to the District of Columbia
21 and the federal government and not apply it to
22 the states.

23 MR. FISHER: Well, I think that was a
24 -- a different -- for a different reason in
25 that the plurality acknowledged the distinction

1 with Bombolis and Hurtado being purely a matter
2 of stare decisis. And that's the basic
3 principle we're -- we're calling on here, which
4 is, if -- if Austin remains good law only
5 because of stare decisis, that doesn't make
6 this a systematic, sort of discounted right.

7 That just means that, you know, you've
8 got as a question -- question of the Court's
9 history some other way you have to look at the
10 situation.

11 But I think it's critical to
12 understand also that the idea that somehow
13 so-called modern in rem forfeitures are
14 different from history because of the existence
15 of innocent owner exceptions is also not
16 correct.

17 Innocent owner exceptions did exist
18 within, you know, the last couple of hundred
19 years. Indeed, authorities contemporaneous
20 with the ratification or roughly
21 contemporaneous with the ratification of the
22 Fourteenth Amendment acknowledged that there --
23 there might be innocent owner defenses.

24 The treatise by Bishop says, if the
25 law in its clemency permits an innocent owner

1 to make a claim, that does not convert into
2 punishment that which was not already
3 punishment. It doesn't make any difference.

4 So whether we -- no matter how we look
5 at in rem forfeitures today and the features
6 that they exhibit, they're no different than
7 the historical in rem forfeitures that this
8 Court has said in -- in cases after Austin
9 calling Austin into question that they were not
10 punishment.

11 JUSTICE BREYER: Well, in your view,
12 an in rem civil forfeiture is not an excessive
13 fine, is that right?

14 MR. FISHER: Yes, that is -- that is
15 true.

16 JUSTICE BREYER: So what is to happen
17 if a state needing revenue says anyone who
18 speeds has to forfeit the Bugatti, Mercedes, or
19 a special Ferrari or even jalopy?

20 (Laughter.)

21 MR. FISHER: There -- no, there is no
22 -- there is no excessive fines issue there. I
23 -- what I will say and what I think is
24 important to -- to remember is that there is a
25 constitutional limit, which is the proof of

1 instrumentality, the need to prove nexus.

2 JUSTICE BREYER: That isn't a problem
3 because it was the Bugatti in which he was
4 speeding.

5 (Laughter.)

6 MR. FISHER: Right.

7 JUSTICE BREYER: So -- so there is all
8 the nexus.

9 MR. FISHER: Historically --

10 JUSTICE BREYER: Now I just wonder,
11 what -- what is it? What is it? Is that just
12 permissible under the Constitution?

13 MR. FISHER: To forfeit the Bugatti
14 for speeding?

15 JUSTICE BREYER: Yeah, and, by the
16 way, it was only five miles an hour --

17 MR. FISHER: Yeah.

18 JUSTICE BREYER: -- above the speed
19 limit.

20 MR. FISHER: Well, you know, the
21 answer is yes. And I would call your attention
22 to the --

23 JUSTICE BREYER: Is it yes?

24 MR. FISHER: Yes, it's forfeitable.

25 JUSTICE BREYER: It is forfeitable?

1 MR. FISHER: Yeah. The Louisa Barber
2 case, one person over the -- the passenger
3 limit and the entire ship is forfeit. This is
4 -- history shows us in rem forfeiture --

5 JUSTICE BREYER: So if the airplane is
6 speeding --

7 (Laughter.)

8 MR. FISHER: Well, in rem forfeitures
9 have -- have -- have always been with us and
10 they have always been harsh.

11 JUSTICE SOTOMAYOR: General, yeah,
12 that -- that is true, but that's because at a
13 certain -- up to a certain point in our
14 history, we didn't apply the Bill of Rights to
15 the states.

16 So, in all of the situations before we
17 apply the Bill of Rights to this -- before we
18 apply the Bill of Rights to states, they did
19 things that under incorporation were
20 unconstitutional. And in most of our cases,
21 they were history going both ways. Some states
22 did; some states didn't.

23 So really what the issue that we have
24 to look at isn't -- is where has our
25 understanding come to in terms of a particular

1 Bill of Rights? And in Austin, we said it is a
2 long part of history that punitive sanctions
3 cannot be excessive. And Justice Scalia said
4 it very well: For the Eighth Amendment to
5 limit cash fines while permitting -- permitting
6 limitless in-kind assessments would make little
7 sense, altering only the form of the Star
8 Chamber abuses.

9 So, at a certain point in Austin, we
10 looked at what had happened to in rem
11 forfeiture and realized that we had just
12 changed the Star Chamber form.

13 I -- I -- I don't actually understand
14 your argument based on history because, without
15 incorporation, the history's going to be what
16 you want it to be. The real question is the
17 fundamental right.

18 Are we trying to avoid a society
19 that's like the Char -- Star Chamber? And if
20 we look at these forfeitures that are occurring
21 today, and that's what Austin documented, many
22 of them seem grossly disproportionate to the
23 crimes being charged.

24 So how do you deal with that? How do
25 we avoid a Star Chamber return?

1 MR. FISHER: Well, the history that's
2 relevant is not simply the history of what
3 states were doing. It's also the history of
4 what the federal government was doing. And
5 there was no suggestion that before the civil
6 rights amendments were passed that the federal
7 government, when all of its harsh in rem
8 forfeitures, was somehow violating the
9 Excessive Fines Clause. There was no
10 proportionality limit there.

11 Now I think, with respect to
12 understanding, you know, how we view today's
13 forfeitures, you can't distinguish what's
14 happening now from historically -- history
15 when, historically, an innocent owner was
16 never -- you know, not entitled to a defense.

17 How -- how would we ever say -- and I
18 think Justice Scalia makes this point -- how
19 would we ever say that a forfeiture as to an
20 innocent owner was proportional because the
21 owner is innocent?

22 So the -- that has never been part of
23 the equation.

24 JUSTICE GORSUCH: Well, the -- the
25 part that's different about modern forfeitures

1 -- and I think that is what Justice Sotomayor
2 is getting at -- is that many of them are
3 punitive to the person and that that was not
4 part of in rem forfeitures at common law.

5 MR. FISHER: Well --

6 JUSTICE GORSUCH: We're dealing with a
7 world in which it's different in kind, not just
8 degree, not just a number but in kind. And
9 that's what Justice Scalia, that's what
10 everybody, in Austin agreed on. That much was
11 unanimous.

12 MR. FISHER: Well --

13 JUSTICE GORSUCH: And I guess I'm
14 asking you, given the concession by the State
15 before the Indiana Supreme Court that the
16 forfeiture here was punitive, if we do -- don't
17 overrule Austin, and you want us to apply not
18 just the question of incorporation but go to
19 the merits, don't you lose?

20 MR. FISHER: No, I don't think we lose
21 because I don't think -- the -- the question of
22 punitive and remedial is -- is something that
23 Austin borrowed from Halper. That test has --
24 has been overruled as to -- as to double
25 jeopardy.

1 Now, if it remains the test with
2 respect to something that -- whether it's
3 encompassed within the Excessive Fines Clause,
4 there still has to be the -- the analysis. I
5 mean, we have to figure out what
6 disproportionate means.

7 JUSTICE GORSUCH: Sure. But you
8 conceded that it's punitive. Now it becomes a
9 question of proportionality.

10 MR. FISHER: But -- but I don't think
11 you can take these on a case-by-case basis. I
12 think it's -- you have to say what is the right
13 being claimed. It's not whether this
14 particular forfeiture was punitive or not.
15 It's a question of whether in rem forfeitures
16 are of the -- of the sort that are swept within
17 the Excessive Fines Clause. And, historically,
18 they --

19 JUSTICE GORSUCH: The statute here
20 says it's punitive and you conceded the
21 statute's punitive. So I'm still stuck on how
22 -- how do you get out of that box?

23 MR. FISHER: Well, I -- I suppose -- I
24 mean, if -- if that's -- if it's the magic word
25 "punitive," we can just change the statute, but

1 I don't think that would be a very satisfactory
2 result.

3 I think what the Court is probably
4 looking for is some better way to -- to
5 describe what is included within the Excessive
6 Fines Clause, something more substantive than
7 that. And the cases after Austin all make
8 clear that this distinction between punitive
9 and remedial simply falls apart.

10 You know, you -- the idea of
11 deterrence in Austin, the thought was, if it's
12 deterrent, that makes it punishment. Well, the
13 Court's now rejected that in Hudson and in
14 other cases. And in Bajakajian. So that part
15 of the test doesn't hold up anymore either.

16 So I think you have to go back and
17 look at this entire -- you know, whether -- you
18 have to look very critically at the idea that
19 there's something different about modern-day
20 forfeitures. There really is no distinction,
21 no material distinction, between them and what
22 was happening at common law and certainly what
23 was happening in the middle of the 19th
24 Century.

25 So I think the other critical thing to

1 bear in mind here is that if we get into the
2 idea that we're somehow going to apply a
3 grossly disproportionate test akin to the way
4 it comes up in -- in the in personam cases,
5 effectively, you're going to be wiping away
6 centuries of -- of precedent, not just Bennis
7 but other innocent owner cases, Van Oster, the
8 Little Charles, the Malek Adhel, all these
9 cases that say that an innocent owner has no
10 constitutional defense.

11 And if it somehow has to come down to
12 the relationship between the -- the guilt of
13 the owner and the crime, then those precedents,
14 I think, simply cannot stand any longer. So I
15 think you're -- you're in this situation where
16 you're confronted with which -- you know, which
17 source of doctrine are we going to override.

18 CHIEF JUSTICE ROBERTS: Well, are we
19 going to be wiping all that away or just
20 leaving that for another day? I mean, it -- it
21 -- what -- I guess this gets back to Justice
22 Gorsuch's first question.

23 I mean, the question presented is does
24 the Excessive Fines Clause -- you know, is it
25 incorporated in the Eighth Amendment? And I

1 guess your argument is -- seems to be this
2 isn't an excessive fine, and, in fact, it isn't
3 a fine at all.

4 Well, we can deal with that later,
5 right?

6 MR. FISHER: Well, first of all, of
7 course, it's in front of you now, so why not.
8 It's been -- you know, it's been briefed and
9 the lower courts can't come to any opposite
10 conclusion. So you're not -- it's not going to
11 percolate.

12 But the second point is that even if
13 we were to say we're not going to revisit
14 Austin, the history of the right is still
15 critical. McDonald tells us that. And it has
16 to inform the question of incorporation.

17 And the Court has never incorporated
18 where there's that kind of history that is four
19 square against the right that's being claimed.
20 And I think that that is going to have to
21 inform the way --

22 CHIEF JUSTICE ROBERTS: Well, you just
23 -- you just want us to make sure that in our
24 opinion that we say, if we're ruling against
25 you, that the excessive fines are incorporate

1 -- incorporated under -- under our
2 incorporation doctrine and not say civil in rem
3 forfeitures are incorporated?

4 MR. FISHER: Well, but if that's all
5 the Court says, unfortunately, the lower courts
6 are going to then read Austin and say, well,
7 you're at civil in rem and so that's part of
8 excessive fines. And -- and when are we ever,
9 you know, going to have a court that's going to
10 create any kind of -- of -- of, you know,
11 dispute on that point?

12 JUSTICE SOTOMAYOR: So, just so I'm
13 clear, you're asking us to overrule Austin?

14 MR. FISHER: I think that's the most
15 historically --

16 JUSTICE SOTOMAYOR: Because that's the
17 only way that you can win with a straight face?

18 MR. FISHER: No, I don't --

19 (Laughter.)

20 MR. FISHER: Not with a straight face.
21 No. Look, I think that's the most historically
22 sound thing to do. But I don't think that
23 that's -- if you're unwilling to do that, that
24 cannot be the -- the end of the analysis on
25 incorporation because, again, you have to take

1 into account under your precedents the history
2 of the right being claimed.

3 Not just some of the history, not just
4 the in personam history, but also the in rem
5 history. And there's no --

6 JUSTICE KAGAN: But, again, it -- it
7 just seems as though there are two questions.
8 And one question is incorporating the right,
9 and the other question is the scope of the
10 right to be incorporated.

11 And, really, what you're arguing is
12 about the scope of the right.

13 MR. FISHER: Well, but I'm --

14 JUSTICE KAGAN: And we can incorporate
15 the right --

16 MR. FISHER: Yeah.

17 JUSTICE KAGAN: -- without saying a
18 word about the scope of the right.

19 Now, as you say, Austin says something
20 about the scope of the right, and that's a
21 problem for you. But -- but you're really
22 asking us to talk about the scope of the right,
23 aren't you?

24 MR. FISHER: Well, certainly, that
25 would -- that's our -- what we think is the

1 most historically sound thing to do, but even
2 if you, you know, assume that away and were
3 just looking at what this -- whether we're
4 going to incorporate the right, the test for
5 incorporation is historically rooted or -- or
6 fundamental to ordered liberty.

7 And to answer that question, you have
8 to look at the history of the right. If the
9 right includes --

10 JUSTICE KAGAN: Well, that's why --
11 why I asked at the beginning what's your theory
12 for how you define the right and which history
13 you look to --

14 MR. FISHER: Yeah.

15 JUSTICE KAGAN: -- because you're
16 really suggesting that we don't take the right
17 wholesale; we try to chop it up. And I guess,
18 you know, there are always going to be
19 questions about the scope of the right to be
20 incorporated.

21 And, so far, we have not addressed
22 those questions when we've decided whether to
23 flip the switch of incorporation or not. We've
24 understood those questions to be distinct
25 and -- and to be questions for another day.

1 And why is it that you're saying we
2 should not use that pretty standard practice
3 and instead start chopping up the right at the
4 incorporation stage?

5 MR. FISHER: We think that's one way
6 to do it. We don't think that's the only way.

7 And if, indeed, the Court doesn't want
8 to chop up the right and it wants to just look
9 at the excessive fines clause, it has to look
10 at all the history, and that includes the
11 history of in rem.

12 And our view is that history means
13 that you can't incorporate. If -- if the
14 history is only in personam, then I don't think
15 there's any serious question about
16 incorporation.

17 But if the history includes the in rem
18 history, the much larger history, the much --
19 the largely uncontested history, that is --
20 then there is no precedent for incorporating in
21 that circumstance where -- where there was that
22 amount of history standing four square against
23 a substantial number of applications of the
24 right. There just isn't anything to look to on
25 that.

1 JUSTICE KAVANAUGH: You cited McDonald
2 as an example earlier of a case where the Court
3 had, in your view, chopped up the right as
4 incorporated. Are you saying the Second
5 Amendment has a different scope after McDonald?

6 MR. FISHER: Oh, no, no, no. No, what
7 -- what I'm saying is that the methodology of
8 McDonald, when doing the incorporation
9 analysis, was to ask, what's the right being
10 claimed? And the right being claimed was the
11 right to have guns in the home for
12 self-defense. And we think that's instructive
13 as to how you look at the right.

14 JUSTICE KAVANAUGH: But you agree
15 post-McDonald -- and this is similar, I think,
16 to what Justice Kagan's asking -- that the --
17 the right is the same as against the states and
18 the federal government?

19 MR. FISHER: Oh, yes. Oh, yes. But,
20 again, we're not dealing there with the same
21 stare decisis issue that we are grappling with
22 with respect to Austin, which I think is --
23 puts this in -- more like in the Hurtado and
24 Bombolis category.

25 We're not asking for a -- again, we're

1 not asking for a federalism discount. What
2 we're asking for is some ability to take
3 cognizance of -- of stare decisis without
4 sacrificing the necessary historical analysis.

5 JUSTICE ALITO: Well, at the time of
6 McDonald and at the present time, all the --
7 the Court has held that the Second Amendment
8 right protects the right to have certain
9 firearms in the home for self-defense. It
10 hasn't gone further.

11 But if this Court were to go further,
12 let's say in a case -- in another case
13 involving the District of Columbia, and said
14 that the right included something more than
15 that, would we have to go through another round
16 of incorporation inquiry to determine whether
17 this broader right applies to the state, or
18 would it follow automatically under McDonald
19 that it -- it applies to the states?

20 MR. FISHER: Well, I think
21 particularly given the methodology the Court
22 would use in coming to grips with what that new
23 right is, it would likely just follow. I don't
24 see there would be any need for -- because it
25 would be essentially the same analysis anyway.

1 But you -- you know, I think the idea
2 here that you can simply look at one part of
3 the history without looking at all of it, you
4 know, I don't think that you can look to -- to
5 McDonald or any of the other precedents and
6 have guidance for that.

7 You have to take -- you can't just
8 ignore it. You have to do something with it.
9 You have to take it into account. And whether
10 that means chopping it up or, you know,
11 grappling with the right as a whole and saying
12 that that history counsels against
13 incorporation, or simply overruling Austin,
14 that's -- you know, one of these ways has to
15 take into account the in rem history.

16 So, you know, that's -- I think, you
17 know, we offer those -- those three suggestions
18 and -- and, you know, we think historically,
19 the most historically sound thing to do is to
20 overrule Austin.

21 So I think, you know, we've got also
22 grounds for saying that Austin is -- I think
23 fits within the Court's precedents on when to
24 overrule cases notwithstanding stare decisis.

25 In -- in Hudson, this Court has

1 already said that the test that Austin applies
2 that comes out of Halper is unworkable. It has
3 gone through the history in Bajakajian and
4 largely shown that Austin was wrongly decided.

5 There isn't any serious reliance
6 interest, I think, that would mean that there
7 was going to be some sort of disruption if
8 Austin were overruled. So, you know, the
9 normal factors the Court takes into account
10 with respect to its precedents, I think, are
11 not barriers here to over -- overruling Austin.

12 And the -- the other thing, I think,
13 you know, you -- you almost can't get away from
14 the prospect of at least implicitly overruling
15 precedent no matter what you do here. If it's
16 not going to be Austin, then it's going to be
17 the innocent owner cases, Bennis, Van Oster,
18 all those precedents.

19 And I think it's instructive here that
20 my friend cites to the dissent in Bennis,
21 acknowledging that, if you're going to
22 incorporate a grossly disproportionate
23 analysis, then really what you've got to do is
24 start getting away from the innocent owner, you
25 know, the lack of a required innocent owner

1 exception, that that's going to become
2 something that is going to have to be part of
3 that analysis.

4 Now Justice Scalia, I -- I do want to
5 call your attention to in -- in Austin, in his
6 concurrence, was grappling with this -- this
7 idea, as can we do something that's grossly
8 disproportionate on in rem the way we would do
9 it in personam.

10 And his concern was, you know what,
11 maybe really what it comes down to is simply
12 this idea of nexus. And the nexus test that he
13 was describing there is essentially what we're
14 describing that would be the proper test under
15 due process.

16 You know, is there a connection
17 between the property and the offense? And we
18 think that belongs in due process. But Justice
19 Scalia, I think, was onto something there when
20 he was acknowledging that there really has to
21 be a different treatment. Given all that
22 history, given all those -- those precedents of
23 the Court, there has to be a differential
24 treatment.

25 And at the end of the day, I think,

1 you know, what you've got to do here when
2 you're looking at this incorporation question
3 is not simply be, you know, I think, you know,
4 cavalier about the idea of this is easy to
5 incorporate.

6 You don't want to do that, I think,
7 without taking a very careful look at what is
8 the right that you're actually incorporating
9 and does it fit with the doctrines and the
10 history of the Court and all of the ways that
11 it's handled incorporation before.

12 And if there's nothing else, I'll cede
13 the remainder of my time. Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 General.

16 Mr. Hottot, four minutes.

17 REBUTTAL ARGUMENT OF WESLEY P. HOTTOT
18 ON BEHALF OF THE PETITIONER

19 MR. HOTTOT: Your Honors, this case is
20 about constitutional housekeeping. Five times
21 over the last 30 years, this Court has remarked
22 that the freedom from excessive economic
23 sanctions should be understood to apply to the
24 states.

25 In Hall, in Kennedy, in Roper, in

1 Cooper Industries, and in Booth, all that
2 remains to do is to expressly so hold.

3 My friend's approach, by contrast, is
4 radical. He asks the Court to overrule Austin,
5 a unanimous decision that has been on the books
6 for 25 years, that was reaffirmed in Hudson, in
7 Bajakajian, and, again, in Kokesh.

8 And that case looked at the same
9 history that my friend urges this Court to
10 review here. It would allow, if the Court were
11 to overrule Austin, governments at all levels
12 to impose constitutionally excessive civil in
13 rem forfeitures based on nothing more than a
14 label.

15 This is not a labeling game.

16 It would also revive the so-called
17 two-track approach that this Court has rejected
18 now for more than 50 years.

19 So even if we imagine that -- that the
20 Court would take such a radical approach, it --
21 it would break with, for example, the
22 commercial speech doctrine, which there was a
23 long history of commercial speech activity in
24 this country before the 1970s decision in which
25 this Court held that there is a commercial

1 speech right, and did so in a case against the
2 state without even pausing on the incorporation
3 question.

4 So, you know, even if some forfeitures
5 are non-punitive, other forfeitures are
6 punitive. And the forfeiture in this case
7 clearly meets Austin's test that it be at least
8 partly punitive.

9 If the Court looks to Indiana Code
10 34-24-1-4(a), it shows that this statute is
11 more punitive than the statute at issue in
12 Austin because it required the -- the state in
13 its case-in-chief to prove that Petitioner knew
14 about or should have known about the crime at
15 issue here, and that is not true under 21
16 U.S.C. 881, the statute at issue in Austin.

17 Both statutes have innocent owner
18 defenses. So, if anything, this is more
19 punitive, not less.

20 If the Court has no further questions.
21 Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 11:01 a.m., the case
25 was submitted.)

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