No. 25-246

In the Supreme Court of the United States

KENNETH J. JOUPPI,
Petitioner,
v.
ALASKA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE BUCKEYE INSTITUTE AS AMICUS CURIAE SUPPORTING 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 Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Buckeye Institute is a leading advocate for public safety reform, promoting policies that eliminate government overreach and keep communities safe through fair processes and fair laws that produce just outcomes. The Buckeye Institute has an interest here because the government overreach takes the form of the unrestricted use of fines, fees, and forfeitures, which pose a grave threat to individual liberty. The Buckeye Institute's amicus briefs on asset forfeiture have been cited by members of this Court. See *Culley* v. *Marshall*, 601 U.S. 377, 395–96 (2024) (Gorsuch, J., concurring) (citing Brief for The Buckeye Institute); *id.* at 405–06 (Sotomayor, J., dissenting) (same).

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[1] As required by Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

In interpreting the Eighth Amendment, and particularly the Excessive Fines Clause, the Court has looked to history for guidance. Indeed, beginning in *Weems* v. *United States*, 217 U.S. 349 (1910), and followed by *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), *United States* v. *Bajakajian*, 524 U.S. 321 (1998), and *Timbs* v. *Indiana*, 586 U.S. 146 (2019), the Court has recounted that history in detail.

The historical record shows that the Eighth Amendment's three prohibitions have been necessary to protect against the government's perennial temptations to punish political rivals and to pervert the machinery of the criminal justice system to raise revenue. Writing for the Court in *Timbs*, Justice Ginsburg recognized the corrosive effect excessive fines have in a free society, observing that "[e]xorbitant tolls undermine other constitutional liberties." *Timbs*, 586 U.S. at 689. And as Justice Scalia recognized, "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. . . . ; fines are a source of revenue." *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.). As the Court has "recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.* (opinion of Scalia, J.).

Reduced to its simplest, the Excessive Fines Clause—along with the Eighth Amendment's other protections—exists because the Framers "believed that power might be tempted to cruelty." *Weems*, 217 U.S. at 373. Because that temptation is perennial, so too must the protections set against it be. Those protections are as necessary today as they were for the Framers.

This brief marshals empirical research and analysis by economists and legal scholars over more than a quarter century to support the common-sense conclusion that civil forfeiture regimes inject impermissible and irrelevant factors into law-enforcement decisions. The economic literature—drawn from across decades—shows that these financial incentives not only drive law enforcement priorities, but also that the strategies that law enforcement agencies employ to maximize their revenue disproportionately burden poor and minority communities, and those least able to protect their property rights. Yet these forfeiture practices persist.

The Excessive Fines Clause requires courts to weigh the gravity of the specific defendant's wrongdoing, not the abstract category of the offense. History and empirical evidence both explain why: A rule with the wrong level of generality is exactly the kind of loophole governments have exploited for eight centuries and the kind that modern forfeiture schemes exploit today.

ARGUMENT

When asked why he robbed banks, Willie Sutton famously replied, "[b]ecause that's where the money is." See *United States* v. *Cravens,* 275 F.3d 637, 638 (7th Cir. 2001). Sutton's response rings humorous; his candor reveals his amorality. Yet it also resonates because Sutton expressed a common-sense economic truth that professional economists and laymen alike understand—financial incentives influence behavior. Forfeiture statutes create a powerful financial incentive to abuse sweeping state police powers to secure revenue through forfeiture. This practice of relieving citizens of their private property with no proportionality between the seizure and any alleged offense deserves no more respect than Sutton's. Indeed, it is all the more galling because the data shows that the incentive structure embedded in forfeiture laws perverts the agencies charged with protecting people and property.

Economic and legal scholars who have studied this issue over the past three decades demonstrate with empirical data that law-enforcement agencies, like Willie Sutton, will focus their efforts "where the money is." The result is a system where revenue generation—not crime prevention—is the primary driver of law enforcement decisions.

I. Freedom from excessive fines was well-established in English law.

The Court has treated "historical analysis as the touchstone of understanding" of the Excessive Fines Clause. Nathaniel Amann, *Restitution and the Excessive Fines Clause*, 58 Am. Crim. Law Rev. 205, 206 (2020). In opinions heavy with history, the Court has documented the near-verbatim transmission of the Clause from the field of Runnymede to the English Declaration of Rights, the English Bill of Rights, the Virginia Declaration of Rights, and ultimately the Eighth Amendment. See *Weems*, 217 U.S. at 349; *Browning-Ferris,* 492 U.S. 257; *Bajakajian*, 524 U.S. at 321, 336; *Timbs*, 586 U.S. at 149–153.

That history is instructive here. It shows that the right to be free of excessive fines is ancient. Yet, whether through king or court or legislature, governments have often yielded to the temptation to abuse their power to levy fines as criminal punishments. Whether to raise revenue, punish political enemies, chill dissent, or any combination thereof, the government's imposition of excessive fines tugs at liberty's looser threads, fraying the whole of the garment. *Timbs*, 586 U.S. at 153–154. The guarantee against excessive fines has provided a check against governmental overreach for forty generations. See *id.*

Jouppi is the living heir to that legacy, and the fundamental principles of fairness regarding excessive fines and government power that have been bequeathed to him merit consideration.

A. The history of the Excessive Fines Clause begins with Magna Carta.

"The Excessive Fines Clause traces its venerable lineage back to at least 1215." *Id.* at 151. The Court and constitutional historians have pointed to Magna Carta's Amercements Clause as the first written protection against excessive financial penalties. *Id.* (quoting Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6–7 (1762 ed.)).

An amercement was a type of fine peculiar to feudal England; "a financial penalty assessed at the discretion of the party's peers for a wide variety for illegal conduct, both civil and criminal" and "payable to the crown or its representative, the feudal lord." Calvin R. Massey, *The Excessive Fines Clause & Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1251–52 (1987). Having committed some wrong, the legal theory goes, "the offender was at the mercy of the crown" or "*in misericordia*." *Id.* at 1260. Thus, "the crown theoretically was permitted to deal with the offender in any fashion the crown desired." *Id.* at 1260–61. And in theory, "the king could demand all that the offender owned." John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 928–29 (2011).

Nineteenth-century English legal historian F.W. Maitland emphasized that to King John's subjects, there was likely "no clause in Magna Carta more grateful to the mass of the people than that about amercements." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L. Q. 833, 854 (2013) (internal citations omitted). Justice Blackmun, writing for the Court in *Browning-Ferris*, expanded on this theme, highlighting the specific manner in which Magna Carta safeguarded English liberties. In forcing King John to agree to Magna Carta, the barons "sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown." *Browning-Ferris*, 492 U.S. at 270–71.

The Amercements Clause limited these abuses by requiring that "one be amerced only for some genuine harm to the Crown; "the amount of the amercement be proportioned to the wrong;" "the amercement not be so large as to deprive him of his livelihood; and" "the amount of the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount." *Id*

Originally, amercements—which were involuntary assessments—were distinguished at law from "fines," which were negotiated voluntary payments to the crown to resolve a common-law crime. As Massey explains, "[t]he thirteenth-century judge could not impose a fine but could bargain with the culprit by accepting payment, or security for payment, of a sum sufficient to settle the matter." *Massey, supra*, at 1261–62.

From its beginnings in Magna Carta, however, the protection against excessive fines evolved as governments abused their power and the law responded. For example, in the 14th century, the Crown and its jurists routinely exploited the distinction between fines and amercements as a loophole to avoid Magna Carta's proportionality requirements. Stinneford, *supra*, at 930. Thus, although a "fine" was nominally a negotiated settlement, because the king could order a person imprisoned and refuse to release him until he had paid some specified fine, there was—to put it mildly—an imbalance in bargaining power. *Id.* at 930–31. Fines, therefore, "ceased to be voluntary and replaced amercements as the predominant form of criminal punishment." *Id.* But as fines supplanted amercements, English law adjusted, recognizing that the line that had existed between fines and amercements had largely dissolved. Amann, *supra*, at 213 (citing 1 Edward Coke, *Institutes of the Laws of England* § 126b (17th ed., London 1817)).

Still, from its inception in 1215, the protection from excessive fines embraced two complementary ideas, both still vital today. The first is that a financial punishment must be proportional to the wrong it purports to punish. See *Timbs*, 586 U.S. at 151; see also Stinneford, *supra*, at 931. Second, under the principle of *salvo contenemento*, no fine should be so great as to deprive a person of their livelihood or ability to support themselves. See *Timbs*, 586 U.S. at 151 (quoting *Browning-Ferris*, 492 U.S. at 271); see also Massey, *supra*, at 1259–1260. Yet despite its canonical status in English law, later royal abuses, most notably throughout the seventeenth century, required Englishmen to continue to reassert their right to freedom from excessive fines against government overreach.

B. The Star Chamber's abuses reignited the need to protect against excessive fines.

Whatever virtues the Star Chamber may have possessed in its early years, Charles I's abuses and Parliament's reaction to them figure into the history of the Excessive Fines Clause. See Daniel L. Vande, *Coercive Power and the Demise of the Star Chamber*, 50 Am. J. Legal Hist. 326 (2010). Beginning in 1629, Charles I sought to govern without convening Parliament and, thus, without Parliamentary appropriations. The predictable result was that the Star Chamber "'imposed heavy fines on the king's enemies' in disregard 'of the provision of the Great Charter'" and that "'[t]he strong interest of [the Star Chamber] in these fines . . . had tendency to aggravate the punishment.'" *Timbs*, 586 U.S. at 162 (Thomas, J., concurring in the judgment) (citations omitted).

Parliament responded by abolishing the Star Chamber in 1641 and "specifically prohibit[ing] any court thereafter from . . . levying . . . excessive fines." *Id*. (Thomas, J., concurring in the judgment). Inthe decades following the Star Chamber's abolition, some common law courts had recognized the applicability of Magna Carta's amercement provisions to fines imposed by courts. See, *e.g.*, *Townsend* v. *Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C.P. 1677) (North, C.J.) ("In cases of fines for criminal matters, a man is to be fined by Magna Charta with a *salvo contenemento suo*; and no fine is to be imposed greater than he is able to pay.").

But despite Parliament's injunction, court acceptance of Magna Carta's principles, and Charles I's cautionary tale, following the Restoration, "Charles

II's judges ignored the limitations and imposed 'ruinous fines' on the King's critics." Massey, *supra*, at 1253. The fines were so severe that in 1680, the House of Commons charged a committee with examining "the transcripts of all the fines imposed in King's Bench since 1677." *Timbs*, 586 U.S. at 162 (Thomas, J., concurring in the judgment); see also Massey, *supra*, at 1253. The committee found that "the judges had acted 'arbitrarily, illegally, and partially' in imposing fines." Massey, *supra* at 1253–54. The committee's findings, however, did not deter these abuses. "During the final years of Charles II's reign, the situation deteriorated further," and "fines became even more excessive and partisan." *Id.*; *Timbs*, 586 U.S. at 162 (Thomas, J., concurring in the judgment). "Judicial rulings that the Magna Charta provided no protection against fines imposed for offenses against the king" made matters even worse. Massey, *supra*, at 1254. Most notably, the infamous Judge George Jeffreys held that "Magna Carta did not apply to fines for offenses against the Crown." *Browning-Ferris*, 492 U.S. at 290 (O'Connor, J., concurring in part and dissenting in part). Thus, "[b]y the Glorious Revolution, James II's judges had determined that the Magna Charta afforded no protection whatsoever from fines, whether imposed for official misconduct or otherwise." Massey, *supra*, at 1263. These rulings further enflamed existing religious and civil strife and set the stage for the larger legal and political revolution to come. *Id.* at 1254, 1263.

C. The English Declaration of Rights once again called for protection against excessive fines. The English Bill of Rights provided the protection.

The tumultuous reign and eventual abdication of James II led to a special convention, which Parliament convened to address the crisis and "draft articles concerning essential laws and liberties that would be presented to William of Orange." *Browning-Ferris*, 492 U.S. at 290–91 (O'Connor, J., concurring in part and dissenting in part).

That convention Parliament accepted William and his Queen, Mary, as their new monarchs, but spelled out its conditions and expectations of the new monarchy in the English Declaration of Rights. Once again, the ancient right to be free from excessive fines figured prominently. Among the thirteen grievances listed with the final version of the Declaration of Rights was that "'excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects'; 'excessive fines have been imposed'; and 'illegal and cruel punishments inflicted.'" John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 Wm. & Mary Bill Rts. J. 989, 1008 (2019). By accepting the crown, William formally acknowledged the rights set forth in the Declaration. Massey, *supra*, at 1244.

In the months that followed, cognizant of how prior governments had avoided or ignored Magna Carta's guarantee against excessive fines, Parliament worked to codify its Declaration, enacting the English Bill of

Rights in 1689. Like the Declaration of Rights, the English Bill of Rights recited the citizenry's grievances against James II and his ministers, noting that "excessive Fines have been imposed." Bessler, *supra*, at 1010. The English Bill of Rights then set forth its guarantee against excessive fines in now familiar language: "Excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689).

D. English history inspired colonial America and the early republic.

"Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment." *Timbs*, 586 U.S. at 152; see also *Browning-Ferris*, 492 U.S. at 266–68 ("[I]t is clear that the Eighth Amendment was 'based directly on Art. I, § 9, of the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.'" (citation omitted)).

The American colonists were not strangers to financial penalties for criminal acts, fines being "among the most prevalent forms of punishment in colonial America." Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 303 (2014). In fact, because of their ubiquity and potential for abuse, the colonists had already incorporated protections against excessive fines in their colonial documents and early constitutions. See, *e.g.*, Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682), *reprinted in* 5 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial*

Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3061 (1909) ("[A]ll fines shall be moderate, and saving men's contenements, merchandize, or wainage.").

The most influential of these colonial proclamations was the Virginia Declaration of Rights, drafted in 1776 by George Mason. In that year of crisis, Mason was clear that Virginians were asserting the rights that Englishmen had guarded across the centuries: "We have received the ancient constitutional and common-law rights of Englishmen from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity." Massey, *supra*, at 1242 (quoting Letter from George Mason to the Committee of Merchants in London (June 6, 1766) *in* 1 *The Papers of George Mason* 71 (Robert A. Rutland ed. 1970)). His view of the colonists' birthright was nothing new. A decade earlier, in 1766, Mason had asserted that the colonists "claim Nothing but the Liberty & Privileges of Englishmen, in the same degree, as if we had still continued amount our brethren in Great Britain." *Id.*

Consistent with his aim of securing the long-acknowledged rights of Englishman for Virginians, Mason adopted the English Bill of Right's excessive fines clause verbatim. Other states followed Virginia's example, and by 1787, "the constitutions of eight States—accounting for 70% of the U.S. population—forbade excessive fines." *Timbs*, 586 U.S. at 152 (citing Steven G. Calabresi, Sarah E. Agudo, & Kathyrn L. Dore, *State Bills of Rights in 1787 and 1791*, 85 S. Cal. L. Rev. 1451, 1517 (2012)). Further, the confederation government included the protection from excessive fines in the 1787 Northwest Ordinance. Massey, *supra* at 1241.

When the Eighth Amendment was considered, "there was little debate over the excessive fines clause in the First Congress," suggesting "an uncritical attitude by the congressional authors toward the excessive fines clause." *Id.* The Framers, however, in creating a new nation, did not rely solely on the reassertion of hereditary privileges. Although "the American Revolution was in origin a protest against English oppression," scholars have noted that "the Bill of Rights has a much broader scope; it is in essence 'a criticism of general feudal arbitrariness.'" Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 Buff. L. Rev. 783, 806 (1975). Thus, the Framers drew from "the political and social ideas of the European Enlightenment, together with the American experience" to form "the underlying rationale for the Bill of Rights—the protection of the private realm against governmental power." *Id.*

Particularly, the Framers looked to the works of Montesquieu and Cesare Beccaria. Montesquieu and Beccaria both argued "that any punishment not derived" from "necessity" (or "absolute necessity," as Beccaria put it) is "tyrannical." Bessler, *supra*, at 999. These ideas "materially shaped Anglo-American views in the decades to come." *Id.* See *Bajakajian,* 524 U.S. at 333 ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality."); *Solem* v. *Helm*, 463 U.S. 277, 289

(1983) (noting all punishments subject to proportionality analysis); *Timbs*, 586 U.S. at 153 ("[A]ll 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality.").

II. Economic data shows that fiscal incentives in modern forfeiture laws affect law enforcement decisions, once again reigniting the need for strong protections against excessive fines.

History records the clashes of kings and parliaments, suppression of dissenting religious sects, secretive court proceedings not bound by law, the tyranny of the Stuart monarchs, and the Framers' attempt to meld established English rights and Enlightenment ideas to create a new nation. This case, in contrast, involves the imposition of a fine through a forfeiture order. But "a principle, to be vital, must be capable of wider application than the mischief which gave it birth." *Weems*, 217 U.S. at 373. See also *id.* at 371–373 (explaining why the Eighth Amendment principles born at Runnymede must apply with equal or greater force today). And in *Austin* v. *United States*, the Court recognized forfeiture can constitute "'payment to a sovereign as punishment for some offense,' and, as such, [be] subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin* v. *United States*, 509 U.S. 602, 622 (1993) (quoting *Browning–Ferris*, 492 U.S. at 265).

Today, nearly "every kind of property, real or personal, tangible or intangible, may be subject to confiscation under the appropriate circumstances." Charles Doyle, Cong. Rsch. Serv., 97-139, Crime and

Forfeiture 3 (2023) (citing examples such as a physician's license to practice medicine; real property, including things growing on, affixed to, and found in land; and tangible and intangible personal property, including rights, privileges, interests, claims and securities). And while drug crimes are often the most referenced examples, forfeiture is allowed for a variety of offenses. At the federal level alone, there are hundreds of possible avenues, from violations of the Federal Seed Act, 7 U.S.C. § 1595 to broadcasting a radio signal without a license, 47 U.S.C. § 510. See Doyle, *supra*, at 90–102 (listing statutes). In *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927), and *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57, 59–60 (1972), the Court intuitively recognized that the incentives inherent in forfeiture laws influence law enforcement decisions. Although this conclusion seems obvious, this Court has the benefit of decades of data and economic studies supporting it. Beginning in the mid-1990s, economists began conducting empirical studies of forfeiture statutes and their effects on law enforcement behavior. These early studies confirmed what common sense predicted: The financial incentives created by allowing law enforcement agencies to keep or share in the forfeiture proceeds led law enforcement to expand enforcement where they stood to realize forfeiture revenue, even at the expense of enforcing other statutes. See Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture & the War on Drugs: Lessons from Economics & History*, 33 San Diego L. Rev. 79, 93 (1996) ("In sum, economic analysis indicates that civil forfeiture leads to: (1) bigger government; (2) inefficient and overly aggressive enforcement of the drug laws; and (3) increased violence and theft.").

A. Economic incentives of forfeiture drive how law enforcement agencies deploy their resources.

In their seminal work, *Policing for Profit: The Drug War's Hidden Economic Agenda,* economists Eric Blumenson and Eva Nilsen studied two decades of drug enforcement forfeitures by analyzing Justice Department reports and conducting numerous interviews of law enforcement officials. Based on that research, Blumenson and Nilsen explained how police shifted their enforcement priorities to maximize forfeiture revenue through "reverse stings." The authors note that reverse stings—"a now common police tactic that rarely was used before the law began channeling forfeited assets to those who seized them"—best reveal the "shift in law enforcement priorities, from crime control to funding raids." Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi L. Rev. 35, 68–69 (1998) (internal citations omitted). In a reverse sting, "police pose as dealers and sell drugs to an unwitting buyer. The chief attraction of the reverse sting is that it allows police to seize a buyer's cash rather than a seller's drugs (which have no legal value to the seizing agency)." *Id.*

Blumenson and Nilsen further noted the "otherwise baffling policy" implemented in New York City and Washington, D.C., of seeking to enforce traffic laws more vigorously based on the direction of the traffic flow. They discovered the reason for this lopsided enforcement in congressional testimony offered by Patrick Murphy, the former Police Commissioner of New York City. Because seized drugs can only be destroyed, and seized cash and vehicles can be forfeited to the agency conducting to stop, police "have a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs." *Id.* at 69 (citing Congressional testimony of former New York City Police Commission, Patrick Murphy).

Not surprisingly, in the years since Blumenson and Nilsen first observed the "baffling policy," journalists and academics identified focused enforcement based upon the direction of money flow in other areas of the country. For example, in a 2016 study on forfeitures, the *Texas Tribune* reported that more than 80% of the cash seizures made by Webb County law enforcement agencies were made on the southbound lanes of I-35 heading into Mexico. Jolie McCullough, Acacia Coronado & Chris Essis, *Texas police can seize money and property with little transparency. So we got the data ourselves*, Tex. Trib., (June 7, 2019), https://apps.texastribune.org/features/2019/texas-civil-asset-forfeiture-counties-harris-webb-reeves-smith. According to a Laredo Police Department Spokesman, on the day he was interviewed, Webb County agencies made only two seizures on the northbound lanes of I-35, compared with 16 cash seizures from the southbound lanes. *Id.*

Similarly, *The Atlantic* reported that in Tennessee, where eastbound I-40 "includes vehicles importing drugs from Mexico," police focus 90% of their efforts on the *westbound* lanes, where cars are "carrying cash back towards Mexico." Conor Freiderdorf, *Police Ignore Illegal Drugs, Focus on Seizing Cash*, The Atlantic (May 24, 2011) https://www.theatlantic.com/national/archive/2011/05/police-ignore-illegal-drugs-focus-on-seizing-cash/239349; see also Chris W. Surprenant & Jason Brennan, *Injustice for All: How Financial Incentives Corrupted and Can Fix the US Criminal Justice System* 101 (2020) ("Instead of trying to seize illegal drugs to prevent them from being distributed, law enforcement officers [on I-40] seemed more interested in seizing the cash connected to their sale to help fund their own operations."). As Professors Blumenson and Nilsen explained, "[t]he consequence of [targeting lanes carrying money] was that the drugs that would have been purchased continued to circulate freely." Blumenson & Nilsen, *supra*, at 69.

Law enforcement's decision to focus on the arteries carrying money rather than those carrying drugs graphically illustrates how financial incentives can affect law enforcement decisions. Although seizing cash may have the added benefit of deterring future drug transactions in some situations, the money-focused approach shows that economic incentives for law enforcement can warp the proper role of enforcing our laws. Stopping the flow of drugs in the first instance also cuts off the money to dealers—deterring future drug transactions—while eliminating the forfeiture of other property and perverse incentives.

B. The economic incentives of forfeiture impact the type of statutes that law enforcement agencies choose to enforce.

In addition to impacting *where* law enforcement agencies focus their efforts, the economic incentives imbedded in civil forfeiture result in agencies focusing on what laws to enforce. In particular, police direct their attention to non-violent drug offenses at the expense of other types of crime. Ten years after the Blumenson and Nilson paper, a similar study by economists at UCLA and the University of California, Irvine examined whether the amount of forfeited property that flowed directly back to the law enforcement agency affected its behavior. Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets,* 91 J. Pub. Econ. 2113 (2007). The authors found that "when law enforcement agencies get to keep more of the assets they seize, they respond by devoting substantially more of their effort to anti-drug [i.e., more profitable] policing and away from other petty crimes." *Id.* at 2115.

Seeking to maximize an agency's budget by focusing on non-violent drug crimes is entirely rational when one considers that the illicit drug trade is a cash-only business and typically relies on motor vehicles to move merchandise. Enforcement of drug laws thus tends to yield cash and cars that are easily convertible into cash. Thus, it is unsurprising that when law enforcement agencies are permitted to keep seized assets, drug arrests increased as a portion of total arrests by nearly 20%. See Brent Mast, Bruce Benson & David Rasmussen, *Entrepreneurial Police* *and Drug Enforcement Policy*, 104 Pub. Choice 285 (2000). It is simply more profitable to focus on drug arrests rather than violent crime.

Similarly, economists John Worrall and Tomislav Kovandzic at the University of Texas drew on the Law Enforcement Management and Administrative Statistics surveys from 1997 and 2000, which contained data on 1,443 observations drawn from surveys regarding forfeitures provided by law enforcement agencies with over 100 sworn officers. John L. Worrall and Tomislav V. Kovandzic, *Is Policing For Profit?: Answers from Asset Forfeiture*, 7 Criminology & Pub. Pol'y 219, 234 (2008). They studied the effect of incentives on law enforcement agency behavior by comparing how often agencies in states with more restrictive state forfeiture statutes partner with the federal government under the federal "equitable sharing" forfeiture program, which allows law enforcement agencies to use federal preemption to bypass state restrictions including caps on the percentage of funds that law enforcement can receive from a forfeiture, with agencies in states with more permissive forfeiture statutes. See 18 U.S.C. § 983.

"Assisted by state law enforcement agencies motivated by this [equitable sharing] program, the federal government seized over $5 billion in assets (yes billion, with a 'b') in 2014, a 550% increase over the amount seized in 2004 and 50% more than what was stolen by burglars in the US during the same year." Surprenant & Brennan, *supra*, at 100. Today, the U.S. Marshals Service "has primary responsibility for holding and maintaining real and tangible personal property seized by" agencies participating in the Department of Justice's Asset Forfeiture Program. Office of the Inspector General, Dep't of Just., *Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2025*, at 2 (2026). The Marshals Service proudly relays that it had $8.2 billion in forfeited assets on hand as of September 30, 2023. *Asset Forfeiture*, Dep't of Just., U.S. Marshals Serv., https://www.usmarshals.gov/what-we-do/asset-forfeiture (last visited July 30, 2026). The Marshals Service received 9,973 assets in 2025, disposed of 12,381 assets, and had 24,179 assets on hand as of September 30, 2025. *Id.* Although the Marshals Service distributed $475 million to victims of crime and claimants in 2025, it shared $602 million with participating state and local law enforcement agencies. *Id.*

Alaska allows state and local law enforcement agencies to use the federal equitable sharing program to circumvent state forfeiture law. Lisa Knepper et al., Inst. for Just., *Policing for Profit the Abuse of Civil Asset Forfeiture* 82 (4th ed. 2026). "Alaska agencies have generated more than $21 million in equitable sharing proceeds from the departments of Justice and the Treasury" since 2000. *Id.* And, "on average from 2019 to 2023, more than 20 Alaska agencies, or an estimated 45% of all law enforcement agencies in the state, were certified for the program." *Id.*

The Worrall and Kovandzic data unsurprisingly shows that "police agencies rationally elect to pursue the most lucrative avenues for asset forfeiture." Worrall & Kovandzic, *supra*, at 234. Although the Worrall and Kovandzic study was not designed to determine whether asset forfeiture distorts law enforcement goals and could thus not answer that question, it noted that "neither drug arrests nor crime were significant predictors of forfeiture" in any of their models. *Id.* at 239.

This troubling implication is borne out by studies showing that up to 80% of civil forfeitures are not accompanied by a criminal conviction. See Blumenson & Nilsen, *supra* at 56. This sobering statistic means that in a substantial majority of forfeiture cases studied, the law-enforcement agency lacked either the evidence or the will to prosecute any crime.

Although a comprehensive look at the substantial body of economic literature on forfeitures could fill volumes, it is important to note that more recent studies are consistent with those from the mid-1990s. In their 2019 paper, *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, researchers examined data from a sample of 36 states "to study the fiscal determinants of arrest patterns, including arrests by race." Michael D. Makowsky, Thomas Stratmann, & Alex Tabarrok, *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. Legal Stud. 189, 191 (2019). The authors hypothesized that "police departments that can keep seized assets are more likely to make the kinds of arrests that lead to seized assets, especially when department budgets are tight." *Id.*

The data supported their hypothesis. Specifically, the authors found that "drug arrests increase in counties where local governments are running deficits, but only in states that allow police departments to retain seizure revenue." *Id.* at 207.

The data showed that "optimal deterrence is not the sole criteria for arrests, and that police officer behavior is influenced by local fiscal conditions." *Id.* at 217. Thus, law-enforcement agencies incentivized by permissive forfeiture laws will—like Willie Sutton—focus their efforts according to where the money is.

C. The economic incentives of forfeiture incentivize law enforcement to focus stops and seizures on the poor and minorities.

Although evidence that police change their law-enforcement behavior in response to institutional financial incentives would be enough to question forfeiture regimes, studies further show that the economics of forfeiture encourage law-enforcement agencies to focus their efforts on poor and minority communities, where forfeiture victims often lack the resources to contest the forfeiture. This is terrible public policy and contributes to the frayed relationship between police and minority communities. For example, the Justice Department's report on policing in Ferguson, Missouri, highlighted how the need to generate revenue resulted in over-policing and distrust of the police: "The City budgets for sizeable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved." Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 2 (2015).

The Ferguson report discussed how the importance of using police power to generate revenue was not merely an unconscious response to economic incentives, it was department policy: "Ferguson police officers from all ranks told us that revenue generation is stressed heavily within the police department, and that the message comes from City leadership. The evidence we reviewed supports this perception." *Id.*

The report found that this focus on revenue generation drove arrests in minority communities:

> Patrol assignments and schedules are geared toward aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation. Officer evaluations and promotions depend to an inordinate degree on "productivity," meaning the number of citations issued. Partly as a consequence of City and FPD priorities, many officers appear to see some residents, especially those who live in Ferguson's predominantly African American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue. This culture within FPD influences officer activities in all areas of policing, beyond just ticketing.

Id.

Although the Ferguson report focused more on monetary fines and fees than on forfeitures, it shows the invidious results that occur when police are driven by a need to raise revenue rather than by a legitimate law-enforcement motive.

Indeed, Makowsky, Stratmann, and Tabarrok found a similar disproportionate effect of revenue-driven policing on minorities. Their research demonstrated that in counties facing deficits, increases in drug arrests were "only observed for black and Hispanic drug arrests; white drug arrests remain unchanged." Makowsky, Stratman & Taborrok, *supra*, at 15. Their study also found that "both black and Hispanic DUI arrest rates are increasing with deficits and seizure laws, while white DUI arrests are not." *Id.* at 16. Makowsky, Stratmann, and Tabarrok further reported that "the seizure of non-narcotic property from black and Hispanic arrestees is increasing with [the] size of the deficit in states where police departments can retain revenue from seized property." *Id.*

Likewise, a 2017 study conducted by *Reason* magazine, Lucy Parson Labs, and *The Chicago Tribune* demonstrated that forfeitures were clustered in poorer neighborhoods. Even more striking is that these seizures were not headline-making major drug busts, but typically cars and cash of low value. The average estimated value of a seizure in the Chicago study was $4,553, while the median value was $1,049. Nearly 75% of all of these seizures were cash. C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows,* Reason (June 13, 2017), https://reason.com/2017/06/13/poor-neighborhoods-hit-hardest-by-asset/. Similarly, an ACLU analysis of forfeitures in Philadelphia between 2011 and 2013 revealed that half of the forfeiture cases involved less than $192. Scott Kelly, *Guilty Property: How Law Enforcement Takes $1 million in Cash from Innocent Philadelphians Every Year—and Gets Away* *with It* (2015), https://tinyurl.com/Guilty-Property-Report.

Because law enforcement seeks to capitalize on a high volume of small seizures, "[t]he financial motivations behind forfeiture actions have the potential to disproportionately impact lower income parties. This is because one way for law enforcement agencies to generate profits is to target low-income parties who are financially incapable of challenging seizures." Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure & Its Impact on Indigent Property Owners*, 35 B.C.J.L. & Soc. Just. 257, 274–77 (2015). This economic reality is sadly consistent with Justice Thomas' observation that "forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Leonard* v. *Texas*, 137 S.Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari) (citing Michael Sallahet al., *Stop and Seize*, Wash. Post, A1, A10, (Sept. 7, 2014) https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/). Ironically, while Willie Sutton focused his efforts on a few well-protected banks, law-enforcement officials seem to focus theirs on volume.

CONCLUSION

As Justice Holmes observed, "[e]xperience is the lifeblood of the law." Oliver Wendell Holmes, *The Common Law* 1 (1881). Experience has shown the corrosive effect that excessive fines have in a free society, and that the Eighth Amendment's prohibitions are born from a historic necessity to protect against the government's perennial temptations to punish political rivals and to pervert the machinery of the criminal justice system to raise revenue. Today, the empirical findings collected by economists over the last three decades show that law-enforcement agencies bend their priorities to chase revenue, and that this comes at the expense of society's most vulnerable.

As the Court decides the question presented, it should keep in mind the past, present, and future state of affairs.

Respectfully submitted,

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