

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TYSON TIMBS, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 17-1091  
 )  
 INDIANA, )  
 )  
 Respondent. )  
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Pages: 1 through 65  
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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: What is the provision  
6 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 Kokesh, 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're going to  
13 -- I mean, the action is not against the  
14 individual. It's against the asset. And so  
15 you will lose assets that you use in crime.

16 MR. HOTTOT: Well, that --

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

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

25 When -- when the Court incorporated

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

6 So there's no reason to require, as my  
7 friend suggests should be required, that --  
8 that litigants show a historic pattern of the  
9 right being enforced.

10 And, in any event, as the Court  
11 recognized in *Austin* and *Bajakajian* and most  
12 recently in -- in *Kokesh*, we're dealing with a  
13 different animal. It uses the same name, civil  
14 in rem forfeiture, but it's a different animal  
15 in that it's not just about personal  
16 jurisdiction and pirate ships anymore; it's  
17 about every person's property, and every  
18 officer on the street now has the power to  
19 strip people of their property.

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

24 MR. HOTTOT: Twenty years'  
25 imprisonment.

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

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

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

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

21 And I think that's significant,  
22 especially given that the Indiana -- the  
23 Indiana Court of Appeals affirmed that  
24 decision. And the Indiana Supreme Court didn't  
25 even address it because it didn't have an

1 opportunity to reach the excessiveness  
2 question.

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

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

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

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

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

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

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

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

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

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

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

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

23          JUSTICE ALITO: If we were to assume  
24          for the sake of argument that imprisonment for  
25          six years would not be an Eighth Amendment

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

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

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

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

18 MR. HOTTOT: Of course.

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

24 MR. HOTTOT: Absolutely, Your Honor.  
25 But the question presented here is merely

1 whether a defendant in any case has the right  
2 to interpose a defense under the Excessive  
3 Fines Clause.

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

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

14 Two state courts here struck down this  
15 forfeiture, held that it was punitive under  
16 Austin, believing that the clause already  
17 applies to the states, and believing that this  
18 forfeiture would be excessive.

19 The Indiana Supreme Court did not  
20 address the excessiveness question. It  
21 "declined to find or assume incorporation"  
22 until this Court "authoritatively holds that  
23 the clause applies."

24 JUSTICE SOTOMAYOR: Is there any in  
25 rem forfeiture, not this one, which relied on



1 the criminal activity of this defendant, but  
2 let's say that Austin -- that the state did  
3 away with innocent owner defense so that the  
4 forfeiture was against the innocent owner.

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

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

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

20           MR. HOTTOT: Well, I --

21           JUSTICE SOTOMAYOR: The property did.

22           MR. HOTTOT: I think, Your Honor, it's  
23 -- it's safe to say that that could be deemed  
24 excessive. If -- if we look at the Bennis  
25 case, that case is about a co-owner who didn't

1 commit the crime. And the Court held that, as  
2 a matter of federal substantive due process,  
3 that co-owner did not have a -- an innocent  
4 owner defense.

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

8 JUSTICE SOTOMAYOR: Why?

9 MR. HOTTOT: Well, three --

10 JUSTICE SOTOMAYOR: If it's not  
11 punitive against him, it's the property that is  
12 being charged --

13 MR. HOTTOT: I see.

14 JUSTICE SOTOMAYOR: -- with having  
15 been involved in a crime.

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

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

25 But, if the state were to go so far as

1 to institute forfeiture proceedings against  
2 that person, as Justice Kennedy recognized in  
3 his Austin concurrence, there would be several  
4 serious constitutional problems with that.

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

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

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

24 MR. HOTTOT: Yes, Your Honor. This  
25 Court has rejected the idea that states can

1 work their way around the Excessive Fines  
2 Clause based on nothing more than a label.

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

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

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

16 (Laughter.)

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

24 Am I right? Does that ring a bell?

25 Because if -- if that still is the

1 law, which I think it is, it's something  
2 anomalous about saying, by the way, if you took  
3 his Mercedes, we will look to see whether  
4 that's disproportionate to taking a golf club,  
5 but if you send him to jail for life, we won't.

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

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

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

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

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

1 simply a question of the degree of punishment,  
2 i.e., life imprisonment, and the nature of the  
3 offense, e.g., stealing a golf club?

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

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

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

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

15 JUSTICE BREYER: Yeah.

16 MR. HOTTOT: -- a life sentence?

17 JUSTICE BREYER: Uh-huh.

18 MR. HOTTOT: I -- I think that, no,  
19 there is no difference, and that if -- if there  
20 is that tension between the Excessive Fines  
21 Clause and the Cruel and Unusual Punishment  
22 Clause, that in an appropriate case this Court  
23 should resolve it. But, here, the question --

24 JUSTICE GINSBURG: I thought the --  
25 the three strikes, it wasn't simply --

1 JUSTICE BREYER: Yeah.

2 JUSTICE GINSBURG: -- stealing a golf  
3 club, it was the third -- the third offense, so  
4 it was --

5 JUSTICE BREYER: Yeah, he had a  
6 history.

7 JUSTICE GINSBURG: -- it was a  
8 punishment for recidivist.

9 MR. HOTTOT: Absolutely, Your Honor,  
10 and thank you for that.

11 JUSTICE BREYER: Yeah. He also robbed  
12 a chicken coop.

13 (Laughter.)

14 MR. HOTTOT: Well --

15 JUSTICE ALITO: This gets me back to  
16 the question I was asking before. If six  
17 years' imprisonment is not a violation of the  
18 Eighth Amendment, and, you know, you said it  
19 might be, I think you might have something of  
20 an uphill fight to prove that, but three years,  
21 two years? How -- how low would the ceiling of  
22 permissible term of imprisonment have to go in  
23 order to justify a holding that a fine of  
24 \$42,000 is a violation of the Eighth Amendment?

25 What is the equation between the --

1 the monetary -- between dollars in -- in a fine  
2 and time imprisonment?

3 MR. HOTTOT: Your -- Your Honor,  
4 although it might be unsatisfying, the Court  
5 has said repeatedly that there is no equation  
6 and that there can be no equation because these  
7 situations are inherently real-world in nature  
8 and that courts have been directed,  
9 specifically with respect to in rem forfeitures  
10 in the Bajakajian case, to assess all of the  
11 circumstances.

12 And -- and as Justice Ginsburg was  
13 assisting me, it -- it's absolutely the case  
14 that the court has to look at not just the  
15 value of the property, not just the gravity of  
16 the offense, but also the offender himself and  
17 his effect, potentially, on the community if he  
18 remains at large.

19 There -- there's nothing new about  
20 that. Trial judges every day assess in all of  
21 the circumstances what is an appropriate  
22 punishment. And all we're saying in this  
23 case -- we're several step -- steps removed  
24 from the question presented right now. All  
25 we're saying is that you have an excessive



1 fines defense that you may raise.

2 JUSTICE KAGAN: So we are several  
3 steps removed, but I think that the import of  
4 some of these questions is, look, we've made it  
5 awfully, awfully hard to assert a  
6 disproportionality claim with respect even to  
7 imprisonment. And if it's at least equally  
8 hard to assert a disproportionality claim with  
9 respect to fines, we could incorporate this  
10 tomorrow and it would have no effect on  
11 anybody.

12 MR. HOTTOT: That's potentially true,  
13 Your Honor, but the standard of assessing this  
14 type of economic sanction, it's important to  
15 recognize, is being developed as we speak in  
16 the lower courts.

17 This Court's decision in *Bajakajian*  
18 has prompted the lower courts to try to  
19 articulate factors. And some courts use some  
20 factors; other courts use others. In an  
21 appropriate case with full briefing and -- and  
22 comment from amici, this Court can and should  
23 decide that important question.

24 But this case merely insists that  
25 Petitioner, like every other American, has the

1 right to raise the excessive fines defense and  
2 that the Indiana courts can then assess the  
3 situation.

4 CHIEF JUSTICE ROBERTS: Well, but  
5 you're asking us to, you know, buy a pig in a  
6 poke; in other words, you're saying incorporate  
7 this, but, you know, we're -- we don't even  
8 know whether it means we're going to decide  
9 whether \$10,000 is enough or \$20,000, or if  
10 we're simply going to say something along the  
11 lines of Harmelin, which it's not just that  
12 it's whatever so many grams; it's that it's the  
13 third offense, and so that's -- that's what's  
14 the -- protection against that is fundamental  
15 to -- to a civilized society or whatever the  
16 standard is that we've been applying.

17 MR. HOTTOT: Well --

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

21 MR. HOTTOT: Your Honor, I'm not  
22 saying don't worry about it. I think that this  
23 is a pressing question, and in an appropriate  
24 case, I -- I think that the Court does need to  
25 take it up.

1                   But if we look to the Harmelin  
2 decision, Justice Scalia's opinion in that case  
3 points out that there is special reason to be  
4 concerned when the government uses economic  
5 sanctions to punish a person because, unlike  
6 all other forms of punishment, whether it be  
7 life imprisonment, Justice Alito, or -- or a  
8 three strikes law, those cost the government  
9 money.

10                   But these types of forfeitures and  
11 fines raise revenue. And there's good reason,  
12 there's good history, for being concerned about  
13 the sovereign power to raise revenue using  
14 punishment.

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

18                   MR. HOTTOT: Yes.

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

25                   MR. HOTTOT: No, Your Honor. It

1 applies the same. The same test --

2 JUSTICE ALITO: Well, would the result  
3 be different? If he had been driving a -- a  
4 car with a -- a book value of \$1500, would the  
5 result be different?

6 MR. HOTTOT: Well, Your Honor, we  
7 would have to know more. We would have to know  
8 what the gravity of the offense was.

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

11 MR. HOTTOT: Okay.

12 JUSTICE ALITO: We know what the  
13 offense is.

14 MR. HOTTOT: I -- I think in this  
15 instance, any forfeiture of the vehicle would  
16 be excessive because this vehicle was not  
17 instrumental to this crime. It was incidental.

18 It's no surprise that -- in rural  
19 Indiana that a -- a person might drive  
20 somewhere to -- to meet with someone. And that  
21 doesn't make this vehicle somehow like a pirate  
22 ship that had been sailing the high seas.

23 CHIEF JUSTICE ROBERTS: Well, that's  
24 contrary to a lot of civil forfeiture law. I  
25 mean, this was an instrumentality of the crime.

1 This is how he got to the -- the deal place and  
2 how he carried the drugs. Normally, I mean,  
3 you're carrying the -- the drugs in your car, I  
4 think it's pretty well established your -- your  
5 car can be forfeited.

6 MR. HOTTOT: Potentially, Your Honor.  
7 It's -- it's well established that the car is  
8 subject to forfeiture. It is not, however,  
9 well established that that would necessarily  
10 not be excessive. So if we look --

11 CHIEF JUSTICE ROBERTS: Well, does it  
12 make a difference -- we've been talking about  
13 the value of the -- the item. What if the --  
14 the person doing this, you know, was a  
15 multimillionaire? Forty-two thousand dollars  
16 doesn't seem excessive to him.

17 MR. HOTTOT: Well --

18 CHIEF JUSTICE ROBERTS: And -- and  
19 yet, if someone is impoverished, it is  
20 excessive? Does that matter?

21 MR. HOTTOT: Well, Your Honor, if the  
22 Court looks to the brief of the Eighth  
23 Amendment scholars, filed in support of neither  
24 party, they discuss this. Magna Carta had the  
25 principle of salvo contentemento, the idea that

1 you can't take from a man so much that he would  
2 be destitute.

3           And the Court has suggested that -- in  
4 -- in the -- in the Bajakajian case, that that  
5 might be a factor, but it -- but it  
6 specifically declined in Bajakajian to  
7 articulate factors, recognizing that this is  
8 highly contextual, highly fact-intensive, and  
9 something that ought to be developed in the  
10 lower courts before this Court pronounces any  
11 particular test.

12           JUSTICE KAGAN: What is the -- on the  
13 federal side, how does this work? What kind of  
14 forfeitures have been held unconstitutional?  
15 Have any?

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

25           And -- and that's important to

1 recognize too. This isn't an all-or-nothing  
2 thing. It may be that the Bugatti that Justice  
3 Alito was talking about would be forfeited in  
4 part and not in full, or that a person who was  
5 particularly dependent on their vehicle, say  
6 they're a mother and it's the -- the minivan  
7 that they use to get their children to school,  
8 that a trial judge might determine that that is  
9 constitutionally excessive.

10 Your Honors, if there are no further  
11 questions, I'd like to reserve the balance of  
12 my time.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 General Fisher.

16 ORAL ARGUMENT OF THOMAS M. FISHER

17 ON BEHALF OF THE RESPONDENT

18 MR. FISHER: Mr. Chief Justice, and  
19 may it please the Court:

20 In rem forfeitures have been a feature  
21 of the Anglo-American judicial system for  
22 hundreds of years, but until about 25 years  
23 ago, no court had held that they were subject  
24 to a proportionality limitation. While other  
25 constitutional doctrines may limit --

1 JUSTICE GORSUCH: General, before we  
2 get to the in rem argument and its application  
3 to this case, can we just get one thing off the  
4 table? We all agree that the Excessive Fines  
5 Clause is incorporated against the states.  
6 Whether this particular fine qualifies because  
7 it's an in rem forfeiture, another question.

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

19 MR. FISHER: I have two responses to  
20 that. First, with --

21 JUSTICE GORSUCH: Well, I -- I think  
22 -- I think a "yes" or "no" would probably be a  
23 good starting place.

24 (Laughter.)

25 MR. FISHER: Well, I think, with



1     respect to in personam, the answer is yes, but  
2     you -- you have to take into account -- and  
3     this is the methodology of McDonald. You have  
4     to take into account the history and traditions  
5     of the right being claimed.

6             Now the right being claimed here is a  
7     right of proportionality as to in rem  
8     forfeitures. The Court has to grapple with  
9     that history, which is really not seriously  
10    contested that that was never subject to  
11    proportionality --

12            JUSTICE GORSUCH: Well, whatever the  
13    Excessive Fine Clause guarantees, we can argue,  
14    again, about its scope and in rem and in  
15    personam, but whatever it, in fact, is, it  
16    applies against the states, right?

17            MR. FISHER: Well, again, that  
18    depends.

19            JUSTICE GORSUCH: I mean, most -- most  
20    of these incorporation cases took place in like  
21    the 1940s.

22            MR. FISHER: Right.

23            JUSTICE GORSUCH: And here we are in  
24    2018 --

25            MR. FISHER: Right.

1 JUSTICE GORSUCH: -- still litigating  
2 incorporation of the Bill of Rights. Really?  
3 Come on, General.

4 MR. FISHER: My -- well, I think what  
5 you have to take into account, though, is the  
6 history, and you have to take into account all  
7 the history, not just the in personam history,  
8 the in rem history.

9 JUSTICE KAVANAUGH: Well, for the  
10 clause, why do you have to take into account  
11 all of the history, to pick up on Justice  
12 Gorsuch's question? Isn't it just too late in  
13 the day to argue that any of the Bill of Rights  
14 is not incorporated?

15 MR. FISHER: The Court has never  
16 incorporated a right against the states where  
17 it could not conclude that there was a  
18 relationship that was fundamental or -- and  
19 deeply rooted in our history and tradition.

20 JUSTICE KAVANAUGH: But aren't -- but  
21 aren't all -- all the Bill of Rights at this  
22 point in our conception of what they stand for,  
23 the history of each of them, incorporated?

24 MR. FISHER: Well, with fairness, not  
25 with your -- respect to your concession --

1 conception on excessive fines, and Austin's  
2 what stands in the way of that. Austin is --  
3 had been undermined by subsequent cases,  
4 including *Ursery*, including *Bajakajian*, which,  
5 by the way, was --

6 JUSTICE GINSBURG: *Bajakajian* cited it  
7 in a footnote with seeming approval.

8 MR. FISHER: Well, that would --  
9 that's -- one thing that's interesting about  
10 that footnote is that it's as weak an  
11 endorsement as I think we can imagine. It says  
12 that Austin was justified by reference to some  
13 difference between common law forfeitures and  
14 so-called modern forfeitures.

15 Well, Austin didn't depend on that  
16 distinction. And that distinction does not  
17 exist. The so-called modern-day forfeitures  
18 are materially the same with respect to the  
19 conceptual nature of them, that they are  
20 against the property and not the person, with  
21 respect to the procedural nature -- nature,  
22 which is civil and not criminal.

23 JUSTICE KAGAN: If I -- if I  
24 understood your response to Justice Gorsuch, it  
25 was essentially that we can't answer the

1 question wholesale, that we have to look at the  
2 particular right being invoked.

3 So I guess the question is, do you  
4 have a theory about how we go about dividing up  
5 rights? You know, how do we decide that we're  
6 looking at a particular right against in rem  
7 forfeitures as opposed to a general right  
8 against excessive fines?

9 MR. FISHER: Well, I think McDonald  
10 gives us some instruction on that. McDonald  
11 talked about not simply the Second Amendment  
12 but about the right to self-defense in the  
13 home.

14 Other cases of incorporation this  
15 Court has decided have approached, for example,  
16 reasonableness under the Fourth Amendment as  
17 distinguished from, you know, the exclusionary  
18 rule.

19 There are -- there are precedents that  
20 do that, but there is no precedent where the  
21 Court has incorporated a right that was not  
22 deeply rooted or fundamental.

23 JUSTICE KAGAN: I mean, that seems to  
24 make the incorporation question sort of  
25 indistinguishable from the substantive

1 question.

2 MR. FISHER: I think you have to come  
3 to grips with the history, whether you just --  
4 whether you call it incorporation or you call  
5 it the substantive merits question. We've  
6 given you three different ways to do this.

7 The most historically sound way is to  
8 overrule Austin. If you don't want to do that,  
9 you can --

10 JUSTICE GORSUCH: Wait a minute,  
11 counsel, you know, if -- if -- just -- just to  
12 pause on that for a second, you know, the  
13 Indiana Supreme Court didn't address the merits  
14 questions, didn't address any of this  
15 forfeiture, in rem, in personam. It just said  
16 that the Excessive Fines Clause is not  
17 incorporated, period.

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

21 Do you really want us to answer the  
22 merits questions too?

23 MR. FISHER: Well, the problem with  
24 relying on lower court percolation on the  
25 merits question, in terms of whether Austin is

1 correct, is that Austin binds the lower courts.  
2 They don't have an opportunity to revisit that.

3 This Court does. The matter has  
4 been -- has been --

5 JUSTICE GORSUCH: Okay. Let's say  
6 this Court's not inclined to revisit Austin.  
7 You're going to lose not just the incorporation  
8 question but the merits question too.

9 Could these work?

10 MR. FISHER: Well, I'm not sure what  
11 you mean by the -- the merits question in that  
12 regard. With respect to whether this  
13 forfeiture is excessive, certainly, that  
14 discussion would -- and that argument would  
15 take place back in the Indiana Supreme Court.

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

19 And I think, with respect to the  
20 broader question, even if the question, Justice  
21 Kagan, is -- is -- is the Excessive Fines  
22 Clause as a whole, and not something where  
23 we're going to slice and dice the rights, we  
24 still have to take into account that history of  
25 in rem forfeiture. And we don't have any

1 examples of incorporation where there is this  
2 substantial history that calls into question  
3 the fundamental or deeply rooted nature of a --  
4 a -- a very large, you know, area where that  
5 right would be applied.

6 JUSTICE GINSBURG: But we do have  
7 relatively recent history calling into question  
8 the division between in rem and in personam.  
9 Certainly, in the area of personal  
10 jurisdiction, it was once quasi in rem  
11 jurisdiction and personal jurisdiction, and  
12 yet, in Shaffer against Heitner, the Court said  
13 we're not going to do that anymore. Due  
14 process controls both.

15 So, whether you label it in rem or in  
16 personam, let's remember that it's -- things  
17 don't have rights or obligations in and of  
18 themselves. It's people that have rights or  
19 obligations with respect to things.

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

24 We're talking about the ability to  
25 seize assets for a case where there had been an

1 in personam judgment. And that is -- that  
2 distinguishes that category of cases from the  
3 historical in rem forfeitures we're talking  
4 about.

5 In rem is still critical for  
6 jurisdictional reasons, for -- it comes up in  
7 sovereign immunity. It binds the states there  
8 that we can't assert sovereign immunity the  
9 same way when we've got an in rem proceeding.  
10 You've got other situations. Double jeopardy.  
11 We already have a distinction in the double  
12 jeopardy context where in rem is critical. So  
13 I don't think we can just wave -- you know,  
14 wave it away.

15 JUSTICE ALITO: What is the difference  
16 between the approach that you're advocating  
17 here and the way the Court used to address the  
18 question whether rights protected by the Bill  
19 of Rights apply to the states, before it began  
20 the process of incorporating provisions of the  
21 Bill of Rights one by one, and it said that  
22 what applied to the states were those rights  
23 that were implicit in the concept of ordered  
24 liberty.

25 So there was a two-tiered system. And



1 that seems to be what you're asking us to go  
2 back to with respect to the Excessive Fines  
3 Clause.

4 MR. FISHER: We don't --

5 JUSTICE ALITO: Is there a difference?  
6 I -- I don't -- could you explain what is the  
7 difference between those two approaches?

8 MR. FISHER: Yes, indeed. We're not  
9 suggesting some sort of systematic differential  
10 treatment. In McDonald, the Court acknowledged  
11 that the differences that exist between the --  
12 the Bill of Rights rights that apply to the  
13 federal government and the states are as a  
14 matter of stare decisis.

15 Now, here, what we're saying is if  
16 that -- if the -- in the analysis, because of  
17 the lack of historical roots of the in rem  
18 proportionality right, there ends up being a  
19 difference, that has to be based on the stare  
20 decisis of Austin.

21 If Austin remains good law only  
22 because of stare decisis, that puts it in the  
23 same category as those other cases. It's not a  
24 systematic federalism discount, if you will, on  
25 -- on the right.

1 JUSTICE ALITO: But, if Austin were  
2 overruled, then the rule as applicable to the  
3 federal government would change as well?

4 MR. FISHER: That's right. That's  
5 right. We would be in the same --

6 JUSTICE ALITO: So I'm still not  
7 seeing the difference between them.

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

17 If you look at Austin and you say, you  
18 know what, that's questionable, but we don't  
19 want to overturn it because stare decisis  
20 principles counsel against that, that's a --  
21 that's a different analysis, and that's more  
22 like *Hurtado*, more like *Bombolis*.

23 JUSTICE ALITO: Well, isn't that  
24 pretty much what the dissent in *McDonald* said?  
25 We don't like *Heller*, but at least let's just

1 keep it applicable to the District of Columbia  
2 and the federal government and not apply it to  
3 the states.

4 MR. FISHER: Well, I think that was a  
5 -- a different -- for a different reason in  
6 that the plurality acknowledged the distinction  
7 with Bombolis and Hurtado being purely a matter  
8 of stare decisis. And that's the basic  
9 principle we're -- we're calling on here, which  
10 is, if -- if Austin remains good law only  
11 because of stare decisis, that doesn't make  
12 this a systematic sort of discounted right.

13 That just means that, you know, you've  
14 got as a question -- question of the Court's  
15 history some other way you have to look at the  
16 situation.

17 But I think it's critical to  
18 understand also that the idea that somehow  
19 so-called modern in rem forfeitures are  
20 different from history because of the existence  
21 of innocent owner exceptions is also not  
22 correct.

23 Innocent owner exceptions did exist  
24 within, you know, the last couple of hundred  
25 years. Indeed, authorities contemporaneous

1 with the ratification or roughly  
2 contemporaneous with the ratification of the  
3 Fourteenth Amendment acknowledged that there --  
4 there might be innocent owner defenses.

5 The treatise by Bishop says, if the  
6 law in its clemency permits an innocent owner  
7 to make a claim, that does not convert into  
8 punishment that which was not already  
9 punishment. It doesn't make any difference.

10 So whether we -- no matter how we look  
11 at in rem forfeitures today and the features  
12 that they exhibit, they're no different than  
13 the historical in rem forfeitures that this  
14 Court has said in -- in cases after Austin  
15 calling Austin into question that they were not  
16 punishment.

17 JUSTICE BREYER: Well, in your view,  
18 an in rem civil forfeiture is not an excessive  
19 fine, is that right?

20 MR. FISHER: Yes, that is -- that is  
21 true.

22 JUSTICE BREYER: So what is to happen  
23 if a state needing revenue says anyone who  
24 speeds has to forfeit the Bugatti, Mercedes, or  
25 a special Ferrari or even jalopy?

1 (Laughter.)

2 MR. FISHER: There -- no, there is no  
3 -- there is no excessive fines issue there. I  
4 -- what I will say and what I think is  
5 important to -- to remember is that there is a  
6 constitutional limit, which is the proof of  
7 instrumentality, the need to prove nexus.

8 JUSTICE BREYER: That isn't a problem  
9 because it was the Bugatti in which he was  
10 speeding.

11 (Laughter.)

12 MR. FISHER: Right.

13 JUSTICE BREYER: So -- so there is all  
14 the nexus.

15 MR. FISHER: Historically --

16 JUSTICE BREYER: Now I just wonder,  
17 what -- what is it? What is it? That -- is  
18 that just permissible under the Constitution?

19 MR. FISHER: To forfeit the Bugatti  
20 for speeding?

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

23 MR. FISHER: Yeah.

24 JUSTICE BREYER: -- above the speed  
25 limit.

1 MR. FISHER: Well, you know, the  
2 answer is yes. And I would call your attention  
3 to the --

4 JUSTICE BREYER: Is it yes?

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

6 JUSTICE BREYER: It is forfeitable?

7 MR. FISHER: Yeah. The Louisa Barber  
8 case, one person over the -- the passenger  
9 limit and the entire ship is forfeit. This is  
10 -- history shows us in rem forfeiture --

11 JUSTICE BREYER: So if the airplane is  
12 speeding --

13 (Laughter.)

14 MR. FISHER: Well, in rem forfeitures  
15 have -- have -- have always been with us and  
16 they have always been harsh.

17 JUSTICE SOTOMAYOR: General, yeah,  
18 that -- that is true, but that's because at a  
19 certain -- up to a certain point in our  
20 history, we didn't apply the Bill of Rights to  
21 the states.

22 So, in all of the situations before we  
23 apply the Bill of Rights to this -- before we  
24 apply the Bill of Rights to states, they did  
25 things that, under incorporation, were

1 unconstitutional. And in most of our cases,  
2 they were history going both ways. Some states  
3 did; some states didn't.

4           So, really, what the issue that we  
5 have to look at isn't -- is where has our  
6 understanding come to in terms of a particular  
7 Bill of Rights? And in Austin, we said it is a  
8 long part of history that punitive sanctions  
9 cannot be excessive. And Justice Scalia said  
10 it very well: For the Eighth Amendment to  
11 limit cash fines while permitting -- permitting  
12 limitless in-kind assessments would make little  
13 sense, altering only the form of the Star  
14 Chamber abuses.

15           So, at a certain point in Austin, we  
16 looked at what had happened to in rem  
17 forfeiture and realized that we had just  
18 changed the Star Chamber form.

19           I -- I -- I don't actually understand  
20 your argument based on history because, without  
21 incorporation, the history's going to be what  
22 you want it to be. The real question is the  
23 fundamental right.

24           Are we trying to avoid a society  
25 that's like the Char -- Star Chamber? And if

1 we look at these forfeitures that are occurring  
2 today, and that's what Austin documented, many  
3 of them seem grossly disproportionate to the  
4 crimes being charged.

5 So how do you deal with that? How do  
6 we avoid a Star Chamber return?

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

17 Now I think, with respect to  
18 understanding, you know, how we view today's  
19 forfeitures, you can't distinguish what's  
20 happening now from -- history when,  
21 historically, an innocent owner was never --  
22 you know, not entitled to a defense.

23 How -- how would we ever say -- and I  
24 think Justice Scalia makes this point -- how  
25 would we ever say that a forfeiture as to an



1 innocent owner was proportional because the  
2 owner is innocent?

3 So the -- that has never been part of  
4 the equation.

5 JUSTICE GORSUCH: Well, the -- the  
6 part that's different about modern forfeitures  
7 -- and I think this is what Justice Sotomayor's  
8 getting at -- is that many of them are punitive  
9 to the person and that that was not part of in  
10 rem forfeitures at common law.

11 MR. FISHER: Well --

12 JUSTICE GORSUCH: We're dealing with a  
13 world in which it's different in kind, not just  
14 degree, not just a number but in kind. And  
15 that's what Justice Scalia, that's what  
16 everybody, in Austin agreed on. That much was  
17 unanimous.

18 MR. FISHER: Well --

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

1           MR. FISHER: No, I don't think we lose  
2 because I don't think -- the -- the question of  
3 punitive and remedial is -- is something that  
4 Austin borrowed from Halper. That test has --  
5 has been overruled as to -- as to double  
6 jeopardy.

7           Now, if it remains the test with  
8 respect to something that -- whether it's  
9 encompassed within the Excessive Fines Clause,  
10 there still has to be the -- the analysis. I  
11 mean, we have to figure out what  
12 disproportionate means.

13           JUSTICE GORSUCH: Sure. But you  
14 conceded that it's punitive. Now it becomes a  
15 question of proportionality.

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

25           JUSTICE GORSUCH: The statute here

1 says it's punitive and you've conceded the  
2 statute's punitive. So I'm still stuck on how  
3 -- how do you get out of that box?

4 MR. FISHER: Well, I -- I suppose -- I  
5 mean, if -- if that's -- if it's the magic word  
6 "punitive," we can just change the statute, but  
7 I don't think that would be a very satisfactory  
8 result.

9 I think what the Court is probably  
10 looking for is some better way to -- to  
11 describe what is included within the Excessive  
12 Fines Clause, something more substantive than  
13 that. And the cases after Austin all make  
14 clear that this distinction between punitive  
15 and remedial simply falls apart.

16 You know, you -- the idea of  
17 deterrence in Austin, the thought was, if it's  
18 deterrent, that makes it punishment. Well, the  
19 Court's now rejected that in Hudson and in  
20 other cases. And in Bajakajian. So that part  
21 of the test doesn't hold up anymore either.

22 So I think you have to go back and  
23 look at this entire -- you know, whether -- you  
24 have to look very critically at the idea that  
25 there's something different about modern-day

1 forfeiture. There really is no distinction,  
2 no material distinction, between them and what  
3 was happening at common law and certainly what  
4 was happening in the middle of the 19th  
5 Century.

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

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

24 CHIEF JUSTICE ROBERTS: Well, are we  
25 going to be wiping all that away or just

1 leaving that for another day? I mean, it -- it  
2 -- what -- I guess this gets back to Justice  
3 Gorsuch's first question.

4 I mean, the question presented is does  
5 the Excessive Fines Clause -- you know, is it  
6 incorporated in the Eighth Amendment? And I  
7 guess your argument is -- seems to be this  
8 isn't an excessive fine, and, in fact, it isn't  
9 a fine at all.

10 Well, we can deal with that later,  
11 right?

12 MR. FISHER: Well, first of all, of  
13 course, it's in front of you now, so why not.  
14 It's been -- you know, it's been briefed and  
15 the lower courts can't come to any opposite  
16 conclusion. So you're not -- it's not going to  
17 percolate.

18 But the second point is that even if  
19 we were to say we're not going to revisit  
20 Austin, the history of the right is still  
21 critical. McDonald tells us that. And it has  
22 to inform the question of incorporation.

23 And the Court has never incorporated  
24 where there's that kind of history that is four  
25 square against the right that's being claimed.

1 And I think that that is going to have to  
2 inform the way --

3 CHIEF JUSTICE ROBERTS: Well, you just  
4 -- you just want us to make sure that in our  
5 opinion that we say, if we're ruling against  
6 you, that the excessive fines are incorporate  
7 -- incorporated under -- under our  
8 incorporation doctrine and not say civil in rem  
9 forfeitures are incorporated?

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

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

20 MR. FISHER: I think that's the most  
21 historically --

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

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

25 (Laughter.)

1           MR. FISHER: Not with a straight face.  
2       No. Look, I think that's the most historically  
3       sound thing to do. But I don't think that  
4       that's -- if you're unwilling to do that, that  
5       cannot be the -- the end of the analysis on  
6       incorporation because, again, you have to take  
7       into account under your precedents the history  
8       of the right being claimed.

9           Not just some of the history, not just  
10       the in personam history, but also the in rem  
11       history. And there's no --

12           JUSTICE KAGAN: But, again, it -- it  
13       just seems as though there are two questions,  
14       and one question is incorporating the right,  
15       and the other question is the scope of the  
16       right to be incorporated.

17           And, really, what you're arguing is  
18       about the scope of the right.

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

20           JUSTICE KAGAN: And we can incorporate  
21       the right --

22           MR. FISHER: Yeah.

23           JUSTICE KAGAN: -- without saying a  
24       word about the scope of the right.

25           Now, as you say, Austin says something

1 about the scope of the right, and that's a  
2 problem for you. But -- but you're really  
3 asking us to talk about the scope of the right,  
4 aren't you?

5 MR. FISHER: Well, certainly, that  
6 would -- that's our -- what we think is the  
7 most historically sound thing to do, but even  
8 if you, you know, assume that away and were  
9 just looking at what this -- whether we're  
10 going to incorporate the right, the test for  
11 incorporation is historically rooted or -- or  
12 fundamental to ordered liberty.

13 And to answer that question, you have  
14 to look at the history of the right. If the  
15 right includes --

16 JUSTICE KAGAN: Well, that's why --  
17 why I asked at the beginning what's your theory  
18 for how you define the right and which history  
19 you look to --

20 MR. FISHER: Yeah.

21 JUSTICE KAGAN: -- because you're  
22 really suggesting that we don't take the right  
23 wholesale; we try to chop it up. And I guess,  
24 you know, there are always going to be  
25 questions about the scope of the right to be



1 incorporated.

2 And, so far, we have not addressed  
3 those questions when we've decided whether to  
4 flip the switch of incorporation or not. We've  
5 understood those questions to be distinct  
6 and -- and to be questions for another day.

7 And why is it that you're saying we  
8 should not use that pretty standard practice  
9 and instead start chopping up the right at the  
10 incorporation stage?

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

13 And if, indeed, the Court doesn't want  
14 to chop up the right and it wants to just look  
15 at the Excessive Fines Clause, it has to look  
16 at all the history, and that includes the  
17 history of in rem.

18 And our view is that history means  
19 that you can't incorporate. If -- if the  
20 history is only in personam, then I don't think  
21 there's any serious question about  
22 incorporation.

23 But if the history includes the in rem  
24 history, the much larger history, the much --  
25 the largely uncontested history, that is --

1 then there is no precedent for incorporating in  
2 that circumstance where -- where there was that  
3 amount of history standing four square against  
4 a substantial number of applications of the  
5 right. There just isn't anything to look to on  
6 that.

7 JUSTICE KAVANAUGH: You cited McDonald  
8 as an example earlier of a case where the Court  
9 had, in your view, chopped up the right as  
10 incorporated. Are you saying the Second  
11 Amendment has a different scope after McDonald?

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

20 JUSTICE KAVANAUGH: But you agree  
21 post-McDonald -- and this is similar, I think,  
22 to what Justice Kagan's asking -- that the --  
23 the right is the same as against the states and  
24 the federal government?

25 MR. FISHER: Oh, yes. Oh, yes. But,

1 again, we're not dealing there with the same  
2 stare decisis issue that we are grappling with  
3 with respect to Austin, which I think is --  
4 puts this in -- more like in the Hurtado and  
5 Bombolis category.

6 We're not asking for a -- again, we're  
7 not asking for a federalism discount. What  
8 we're asking for is some ability to take  
9 cognizance of -- of stare decisis without  
10 sacrificing the necessary historical analysis.

11 JUSTICE ALITO: Well, at the time of  
12 McDonald and at the present time, all the --  
13 the Court has held that the Second Amendment  
14 right protects the right to have a -- certain  
15 firearms in the home for self-defense. It  
16 hasn't gone further.

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

1           MR. FISHER: Well, I think  
2 particularly given the methodology the Court  
3 would use in coming to grips with what that new  
4 right is, it would likely just follow. I don't  
5 see there would be any need for -- because it  
6 would be essentially the same analysis anyway.

7           But you -- you know, I think the idea  
8 here that you can simply look at one part of  
9 the history without looking at all of it, you  
10 know, I don't think that you can look to -- to  
11 McDonald or any of the other precedents and  
12 have guidance for that.

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

22           So, you know, that's -- I think, you  
23 know, we offer those -- those three suggestions  
24 and -- and, you know, we -- we think  
25 historically, the most historically sound thing

1 to do is to overrule Austin.

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

6 In -- in Hudson, this Court has  
7 already said that the test that Austin applies  
8 that comes out of Halper is unworkable. It has  
9 gone through the history in Bajakajian and  
10 largely shown that Austin was wrongly decided.

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

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

25 And I think it's instructive here that

1 my friend cites to the dissent in Bennis,  
2 acknowledging that, if you're going to  
3 incorporate a grossly disproportionate  
4 analysis, then, really, what you've got to do  
5 is start getting away from the innocent owner,  
6 you know, the lack of a required innocent owner  
7 exception, that that's going to become  
8 something that is going to have to be part of  
9 that analysis.

10 Now Justice Scalia, I -- I do want to  
11 call your attention to in -- in Austin, in his  
12 concurrence, was grappling with this -- this  
13 idea, as can we do something that's grossly  
14 disproportionate on in rem the way we would do  
15 it in personam.

16 And his concern was, you know what,  
17 maybe really what it comes down to is simply  
18 this idea of nexus. And the nexus test that he  
19 was describing there is essentially what we're  
20 describing that would be the proper test under  
21 due process.

22 You know, is there a connection  
23 between the property and the offense? And we  
24 think that belongs in due process. But Justice  
25 Scalia, I think, was onto something there when

1 he was acknowledging that there really has to  
2 be a different treatment. Given all that  
3 history, given all those -- those precedents of  
4 the Court, there has to be a differential  
5 treatment.

6 And at the end of the day, I think,  
7 you know, what you've got to do here when  
8 you're looking at this incorporation question  
9 is not simply be, you know, I think, you know,  
10 cavalier about the idea of this is easy to  
11 incorporate.

12 You don't want to do that, I think,  
13 without taking a very careful look at what is  
14 the right that you're actually incorporating  
15 and does it fit with the doctrines and the  
16 history of the Court and all of the ways that  
17 it's -- it's handled incorporation before.

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

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 General.

22 Mr. Hottot, four minutes.

23 REBUTTAL ARGUMENT OF WESLEY P. HOTTOT  
24 ON BEHALF OF THE PETITIONER

25 MR. HOTTOT: Your Honors, this case is

1 about constitutional housekeeping. Five times  
2 over the last 30 years, this Court has remarked  
3 that the freedom from excessive economic  
4 sanctions should be understood to apply to the  
5 states.

6 In Hall, in Kennedy, in Roper, in  
7 Cooper Industries, and in Booth, all that  
8 remains to do is to expressly so hold.

9 My friend's approach, by contrast, is  
10 radical. He asks the Court to overrule Austin,  
11 a unanimous decision that has been on the books  
12 for 25 years, that was reaffirmed in Hudson, in  
13 Bajakajian, and, again, in Kokesh.

14 And that case looked at the same  
15 history that my friend urges this Court to  
16 review here. It would allow, if the Court were  
17 to overrule Austin, governments at all levels  
18 to impose constitutionally excessive civil in  
19 rem forfeitures based on nothing more than a  
20 label.

21 This is not a labeling game.

22 It would also revive the so-called  
23 two-track approach that this Court has rejected  
24 now for more than 50 years.

25 So even if we imagine that -- that the



1 Court would take such a radical approach, it --  
2 it would break with, for example, the  
3 commercial speech doctrine, which there was a  
4 long history of commercial speech activity in  
5 this country before the 1970s decision in which  
6 this Court held that there is a commercial  
7 speech right, and did so in a case against the  
8 state without even pausing on the incorporation  
9 question.

10 So, you know, even if some forfeitures  
11 are non-punitive, other forfeitures are  
12 punitive. And the forfeiture in this case  
13 clearly meets Austin's test that it be at least  
14 partly punitive.

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

23 Both statutes have innocent owner  
24 defenses. So, if anything, this is more  
25 punitive, not less.

1                   If the Court has no further questions.

2                   Thank you, Your Honor.

3                   CHIEF JUSTICE ROBERTS: Thank you,

4                   counsel. The case is submitted.

5                   (Whereupon, at 11:01 a.m., the case  
6                   was submitted.)

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