No. 25-246

In the Supreme Court of the United States

KENNETH J. JOUPPI, PETITIONER

v.

STATE OF ALASKA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the courts below were required, and failed, to consider particular individualized aspects of petitioner's illegal transportation of alcohol in order to reject his claim that the Excessive Fines Clause entitles him to avoid forfeiture of the instrumentality of that crime.

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INTEREST OF THE UNITED STATES

This case concerns the interpretation of the Eighth Amendment's Excessive Fines Clause. The United States has a substantial interest in that issue because it often faces claims under the Clause when seeking fines under federal law.

INTRODUCTION

From the founding era through the present day, it has been commonplace to require forfeiture of the instrumentality of an illegal act—and, specifically, forfeiture of a vehicle used to unlawfully transport liquor. The mandatory forfeiture of petitioner's airplane, in which he knowingly attempted to transport alcohol to a dry Alaskan village, accords with that longstanding tradition. It does not violate the Excessive Fines Clause.

Petitioner contends (Br. 1) that a court should review the excessiveness of that penalty "with reference to the

defendant's own wrongdoing," and that his wrongdoing does not justify the forfeiture because he is a first-time offender and only six of the 72 beers that he was transporting were in plain view. But the forfeiture of the "instrument of the offence" is an "established" penalty, *Smith* v. *Maryland*, 18 How. 71, 75 (1855), and the "time-honored" tradition of "[f]orfeiture of vehicles" for alcohol smuggling dates all the way back to the First Congress, *General Motors Acceptance Corp.* v. *United States*, 286 U.S. 49, 56 (1932).

Such forfeiture has traditionally been mandatory, regardless of the value of the instrumentality or additional details of the misconduct. "Scales used to measure out unlawful drug sales" are forfeitable "whether made of the purest gold or the basest metal." *Austin* v. *United States*, 509 U.S. 602, 627 (1993) (Scalia, J., concurring in part and concurring in the judgment). And even if that history were not conclusive, the penalty was not "grossly disproportional to the gravity of the defendant's offense," particularly in light of the "'substantial deference,'" *United States* v. *Bajakajian*, 524 U.S. 321, 336-337 (1998) (citation omitted), owed to the Alaska legislature's considered judgment about the best way to protect communities' choices to go completely dry to prevent alcohol abuse and its attendant social ills.

STATEMENT

1. The village of Beaver is located on the north bank of the Yukon River amidst the Yukon Flats, a vast wetland area in central Alaska. See Valerie A. Sumida, Div. of Subsistence, Alaska Dep't of Fish & Game, *Patterns of Fish and Wildlife Harvest and Use in Beaver, Alaska* 7 (1989), https://perma.cc/V7YB-82J9. Beaver was founded in 1910, after the discovery of gold nearby, at the terminus of a trail linking the river to a mining

camp. See *id.* at 7, 9. When the gold rush ended, local miners turned to trapping, and Beaver survived as a trading post. See *id.* at 9. The village's first post office opened in 1913, followed by its first school in 1928. See *ibid.*

In the 2020 census, Beaver reported a population of 48. See U.S. Census Bureau, *Beaver CDP, Alaska*, https://data.census.gov/all?g=160XX00US0205750. The village is off the road system and is accessible primarily by air. See Sumida 9. The nearest neighboring community, Fort Yukon, is about 60 miles away. See *ibid.*

2. Remote Alaskan villages like Beaver face serious challenges in addressing the abuse of alcohol. See *Burnor* v. *State*, 829 P.2d 837, 840-841 (Alaska Ct. App. 1992). The villages' isolation, inaccessibility, and inclement weather make it difficult for police officers and medical personnel to respond to emergencies, increasing the risks associated with alcohol abuse. See *ibid.*

In 1980, faced with studies showing that one in ten Alaskans was an alcoholic, the state legislature enacted a local-option law. See 1980 Alaska Sess. Laws ch. 131; *Harrison* v. *State*, 687 P.2d 332, 335-336 (Alaska Ct. App. 1984). As amended, that law allows a village to ban the possession, sale, and importation of alcohol. See Alaska Stat. § 04.11.491. Beaver voted to go dry in a 2004 referendum spurred by an incident in which a 21-year-old resident spent a night drinking, passed out outdoors in sub-zero temperatures, and later choked to death on his vomit. See Joel Gay, *Yukon River village backs prohibition*, Fairbanks Daily News-Miner, Aug. 16, 2004.

3. Knowingly transporting or attempting to transport alcohol to a dry village like Beaver is a crime under Alaska state law. See Alaska Stat. § 04.11.499. While the offense is generally a misdemeanor, it is a felony if

the offender is a proven recidivist or the quantity of alcohol involved exceeds specified thresholds. See *id.* § 04.16.200(e). Under either version, any "aircraft, vehicles, or vessels used to transport" alcohol to a dry village are subject to forfeiture. *Id.* § 04.16.220(a)(3).

State law originally left trial courts with discretion to decide whether to order such forfeitures, see Pet. App. 21a, but in 2004, the legislature made aircraft forfeitures mandatory, see 2004 Alaska Sess. Laws ch. 124, § 11. Although a conveyance is subject to forfeiture even if someone other than the owner uses it to illegally transport alcohol, an owner can reacquire the conveyance through remission by showing, among other things, that he was not a party to the crime and that he did not know or have reason to believe that his property would be used in violation of the law. See Alaska Stat. § 04.16.220(e).

4. Petitioner operated an air-taxi company, piloting a small airplane that he owned and that his company leased from him. Pet. App. 3a-4a. In April 2012, petitioner planned to fly a passenger from Fairbanks to Beaver. *Id.* at 4a. After petitioner loaded the airplane, state troopers who were investigating him for violating the local-option alcohol laws stopped the airplane and executed a search warrant. *Id.* at 33a. They found 72 cans (nine gallons) of beer on board. *Id.* at 4a, 24a, 33a.

Alaska charged petitioner with misdemeanor transportation of alcohol to a dry village. Pet. App. 33a; see *id.* at 33a n.4 (explaining that the definition of "transport" includes "attempting * * * to deliver or transfer") (emphasis omitted) (quoting Alaska Stat. § 04.11.499(c)(3)). The evidence at trial showed that at least one six-pack of beer was in plain view to petitioner when he loaded the airplane. *Id.* at 4a. A trooper also

testified that petitioner would "have to be blind not to know" that he had been loading beer on the airplane and that "pilots with that bad of eyesight don't fly." 397 P.3d 1026, 1029.

The jury found petitioner guilty, and the trial court sentenced him to 180 days in jail (with 177 days suspended), a fine of $3000 (with $1500 suspended), and three years of probation. Pet. App. 5a. But the court refused to order forfeiture of petitioner's airplane, which it valued at $95,000, on the view that such forfeiture would violate the federal Constitution's Excessive Fines Clause. *Id.* at 163a; see *id.* at 152a-169a.

5. The Alaska Court of Appeals vacated and remanded after concluding that the trial court's legal analysis and factual findings were incomplete. Pet. App. 30a-63a. Judge Mannheimer filed an opinion concurring in part and dissenting in part, in which he determined that forfeiture was "clearly proper." *Id.* at 65a; see *id.* at 64a-151a.

The Alaska Supreme Court vacated that judgment and found that forfeiture would be constitutional. Pet. App. 1a-29a. The court found forfeiture not to be grossly disproportionate to petitioner's crime because petitioner had "knowingly transported a six-pack of alcohol in plain view while acting in his professional capacity as the operator of an air taxi company and the pilot of the airplane," petitioner committed a "serious" offense by "knowingly" transporting alcohol to a dry village, petitioner was "clearly within the class" targeted by the statute, the value of the plane was "only 9.5 times the maximum fine," and the crime at issue causes "grave societal harm." *Id.* at 19a-20a, 23a-24a.

SUMMARY OF ARGUMENT

Our Nation has a long tradition, dating back to the founding, of forfeiture of the instrumentalities used to commit crimes. In accord with that tradition, the Excessive Fines Clause allows the forfeiture of the airplane that petitioner knowingly used to commit his crime, regardless of the value of the airplane or additional details of his misconduct.

A. The tradition of instrumentality forfeitures includes a longstanding practice of forfeiting a conveyance used to smuggle alcohol. The First Congress required the forfeiture of ships or carriages used to remove untaxed spirits from distilleries. In 1834, Congress required the forfeiture of boats used to bring wine or spirits into Indian country. In the same month that the Fourteenth Amendment was ratified, Congress required the forfeiture of ships that smuggled spirits into Alaska. And during Prohibition, Congress required the forfeiture of vehicles involved in bootlegging.

Forfeiture of petitioner's airplane fits within both the general tradition of instrumentality forfeitures and the more specific tradition of confiscating conveyances used to smuggle alcohol. Instrumentality forfeitures traditionally did not depend on the instrumentality's value. Nor did they depend on additional details of the offender's misconduct, beyond the use of the conveyance. And although the historical forfeitures were *in rem*, they are closely analogous to *in personam* forfeiture of petitioner's airplane. Accordingly, historical tradition alone establishes that forfeiture here complies with the Excessive Fines Clause.

B. Forfeiture here also passes muster under the gross-disproportionality framework that this Court applied in *United States* v. *Bajakajian*, 524 U.S. 321

(1998), to evaluate the excessiveness of the forfeiture of currency that was the subject of a crime. See *id.* at 336. That standard requires a court to grant substantial deference to the legislature, which is responsible for determining the appropriate penalty for a crime in the first instance. See *ibid.* The Alaska legislature did not exceed its broad authority here.

The Alaska legislature has determined that the transportation of alcohol to a dry village should result in the mandatory forfeiture of the airplane used in the crime, even if, as petitioner claims here, the offense involves a small quantity of alcohol. Petitioner provides no sound reason to disturb that considered legislative judgment. While individualized circumstances can bear on whether a mandatory forfeiture is grossly disproportionate, the analysis must pay heed to the severity of the general problem that the legislature seeks to address and the specific role of the forfeiture provision in responding to that problem.

The mandatory penalty here embodies the Alaska legislature's judgment that alcohol abuse poses a grave problem in rural Alaska. It reflects, among other things, the difficulty of detecting alcohol smuggling: the harder a crime is to catch, the stiffer a consequence needs to be to deter it. And it directly addresses the alcohol-smuggling problem by eliminating the possibility that airplanes used to smuggle alcohol will be used that way again. Petitioner is well within the heartland of the statute. The jury found that he knew that he was transporting alcohol, and even a small amount of alcohol can cause substantial harms in a community that has chosen the all-in measure of banning alcohol completely.

C. Petitioner's historical authorities, which concern monetary fines, are inapposite because monetary fines

meaningfully differ from instrumentality forfeitures. Judges historically had broad discretion to determine the amounts of monetary fines. Such discretionary fines raised concerns, like arbitrariness and deliberate abuse, that are absent for mandatory instrumentality forfeitures, which target the instrumentalities selected by the offenders themselves. They also serve different purposes; unlike a monetary fine, a forfeiture incapacitates an offender by depriving him of the instruments of the offense. Given those differences, courts should analyze instrumentality forfeitures under the historical standards that govern those forfeitures, not under the distinct standards that govern monetary fines. And that analysis confirms that forfeiture here is constitutional.

ARGUMENT

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. Where, as in the case of criminal *in personam* forfeiture here, forfeiture of property "serves in part to punish," it "can be a fine." *Pung* v. *Isabella County*, 609 U.S. 30, 43 (2026) (brackets, citations and internal quotation marks omitted). But history conclusively shows that, regardless of the other "particular facts" of the case, Pet. Br. 8 (citation omitted), forfeiture of the vehicle that petitioner knowingly used in the illegal transportation of alcohol—the instrumentality of his crime—is not excessive. Nor, for that matter, would forfeiture here be deemed excessive even under the "gross disproportionality" standard that this Court applied to a non-instrumentality forfeiture in *United States* v. *Bajakajian*, 524 U.S. 321, 336 (1998).

A. Forfeiture Of Petitioner's Airplane Fits Within Our Nation's Long Tradition Of Instrumentality Forfeitures

In applying the Excessive Fines Clause, this Court has often begun by consulting historical practice. See *Pung*, 609 U.S. at 43; *Bajakajian*, 524 U.S. at 336. Here, that practice shows that the government may confiscate property that was used in serious crimes, including conveyances involved in alcohol smuggling, regardless of other details about the circumstances of the offense.

1. Our Nation has a long tradition of confiscating the instrumentalities of crime, including conveyances involved in alcohol smuggling

a. For centuries, legislatures have required the forfeiture of instrumentalities of crime—*i.e.*, property used in the commission of offenses. See *Bajakajian*, 524 U.S. at 333 n.8. Instrumentality forfeitures began in England more than seven centuries ago with the Statute of Westminster 1285, 13 Edw. 1, c. 47, which required forfeiture of nets used for unlawful fishing. Statutes enacted over the ensuing centuries similarly required the forfeiture of arms that were unlawfully carried in public, see Statute of Northampton 1328, 2 Edw. 3, c. 3; ships that were used for unlawful fishing, see Fisheries, etc. Act 1663, 15 Car. 2, c. 16, § 2; and horses and carriages that were used to carry unlawful exports, see Wool Act 1695, 7 Will 3, c. 28, § 6.

The tradition crossed the Atlantic. The Navigation Acts, a series of seventeenth-century English laws regulating colonial trade, were enforced through the forfeiture of ships involved in violations, and American courts routinely conducted forfeiture proceedings under those statutes. See *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 138-140 (1943). Colonial legislatures also enacted their own forfeiture laws, confiscating property ranging from

ships used to carry unlawful exports, see Act of June 14, 1690, ch. 45, 1 *Laws of New Hampshire* 419 (Albert Stillman Batchellor ed., 1904), to guns used for poaching, see Act of Dec. 21, 1771, § 3, *Laws of the State of New-Jersey* 26 (1821).

Forfeiture of instrumentalities remained common after independence. The First Congress required the forfeiture of ships, horses, and carriages involved in customs violations. See, *e.g.*, Collection Act of 1789, ch. 5, §§ 12, 34, 40, 1 Stat. 39, 46, 48-49; Collection Act of 1790, ch. 35, §§ 14, 27, 60, 70, 1 Stat. 158, 163, 174, 177. Later in the 1790s, Congress required the forfeiture of ships involved in violating neutrality laws, slave-trade laws, and embargos. See, *e.g.*, Slave Trade Act of 1794, ch. 11, § 1, 1 Stat. 349; Neutrality Act of 1794, ch. 50, § 3, 1 Stat. 383; Act of June 13, 1798, ch. 53, § 1, 1 Stat. 565. And founding-era state legislatures provided for an even broader range of forfeitures, including forfeitures of "horses used in races that violated gambling laws," "shingles sold in bundles that violated commercial regulations," and "gunpowder stored above the quantities permitted by fire safety laws." Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2472 (2016).

Instrumentality forfeitures remained routine in the nineteenth century. During the era surrounding ratification of the Fourteenth Amendment, for example, Congress required the forfeiture of tools used to manufacture untaxed goods, see Revenue Act of 1864, ch. 173, § 48, 13 Stat. 240; railway cars used to smuggle imports, see Smuggling Act of 1866, ch. 201, § 3, 14 Stat. 178-179; and vessels used to hunt endangered seals in Alaska, see Act of July 27, 1868, ch. 273, § 6, 15 Stat. 241. And instrumentality forfeitures remain commonplace today,

including forfeitures of aircraft and other conveyances used to transport illegal drugs, see 21 U.S.C. 881(a)(4), equipment used in copyright piracy, see 18 U.S.C. 2323(a)(1)(B), and unlawfully possessed firearms, see 18 U.S.C. 922(d)(1).

b. The Nation has not only a general tradition of confiscating instrumentalities of crime, but also a more specific historical practice of confiscating conveyances used to illegally transport alcohol. At the federal level, that practice began with the First Congress, which required the forfeiture of ships, horses, and carriages used to remove untaxed spirits from distilleries. See Whiskey Tax Act of 1791, ch. 15, § 19, 1 Stat. 204. Discussing that statute in a report to the Second Congress, Secretary of the Treasury Alexander Hamilton explained that the "forfeiture of the ship or vessel, and of the waggon or other instrument of conveyance, assistant in a breach of the law," was a "common" and "comparatively moderate" "penalt[y]" that "cannot truly be deemed either unusual or excessive." 11 *The Papers of Alexander Hamilton* 82-83 (Harold C. Syrett et al. eds., 1966).

The practice of forfeiture of the instrumentalities of crime continued during the nineteenth century. In the 1820s, New Jersey and Pennsylvania required forfeiture of many types of conveyances involved in the crime of selling liquor near a place of worship. See Act of Feb. 2, 1820, § 2, 1820 N.J. Acts 41; Act of Apr. 2, 1822, ch. 169, § 2, 1822 Pa. Acts 287. In 1834, Congress required the forfeiture of boats used in bringing wine or spirits into Indian country, and in 1864, it extended that provision to wagons and sleds. See Trade and Intercourse Act of 1834, ch. 161, § 20, 4 Stat. 732; Act of Mar. 15, 1864, ch. 33, 13 Stat. 29. Those statutes, this Court has remarked, show that "severe penalties" for bringing liq-

uor into Indian country date to "an early period of our history." *United States* v. *McGowan*, 302 U.S. 535, 538 (1938). Later, in the same month when the Fourteenth Amendment was ratified, Congress required the forfeiture of any "vehicle or animal used in carrying or conveying" spirits from an unlawful distillery, see Act of July 20, 1868, ch. 186, § 18, 15 Stat. 132, as well as any ship that smuggled spirits worth more than $400 into the newly acquired territory of Alaska, see Act of July 27, 1868, § 4, 15 Stat. 241.

Legislatures in the early twentieth century extended the instrumentality-forfeiture practice to cars and airplanes. During Prohibition, Congress required the forfeiture of any "vehicle," including any "air craft," used to transport liquor. Volstead Act, ch. 85, Tit. II, § 26, 41 Stat. 315. States generally included similar forfeiture provisions in their own prohibition laws. See Kenneth A. Murchison, *Property Forfeiture in the Era of National Prohibition*, 32 Buff. L. Rev. 417, 423 & n.24 (1983). And after the Twenty-First Amendment ended national Prohibition, Congress required the forfeiture of any "vehicle"—including any "means of transportation * * * through the air"—used to bring liquor into a dry State. Liquor Enforcement Act of 1936, ch. 815, §§ 2(b), 4, 49 Stat. 1928.

The practice has endured to the present. Federal law today requires the forfeiture of "every vehicle," including any "means of transportation * * * through the air," used to transport liquor in violation of federal commercial regulations. 18 U.S.C. 3667. It also requires the forfeiture of "[a]ny conveyance" used to introduce liquor "into the Indian country, or into other places where the introduction is prohibited by treaty or enactment of Congress." 18 U.S.C. 3669.

2. Forfeiture of an instrumentality traditionally does not depend on the relation between its value and the offender's conduct

Historical practice shows that the "unlawful use" of property is generally a sufficient basis for confiscating it. *Austin* v. *United States*, 509 U.S. 602, 627 (1993) (Scalia, J., concurring in part and concurring in the judgment). Forfeiture of an instrumentality of a crime does not depend on an assessment of the value of the property or the relation between that value and the offender's conduct.

a. Traditionally, "the value of the property [used in a crime] is irrelevant to whether it is forfeited." *Austin*, 509 U.S. at 626 (Scalia, J., concurring in part and concurring in the judgment). At the founding, a vessel involved in a customs violation was forfeited whether it was a boat or a three-masted ship. See Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449, 1475 (2019). During Prohibition, a vehicle used to transport liquor was forfeited whether it was a "wheelbarrow" or a "Rolls Royce." *United States* v. *One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. 219, 237 (1939). Today, a defendant is not entitled to special protection from forfeiture simply because he chooses to use a Lamborghini, rather than a beat-up old jalopy, to transport drugs. In other words, "[s]cales used to measure out unlawful drug sales" are forfeitable "whether made of the purest gold or the basest metal." *Austin*, 509 U.S. at 627 (Scalia, J., concurring in part and concurring in the judgment).

That tradition reflects a core purpose of forfeiture: depriving offenders "of the instruments through which they might commit further crimes." *United States* v. *Cullen*, 979 F.2d 992, 994 (4th Cir. 1992). "Forfeiture of

conveyances that have been used—and may be used again—in violation of the" law "prevent[s] further illicit use of the conveyance." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-687 (1974). That objective has nothing to do with the value of the property. "So far as the public welfare is concerned, the Ferrari [used to carry drugs] is at least as harmful an instrumentality as the Chevette." *Cullen*, 979 F.2d at 995. If anything, property may be more valuable precisely because of features that make it more useful in crime—say, a "$14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs." *United States* v. *Chandler*, 36 F.3d 358, 364 (4th Cir. 1994), cert. denied, 514 U.S. 1082 (1995).

b. Forfeiture likewise does not depend on the details of the offender's conduct beyond the use of the conveyance. The historical laws discussed above did not make the propriety of instrumentality forfeitures contingent on an "'individualized assessment'" of the "the defendant's own wrongdoing." Pet. Br. 2, 34 (citation omitted). Nor did they leave the forfeiture to the discretion of the court. Instead, they provided that anyone who commits a given crime would forfeit a given instrumentality.

For instance, certain founding-era customs violations, such as importing liquor in casks of the wrong size or bearing the wrong marks, resulted in the mandatory forfeiture of the ship, even if the government lost only a few dollars in revenue and even if the ship was worth thousands. See Arlyck 1474-1475. In one case from 1795, a shipowner brought on board two casks of rum to sell to passengers traveling from Ireland to New York. See *id.* at 1475. Because the casks bore the wrong marks, the government sought forfeiture of the $12,000

ship—"a penalty more than 100 times greater than the duties owed" on the rum. *Ibid.* Other cases from the 1790s involved the forfeiture of an $11,550 ship for importing undersized casks containing beer worth $87.50; the forfeiture of a $6000 ship for importing undersized casks containing beer worth $240; and the forfeiture of a $2000 ship for importing undersized casks containing gin worth $14.84. See *id.* at 1475 n.155.

At most, early statutes accounted for the owner's mens rea, or the "overwhelming necessity" of the conduct. *Culley* v. *Marshall*, 601 U.S. 377, 400 (2024) (Gorsuch, J., concurring) (citation omitted). Some statutes allowed an owner to avoid forfeiture by showing that the violation "proceeded from accident or mistake." Collection Act of 1799, ch. 22, § 67, 1 Stat. 677. Others gave the Secretary of the Treasury discretion to grant relief if the owner's culpability did not rise to the level of "wilful negligence." Remission Act of 1790, ch. 12, § 1, 1 Stat. 123. And in the absence of express statutory language, courts construed forfeiture statutes to apply only if the property was misused with the "consent or connivance" of the owner or of "some person employed or trusted by him." *Peisch* v. *Ware*, 4 Cranch 347, 364 (1808) (Marshall, C.J.). Those limited practices, however, stopped far short of a freewheeling inquiry into other individual circumstances.

3. Because forfeiture here comports with historical practice, it is not excessive

a. The Alaska State Legislature has made the judgment that the transportation of alcohol to a dry village should be addressed, in part, by forfeiture of the "aircraft, vehicles, or vessels used" in the crime. Alaska Stat. § 04.16.220(a)(3). The state legislature at first made such forfeitures discretionary, but it determined

in 2004 that alcohol smuggling by air is such a serious problem that aircraft forfeitures should be mandatory. See 2004 Alaska Sess. Laws ch. 124, § 11.

Because an airplane used to fly alcohol to a dry village is unquestionably an instrumentality—*i.e.*, the "means by which an offense [i]s committed," *Bajakajian*, 524 U.S. at 333 n.8—its forfeiture fits within the general tradition of confiscating criminal instrumentalities. More specifically, the forfeiture carries on the tradition of confiscating conveyances used to unlawfully transport alcohol. Petitioner emphasizes (Br. 39) that his airplane is worth $95,000, but history shows that a conveyance used to transport alcohol is forfeitable whether it is a snowmobile or a luxury jet.

If anything, the forfeiture here is more moderate than others that have historically been permitted. Traditionally, an owner could forfeit his property because *someone else* "employed or trusted" by him used it to commit a crime. *Peisch*, 4 Cranch at 364. This Court has recognized, for instance, that an owner may forfeit a ship because the crew uses it for piracy, see *Harmony* v. *United States*, 2 How. 210, 234 (1844); that a landlord may forfeit a building because a lessee uses to run an illegal distillery, see *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 399 (1878); and that a leasing company may forfeit a yacht because a lessee uses it to transport marijuana, see *Calero-Toledo*, 416 U.S. at 690. *A fortiori*, a State may confiscate an airplane that the owner himself knowingly uses in a crime.

To the extent that history sometimes permitted an exception for an owner who was merely negligent, or who undertook an illegal act due to necessity, no such exception is at issue here. Petitioner's crime did not result from mere accident, inadvertence, or negligence, or

from someone else's use of his airplane without his consent or connivance. The jury instead found petitioner guilty of knowingly using his own airplane to violate the law. See Pet. App. 5a. And he does not claim that it was necessary to fly Budweiser to Beaver.

b. The forfeiture in this case differs in one respect from its forebears: it was collected in an *in personam* criminal prosecution against petitioner, see Pet. App. 14a, while historical instrumentality forfeitures were collected through *in rem* civil proceedings directed at the property, see *Bajakajian*, 524 U.S. at 329-332. The Court has stated that *in rem* forfeitures, including at least some instrumentality forfeitures, "were considered to occupy a place outside the domain of the Excessive Fines Clause" because they were "directed against 'guilty property'" and were "not considered punishment against the individual." *Id.* at 330-331. But the Court has also recognized that "statutory *in rem* forfeiture * * * historically ha[s] been understood, at least in part, as punishment" for "the owner." *Austin*, 509 U.S. at 618. And the *in rem/in personam* distinction makes no difference here.

As Justice Story recognized nearly two hundred years ago, even if historical "laws providing for *in rem* forfeiture of goods imported in violation of customs laws" "'truly deserve[d] to be called, remedial,'" they "in one sense 'impose[d] a penalty.'" *Bajakajian*, 524 U.S. at 331 (quoting *Taylor* v. *United States*, 3 How. 197, 210 (1845)). Laws that required the forfeiture of the instrumentalities used to transport such goods had an evident (albeit latent) penal aspect. Although such laws "ascrib[ed] to the property a certain personality," that anthropomorphism could not alone explain them. *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254

U.S. 505, 510 (1921). "To th[at] superstitious reason," "Blackstone add[ed] 'that such misfortunes are in part owing to the negligence of the owner and therefore, he is properly *punished* by such forfeiture.'" *Ibid.* (emphasis added)); see 1 William Blackstone, *Commentaries on the Laws of England* 291 (1765); see also *Calero-Toledo*, 416 U.S. at 686. As contemporaneous observers, including Chief Justice Marshall, were well aware, "inanimate matter can commit no offence," and the "mere wood, iron, and sails of the ship, cannot, of themselves, violate the law." *United States* v. *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,162) (Marshall, C.J.); see Beth A. Colgan, *Of Guilty Property and Civil/Remedial Punishment*, 3 J. Am. Const. Hist. 697, 712-739 (2025).

Because historical *in rem* instrumentality forfeitures served at least in part to punish, they are closely analogous to the punitive *in personam* forfeiture here. A well-established penalty does not become excessive—*i.e.*, "surpassing the usual, the proper, or a normal measure of proportion," *Bajakajian*, 524 U.S. at 335—just because the State chooses to collect it *in personam* rather than *in rem*.

c. To the extent that petitioner might contend that this Court's decision in *Bajakajian* requires that the Court simply ignore the volumes of history that support forfeiture in this case, such a contention would be misplaced. *Bajakajian* did not itself involve an instrumentality forfeiture, but instead an *in personam* forfeiture of the "subject of the crime": the entire $357,144 that the defendant was carrying, for failing to report that he was transporting more than $10,000 out of the country. 524 U.S. at 334 n.9; see *ibid.* ("The currency in question is not an instrumentality."). The Court's analysis was

divided into two parts, the first of which does not implicate any issue disputed in this case, and the second of which does not address whether historical *in rem* instrumentality forfeitures are relevant to the constitutionality of modern *in personam* ones.

The first part of the *Bajakajian*'s analysis concerned whether the *in personam* forfeiture there should be deemed a "fine," subject to the Excessive Fines Clause, because it "constitute[d] punishment." 524 U.S. at 330-334. In the course of that analysis, the Court suggested that at least some "traditional civil *in rem* forfeitures," including at least some instrumentality forfeitures, were "inapposite" to the classification of modern criminal forfeitures as fines "because such [*in rem*] forfeitures were historically considered nonpunitive. *Id.* at 330. The Court observed that the "theory behind" those *in rem* forfeitures "was the fiction that the action was directed against 'guilty property,' rather than against the offender himself," *id.* at 330, and deemed that distinction insufficient to support the classification of modern criminal forfeitures—whether of goods or instrumentalities—as nonpunitive, *id.* at 333-334. It is accordingly uncontested that the *in personam* forfeiture here should be treated as a fine.

The second part of the Court's analysis, which undertook a proportionality determination, did not dismiss traditional *in rem* forfeitures out of hand. To the contrary, it considered at length the government's "contention that the proportionality of full forfeiture is demonstrated by the fact that the First Congress enacted statutes requiring full forfeiture of goods involved in customs offenses or the payment of monetary penalties proportioned to the goods' value." *Bajakajian*, 524 U.S. at 340; see *id.* at 340-344. The Court's rationale for re-

jecting the comparison did not rest solely on the *in rem* nature of the historical proceedings, but instead on the purpose that the historical forfeitures were meant to serve. Unlike the forfeiture of the entire $357,144 that the defendant in *Bajakajian* was carrying, the early "goods" forfeitures "sought to vindicate the Government's underlying property right in customs duties," *id.* at 340, or "serv[ed] the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs duties," *id.* at 342. And a monetary exaction "that serves purely remedial purposes cannot be considered 'excessive.'" *Austin*, 509 U.S. at 622 n.14.

The traditional instrumentality forfeitures here, however, cannot be characterized simply as "remedies" for violating customs laws. Some of them were not attached to customs (or tax) laws at all, but were instead directed at the instrumentalities of other types of forbidden activities. See, *e.g.*, Nelson 2472 (describing forfeitures for gambling and unsafe gunpowder storage). And even the revenue-related ones were not directed at government losses. Instead, as explained above, see p. 17-18, *supra*, they had latent penal objectives. It is clear from their very nature, and the manner in which they were applied, that they were calibrated not to the amount of the government's loss (or presumed loss), but instead to serve the purposes of "preventing further illicit use" and "imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo*, 416 U.S. at 687; see *United States* v. *The Brig Burdett*, 9 Pet. 682, 690 (1835) ("forfeiture of the vessel * * * for a violation of a revenue law * * * is * * * highly penal").

Nothing in *Bajakajian* compels a court to willfully blind itself to the historical tradition of considering instrumentality forfeitures an appropriate response to

the use of property—of whatever value—to violate the law. While *Bajakajian* noted that some "early customs statutes" required forfeiture not just of "goods" but of "the vessels carrying them as well," its analysis focused exclusively on the goods. 524 U.S. at 340 (citing only examples involving forfeiture of "goods"). That is presumably because the Court considered the only possible analogue for the defendant's "[c]ash in a suitcase" to be smuggled goods that are likewise the "subject of the crime." *Id.* at 334 n.9. The airplane here, however, is an "instrumentality" of a crime, like "an automobile" or ship that "facilitates the transportation of goods concealed to avoid taxes," *ibid.*, and appropriately evaluated in light of the history of similar forfeitures.

B. Forfeiture Of Petitioner's Airplane Also Satisfies General Standards Of Proportionality

While history provides a sufficient basis for the forfeiture of petitioner's airplane, the forfeiture would also be valid under the general proportionality standard applied in *Bajakajian*. See 524 U.S. at 334-344. That standard draws guidance from the Court's "Cruel and Unusual Punishments Clause precedents," and requires only avoiding "gross" disproportionality, not achieving "strict" proportionality. *Id.* at 336. Accordingly, it is satisfied so long as the fine "bear[s] some relationship to the gravity of the offense that it is designed to punish." *Id.* at 334. And in making that assessment, the prescribed amount of the fine receives "'substantial deference,'" because "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 336 (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 (1983)). There is no sound basis to reject the Alaska legislature's judgment here.

1. Proportionality review of a mandatory forfeiture requires that any individualized circumstances be viewed in light of systemic legislative objectives

As described in *Bajakajian*, the excessiveness inquiry "must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Bajakajian*, 524 U.S. at 336-337. That deferential standard recognizes both "'the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes'" and the "inheren[t] imprecis[ion]" of "judicial determination regarding the gravity" of an offense. *Id.* at 336 (citation omitted). Accordingly, while individualized circumstances of an offender's conduct can be relevant, their relevance and weight must be considered in relation to the legitimate legislative objectives of a penalty—especially a mandatory one.

a. The legislature here prescribed a mandatory penalty, requiring forfeiture of any "aircraft" "used to transport" alcohol to a dry village. See Alaska Stat. §§ 04.16.220(a)(3) and (i). As the Court's Cruel and Unusual Punishments Clause precedents recognize, legislatures may choose mandatory, determinate sentences rather than discretionary, individualized sentences. See *Harmelin* v. *Michigan*, 501 U.S. 957, 994-996 (1991); *Chapman* v. *United States*, 500 U.S. 453, 466-467 (1991). Indeed, determinate sentencing was the norm for death or term-of-years sentences at the founding; individualized sentencing is largely a more modern development. See *United States* v. *Grayson*, 438 U.S. 41, 45-46 (1978).

The Court's Cruel and Unusual Punishments Clause precedents also emphasize that proportionality review requires "a comprehension of all that the legislature did

or could take into account, that is, a consideration of the mischief and the remedy." *Weems* v. *United States*, 217 U.S. 349, 379 (1910). The Court has accordingly upheld a mandatory sentence of life in prison without parole for possessing 672 grams of cocaine in large part because "drugs represent 'one of the greatest problems affecting the health and welfare of our population.'" *Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment) (citation omitted). The Court has also upheld a mandatory sentence of 25 years to life in prison for a recidivist felon, even though his most recent conviction was for stealing three golf clubs, largely because "[r]ecidivism is a serious public safety concern." *Ewing* v. *California*, 538 U.S. 11, 26 (2003) (plurality opinion).

b. While *Bajakajian* demonstrates that "the gravity of the defendant's offense" is relevant to the proportionality of a mandatory forfeiture, 524 U.S. at 337, giving significant weight to individual circumstances when reviewing the proportionality of a mandatory penalty would subvert the principle that a "sentencing scheme providing for 'individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.'" *Chapman*, 500 U.S. at 467; see *Bajakajian*, 524 U.S. at 325 (statute required full forfeiture of all unreported currency). The relevance of individual circumstances will depend, in particular, on what the forfeiture is intended to accomplish. See *Ewing*, 538 U.S. at 29 ("[P]roportionality review * * * must take [the penalty's] goal into account."); 4 Blackstone 12 (1769) ("[P]unishment ought always to be proportioned to the particular purpose it means to serve.").

In *Bajakajian*, for example, the government asserted a "correlation between the amount forfeited and

the harm that the Government would have suffered had the crime" of unreported currency transportation "gone undetected." 524 U.S. at 339. But other types of mandatory forfeitures may have other goals. Here, for example, the Alaska legislature made a specific judgment that "aircraft" used to transport alcohol to a dry community should be forfeited. Alaska Stat. § 04.16.220(a)(3). One obvious goal of requiring forfeiture of that specific instrumentality is to eliminate the possibility that the aircraft will be used for additional alcohol smuggling. See *Calero-Toledo*, 416 U.S. at 687. Individual circumstances may be more or less relevant to those or other particular "mischief[s]" and "remed[ies]," *Weems*, 217 U.S. at 379, that are the subject of the legislation.

2. Forfeiture of petitioner's airplane is not grossly disproportionate to his offense

Applying those principles to the circumstances of this case, forfeiture of petitioner's airplane was not grossly disproportionate to his offense. The penalty is substantial, but so is the problem that the penalty aimed to address. And petitioner's conduct was not so innocuous as to support a constitutional exemption from the Alaska legislature's judgment.

a. The legislature enacted the local-option law in 1980 after considering studies showing that one in ten Alaskans was an alcoholic, that Alaska's alcoholism mortality rate was more than four times the national average, and that alcohol consumption in Alaska had risen at twice the national rate. See *Harrison* v. *State*, 687 P.2d 332, 335 (Alaska Ct. App. 1984). The legislature also found that "the dangers resulting from alcohol abuse are particularly acute in rural areas of the state because the communities are small, isolated, without adequate law enforcement, without adequate health

care facilities, and populated by people who are closely related and interdependent." 1986 Alaska Sess. Laws ch. 80, § 1(6).

Such rural areas—including Beaver—may be unreachable by means other than airplanes or other specialized vehicles, making it particularly important that the operators of such vehicles respect the State's dry laws and the local community's uncompromising effort to avoid the possibility of alcohol abuse. Forfeiture of petitioner's airplane ensures that the plane will not be used in the future to violate Beaver's, or some other community's, considered choice to live alcohol-free. The other penalties attached to the crime confirm the appropriateness of the penalty. Petitioner faced a maximum of one year of imprisonment, see Pet. App. 34a—a term significant enough to trigger the right to trial by jury, see *Blanton* v. *North Las Vegas*, 489 U.S. 538, 542 (1989). His air-taxi company, which was not subject to jail time, faced a maximum fine of $500,000, see Pet. App. 7a n.10—more than five times the value of the airplane.

The severity of the penalty also reflects the difficulty of detecting petitioner's crime. "Alaska has always been a vast and thinly populated region where it is difficult for law enforcement officers to detect and prevent smuggling." Pet. App. 77a (Mannheimer, J., concurring in part and dissenting in part). "[S]ince deterrent effect depends not only upon the amount of the penalty but upon its certainty," a crime that is "less grave but significantly more difficult to detect" often warrants "substantially higher penalties." *Harmelin*, 501 U.S. at 989 (opinion of Scalia, J.). Nor is petitioner an innocent owner. Although Alaska law would allow forfeiture for merely negligent conduct, the jury here found that petitioner knowingly used his own airplane to violate the

law. See Pet. App. 5a. That in itself raises at least the possibility of prior undetected conduct, as well as the possibility of its continuation.

Finally, as discussed above, the forfeiture here bears the endorsement of history. See pp. 9-21, *supra*. Even if history is not dispositive, a court should hesitate to conclude that a consequence as old as the Republic—the forfeiture of a conveyance involved in smuggling—is grossly disproportionate.

b. Petitioner argues (Br. 1-2) that the forfeiture was excessive because he was a first-time offender and was (he says) aware of only the six beers that were clearly visible to him, not all 72 beers on the airplane. See Pet. App. 24a-25a. But Alaska's statutory scheme embodies a considered legislative determination that the types of facts that petitioner emphasizes—the quantity of alcohol and lack of a prior record—should not affect forfeiture of an aircraft. Particularly because "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise," *Bajakajian*, 524 U.S. at 336, petitioner presents no sound reason to substitute an amorphous judicial line-drawing exercise in place of the Alaska legislature's considered judgment.

Alaska distinguishes between misdemeanor and felony transportation of alcohol based on how much alcohol is involved and whether the offender has a prior record, see Alaska Stat. § 04.16.200(e), but it has made aircraft forfeiture mandatory even for the misdemeanor, see *id.* § 04.16.220(a)(3)(C). Further, while Alaska has made forfeiture of aircraft mandatory across the board, it has required forfeiture of vehicles or watercraft only when the offender has a prior record or the quantity of alcohol exceeds specified thresholds. See *id.* § 04.16.220(i). Ve-

hicle and watercraft forfeitures, but not aircraft forfeitures, are also subject to an exception for cases where "the vehicle or watercraft is the sole means of transportation for a family." *Id.* § 04.16.220(j)(1). That design shows that the legislature viewed "aircraft-facilitated importation as more severe than other methods of unlawful importation." Pet. App. 22a. Even if an airplane owner has never been caught before, the airplane is what enabled the crime (as well as any past undiscovered and possible future crimes). And even assuming that a six-pack would not itself cause drunkenness in a Beaver resident unaccustomed to alcohol, it could have other ill effects, such as whetting a recovering alcoholic's taste for liquor. A community's decision to be completely dry is not a half-measure.

c. Any comparison between the circumstances here and the circumstances in *Bajakajian*, which found forfeiture of the entire $357,144 to be excessive, is inapt. This case involves a more precise, more squarely applicable legislative judgment than *Bajakajian*: forfeiture not of the amount of currency that the violator of a reporting requirement happened to be carrying, but of an airplane that, whatever its value, was used and is capable of being used again to illegally transport alcohol.

The defendant in *Bajakajian* also "d[id] not fit into the class of persons for whom the statute was principally designed." 524 U.S. at 338. "He [was] not a money launderer, a drug trafficker, or a tax evader," but instead planned to use the currency "to repay a lawful debt." *Ibid.* Here, in contrast, the Alaska judiciary has made clear that "a pilot knowingly transporting a passenger's alcohol to a dry village is precisely the kind of person and conduct that the legislature was concerned about." Pet. App. 26a. The Alaska legislature has ac-

cordingly required the forfeiture of an airplane that was used to engage in substantive conduct that, in the legislature's judgment, threatens serious societal harm.

C. Petitioner's Near-Exclusive Reliance On Cases Involving Fines, Rather Than Instrumentality Forfeitures, Is Misplaced

Petitioner relies almost exclusively (Br. 20-32) on the history of monetary fines in arguing that the forfeiture of his airplane is excessive. But this case involves an instrumentality forfeiture, not a monetary fine. Given the historical and functional differences between such penalties, the "excessiveness analysis" for instrumentality forfeitures "must be different from that applicable to monetary fines." *Austin*, 509 U.S. at 627 (Scalia, J., concurring in part and concurring in the judgment). Historically, amounts of monetary fines were usually left to the discretion of courts. Blackstone wrote that, because the "value of money" changes and because "what is ruin to one man's fortune, may be [a] matter of indifference to another's," the amounts of "pecuniary fines" could not be "ascertained by any invariable law." 4 Blackstone 371. Such fines accordingly pose risks of abuse that mandatory instrumentality forfeitures do not.

For example, the English Bill of Rights' excessive-fines provision, from which our Excessive Fines Clause descends, was adopted largely in response to the Stuart kings' use of exorbitant fines to target parliamentary critics and religious dissidents. See *Timbs* v. *Indiana*, 586 U.S. 146, 152 (2019). One member of Parliament complained that "Men have been fined, not according to their Crimes, but their Principles: Sometimes because they have been Protestants." 8 *Debates of the House of Commons, From the Year 1667 to the Year 1694*, at 228 (Anchitell Grey ed., 1763). In contrast, prosecutors and

courts do not control the amount of an instrumentality forfeiture, so they cannot increase that amount based on the offender's identity.

By the same token, monetary fines, but not instrumentality forfeitures, are capable of causing "a shock to the offender who learns the severity of his sentence only after he commits the crime." *Harmelin*, 501 U.S. at 1008 (Kennedy, J., concurring in part and concurring in the judgment). To take one of petitioner's examples (at 26-27), when the Earl of Devonshire assaulted Thomas Culpeper in 1687, he had no way to anticipate that a court would fine him £30,000. Instrumentality-forfeiture laws, however, provide clear warning: if you use something to commit a crime, then that thing will be forfeited. An offender who knowingly uses a valuable asset in his offense has only himself to blame for the value of the forfeiture.

The potential for a fine beyond a defendant's means has also historically led to abuses that have no analogue in an instrumentality forfeiture. In England, offenders could be jailed until they paid their fines, prompting Blackstone to remark that "fines in the king's court are frequently denominated ransoms" and that "a stated imprisonment" "is better than an excessive fine, for that amounts to imprisonment for life." 4 Blackstone 373. Similarly, after the Civil War, southern States imposed draconian fines for violations of the Black Codes and demanded involuntary labor from those who could not pay. See *Timbs*, 586 U.S. at 153. Instrumentality forfeitures do not raise such concerns, "for of necessity the [property] is there to satisfy the forfeiture." *Bajakajian*, 524 U.S. at 355 (Kennedy, J., dissenting).

Finally, the penalties pursue different objectives. Monetary fines generally seek retribution and deter-

rence. See *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). But they do not have the same incapacitative rationale as instrumentality forfeitures, which "remov[e] the instrument[s] through which" the law has been violated. *Cullen*, 979 F.2d at 994. Even if a $95,000 monetary fine would not be justified by retribution and deterrence alone, forfeiture of petitioner's airplane is justified by the goal of preventing its use for further crimes.

Petitioner errs in suggesting (Br. 32-37) that all those differences—and a volume of history besides, see pp. 9-21, *supra*—must be disregarded, lest forfeitures go unchecked. History would not support the confiscation of a car involved in a civil traffic violation, such as "going five miles over the speed limit." Pet. Br. 2. Nor would history support seizing the lawful cargo in petitioner's airplane, or the airport from which the airplane took off. See *Culley*, 601 U.S. at 399 (Gorsuch, J., concurring). But it does support forfeiture of petitioner's airplane. Such forfeiture is accordingly constitutional.

CONCLUSION

The judgment of the Supreme Court of Alaska should be affirmed.

Respectfully submitted.

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