No. 17-________

In The

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

**On Petition For A Writ Of Certiorari
To The Indiana Supreme Court**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are Tyson Timbs and his 2012 Land Rover LR2. Respondent is the State of Indiana. Additional plaintiffs before the trial court were the J.E.A.N. Team Drug Task Force, the Marion Police Department, and the Grant County Sheriff's Department.

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INTRODUCTION

This case presents an unsettled question of national importance: whether the Excessive Fines Clause of the Eighth Amendment is incorporated against the States. Although the majority of state and federal courts to consider this question have applied the Clause to the States, a growing minority of state courts have chosen not to. The Indiana Supreme Court in this case aligned itself with that minority view, relying on a sentence of "dicta" from *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), while acknowledging an open break with other jurisdictions. *See* App. 8-9. Unless and until this Court "authoritatively" holds that the Excessive Fines Clause is incorporated against the States, the Indiana Supreme Court announced that it would "decline to find or assume incorporation"—or even engage with the incorporation analysis. App. 8.

The Indiana Supreme Court's decision deepens a growing divide on the question presented. Although two Circuits and at least 14 state high courts apply the Excessive Fines Clause to the States, a minority of courts—in Montana, Mississippi, Michigan, and now Indiana—believe that the Clause does not apply. And despite their "coordinate responsibility" to give effect to federally protected rights, *Howlett* v. *Rose*, 496 U.S. 356, 367 (1990), each of these jurisdictions has written off the Excessive Fines Clause without evaluating this Court's incorporation precedent. As a result, Petitioner Tyson Timbs—along with the 6.6 million residents of Indiana and more than 13 million residents of the three other minority jurisdictions—enjoys Eighth

Amendment protection against fines and forfeitures imposed by the federal government but not against those imposed by state and local authorities. *See generally Austin* v. *United States*, 509 U.S. 602, 621-22 (1993) (holding that the Excessive Fines Clause applies to civil forfeitures imposed by the federal government).

Beyond exacerbating a split of authority, the Indiana Supreme Court's decision also breaks with this Court's precedent. The Eighth Amendment embodies three "parallel limitations" on the government's power to punish: the Cruel and Unusual Punishments Clause, the Excessive Bail Clause, and the Excessive Fines Clause. *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989) (quoting *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977)). Together, these Clauses operate to secure a single, fundamental right to be free from excessive punishments. For that reason, this Court has repeatedly observed that the three Clauses are incorporated in equal measure against the States. *See*, *e.g.*, *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014); *Cooper Indus.* v. *Leatherman Tool Grp.*, 532 U.S. 424, 433-34 (2001); *Thompson* v. *Oklahoma*, 487 U.S. 815, 819 n.1 (1988) (plurality opinion). And by any measure, the Excessive Fines Clause is deeply rooted in our nation's legal tradition, making it an obvious candidate for incorporation.

Moreover, the question presented is especially pressing today. As disagreement among courts has deepened, fines and forfeitures have exploded at the state and local levels. Civil forfeiture in particular—

the basis for this case—is now "widespread and highly profitable," causing "egregious and well-chronicled abuses." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). State and local governments "have strong incentives to pursue forfeiture" in part because "many States permit 100 percent of forfeiture proceeds to flow directly to law enforcement." *Id.* Additionally, prosecutors enjoy procedural advantages in civil-forfeiture cases—for example, no criminal conviction is needed, the standard of proof is lower than in criminal cases, and property owners have no right to appointed counsel. And in Indiana, prosecutors sometimes have a *personal* financial stake in civil forfeiture because in many cases—including this one—the government farms out forfeiture prosecutions to private lawyers on a contingency-fee basis. The impulse to use economic sanctions "for raising revenue in unfair ways" could hardly be stronger. *See Browning-Ferris Indus.*, 492 U.S. at 272.

This Court has recognized that the Excessive Fines Clause is an essential check on the government's tendency to "use[] the civil courts to extract large payments or forfeitures for the purpose of raising revenue." *Id.* at 275. But that protection carries little weight if state courts can "decline" to apply it, as the Indiana Supreme Court did here. *See* App. 9. Only this Court can resolve the inherently national question whether the Excessive Fines Clause is incorporated

against all 50 States. Because this case is an ideal vehicle for doing so, the Court should grant certiorari.

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at 84 N.E.3d 1179. *See* App. 1-12. The opinion of the Indiana Court of Appeals is reported at 62 N.E.3d 472. *See* App. 13-26. The opinions of the Grant County Superior Court are unpublished, but included in the Appendix at App. 27-34.

JURISDICTION

The Indiana Supreme Court entered judgment on November 2, 2017. *See* App. 1. Petitioners request a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. After his father died, in the winter of 2012, Petitioner Tyson Timbs ("Petitioner") received around $73,000 in life-insurance proceeds. He used $41,558.30 to buy a car—the Land Rover LR2 at issue in this case.

At the time, Petitioner had recently moved to Marion, Indiana, to live with an aunt while he worked on rebuilding his life. Back home in St. Mary's, Ohio, he had become addicted to hydrocodone—an opioid medication prescribed to him for a work-related injury. When he could no longer find pills on the street, he began using heroin.

For a short time in Marion, Petitioner overcame his addiction. But following his father's death, he began using heroin again. With a new Land Rover and more than $31,000 left to spend, Petitioner began driving the vehicle to Richmond, Indiana, and Ohio—sometimes on a daily basis—to buy heroin for his personal use.

His money soon ran out, and Petitioner began looking for new ways to fund his addiction. With the help of a confidential informant, he arranged several drug transactions with undercover officers. On the first such occasion, Petitioner drove across Marion in

the Land Rover and sold officers two grams of heroin for $225. Hrg. Tr. 26:25-27:02 (July 15, 2015). A few days later, he walked from his aunt's house to a nearby gas station, where he sold officers another two grams for $160. Hrg. Tr. 29:16-29:20. While driving to a third transaction, Petitioner was pulled over and arrested. No drugs were found in the vehicle (apart from a prescription pill in the pocket of Petitioner's traveling companion). The Land Rover was seized.

The State of Indiana charged Petitioner with two counts of dealing in a Schedule I controlled substance (a class B felony, *see* Ind. Code § 35-48-4-2(a)(1)(C)) and one count of felony conspiracy to commit theft (a class D felony, *see id.* § 35-43-4-2(a)).[1]

Petitioner pleaded guilty to one count of dealing and to the count of conspiracy to commit theft. The trial court sentenced him to six years, with the first year to be served in home detention and the remaining five years on probation. Petitioner agreed to attend an addiction-treatment program under court supervision. He also agreed to pay police costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50,

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[1] In a post-arrest interview, detectives asked why Petitioner and his companion had no heroin in the Land Rover at the time of their arrest, given they were traveling to a meeting at which undercover officers expected to buy heroin. Petitioner told them, "we thought about maybe just pulling up and, if he would've gave me the money, just driving away . . . I'm not really sure what we were going to do." State's Trial Ex. 1 at 19:23-20:00, 21:03-21:25. These statements appear to have been the basis for Petitioner's theft charge.

and a $400 fee for undergoing a drug-and-alcohol assessment with the probation department.

2. Several months after Petitioner's arrest, a private law firm filed a case to forfeit his vehicle on behalf of the State. The complaint "referred only to May 31, 2013"—the date on which Petitioner was arrested while driving to the unconsummated third transaction with officers. *See* App. 21.

Following Petitioner's conviction, the trial court held an evidentiary hearing on the State's forfeiture request. The court found that Petitioner purchased the Land Rover legally using life-insurance proceeds but used the vehicle to "transport . . . heroin back to Marion." App. 28 ¶¶ 2-3. Based on the record, the court determined that forfeiture would be "grossly disproportional to the gravity of [Petitioner's] offense" and thus unconstitutional under the Eighth Amendment's Excessive Fines Clause, App. 29-30 ¶¶ 6-9. "While the negative impact on our society of trafficking in illegal drugs is substantial," the court acknowledged, "a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to [Petitioner's] illegal conduct." App. 30 ¶ 9.

3. A divided panel of the Indiana Court of Appeals affirmed. App. 13-26. The court concluded that "[t]he United States Supreme Court has yet to hold that the Excessive Fines Clause is applicable to the States." App. 17-18 n.4 (citing *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)). Based on its own precedent, however, the court held

that the Clause applies in state forfeiture proceedings. App. 17-18 n.4 (citing *$100* v. *State*, 822 N.E.2d 1001, 1011 (Ind. Ct. App. 2005)).

After conducting the proportionality assessment required under this Court's excessive-fines precedent, the court of appeals affirmed that forfeiture of Petitioner's vehicle would be unconstitutionally excessive. App. 20 (citing *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998)). The court compared the value of the Land Rover (about $40,000) to the maximum criminal penalty that could be imposed for Petitioner's offense ($10,000). App. 20-21.[2] The court considered the "financial burdens [that] had already been imposed on [Petitioner] when he pleaded guilty." App. 21. It further concluded that the State's request for forfeiture was based on a single, unconsummated sale of heroin on May 31, 2013. App. 21. "If the State wished to seek forfeiture of the Land Rover based on [Petitioner's] other criminal acts," the court reasoned, "it should have done so more clearly in its forfeiture complaint." App. 21-22. Regardless, the court observed, "the only evidence before the trial court was that [Petitioner] sold heroin twice, both times as a result of controlled buys." *See* App. 22 (noting that "[t]he remaining times he transported heroin, it was apparently for his own use"). Based on this record, the court affirmed that

[2] Indiana sets a uniform $10,000 maximum fine for every class of felony. *See* Ind. Code §§ 35-50-2-4 to -7.

"[f]orfeiture of the Land Rover . . . was grossly disproportionate to the gravity of [Petitioner's] offense." App. 24.[3]

4. The Indiana Supreme Court granted review and unanimously reversed. App. 1-12. Surveying decisions that have addressed the incorporation of the Excessive Fines Clause, App. 5-7, the court concluded that this Court "has never held that the States are subject to the Excessive Fines Clause," App. 5. Given the "lack of clear direction from the Supreme Court," the court "decline[d] to find or assume incorporation." App. 8. Because this Court has not "decide[d] the issue authoritatively," the Indiana Supreme Court believed that no incorporation analysis was warranted. App. 8. Citing Indiana's status as "a sovereign state within our federal system," the court held that it would not "impose federal obligations on the State that the federal government itself has not mandated." App. 9.

The Indiana Supreme Court acknowledged that its holding broke from the weight of authority. *See* App. 8. The court further acknowledged that "our colleagues on the Court of Appeals and the trial court may be correct in foretelling where the Supreme Court will one

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[3] The dissenting court-of-appeals judge agreed that "the Excessive Fines Clause of the Eighth Amendment may come into play in a forfeiture case," App. 25, but disagreed that forfeiture of Petitioner's Land Rover would be excessive, App. 26. Like the trial court, the court-of-appeals majority addressed the Excessive Fines Clause alone, noting that Petitioner did not raise the separate protection against excessive fines under the Indiana Constitution. *See* App. 18 n.4 (citing Ind. Const. art. I, § 16).

day lead on whether to apply the Clause to the States." App. 9-10. Nonetheless, the court declined to apply the Excessive Fines Clause absent further instruction from this Court.

REASONS FOR GRANTING THE PETITION

Four Terms ago, this Court remarked—correctly—that all three Clauses of the Eighth Amendment apply to the States: "The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,'" and "[t]he Fourteenth Amendment applies those restrictions to the States." *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014). The Court has reaffirmed the same principles on a half-dozen other occasions: in 2008, *Kennedy* v. *Louisiana*, 554 U.S. 407, 419; *Baze* v. *Rees*, 553 U.S. 35, 47 (plurality opinion); in 2005, *Roper* v. *Simmons*, 543 U.S. 551, 560; in 1991, *Harmelin* v. *Michigan*, 501 U.S. 957, 962 (opinion of Scalia, J.); in 1988, *Thompson* v. *Oklahoma*, 487 U.S. 815, 819 n.1 (plurality opinion); and in 1987, *Booth* v. *Maryland*, 482 U.S. 496, 501 n.5, *overruled on other grounds*, *Payne* v. *Tennessee*, 501 U.S. 808 (1991). Put simply, "the Fourteenth Amendment . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus.* v. *Leatherman Tool Grp.*, 532 U.S. 424, 433-34 (2001).

The Indiana Supreme Court nonetheless concluded that this Court has been insufficiently "definitive" on the incorporation of the Excessive Fines Clause. App. 9. For that reason, it "decline[d] to find or assume incorporation until the Supreme Court decides the issue authoritatively." App. 8. The court reached this conclusion based on what it labeled "dicta" in *McDonald* v. *City of Chicago*—in which this Court addressed incorporation of the Second Amendment, not the Eighth. *See* App. 8-9. Indiana thus aligned itself with a growing minority of jurisdictions that decline to apply the Excessive Fines Clause when state and local authorities impose economic sanctions.

Given the surge in punitive fines and forfeitures at the state and local levels, the issue of the Clause's incorporation is more pressing now than ever. Only this Court can answer the inherently national question of incorporation, and this case presents the ideal vehicle for resolving that question.

I. The Indiana Supreme Court's decision deepens an existing conflict over whether the Excessive Fines Clause applies to the States.

The Indiana Supreme Court's decision turned on what it called a "lack of clear direction" from this Court. App. 8. While acknowledging that other courts "have either applied the Excessive Fines Clause to challenged state action or assumed without deciding that the Clause applies," the court elected to "await

guidance" from this Court. App. 8. This decision deepens an existing split over whether state courts are required to enforce the federal protection against excessive fines under the Eighth and Fourteenth Amendments.

In large part, this growing divide stems from what state courts—and lower federal courts—have perceived as mixed signals from this Court. In 1989, for example, this Court suggested that it had yet to "decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment." *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22. Twelve years later, however, the Court remarked that "the Due Process Clause of the Fourteenth Amendment . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus.*, 532 U.S. at 433-34. But in 2010, the Court noted that "[w]e never have decided whether . . . the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause." *McDonald* v. *City of Chicago*, 561 U.S. 742, 765 n.13. At other times, the Court has observed that all three Clauses of the Eighth Amendment apply to the States equally. *See, e.g.*, *Hall*, 134 S. Ct. at 1992; *Kennedy*, 554 U.S. at 419; *Baze*, 553 U.S. at 47 (plurality opinion).

These conflicting statements have left state and federal courts split, leading to "a surprising amount of confusion as to whether the Excessive Fines Clause has been incorporated against the states." *Reyes* v. *N.*

Tex. Tollway Auth., 830 F. Supp. 2d 194, 206 (N.D. Tex. 2011). The majority of courts that have addressed the issue have applied the Clause to the States (Section A, *infra*). A lopsided minority—now including Indiana—have declined to do so (Section B, *infra*).

A. Two Circuits and at least 14 state high courts apply the Excessive Fines Clause to the States.

The Eighth and Ninth Circuits have applied the Excessive Fines Clause to the States. So, too, have the high courts of Alabama, California, Delaware, Georgia, Idaho, Illinois, Kentucky, Massachusetts, Minnesota, Nevada, Ohio, Pennsylvania, Utah, and West Virginia.

These courts view the matter as beyond serious dispute. In *Qwest Corp.* v. *Minnesota Public Utilities Commission*, 427 F.3d 1061 (8th Cir. 2005), for example, the Eighth Circuit reviewed a local exchange carrier's challenge to a state agency's $25.95-million penalty. Drawing on *Cooper Industries*, the court held that "[t]he Eighth Amendment's prohibition of excessive fines applies to the states through the Due Process Clause of the Fourteenth Amendment." *Id.* at 1069 (citing *Cooper Indus.*, 532 U.S. at 433-34). Likewise in *Wright* v. *Riveland*, 219 F.3d 905 (9th Cir. 2000), the Ninth Circuit held that a Washington statute authorizing deduction of inmate funds "is punitive and subject to Eighth Amendment scrutiny" under the Excessive Fines Clause. *Id.* at 915. And two other

Circuits—the Fifth and the Seventh—have frequently remarked on the "open question" of incorporation before forging ahead on the assumption that the Excessive Fines Clause applies to the States. *Simic* v. *City of Chicago*, 851 F.3d 734, 739 (7th Cir. 2017); *see also Cripps* v. *La. Dep't of Agric. & Forestry*, 819 F.3d 221, 234 (5th Cir.), *cert. denied*, 137 S. Ct. 305 (2016); *Disc. Inn, Inc.* v. *City of Chicago*, 803 F.3d 317, 319-20 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1209 (2016); *Vanderbilt Mortg. & Fin.* v. *Flores*, 692 F.3d 358, 374 & n.14 (5th Cir. 2012); *Broussard* v. *Par. of Orleans*, 318 F.3d 644, 652 (5th Cir. 2003).[4]

At the state-court level—where judicial review of state and local fines normally occurs—at least 14 state courts of last resort have applied the Excessive Fines Clause to the States:

Alabama. The Alabama Supreme Court holds that "[t]he forfeiture provisions of our Code are subject to the Excessive Fines Clauses of the Alabama Constitution, Art. I, § 15, and the Eighth Amendment to the

[4] The Tenth Circuit appears to have taken both sides of the issue. In 1998, the court analyzed the forfeiture of a state pension under the Excessive Fines Clause, rejecting the constitutional claim without commenting on incorporation. *See Hopkins* v. *Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1162-63. But, in a recent unpublished decision, the court affirmed the dismissal of a *pro se* appeal in part because "the Excessive Fines Clause has never been incorporated by the Fourteenth Amendment and applied to the states." *Garcia* v. *Wyoming*, 587 F. App'x 464, 469 (10th Cir. 2014).

United States Constitution." *Ex parte Kelley*, 766 So. 2d 837, 840 (Ala. 1999).

California. The California Supreme Court likewise recognizes that "[t]he Due Process Clause of the Fourteenth Amendment to the Federal Constitution . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420 (Cal. 2005), *as modified* (Jan. 18, 2006) (quoting *Cooper Indus.*, 532 U.S. at 433-34).

Delaware. Answering certified questions, the Delaware Supreme Court has held that "it is clear that civil forfeitures imposed pursuant to Delaware law are subject to the constraints of the Excessive Fines Clause of the Eighth Amendment." *In re 1982 Honda*, 681 A.2d 1035, 1039 (Del. 1996).

Georgia. Answering certified questions, the Georgia Supreme Court has held that "[t]he prohibition against excessive fines of the Eighth Amendment does apply to civil in rem forfeitures under [the State's civil-forfeiture law]." *Thorp* v. *State*, 450 S.E.2d 416, 417 (Ga. 1994), *abrogated on other grounds by Howell* v. *State*, 656 S.E.2d 511 (Ga. 2008).

Idaho. The Idaho Supreme Court "has decided that the Eighth Amendment's prohibition on 'excessive fines' applies to civil *in rem* forfeitures brought under [the State's civil-forfeiture law]." *Idaho State Police ex rel. Russell* v. *Real Prop.*, 156 P.3d 561, 564 (Idaho 2007).

Illinois. The Illinois Supreme Court holds that the Excessive Fines Clause applies to state-law forfeitures. *People ex rel. Waller* v. *1989 Ford F350 Truck*, 642 N.E.2d 460, 466 (Ill. 1994); *see also id.* ("[W]e remand with instructions for the circuit court to expressly consider and determine the excessive fine issue.").

Kentucky. The Kentucky Supreme Court has recognized that "a punitive forfeiture is subject to scrutiny to determine if it violates the 'excessive fines' clauses of the Eighth Amendment to the United States Constitution and section 17 of our Constitution, which contain identical language." *Commonwealth* v. *Fint*, 940 S.W.2d 896, 897-98 (Ky. 1997) (internal citation omitted).

Massachusetts. The Supreme Judicial Court of Massachusetts holds that "[t]he due process clause of the Fourteenth Amendment to the United States Constitution 'makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States.'" *Pub. Emp. Ret. Admin. Comm'n* v. *Bettencourt*, 47 N.E.3d 667, 672 n.7 (Mass. 2016) (quoting *Cooper Indus.*, 532 U.S. at 433-34).

Minnesota. The Minnesota Supreme Court has invalidated fines under "the Excessive Fines Clauses of the United States and Minnesota Constitutions" alike. *State* v. *Rewitzer*, 617 N.W.2d 407, 415 (Minn. 2000); *see also Wilson* v. *Comm'r of Revenue*, 656 N.W.2d 547, 557 (Minn. 2003).

Nevada. The Nevada Supreme Court holds that the Excessive Fines Clause places limits on state-law forfeitures. *Levingston* v. *Washoe Cty.*, 916 P.2d 163, 169 (Nev. 1996) ("While we conclude that excessive fines analysis applies to civil forfeiture actions, insufficient evidence was presented to the district court to determine whether [the government's] forfeiture of the 10th Street home violated the Excessive Fines Clause."), *opinion modified on reh'g on other grounds*, 956 P.2d 84 (Nev. 1998).

Ohio. The Ohio Supreme Court "hold[s] that forfeiture of property, pursuant to [the State's civil-forfeiture law], is a form of punishment for a specified offense and, therefore, is a 'fine' for purposes of Section 9, Article I of the Ohio Constitution and the Eighth Amendment to the United States Constitution." *State* v. *Hill*, 635 N.E.2d 1248, 1256 (Ohio 1994).

Pennsylvania. The Pennsylvania Supreme Court holds that "[t]he Eighth Amendment, and, specifically, the Excessive Fines Clause, is made applicable to the states through the Fourteenth Amendment to the United States Constitution." *Commonwealth* v. *1997 Chevrolet*, 160 A.3d 153, 162 n.7 (Pa. 2017) (citing *Cooper Indus.*, 532 U.S. at 433-34).

Utah. The Utah Supreme Court has recognized that "a forfeiture pursuant to [the State's civil-forfeiture law] is . . . subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *State* v. *A House*, 886 P.2d 534, 541 (Utah 1994); *see also State* v. *Real Prop.*, 994 P.2d 1254, 1256 (Utah 2000)

(invalidating forfeiture as excessive fine "on the basis of the United States Constitution alone").

West Virginia. The Supreme Court of Appeals of West Virginia holds that "[t]he Excessive Fines Clause of the U.S. Constitution is applicable to the states through the Fourteenth Amendment." *Vanderbilt Mortg. & Fin.* v. *Cole*, 740 S.E.2d 562, 570 n.10 (W. Va. 2013) (citing *Cooper Indus.*, 532 U.S. at 433-34); *see also Dean* v. *State*, 736 S.E.2d 40, 42 syl. 6 (W. Va. 2012).[5]

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[5] Intermediate appellate courts in at least nine other jurisdictions have applied the Excessive Fines Clause to the States. *Dami Hosp., LLC* v. *Indus. Claim Appeals Office*, No. 16CA0249, 2017 WL 710497, at *1 (Colo. App. Feb. 23, 2017), *cert. granted in part sub nom. Colo. Dep't of Labor & Emp.* v. *Dami Hosp., LLC*, No. 17SC200, 2017 WL 3977989 (Colo. Sept. 11, 2017) (agreeing to decide, among other questions, "[w]hether the protections of the Excessive Fines Clause of the Eighth Amendment apply to corporations"); *Agresta* v. *City of Maitland*, 159 So. 3d 876, 878 (Fla. Dist. Ct. App. 2015); *Davanne Realty* v. *Edison Twp.*, 972 A.2d 1164, 1167 (N.J. Super. Ct. App. Div. 2009), *aff'd*, 990 A.2d 639 (N.J. 2010); *In re Prop. of Flores*, 711 N.W.2d 733 (table), at *4 (Iowa Ct. App. 2006); *One Car* v. *State*, 122 S.W.3d 422, 423 n.2, 428 (Tex. App. 2003); *State* v. *Bergquist*, 641 N.W.2d 179, 180 (Wis. Ct. App. 2002); *State* v. *Leyva*, 985 P.2d 498, 504 (Ariz. Ct. App. 1998); *Tellevik* v. *Real Prop.*, 921 P.2d 1088, 1093-94 (Wash. Ct. App. 1996); *Attorney-Gen.* v. *One Green 1993 Four Door Chrysler*, 217 A.D.2d 342, 345 (N.Y. App. Div. 1996).

B. Indiana joins Montana, Mississippi, and the Michigan Court of Appeals in holding that the Excessive Fines Clause does not apply to the States.

The Indiana Supreme Court acknowledged parting ways with the weight of authority on the question presented. In so doing, the court aligned itself with a growing minority of jurisdictions that have written off the nationwide force of the Excessive Fines Clause.

In a civil-forfeiture case, like this one, the Montana Supreme Court refused to treat the Excessive Fines Clause as incorporated against the States. *State* v. *2003 Chevrolet Pickup*, 202 P.3d 782, 783 (Mont. 2009). Reasoning that this Court has not clearly incorporated the Clause, the Montana Supreme Court declined to "hold that the Eighth Amendment to the federal constitution is applicable to Montana, when the federal courts have not done so." *Id.*

The Mississippi Supreme Court has taken a similar approach. Relying on a decision that predates the Fourteenth Amendment, that court has twice remarked that "[t]he United States Supreme Court has never held that the Excessive Fines Clause of the Eighth Amendment is applicable to the states." *One (1) Charter Arms, Bulldog 44 Special* v. *State ex rel. Moore*, 721 So. 2d 620, 623 (Miss. 1998) (citing *Pervear* v. *Commonwealth*, 72 U.S. 475 (1866) and *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958), *overruled by Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964)); *One (1) 1979 Ford 15V* v. *State ex rel. Miss. Bureau of Narcotics*, 721

So. 2d 631, 634 (Miss. 1998). For this reason, Mississippi courts evaluate excessive-fines defenses using a unique state constitutional test. *See Galloway* v. *City of New Albany*, 735 So. 2d 407, 412 (Miss. 1999) (discussing four-part test); *One 2011 Chevrolet Silverado 1500* v. *Panola Cty. Narcotics Task Force*, 169 So. 3d 967, 970 (Miss. Ct. App. 2014) (same).

Michigan's lower courts have likewise rejected incorporation. Although the Michigan Supreme Court has not considered the issue, the intermediate court of appeals has three times declined to address properly raised arguments on the ground that "the United States Supreme Court has never determined that the Excessive Fines Clause is applicable to the states through the Fourteenth Amendment." *In re Forfeiture of $25,505*, 560 N.W.2d 341, 347 (Mich. Ct. App. 1996); *see also In re Forfeiture of 5118 Indian Garden Rd.*, 654 N.W.2d 646, 648 (Mich. Ct. App. 2002) (similar); *People* v. *Antolovich*, 525 N.W.2d 513, 515 (Mich. Ct. App. 1994) ("We decline to determine whether the $25,000 fine imposed violates the Eighth Amendment of the United States Constitution."). *But see People* v. *Castillo*, No. 243968, 2004 WL 243417, at *1 (Mich. Ct. App. Feb. 10, 2004) (non-precedential) ("[W]e note that the Supreme Court recently held that the Due Process Clause of the Fourteenth Amendment 'makes the Eighth Amendment's prohibition against excessive fines . . . applicable to the States.'"). Like the high courts of Indiana, Montana, and Mississippi, the Michigan Court of Appeals conducted no meaningful analysis of whether the Fourteenth Amendment

incorporates the Clause against the States. Rather, the court refused to apply the Clause based on the absence of a sufficiently definitive ruling from this Court.

In sum, the state courts taking the minority position have placed the onus on this Court to more clearly hold that the Excessive Fines Clause is incorporated. All of these courts—like the Indiana Supreme Court in this case—have decided that they will not enforce excessive-fines defenses under the Eighth Amendment until this Court decides the question presented.

II. The Indiana Supreme Court's decision conflicts with this Court's precedent.

Review is also warranted because the Indiana Supreme Court's decision conflicts with this Court's incorporation precedent. By any measure, the Eighth Amendment's protection against excessive fines is deeply rooted in our nation's legal tradition, making it a clear candidate for incorporation. By declining to apply the Clause, the Indiana Supreme Court thus broke with this Court's precedent at a fundamental level. The court compounded that error by failing to undertake the incorporation analysis. By "await[ing] guidance" from this Court, App. 8, the Indiana Supreme Court neglected its "coordinate responsibility" to determine whether the Clause protects people like Petitioner from excessive fines imposed by state and local authorities, *see Howlett* v. *Rose*, 496 U.S. 356, 367 (1990).

1. The Excessive Fines Clause applies to the States under a straightforward application of this Court's precedent. Along with the other Civil War Amendments, the Fourteenth Amendment "fundamentally altered our country's federal system." *McDonald*, 561 U.S. at 754. And under the selective-incorporation doctrine, "almost all of the provisions of the Bill of Rights" apply not just to the federal government, but to the States and municipalities as well. *Id.* at 764; *see also id.* ("The Court . . . shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause."). In determining whether one of the Bill of Rights' provisions applies to the States, the Court asks whether the right in question "is fundamental to our scheme of ordered liberty," *id.* at 767 (emphasis omitted), and, relatedly, whether it "is 'deeply rooted in this Nation's history and tradition,'" *id.* (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997)). Unsurprisingly, virtually all of the rights the Framers enshrined in the first eight amendments satisfy this test.

The Eighth Amendment's protection against excessive fines is no different. On at least seven occasions, this Court has said that the Clause applies to the States by way of the Fourteenth Amendment.[6] Like the protections against "cruel and unusual punishments" and "excessive bail"—which the Court long ago applied

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[6] *Hall*, 134 S. Ct. at 1992; *Kennedy*, 554 U.S. at 419; *Baze*, 553 U.S. at 47 (plurality opinion); *Cooper Indus.*, 532 U.S. at 433-34; *Harmelin*, 501 U.S. at 962 (opinion of Scalia, J.); *Thompson*, 487 U.S. at 819 n.1 (plurality opinion); *Booth*, 482 U.S. at 501 n.5.

to the States—the Excessive Fines Clause "prevent[s] the government from abusing its power to punish." *Austin* v. *United States*, 509 U.S. 602, 607 (1993) (emphasis omitted). Together, the three Clauses "place[ ] limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Browning-Ferris Indus.*, 492 U.S. at 275. By working in harmony "to prohibit all excessive punishments," *Atkins* v. *Virginia*, 536 U.S. 304, 311 n.7 (2002), the Clauses secure Americans' life, liberty, and property, *see* U.S. Const. amend. XIV, § 1. There is thus "no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation." *Browning-Ferris Indus.*, 492 U.S. at 284 (O'Connor, J., concurring in part and dissenting in part). All three Clauses stand as "parallel limitations" securing the same unitary right to be free from disproportionate punishment. *See id.* at 263 (majority opinion); *cf. Trop* v. *Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

Like the rest of the Eighth Amendment, of course, the Excessive Fines Clause is also "deeply rooted" in our constitutional tradition. *See McDonald*, 561 U.S. at 767. At the time of ratification, "at least eight of the original States . . . had some equivalent of the Excessive Fines Clause in their respective Declarations of Rights or State Constitutions." *Browning-Ferris Indus.*, 492 U.S. at 264. The Eighth Amendment's language was borrowed from the Virginia

Declaration of Rights, which drew from the 1689 English Bill of Rights, which in turn declared that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689), *quoted in Browning-Ferris Indus.*, 492 U.S. at 266-67. Blackstone traced the constitutional protection against excessive fines back further still, to Magna Carta, and before that to the reign of Henry II. *See* 4 William Blackstone, Commentaries *372; *see generally McDonald*, 561 U.S. at 768 (looking to Blackstone and the English Bill of Rights to determine that the Second Amendment is incorporated).

The same mistrust of the government's power to punish inspired the Eighth Amendment. The "primary focus" of the Amendment "was the potential for governmental abuse of its 'prosecutorial' power," *Browning-Ferris Indus.*, 492 U.S. at 266, with the Excessive Fines Clause in particular "limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends," *id.* at 267. In adopting the Eighth Amendment, the Framers thus "uncritically claim[ed] a liberty of their heritage." *See* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 Harv. J.L. & Pub. Pol'y 119, 134 (2004). Relying on Anglo-American legal traditions, they recognized that economic sanctions can impose burdens no less punishing than incarceration; an excessive fine, after all, can "amount[] to imprisonment for life." 4 William Blackstone Commentaries *373. When the Fourteenth Amendment was ratified, in 1868, these

same concerns persisted. By that time, 35 state constitutions included protections against excessive fines. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 82 (2008); *cf. McDonald*, 561 U.S. at 769, 777 (looking to state constitutions during the periods surrounding ratification of the Bill of Rights and the Fourteenth Amendment to determine incorporation).

For these reasons, the Framers counted the protection against excessive fines as among those fundamental rights that are essential to our system of ordered liberty, and the Fourteenth Amendment's ratifiers intended that protection to apply to the States.

2. Like the courts of Montana, Mississippi, and Michigan, the Indiana Supreme Court took account of none of these principles. In that court's view, it was enough that this Court has not issued a "definitive holding" on the question of the Excessive Fines Clause's incorporation. App. 9. And because "Indiana is a sovereign state within our federal system," the court "elect[ed] not to impose federal obligations on the State that the federal government itself has not mandated." App. 9. Until this Court "decides the issue authoritatively," the Indiana Supreme Court thus announced that it would "decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." App. 8, 9 (emphasis in original).

Far from being "cautious," App. 8, this reasoning raises grave constitutional concerns in its own right. Our federal system "charges state courts with a coordinate responsibility" to give effect to all Americans' federally protected rights. *Howlett*, 496 U.S. at 367. This includes deciding whether federal constitutional provisions like the Excessive Fines Clause protect against penalties levied by state and local governments. For "the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Id.*; *see also Claflin* v. *Houseman*, 93 U.S. 130, 137 (1876) (explaining that federal and state courts both must enforce "the laws of the United States"). By declining to engage with this issue, the Indiana Supreme Court thus effectively "den[ied] a federal right." *Howlett*, 496 U.S. at 369.

By dismissing the Excessive Fines Clause as "a *federal* test" that could "impede development" of state law, App. 9, the Indiana Supreme Court also misunderstood the supremacy of the federal Constitution, *see* U.S. Const. art. VI, cl. 2. State courts—no less than federal courts—must give effect to the Constitution. And it is never the case that a constitutional protection should remain unincorporated simply to avoid interfering with state laws. *See McDonald*, 561 U.S. at 790 (plurality opinion) ("Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights."). Yet the Indiana Supreme Court's reasoning begins and ends with that flawed premise. *See* App. 9. The Court should thus grant certiorari, reaffirm the state courts' coordinate

duty to enforce federally protected rights, and hold that the Excessive Fines Clause is incorporated against the States.

III. The question presented raises issues of national importance that warrant this Court's review.

As suggested by the number of courts that have considered the question presented, *see* pp. 13-21, *supra*, whether the Excessive Fines Clause applies to the States is an important and recurring issue. It is important in all 50 States (and countless localities), which levy fines and forfeit property on a daily basis. And it is important to the many Americans every year targeted for punitive economic sanctions by state and local authorities. As the Indiana Supreme Court put it, only a "definitive holding" from this Court (App. 9) will guarantee that the Clause can act as a truly national counterweight to the "terrifying force of the criminal justice system." *Robertson* v. *United States ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting from dismissal of certiorari). There is no reason to wait to resolve the question presented, and this case is the perfect vehicle in which to do so.

A. The Excessive Fines Clause is a key protection against punitive economic sanctions by States and municipalities.

The main evil addressed by the Excessive Fines Clause—like its precursors in the English Bill of

Rights and Magna Carta—is the sovereign impulse to "use[ ] the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." *See Browning-Ferris Indus.*, 492 U.S. at 275. This constitutional safety valve is as urgently needed today as ever. Particularly at the state and local levels, "many lawmakers use economic sanctions in order to avoid increasing taxes while maintaining governmental services, with some lawmakers even including increases to revenues generated from economic sanctions in projected budgets." Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. (forthcoming 2018) (footnotes omitted).

Like the Stuart practices that inspired the Excessive Fines Clause, modern economic sanctions also "target the politically vulnerable." *Id.* "Fines, fees, and forfeitures can have devastating consequences on those who are financially vulnerable, particularly in low-income communities and communities of color that are most likely to be heavily policed." Beth A. Colgan, "Fines, Fees, and Forfeitures" in *Reforming Criminal Justice – Volume 4: Punishment, Incarceration, and Release* 212 (Erik Luna ed. 2017) (footnote omitted). In Ferguson, Missouri, for example, the U.S. Department of Justice determined that "[c]ity officials have consistently set maximizing revenue as the priority for . . . law enforcement activity." U.S. Dep't of Justice, *Investigation of the Ferguson Police Department*, at 9 (Mar. 4, 2015). The roughly 3,000 residents of nearby Pagedale—five miles to the south of

Ferguson—have been fined for trivial offenses like missing curtains, aging paint, walking on the left side of crosswalks, and enjoying a beer within 150 feet of a grill. *See* George F. Will, *A Missouri town demands substantive due process*, The Wash. Post (Dec. 11, 2015), https://goo.gl/Jfq667. From 2010 to 2013, the number of non-traffic tickets in Pagedale increased 495%, with the city collecting $356,601 in associated fines and fees in 2013 alone. *Id.* In 2014, authorities issued nearly enough non-traffic tickets for each household within city limits to receive two. *See* Jennifer S. Mann, *Lawsuit filed against Pagedale for ticketing high grass and other code violations*, St. Louis Post-Dispatch (Nov. 4, 2015), https://goo.gl/Qmc86R.

In civil-forfeiture cases, like this case, the Excessive Fines Clause is a vitally important check on the government's impulse to punish disproportionately. In the majority of States and at the federal level, when property is forfeited most (and often all) of the resulting proceeds flow to law-enforcement coffers, frequently those of the seizing agency. As a result, state and federal agencies have increasingly resorted to civil forfeiture as a revenue-raising tool. In 2012 alone, agencies in 26 States and the District of Columbia took in more than $254 million through forfeiture. Institute for Justice, Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 11 (2d ed. 2015), https://goo.gl/sY32sT. (Between 2001 and 2014, total deposits in the Department of Justice and Treasury forfeiture funds approached $29 billion. *Id.* at 10.) Nationwide, the modern civil-forfeiture system "has

led to egregious and well-chronicled abuses." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). And, like economic sanctions generally, forfeitures "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Id.*

Indiana vividly illustrates these national problems. As one prosecutor declared after law enforcement acquired a financial stake in civil forfeiture, "the statute is limited only by your own creativity." Joseph T. Hallinan, *Police can take crime cash but can't dish it out*, The Indianapolis Star, Feb. 2, 1986, at 6B. Moreover, Indiana's forfeiture system has inspired a unique set of abuses. Unlike every other State, Indiana allows local prosecutors to outsource their civil-forfeiture cases to private-sector lawyers on a contingency-fee basis. *See* Ind. Code § 34-24-1-8. Petitioner's case, for example, was prosecuted by a private law firm. *See* App'x of Appellant at 10-11, *State* v. *Timbs*, No. 27A04-1511-MI-1976 (Ind. Ct. App. filed Mar. 30, 2016) (complaint); *see generally* David P. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.01, at 1-13 (LexisNexis 2017) ("The biggest scandal of all is Indiana's institutionalized bounty hunter system in which state DAs contract with *private* attorneys to handle all of the county's civil forfeiture cases for a contingent fee of a quarter or a third of all the property they forfeit.").

This system of mercenary prosecutors only magnifies the Excessive Fines Clause's animating concern: that state power will be harnessed "for raising revenue in unfair ways, or for any other improper use."

Browning-Ferris Indus., 492 U.S. at 272. Predictably, private-sector lawyers pocket hundreds of thousands of dollars based on forfeitures. *See generally* Heather Gillers et al., *Cashing in on crime: Indiana law allows prosecutors to farm out forfeiture cases to private lawyers – who get a cut of the money*, The Indianapolis Star, Nov. 14, 2010, at A1. One deputy prosecutor litigated criminal cases while moonlighting as a contingency-fee lawyer in parallel forfeiture proceedings. "On numerous occasions when the ethics of the asset forfeiture procedures were called into question," the Indiana Supreme Court later found, "[the prosecutor] turned a blind eye and acted to protect his private interest in his continued pursuit of forfeiture property." *In re McKinney*, 948 N.E.2d 1154, 1155-56 (Ind. 2011). In the same county, a local trial court investigated the same system, which it termed "a carefully crafted assault on the judicial system and court adjudication of civil forfeitures." Findings and Report on Civil Drug Forfeitures in Division 2, Including a Limited Number of Cases in the Other Four Divisions of the Delaware Circuit Court, at 6 (Ind. Cir. Ct., Delaware Cty. Aug. 18, 2008), https://goo.gl/TCHk4S; *see also id.* at 13 ("The handling of civil drug forfeitures amounts to fraud on the court.").

Elsewhere in Indiana, a county council sued its local sheriff and prosecutor over their "respective roles in administering civil forfeiture proceedings, including most notably the handling of funds therefrom." *Knox Cty. Council* v. *Sievers*, 895 N.E.2d 1263, 1265 (Ind. Ct. App. 2008). As alleged in that case, the state auditing

agency "found a deficiency balance of $51,987.00 in the Drug Seizure Fund," *id.*, but law-enforcement officials refused to produce even basic information "concerning the financial aspects of [the county's] civil forfeiture proceedings," *id.* at 1266. And last year, a federal audit found that Indiana's Henry County and a neighboring police department misspent more than $300,000 in federal forfeiture money on "unallowable purchases" and "unallowable salary and fringe benefit costs." Office of the Inspector Gen., U.S. Dep't of Justice, *Audit of Henry County Sheriff's Office's Equitable Sharing Program Activities, New Castle, Indiana* at 4 (Feb. 2017), https://goo.gl/A56PuJ.

For ordinary citizens—many of them low-level drug offenders or innocent property owners—the real-world consequences are profound. With economic sanctions serving as both punishment and revenue source, "law enforcement Weapons of Mass Destruction" are increasingly deployed against "pedestrian targets." *Sargent* v. *State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting). In one case, Indianapolis law enforcement sued to forfeit a teenager's car, which was found with "a large quantity of Gatorade bottles and assorted snacks and candies" stolen from a playground concession stand. *See* Pls.' Mot. Summ. J., *State* v. *Jaynes*, No. 49D01-1111-MI-043642, 2012 WL 12974140 (Ind. Super. Ct., Marion Cty. filed May 23, 2012). In another case, the State tried to forfeit a woman's 1996 Buick Century after she attempted to shoplift four iPhones. *Sargent*, 27 N.E.3d at 731. When the Indiana Supreme Court rejected that forfeiture on

statutory grounds, *see id.* at 733, even a dissenting justice voiced bewilderment at the State's "overreach," *id.* at 735 (Massa, J., dissenting); *see also id.* at 734 ("But really? Firing Sargent and having her righteously prosecuted for felony theft was not enough? The State had to take her car, too?").

The abuse of fines and forfeitures is not unique to Indiana. Nor is it new. The pressure to generate "royal revenue" is a well-recognized byproduct of any system of economic sanctions. *See Browning-Ferris Indus.*, 492 U.S. at 271. Unlike every other form of punishment—all of which cost the government money—"fines are a source of revenue." *Harmelin*, 501 U.S. at 978 n.9 (opinion of Scalia, J.). So "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Id.* Because "the State stands to benefit" from levying fines, *id.*, there is a singular risk that governments—federal, state, and local alike—will exercise their punitive powers with an eye toward revenue, rather than justice. The Excessive Fines Clause is an essential check on the many unjust punishments that can result from such perverse incentives. *Cf. McDonald*, 561 U.S. at 918 (Breyer, J., dissenting) (considering "the extent to which incorporation will further other, perhaps more basic, constitutional aims").

B. National uniformity is critical.

Few questions are more demanding of national resolution than which provisions of the Bill of Rights

apply to the several States. By setting a constitutional floor securing individual liberty, the Fourteenth Amendment "fundamentally restructured the relationship between individuals and the States." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). That principle makes this Court's intervention particularly warranted in a case like this. As the Indiana Supreme Court recognized, this Court plays a unique role in deciding incorporation issues. *See* App. 8-9. All 50 States, as well as their residents, need to know which federal protections apply in state proceedings. In this way, every question of incorporation bears on the nation as a whole, and this Court alone can provide a nationwide answer.

Of course, the federal-state balance is not just "a matter of rights belonging only to the States." *Bond* v. *United States*, 564 U.S. 211, 222 (2011). It also "protects the liberty of the individual from arbitrary power," *id.*, with the Fourteenth Amendment "add[ing] greatly to the dignity and glory of American citizenship, and to the security of personal liberty," *Plessy* v. *Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting). To be a meaningful right of American citizenship, however, a right must have equal force throughout the nation. Today, the Eighth Amendment's protection against excessive fines applies in some places, but not others. The Clause protects people in Idaho, but not Montana; it protects people in Alabama, but not Mississippi; and—with the Indiana Supreme Court's decision in this case—it protects people in Illinois, but not Indiana.

By "elect[ing] not to impose federal obligations on the State," App. 9, the Indiana Supreme Court has also undermined the rights of people far beyond Indiana's borders. For instance, Indianapolis is home to one of the nation's central FedEx hubs,[7] which state and local law enforcement routinely comb for cross-country shipments of cash to seize. *See generally Bowman* v. *State*, 81 N.E.3d 1127, 1131 (Ind. Ct. App. 2017), *pet. for transfer pending* (holding parcel-seizure practices unlawful). In 2017 alone, Indianapolis prosecutors sued to forfeit—or to transfer to the federal government—over $1.5 million in currency seized in this fashion.[8]

With the Indiana Supreme Court's decision in this case, whether citizens fighting these seizures enjoy any protection under the Excessive Fines Clause depends on happenstance: whether a particular shipment is routed through Indiana and whether a prosecutor there decides to seek forfeiture in a state forum or a federal one. The prosecutor may elect to transfer the property to federal agencies for forfeiture under federal law, in which case the Clause would apply. *See generally* Office of the Att'y Gen., Order No. 3946-2017 (Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies) (July 19, 2017). Or the prosecutor may proceed in state court, in which case the Clause would not apply.

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[7] *See* Paris Lewbel, *Take a look inside Indy's FedEx hub, the second-largest in the U.S.*, Indy Channel (Dec. 15, 2017), https://goo.gl/g2wp41.

[8] This figure is derived from filings available on Indiana's online case-management system.

This situation calls out for correction. Federally protected rights should never depend on state borders, much less on how commercial carriers choose to route their shipments. "The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection." *Kennedy*, 554 U.S. at 412. Despite the Court's many statements to this effect, however, state courts and ordinary Americans are in need of a "definitive holding" on whether the Excessive Fines Clause applies to the States. *See* App. 9.

C. This case is a good vehicle for deciding the question presented.

This case offers an excellent vehicle for resolving the question presented. The Excessive Fines Clause was the sole basis for the decisions of the trial court, App. 27-30, and court of appeals, App. 13-26. Both courts believed that the Clause was incorporated and so they applied the Clause and ruled in Petitioner's favor on the merits, holding that forfeiture of his vehicle would be "grossly disproportionate to the gravity of [his] offense." App. 24, 29-30. The Indiana Supreme Court did not consider whether the lower courts correctly applied the Clause, however. App. 4 ("Before addressing whether forfeiture of Timbs's Land Rover would be an excessive fine, we must decide the antecedent question of whether the Excessive Fines Clause applies to forfeitures by the State."). Instead, the state

high court reversed on one ground: This Court has not "authoritatively" held that the Clause applies to the States. App. 8. That decision turned on no factual findings or matters of state law. And, like the lower courts in *Austin*, the Indiana Supreme Court "had no occasion to consider what factors should inform [the Eighth Amendment analysis] because it thought it was foreclosed from engaging in the inquiry." *See Austin*, 509 U.S. at 622. The incorporation question could not be more cleanly presented.

Nor is there any reason to delay addressing the issue, which this Court raised nearly three decades ago. *See Browning-Ferris Indus.*, 492 U.S. at 276 n.22. Further percolation serves little purpose. Every court that has dealt with this issue has (tacitly or expressly) looked to this Court for guidance. The courts that apply the Clause to the States do so because they view this Court's prior statements as commanding incorporation. *See supra* pp. 13-18. Conversely, those courts that decline to apply the Clause have read the very same statements and concluded they leave the incorporation issue unsettled. *See supra* pp. 19-21. Those courts taking the minority position—Montana, Mississippi, the Michigan Court of Appeals, and now Indiana—have not analyzed whether the Clause applies to the States under this Court's incorporation precedent. Rather, like Indiana, they have decided that, until this Court issues a "definitive holding," they will "elect not to impose federal obligations on the State that the federal government itself has not mandated." *See* App. 9.

This Court should grant review, hold that the Excessive Fines Clause applies to the States, and reaffirm that state courts—like the federal courts—bear "the duty to safeguard and enforce the right of every citizen." *Howlett*, 496 U.S. at 368 (quoting *Minneapolis & St. L.R. Co.* v. *Bombolis*, 241 U.S. 211, 222 (1916)).

CONCLUSION

The petition for a writ of certiorari should be granted.

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