No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS *and*
A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari
to the Supreme Court of Indiana

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE**

The American Bar Association ("ABA") respectfully submits this amicus brief to urge the Court to consider the fundamental importance of the right to equal justice without regard to economic status and the essential role of the Excessive Fines Clause in preserving that right.

The ABA is one of the largest voluntary professional membership organizations in the United States. The ABA's more than 400,000 members include attorneys in private firms, corporations, nonprofit organizations, and government agencies, including prosecutors and defense counsel, as well as judges, legislators, law professors, law students, and non-lawyers in related fields.

The ABA has long recognized that lawyers have a special obligation to act as stewards of the system of justice. To that end, as the voice for American lawyers, the ABA has repeatedly advocated for equal justice as an essential attribute of the legal system. Less than a week after this Court held in *Gideon v. Wainwright* that a state must provide legal assistance to defendants too poor to pay for it, the ABA noted that its preexisting standards for the protection of indigents anticipated the decision, which it praised as a "great advance in the

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* Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

administration of criminal justice." James E. Clayton, *States Have Helped Whittle Away Own Rights: 30 Years of Revolution*, Wash. Post, Mar. 24, 1963, at E1; *Counsel for Poor Acclaimed by Bar: American Association Hails Supreme Court Rulings*, N.Y. Times, Mar. 21, 1963, at 5. In the years since *Gideon*, the ABA has consistently and forcefully sought to advance equal justice by submitting amicus briefs, organizing conferences, and adopting standards, guidelines, and recommended policies for courts and legislators.

Most recently, the ABA has focused on how judicially imposed fines that exceed a defendant's ability to pay subvert equal justice. In 2015 the ABA formed a Task Force to explore issues relating to the breakdown of trust between law enforcement and the communities they serve. *See* ABA, *Report of the Task Force on Building Public Trust in the American Justice System* (Jan. 2017), http://bit.ly/2QkjZJi. Building on that work, in 2017 and 2018, the ABA Working Group on Building Public Trust in the American Justice System addressed the concern that excessive judicial fines and fees "disproportionately harm the millions of Americans who cannot afford to pay them, entrenching poverty, exacerbating racial and ethnic disparities, diminishing trust in our justice system, and trapping people in cycles of punishment simply because they are poor." ABA Resolution 114 (Aug. 2018), Report at 2, http://bit.ly/2NhGzDy [hereinafter ABA *Guidelines*, Report]. In August 2018, the Working Group proposed, and the House of Delegates adopted, *Ten Guidelines on Fines and Fees*, designed to ensure equal treatment of rich and poor in the justice system, and to promote fair practices that consider a defendant's individual financial circum-

stances. *See* ABA, *Ten Guidelines on Fines and Fees* (Aug. 2018), http://bit.ly/2NhGzDy [hereinafter ABA *Guidelines*, Comm.].

For example, the Guidelines recommend a mandatory ability-to-pay hearing before a fine or fee can be imposed on a defendant. *Id.* at 7. Another Guideline urges courts never to incarcerate individuals solely because they are unable to pay a fine. *Id.* at 3. The Guidelines recommend, in addition, that courts and legislatures favor alternatives to monetary payments by defendants; bar harsh penalties, including incarceration, when ability to pay is not willful; guarantee a right to counsel for those facing fines and fees if nonpayment could result in incarceration; and protect against improper collection methods. *Id.* at 10. The Guidelines, however, are by no means the ABA's first contribution in this area. In large part, they refine, consolidate, and complement earlier ABA policies, criminal standards, and model ethical rules that have sought equal justice for all defendants without regard to economic status. *See, e.g.*, ABA Standards for Criminal Justice Sentencing, Standards 18-2.4, 18-3.16, & 18-3.22, http://bit.ly/2PHXzRS; *see also* ABA Resolution 110 (Aug. 2004), http://bit.ly/2P7E8kj (urging compliance with procedural safeguards when accused persons are ordered to make a payment for representation furnished to them at government expense); ABA Resolution 111B (Aug. 2016), http://bit.ly/2Lx6Zfx (urging state, local, territorial, and tribal legislatures to abolish "offender funded" systems of probation supervised by private, for profit companies); ABA Resolution 112C (Aug. 2017), http://bit.ly/2Lx7Wo7 (urging that pretrial detention should never occur solely due to an inability to pay).

As the standard-bearer for a profession with a special obligation to safeguard the system of justice, the ABA has a paramount interest in the question presented in this case and can provide the Court a unique and informed perspective on it.

CONSTITUTIONAL PROVISIONS INVOLVED

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

The Fourteenth Amendment 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."

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution enshrines equal justice as a core principle of our democracy. The promise of equal treatment without regard to economic status inheres in multiple provisions of the Constitution. Indeed, this Court has treated equal justice as one of the Constitution's cardinal guarantees. Again and again in cases involving the criminal justice system, the Court has elevated the principle of equal justice over considerations of cost, administrative ease, and more potent law enforcement. The Court has guaranteed criminal defendants a lawyer at both the trial and appellate level without regard to ability to pay, barred fees that would prevent access to the courts, and prohibited differential punishments for those who can pay fines and those who cannot.

The Court has also recognized that imposing the same requirements or penalties across the board on defendants presenting a wide array of different circumstances is not equal justice. A million-dollar fine, for example, is unlikely to deprive a very rich person of food, shelter, or livelihood. The same fine—or even one that is orders of magnitude smaller—levied on a poor person who cannot pay it could cast him into an inescapable spiral of debt and imprisonment.

The Excessive Fines Clause should be a bulwark against fines that deny equal justice. The Clause has historically served two functions. First, it has sought to bar fines so disproportionate to the crimes they punish that they entrap defendants into endless cycles of poverty. Second, it has sought to prevent fines so disconnected from individual defendants' ability to pay that they render punishment harsher for poor defendants than for rich ones, potentially rendering the penalty out of proportion to the offense by depriving low-income defendants of food, shelter and livelihood even for relatively minor infractions.

Empirical evidence corroborates how excessive fines undermine equal justice. The evidence demonstrates that excessive fines have a disproportionate impact on the poor, as well as a significantly disparate impact based on race.

This Court has held that a right in the Bill of Rights must be incorporated into the Fourteenth Amendment's Due Process Clause if that right is "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *McDonald v. City of Chicago*, 561 U.S. 742, 760-61 (2010). The Excessive Fines Clause meets that standard. As dis-

cussed below, the historical record shows that equal justice in the imposition of fines—the objective of the Excessive Fines Clause—is deeply embedded in the protections afforded in the criminal justice system. Further, this Court's long insistence on equal treatment in the administration of criminal justice, without regard to financial means, further demonstrates the centrality of equal justice where a defendant's liberty is at stake. Despite this insistence, empirical evidence demonstrates the persistence of inequities in the system of justice, and corroborates that excessive fines disproportionately burden the poor and communities of color. That disparate impact implicates additional guarantees and protections of equal treatment, adding to the combination of attributes that place equal justice at the core of ordered liberty.

No just society should knowingly subject defendants to fines they can never pay and then punish them further for their financial default. Such denials of equal justice, however, are rampant in local courts throughout the country, spawning a renaissance of debtors' prisons—an institution ostensibly abolished as inhumane 170 years ago—to house those who cannot pay the fines imposed upon them. The prohibition on excessive fines, once identified as the Magna Carta's most important guarantee, is increasingly important to safeguard the fundamental right to equal justice.

ARGUMENT

I. It Is a "Fundamental Right" in a Free Society that Justice Be Equal in Substance and Availability, Without Regard to Economic Status

Equal justice without regard to economic status is a cornerstone of the American justice system. *See* Justice Lewis F. Powell, Address at Legal Services Corporation: A Presidential Program of the Annual Meeting of the American Bar Association 2 (Aug. 10, 1976), http://bit.ly/2MAO5K3 ("Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists. … It is … fundamental that justice should be the same, in substance and availability, without regard to economic status.").

From its fledgling days to the current era, this Court has recognized the centrality of equal justice in the judicial system. John Jay, the first Chief Justice of the United States, wrote on behalf of this Court that, "Justice is indiscriminately due to all, without regard to numbers, wealth, or rank." *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794). The judicial oath, set forth in the Judiciary Act of 1789 (and unchanged in relevant part today) required that judges swear to "administer justice without respect to persons, and do equal right to the poor and to the rich." 1 Stat. 76 § 8; *Marbury v. Madison*, 5 U.S. 137, 180 (1803); 28 U.S.C. § 453. Less than a century later, this Court held that "[n]o duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free

government." *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897).

The commitment to equal justice has persisted over the 225 years since Chief Justice Jay's observation. Indeed, this Court has increasingly come to understand the many ways in which the principle affects defendants in the criminal justice system.

Thus, this Court has held that an indigent defendant may not be denied the assistance of a lawyer at his trial, *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963), or on direct appeal from conviction, *Douglas v. California*, 372 U.S. 353, 356-58 (1963). Nor may a state preclude a defendant from appealing a conviction or denial of collateral relief solely because of inability to pay a docket fee or similar charge. *Smith v. Bennett*, 365 U.S. 708, 710-13 (1961); *Burns v. Ohio*, 360 U.S. 252, 253-58 (1959). The state also must provide an indigent defendant with a free transcript of trial proceedings to aid in preparing an appeal of a conviction. *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956); *Eskridge v. Wash. State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 214-16 (1958) (per curiam): *Draper v. Washington*, 372 U.S. 487, 497-500 (1963). Moreover, this Court has held that States cannot satisfy this obligation of equal justice by securing nominal assistance of counsel. The assistance must be effective. *See McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U.S. 429, 435 (1988); *Evitts v. Lucey*, 469 U.S. 387, 395-96 (1985); *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

This Court has similarly held that prisoners, perhaps the most economically vulnerable of all

litigants, must have meaningful access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Procunier v. Martinez*, 416 U.S. 396, 419 (1974); *Younger v. Gilmore*, 404 U.S. 15, 15 (1971) (per curiam); *Johnson v. Avery*, 393 U.S. 483, 483, 485 (1969); *Cochran v. Kansas*, 316 U.S. 255, 257-58 (1942); *Ex parte Hull*, 312 U.S. 546, 549 (1941).

In addition, this Court has implemented the principle of equal justice by barring courts from imposing differential punishments on the basis of economic status. Thus, a State violates the Equal Protection Clause when it imprisons an indigent individual solely because he cannot afford to pay a fine. In *Williams v. Illinois*, the defendant had served his prison sentence, but an Illinois statute required him to remain in jail because he could not pay the monetary penalty of his sentence. 399 U.S. 235, 236-37 (1970). This Court invalidated the statute, holding that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Id.* at 244. The Court reasoned that, "[s]ince only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum," and that "[b]y making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons." *Id.* at 242. The very next term, in *Tate v. Short*, the Court extended Williams, holding that Texas violated the Equal Protection Clause when it imprisoned a defendant convicted under a fine-only statute solely

because the defendant was indigent and unable to immediately pay the fine in full. 401 U.S. 395, 398-99 (1971).

Again implementing the principle of equal justice, this Court has held that the State impermissibly discriminates on the basis of financial status when it automatically revokes an individual's probation for failure to pay a fine, without first inquiring into why. *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). "To do [so] would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.*

Thus, no one today would contend that a State or the Federal Government could, consistent with the Constitution, systematically impose greater punishments on the poor than on the rich. Such an intentional disparity would make a mockery of the Constitution's promise of equal protection of the laws. In the imposition of punishments, the state can no more discriminate on account of poverty than on account of religion, race, or creed.

This Court's longstanding and broad-based holdings ensuring effective representation to indigent defendants, providing them access to the courts, and rejecting differential punishments, support the determination that the right to equal justice without regard to economic status is fundamental.

II. A Key Function of the Excessive Fines Clause Is to Ensure Equity in the Imposition of Fines

For nearly 1000 years, the English constitution, and for its shorter lifespan, the American Constitution, have recognized the nexus between

excessive fines and equal justice. From its historical origins, to its embodiment in modern jurisprudence, the protections of the Excessive Fines Clause and its antecedents have turned not only on proportionality of the fine to the offense, but also on its compatibility with the defendant's ability to pay.

By the twelfth century, there existed a pre-Magna Carta English writ known as *de moderata misericordia* under which unjustly large fines could be reduced. Glanvill's treatise (dating to around 1188) states that "[fines] by the lord king … means that he is to be [fined] by the oath of lawful men of the neighborhood, but so as not to lose any property necessary to maintain his position." Glanvill, *The Treatise on the Laws and Customs of the Realm of England* 114 (G.D.G. Hall ed., 1965).

The Magna Carta (1215) provides: "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood." Frederic Maitland wrote that "[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about [excessive fines]." F.W. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Provisions regarding the calculation of fines, mirroring Magna Carta's were also included in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275), which required "that no City, Borough, nor Town, nor any Man be [fined], without reasonable Cause, and according to the Quantity of his Trespass; that is to say, [according to his ability to pay]."

The Eighth Amendment has its roots in these English sources. It was taken verbatim from a provision of the English Bill of Rights of 1689, which

itself grew out of the language of the Magna Carta. Scholars have therefore recognized the historical link between the Excessive Fines Clause and equal justice. *See, e.g.*, Nicholas M. Mclean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 839-41 (2013). This Court likewise has recognized that link. *See United States v. Bajakajian*, 524 U.S. 321, 335 (1998) (noting that, at the Founding, English constitutional law required that "amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood").

The U.S. Court of Appeals for the First Circuit has viewed the Eighth Amendment in the same light, holding that an individual's ability to pay directly bears on a fine's "excessiveness." *See United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007). In *United States v. Levesque*, the court found that a forfeiture—for current purposes the equivalent of a fine—could be so onerous as to deprive a defendant of his or her future ability to earn a living, thus implicating the historical concerns underlying the Excessive Fines Clause." 546 F.3d 78, 83-85 (1st Cir. 2008). Along similar lines, the Second Circuit has held that "when analyzing a forfeiture's proportionality under the Excessive Fines Clause, courts may consider—in addition to the four factors we have previously derived from *Bajakajian*—whether the forfeiture would deprive the defendant of his livelihood, i.e., his 'future ability to earn a living.'" *United States v. Viloski*, 814 F.3d 104, 111 (2nd Cir. 2016) (quoting *Levesque*, 546 F.3d at 85).

These sources establish that the Excessive Fines Clause requires courts, in imposing fines, to take into account the defendant's ability to pay.

III. Empirical Evidence Confirms that Excessive Fines Undermine Equal Justice

In general, even when not excessive, fines imposed in judicial proceedings have disparate effects on the poor and communities of color. The greater the fines, the more acute and widespread the disparate impacts. Low income defendants are more likely to be unable to pay fines than are higher income defendants. And unpaid fines can result in incarceration, suspension of driver's and occupational licenses, and loss of employment, further impeding the ability to pay and prolonging the penalty imposed for the original offense. As the evidence shows, such financial penalties can render justice unequal.

A. Excessive Fines Disproportionately Burden the Poor

1. The ABA Has Recognized that Fines, Unless Calibrated to Ability to Pay, Unfairly Burden Defendants of Lesser Means

Concerned with the burgeoning evidence that fines not linked to ability to pay are denying equal justice to defendants who are poor, the ABA in August 2018 adopted *Ten Guidelines on Court Fines and Fees*. The report accompanying the Guidelines laid out some of that evidence. The report noted, for example, that an estimated 10 million Americans owe more than $50 billion in debts imposed by the criminal justice system. *See* ABA *Guidelines*, Report at 2, http://bit.ly/2NhGzDy. Further, the ABA cited studies showing that nearly two-thirds of current prisoners were assessed court fines and fees, and have little prospect of paying them when they leave prison, as 60 percent remain unemployed a year after release. *Id.*

The commentary to the guidelines debunks the popular misconception that the United States long ago abolished "debtors' prisons." ABA *Guidelines,* Comm. at 3-4. Many current prisoners are incarcerated because they could not pay court fees and fines. Such incarceration has been documented in at least thirteen States since 2010. *Id.* at 4. In several States, the municipal courts that typically administer fine-and-jail systems simply do not make the indigence inquiry necessary to safeguard the constitutional protection *Bearden* provides against incarceration-for-nonpayment. Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 Harv. L. Rev. 1024, 1027-31 (2016). Thus, in some States, courts still revoke or withhold probation based on failure to pay. ABA *Guidelines,* Comm. at 9. Others force defendants to choose between incarceration and paying the fine. *Id.* at 4-5. And still others allow individuals to be arrested and held while they await an ability-to-pay hearing. *Id.* at 5.

The remedies the Guidelines recommend testify to the inequities that the empirical data demonstrate. Thus, the Guidelines urge, among other things, that fines be calibrated to the financial circumstances of the person ordered to pay; that inability to pay (as opposed to willful nonpayment) never result in incarceration, deprivation of fundamental rights, or other disproportionate sanctions; that courts hold mandatory ability-to-pay hearings before imposing a fine; that courts consider alternative sanctions for those unable to pay fines; and that defendants have a right to counsel if incarceration could result from nonpayment of a fine. *See* ABA *Guidelines,* Comm.

Thus, Guideline 2 advises that "[f]ines used as a form of punishment for criminal offenses or civil

infractions should not result in substantial and undue hardship to individuals or their families. … [A] full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship." *Id.* at 3. Guideline 3 provides that "[a] person's inability to pay a fine, fee or restitution should never result in incarceration or other disproportionate sanctions." *Id.* at 3. Along the same lines, Guideline 4 states that before sanctioning an individual for nonpayment, "the court must first hold an 'ability-to-pay' hearing, find willful failure to pay a fine or fee the individual can afford, and consider alternatives to incarceration." *Id.* at 7.

ABA recommendations require broad-based consensus from a cross-section of the legal profession. That the ABA adopted these Guidelines signals the dimensions of the problem. And the Guidelines themselves illuminate the inherent inequalities in use of fines as criminal punishments—disparities that cement the link between equal justice and excessive fines.

2. Scholars Have Also Extensively Documented the Disproportionate Burden that Excessive Fines Impose on the Poor

Scholars have also noted the disproportionate impact of excessive fines on the poor. For example, through studies and first-person observations, Alexes Harris and co-authors have documented the disproportionate effect of excessive fines on those of lesser economic means. *See* Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 151-56 (2016); Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Sociology 1753, 1778, 1785-86 (2010) (noting that

80% of those interviewed found their criminal debt obligations to be "unduly burdensome").

Beth A. Colgan has similarly provided qualitative accounts of the impacts of excessive fines on poor individuals, *see* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 8-9 (2018), and has noted that "municipalities appeared to be targeting low-income and black communities with … [fine, fee, and imprisonment] practices," Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 Wm. & Mary L. Rev. 1171, 1174-75 (2017). She has also explained how excessive fines and fees entrench poverty. *See* Beth A. Colgan, *Fines, Fees, and Forfeitures,* in 4 Reforming Criminal Justice: Punishment, Incarceration, and Release 205, 212-16 (Erik Luna ed. 2017), http://bit.ly/2od5ERW.

A 2007 report commissioned by the Council of State Governments Justice Center and funded by the federal Bureau of Justice Assistance similarly corroborated the extraordinary impact of excessive fines on the economically vulnerable. The report found that "[m]any people released from prisons and jails have a substantial amount of debt to repay, including supervision fees, court costs, victim restitution, and child support," but that "[p]eople released from prisons and jails typically have insufficient resources to pay their debts." Rachel L. McLean & Michael D. Thompson, *Repaying Debts* 7-8 (2007), http://bit.ly/2wi2lNB. That is because, "[n]ationally, two-thirds of people detained in jails report annual incomes under $12,000," and "[m]ost people returning to the community have difficulty finding employment upon release from incarceration, and they often rely on their families for support." *Id.*

Thus, "[v]ictims, families, and criminal justice agencies often compete for a share of the small payments people released from prisons and jails are able to make." *Id.*

A 2015 report by the White House Council of Economic Advisors reached many of the same conclusions. *See* Council of Economic Advisers Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* 3-4 (Dec. 2015), http://bit.ly/2oexSff. The report noted that fines and fees "serve as a regressive form of punishment as the same level of debt presents an increasingly larger burden as one moves lower on the income scale." *Id.* The report observed further that "[f]ines and fees create large financial and human costs, all of which are disproportionately borne by the poor." *Id.*

B. Excessive Fines Disproportionately Burden Communities and Persons of Color

1. The ABA Has Recognized the Disparate Impact Excessive Fines Have on Minority Communities

One of the foundations for the ABA's Guidelines was the determination that fines and fees fixed without regard to whether a person reasonably can pay them "are regressive and have a disproportionate, adverse impact on low-income people and people of color." ABA *Guidelines*, Comm., at 5 & n. 18. The disproportionate racial and ethnic impact arises because of, among other things, the continuing disparity in income and wealth based on race and ethnicity, higher rates of poverty and unemployment among minorities, and persistent racial discrimination. Statistics show, for example, a disproportionate number of driver's license

suspensions in communities of color for nonpayment of fines. *See id*. Often, individuals need to drive in order to work. The disparate number of license suspensions contributes to higher unemployment among minorities, and to a higher incidence of convictions for driving with a suspended license, which carries even greater penalties. These disparities have resulted in waning trust in the justice system, particularly in communities of color, and hostile or even explosive relationships between lower income, minority communities and the police.

2. Other Sources Have Also Documented Racial and Ethnic Disparity in the Imposition and Enforcement of Fines

Other groups have also demonstrated the disproportionate racial impact of fines and fees on minority communities.

A report by "Back on the Road California," a coalition of California civil-rights organizations, found, through analysis of public records from the California Department of Motor Vehicles and U.S. Census data, that, in California, "there are dramatic racial and socioeconomic disparities in driver's license suspensions and arrests related to unpaid traffic fines and fees." Back on the Road California, *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California* 1, 22-24 (2016), http://bit.ly/2PISx7M. As the report documented, "data collected from 15 police and sheriff's departments across California show that Black motorists are far more likely to be arrested for driving with a suspended license for failure to pay an infraction citation than White motorists." *Id.* at 1.

The Brennan Center for Justice, a non-partisan public policy and law institute that focuses on

fundamental issues of democracy and justice, found that "African-Americans face a particularly severe burden" from the imposition of fines and fees. Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 4 (2010), http://bit.ly/2MS7TIm. In particular, because in at least seven States, individuals must pay off criminal justice debt before they can regain their eligibility to vote after a conviction, criminal justice debt disproportionately disenfranchises African-Americans. *See id.* at 29.

The ACLU of Pennsylvania, after a months-long investigation, found pronounced racial disparities in civil forfeiture practices in Philadelphia. According to the study, "[a]n estimated 7 out of 10 people whose cash is taken by Philadelphia law enforcement agencies *even though they have not been convicted of a crime* are African-American." ACLU of Pennsylvania, *Guilty Property* 10 (2015), http://bit.ly/2PFet3s (emphasis in original).

The Center for American Progress, a non-profit organization in Washington, D.C., found that "people of color are disproportionately impacted by civil asset forfeiture." Center for American Progress, *Forfeiting the American Dream* 5 (2016), http://bit.ly/2PJDzhR. The Center reported that people of color appear to bear the brunt of civil asset forfeiture in States and cities across the United States. *See id.*

3. The Department of Justice Has Similarly Identified Excessive Fines as a Significant Burden for Communities of Color

The Department of Justice investigation in Ferguson, Missouri, also identified significant racial disparities in the imposition of fines and fees. Originally intended as an investigation into a police shooting of an African-American teenager, the DOJ

investigation produced a 105-page report on the City's allegedly exploitative, excessive system of fines. *See* United States Department of Justice Civil Rights Division, *Investigation of the Ferguson Police Department*, 2, 3, 9, 10, 13 (Mar. 4, 2015), http://bit.ly/2ofK7bu; *see also* United States Department of Justice Civil Rights Division, *Dear Colleague Letter*, 2 (Mar. 14, 2016), http://bit.ly/2O4LlkV (reminding state and local law enforcement agencies, in the wake of the Ferguson report, that practices related to the imposition of fines may "violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, when they unnecessarily impose disparate harm on the basis of race or national origin").

4. Excessive Fines Have a Sordid History as Tools of Racial Oppression

Excessive fines were used as tools in the post-Reconstruction and Jim Crow South to subordinate African-Americans. As one letter writer stated succinctly in a 1942 letter to the NAACP,

> the general practice of white land lords down here is to go into the county courts that meet in the spring of the year and 'bail out' all available Negroes 'convicted' of petty crimes, pay their fines, and have them placed into their custody and work them as long as they choose.

Letter from Thomas Monroe Campbell, Tuskegee Institute, Alabama, to George C. Schuyler, NAACP (Mar. 3, 1942). George McCutcheon McBride wrote in the entry on "Peonage" in the 1934 *Encyclopedia of the Social Sciences*, that

> [a]s a penalty for vagrancy or petty crimes, especially when committed by Negroes, it

> became customary in many districts to impose a fine and to accept payment of this fine from some employer of labor, who in return secured the services of the culprit until the amount of the fine had been worked out. It was not difficult to bring about the accumulation of other debts by excessive charges for tools, food, lodgings and clothing advanced to the victim. Thus a system of long continued, if not permanent, involuntary servitude developed.

Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 Stan. L. Rev. 254, 269-70 (1963) (quoting George McCutcheon McBride, *Peonage*, in 12 *Encyclopedia of the Social Sciences* 69, 71 (1934)).

Those Jim Crow practices had roots in the period immediately following Reconstruction, where "minor breaches of sometimes vague laws made the [fine and fee] system a device for controlling blacks, whose omnipresence as free persons was found offensive by many whites." Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910*, 70 Chi.-Kent L. Rev. 439, 468 (1994). Scholars of the post-Reconstruction South have documented how excessive fines, among other excessive punishments, were enacted in that period for the purpose of racial oppression. *See* Douglas Blackmon, *Slavery by Another Name* 53-57, 63-69 (2008); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 198-205 (1988).

IV. The Excessive Fines Clause Protects the Fundamental Right to Equal Justice

This Court has engaged in "selective incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. The standard for incorporation is whether the right is "implicit in the concept of ordered liberty," and "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010); *see Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The Excessive Fines Clause plays an essential role in protecting equal justice.

This Court has recognized that protecting equal justice without regard to economic status is a key function of the Fourteenth Amendment. As shown in Part I, *supra*, in case after case this Court has recognized fundamental rights—such as access to courts and counsel, and protection from differential punishments on the basis of economic status—that are themselves merely instrumental to the preservation of equal justice. Those cases recognize that equal justice, without regard to economic status, is an indispensable component of ordered liberty. *See Bearden*, 461 U.S. at 666-69; *Gideon*, 372 U.S. at 343-45.

The Excessive Fines Clause is an essential safeguard of equal justice. As shown in Part II, *supra*, for nearly a millennium an important aim of the Excessive Fines Clause has been to ensure equal justice by requiring that a fine be proportional to the offense *and* that it not exceed a defendant's ability to pay. Moreover, as shown in Part III, *supra*, there is

an overwhelming practical link between excessive fines and equal justice. Empirical evidence shows that fines not calibrated to ability to pay have had a disparate impact on both the poor and communities of color, in derogation of equal justice.

Finally, the well-documented pervasive, nationwide racially disparate impact of excessive fines is further proof of its necessity in ensuring equal justice. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). "Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879). To be sure, this Court has generally focused its constitutional inquiry on whether a law has a racially discriminatory purpose. *See Washington v. Davis*, 426 U.S. at 239. But here, where the question is not whether to invalidate a law but whether to incorporate a constitutional right into the Due Process Clause, the calculus is different. Whether or not the disparate racial impact of excessive fines would be unconstitutional otherwise, the disparity adds another level—one of unique historical, legal, and sociological import—to the impairment of equal justice due to excessive fines. This evidence is another important building block in establishing the centrality of the Excessive Fines Clause in the concept of ordered liberty.

CONCLUSION

Amicus curiae the American Bar Association respectfully urges that the Court reverse the decision below.

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