No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS, et al.,
Petitioners,
v.

STATE OF INDIANA,
Respondent.

On Writ of Certiorari
To the Supreme Court of Indiana

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of God-given liberties and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because the practice of civil forfeiture has been abused to wrongfully deprive people of their God-given right to property and to wrongfully punish people through the intermingling of criminal and civil law. In addition, the Foundation believes that this Court should apply its constitutional jurisprudence of incorporation consistently, which means incorporating the Excessive Fines Clause in the same way that it has incorporated most of the other provisions of the Bill of Rights.

SUMMARY OF ARGUMENT

Mary Misdemeanor is charged with a minor drug offense. She pleads guilty, or is found guilty, pays a fine, and receives a suspended sentence. Not a pleasant experience, she thinks, but at least it's over

[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief through filing blanket consent forms. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

with, and perhaps justice was done. Case closed, move on.

But then she is shocked to find out that her case isn't closed after all. Because she transferred the marijuana in her home, or transported it in her car, now the government is taking her home or car through something called "civil forfeiture." She calls her court-appointed attorney who informs her he can no longer represent her because she is not entitled to court-appointed counsel in a civil proceeding. And he further informs her that not only can the government take this "second bite out of the apple;" they don't have to give her the presumption of innocence or the other protections that apply in the criminal process.

"But when I pleaded guilty and received my sentence," she says, "I thought that was the end of it." "No," the attorney says, "this is independent of your criminal case. In fact, the state could take your home through civil forfeiture even if the jury had found you innocent, or even if no charges had been filed against you at all."

"But what about the Bill of Rights?" Mary asks. The attorney answers, "That won't help. Even if this is an excessive fine under the Eighth Amendment, under the doctrine of selective incorporation that clause does not apply to state and local governments. It is not implicit in the concept of ordered liberty."

"Not implicit in what?" By this time Mary is incredulous, wondering whether those words in the

Pledge she had always recited, "with liberty and justice for all," were nothing but a meaningless sham.

In this brief the Foundation hopes to give voice to Mary's concerns. Civil forfeiture is punishment and thus comes under the Excessive Fines Clause of the Eighth Amendment, a clause that is fully as implicit in the concept of ordered liberty as the Cruel and Unusual Punishments Clause and the Excessive Bail Clause, and therefore, consistent with the way the Court has incorporated other rights, it should be applied to state and local governments.

Civil forfeiture is especially opprobrious because it infringes upon the God-given right to property, a right the Framers held sacred.

The Foundation will further argue that civil forfeiture is an improper comingling of civil law and criminal law, two realms of justice that should be kept separate and distinct.

ARGUMENT

When organizations as diverse and polarized as the *amici* supporting the Petitioners are on the same side, that case must be unusual. But the much-abused practice of civil forfeiture has raised concerns among conservative constitutionalists, civil libertarians, advocates for the poor and disadvantaged, and many others.

The reason is clear: Civil forfeiture, both in theory and in practice, violates fundamental rights enshrined in the Constitution.

I. Regardless of the validity of the incorporation doctrine, the doctrine of selective incorporation is subject to manipulation and abuse.

Since the adoption of the Fourteenth Amendment in 1868, great legal thinkers, including members of this Court, have advocated "non-incorporation" (that the Fourteenth Amendment does not incorporate the Bill of Rights), "total incorporation" (that the Fourteenth Amendment incorporates all of the Bill of Rights), and "selective incorporation" (that the Fourteenth Amendment incorporates only some of the Bill of Rights.

A. Non-incorporation:

Justice Frankfurter summarized the non-incorporation view in his concurring opinion in *Adamson v. California,* 332 U.S. 46, 62 (1947):

> Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court -- a period of 70 years -- the scope of that Amendment was passed upon by 43 judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the

> belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States.

Others who have articulated this position include Colonel Charles Fairman, Professor of Law at Stanford, *Does the Fourteenth Amendment Incorporate the Bill of Rights? An Original Understanding,* 2 Stan. L. Rev. 5 (1949), and Yale Professor Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Liberty Fund 1977).

A more recent scholar, David Benner, in *The Fourteenth Amendment and the Incorporation Doctrine* (Life and Liberty, 2017), who argues that the purpose of the Fourteenth Amendment was not to incorporate the Bill of Rights but rather to provide a constitutional basis for the Civil Rights Act of 1866.

B. Total Incorporation:

At the opposite extreme, Justice Black, joined by Justice Douglas, expressed the total incorporation view in his *Adamson* dissent:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as

> well as those who opposed its submission and passage, persuades me that one of the chef objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.

Adamson, 332 U.S. at 71-72 (Black, J., dissenting).

C. Selective Incorporation:

In recent decades neither the non-incorporation position nor the total incorporation position has been able to command a majority on the Court. As a result, the selective incorporation view has emerged as an unsteady compromise. This view holds that certain provisions of the Bill of Rights are incorporated and applied to the states, and certain others are not.

Those provisions of the Bill of Rights that are incorporated are said to be those which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Commonwealth of Massachusetts,* 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." *Palko v. Connecticut,* 332 U.S. 319, 325 (1937).

But these formulations make the selective incorporation doctrine highly subjective. As Justices Harlan and Stewart said in their *Duncan v. Louisiana* dissent,

> Today's Court still remains unwilling to accept the total incorporatists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally unfair. Consequently the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in" or "out."
>
> The Court has justified neither its starting place nor its conclusion.

Duncan v. Louisiana, 391 U.S. 145, 180-81 (1968) (Stewart, J, dissenting).

Justice Frankfurter's *Adamson* concurrence further illustrates the subjectivity of selective incorporation:

> There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of 12 for every claim above $20 might appear to another as an ultimate need in a free society.

Adamson, 322 U.S. at 65 (Frankfurter, J., concurring).

In the original draft, the writer of this brief mistakenly titled this subsection "Subjective Incorporation." He corrected it to "Selective Incorporation," but upon reflection he concludes that the original title was not far from the mark. Selective incorporation is in reality subjective incorporation.

Even though contemporary jurisprudence generally moves within the limits of selective incorporation, with some advocating a broader degree of incorporation and others advocating a more limited degree of incorporation, the selective incorporation approach is highly selective, subject to abuse, and therefore dangerous to constitutional liberty and limited government. Although the Foundation questions the historical and constitutional basis for both selective incorporation and total incorporation, we urge this Court not to single out certain provisions of the Bill of Rights as less deserving of protection than others. The protection against excessive fines is as implicit in the concept of ordered liberty and as essential to fundamental freedom as other provisions of the Bill of Rights that have been held applicable to the states.

II. The Excessive Fines Clause is at least as deserving of incorporation as other portions of Bill of Rights.

A. Its placement with Cruel and Unusual Punishment and Excessive Bail in the Eighth Amendment.

The Framers placed the Excessive Fines Clause, the Cruel and Unusual Punishment Clause, and the Excessive Bail Clause in an amendment by themselves, separate from the others, for a reason: They deal with outcomes rather than processes, ends rather than means.

Provisions of the Fourth, Fifth, and Sixth Amendments dealing with search and seizure, grand jury indictment, double jeopardy, self-incrimination, public trial, trial by jury, confrontation, and right to counsel relate processes and means -- no one can be punished unless and until these procedures have been followed.

But the provisions of the Eighth Amendment deal with ends -- punishment itself. Punishment may not be cruel and unusual, and if the punishment is a fine, that fine may not be excessive. The Excessive Bail Clause is in this category as well, because bail involves the actual payment of money as a condition for being free prior to conviction.

These three clauses also stood together in the English Bill of Rights of 1689:

> And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects;
>
> And excessive fines have been imposed;
>
> And illegal and cruel punishments inflicted;
>
> And several grants and promises made of fines and forfeitures before any conviction or judgment against the

> persons upon whom the same were to be levied;
>
> All which are utterly and directly contrary to the known laws and statutes and freedom of this realm;...[2]

B. The other clauses of the Eight Amendment are applied to the states.

The Cruel and Unusual Punishments Clause was held applicable to the states in *Robinson v. California,* 370 U.S. 660 (1962).

It is difficult to get a clear Supreme Court ruling on whether the Excessive Bail Clause applies to the states, because bail issues are commonly moot by the time a defendant's case reaches the Supreme Court. But the Excessive Bail Clause appears to apply to the states; in *Schilb v. Kuebel,* 404 U.S. 357 (1971), this Court said in dicta, "Bail, of course, is basic to our system of law, and the Eighth Amendments' proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." The Eighth Circuit held the clause applicable to the states in *Hunt v. Roth,* 648 F.2d 1148 (8th Cir. 1981), but the decision was vacated for mootness, *Murphy v. Hunt*, 455 U.S. 478 (1982). Bail definitely acts as a punishment, whether or not it is called punishment, because the criminal

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[2] English Bill of Rights (1689); *reprinted in* 3 John Eidsmoe, *Historical and Theological Foundations of Law* 1085 (Nordskog 2016).

defendant must either pay a substantial sum of money (which he may receive back in part) or lose his liberty prior to being convicted.

C. Civil forfeitures violate property rights.

Civil forfeitures constitute a taking of property, and the Framers held property rights to be sacred. Thomas Jefferson and the Continental Congress said in the Declaration of Independence that this nation is entitled to independence under the "laws of nature and of nature's God" and that all men are "endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." *The Declaration of Independence* para. 1-2 (U.S. 1776). As the Virginia Declaration of Rights stated, property was indispensable to the pursuit of happiness:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[3]

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[3] Virginia Declaration of Rights (drafted by George Mason, ratified unanimously by the Fifth Virginia Convention at Williamsburg June 12, 1776, influential on the Declaration of Independence and the Bill of Rights); quoted in Mary-Elaine

In a similar vein, the Framers of the Fifth and Fourteenth Amendments spoke of the rights of "life, liberty, or property," because they regarded both as deeply rooted in our history and tradition, implicit in the concept of ordered liberty, and essential to fundamental fairness. Their respect for property rights, like that of John Locke, was based upon the Ten Commandments which protect property rights by forbidding theft ("Thou shalt not steal," *Exodus* 20:15, *Deuteronomy* 5:19) and "Thou shalt not covet," *Exodus* 20:17, *Deuteronomy* 5:21). In 1982, Congress passed Public Law 97-280 which declared 1983 the "Year of the Bible." Public Law 97-280 states in part,

> Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States...[4]

The Framers' high view of property rights is utterly inconsistent with civil forfeiture as it is practiced today.

Swanson, *John Locke: Philosopher of American Liberty* 224 (Nordskog 2012).

[4] Public Law 97-280, October 4, 1982.

D. Civil forfeitures operate as punishments.

Likewise, regardless of what they are called, forfeitures involve ends, not means, as they constitute deprivation of criminal defendants (and sometimes unindicted persons or other completely innocent persons) of their property. This Court has recognized that both criminal forfeitures and civil forfeitures constitute fines for the purposes of the Excessive Fines Clause; see *Austin v. United States,* 509 U.S. 602 (1993) (civil forfeiture), and *Alexander v. United States,* 509 U.S. 54 (1993) (criminal forfeiture). In *Austin* the Court noted that various provisions of the Fifth and Sixth Amendments expressly applied only to criminal proceedings, but

> The text of the Eighth Amendment includes no similar limitation. ... Nor does the history of the Eighth Amendment require such a limitation. ...Section 10 of the English Bill of Rights of 1689 is not expressly limited to criminal cases either. The original draft of Sec. 10 as introduced in the House of Commons did contain such a restriction, but only with respect to the bail clause: "The requiring excessive Bail of Persons committed in criminal Cases, and imposing excessive Fines, and illegal Punishments, to be prevented." 10 H. C. Jour. 17 (1688-1689). The absence of any similar restriction in the other two clauses suggests that they were not

> limited to criminal cases. In the final version, even the reference to criminal cases in the bail clause was omitted. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689) ("That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted"); see also L. Schwoerer, The Declaration of Rights, 1689, p. 88 (1981) ("But article 10 contains no reference to `criminal cases' and, thus, would seem to apply . . . to all cases").

Austin, 509 U.S. at 608-09.

To argue that civil forfeitures cannot constitute excessive fines is to ignore reality. The forfeited property may be a vehicle or a home that is worth many times the maximum fine for the offense. It may be a vehicle the defendant has saved for years to buy, that the defendant uses to transport her children to and from school, that the defendant uses in his work, and/or that the defendant has heavily mortgaged.[5] To charge a person with an offense for

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[5] The rights of mortgagors and mortgagees concerning forfeited property are discussed in Houston S. Park III, *Innocent Mortgagees and In Rem Civil Forfeitures*, 3 U. Miami Bus. L. Rev. 143 (1993), *available at* http://repository.law.miami.edu/umblr/vol3/iss2/4. For the practical effects and hardships upon mortgagors and mortgagees, even if innocent owners, see Patricia M. Canavan, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 Pace L. Rev. 485 (1990), *available at*

which the maximum punishment is, say, six months in jail and a maximum fine of $500, and then in a separate proceeding force that person to forfeit a vehicle worth maybe $50,000 or a home worth maybe $200,000, and dismiss a constitutional challenge by saying this isn't really punishment, shocks the conscience, is contrary to common concepts of fundamental fairness, and violates norms that are implicit in the concept of ordered liberty. Certainly many if not most criminal defendants would rather pay the criminal penalties than forfeit valuable property to the government.[6]

In *Austin, supra,* this Court recognized that civil forfeitures cannot be considered remedial. They do not protect the public from the instrumentalities of a crime, especially if the "instrumentality" is a home, a business, or a vehicle. Nor do they compensate the government for the cost of law enforcement; civil forfeitures are in no way linked to, tailored to, proportionate to, conditioned upon, or appropriated to

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http://digitalcommons.pace.edu/plr/vol10/iss2/12. Although in most jurisdictions the government would have to use the proceeds of the forfeiture sale to satisfy the lienholder, any remaining balance would normally be the responsibility of the criminal defendant.

[6] In teaching Constitutional Law, to illustrate the relationship between imprisonment and fines, the writer of this brief has occasionally asked students, "Would you rather pay a $100,000 fine or serve a day in jail?" (Most choose jail). "$50,000 or a week?" (Most still choose jail). "$20,000 versus a month?" (The vote is closer). "$10,000 versus three months?" (The balance shifts). The point of the exercise is to demonstrate that one cannot say categorically that imprisonment is more "cruel and unusual" than a fine or forfeiture.

such costs. As this Court said in *United States v. Ward,* 448 U.S. 242, 254 (1980), "forfeiture of property...[is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." Purely and simply, civil forfeitures are additional punishment, procured through the civil courts rather than the criminal courts.

III. Civil forfeiture wrongfully comingles criminal and civil law.

In the United States as in most Western societies, law is divided into two distinct categories: criminal law and civil law, a division that goes back at least to the Norman Conquest of A.D. 1066. As *Encyclopedia Britannica* explains,

> Criminal law deals with behavior that is or can be construed as an offense against the public, society, or the state -- even if the immediate victim is an individual. ... Civil law deals with behavior that constitutes an injury to an individual or other private party, such as a corporation.[7]

In his *Commentaries on the Laws of England,* Sir William Blackstone treated criminal law in a separate volume (Book 4), saying criminal law "treats

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[7] Brian Duignanm, *What Is the Difference Between Criminal Law and Civil Law,* Encyclopedia Britannica, https://www.britannica.com/story/what-is-the-difference-between-criminal-law-and-civil-law

of public wrongs" while civil law deals with private wrongs.

The purposes of the criminal justice system are to determine guilt and innocence, establish justice by prescribing just punishment, and protect society from crime. The purposes of the civil justice system are to protect the rights of individuals and to provide a remedy for those who have been wronged (commonly by tort or by breach of contract) by putting those wronged persons in the position they would be in had the tort or breach not occurred. [8]

Because civil law and criminal law have distinct purposes and methods of operation, they should be carefully distinguished and not mixed. Writing in the *Yale Law Journal,* Noah M. Kazis explains that

> Legal education, courts, and law offices alike treat civil and criminal law separately. Indeed, "every society sufficiently developed to have a formal legal system," from Rome to the present, "uses the criminal-civil distinction as an organizing principle. ...
>
> The consistent efforts to locate the tort/crime line reflect an underlying scholarly consensus that we ought to maintain it. Legal-process scholars believed that "a basic 'method' distinguished the criminal law," which

[8] 4 Sir William Blackstone, *Commentaries on the Laws of England* 1 (Philadelphia: Robert Bell, 1772).

> included a focus on morally culpable mental states and legislatively detailed crimes, and that any "substantial deviation from that 'method' threatened the criminal law's legitimacy." John Coffee, arguably the tort/crime line's leading contemporary defender, argued that blurring weakens the criminal law's unique role in moral education. Tort law, in contrast, is seen as pricing harms rather than prohibiting them outright. Others have argued that criminal law's harsher punishments as compared to tort's, such as imprisonment and long-term discrimination, require justification. With notable exceptions, most legal scholars agree that the law should "resist the temptation to mix and match doctrines and functions at will."[9]

Recognizing this distinction, until 1983 DR7-105(a) of the ABA Model Code of Professional Responsibility provided:

> (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

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[9] Noah M. Kazis, *Tort Concepts in Traffic Crimes,* 125 Yale L. J. 4 (2016), https://www.yalelawjournal.org/comment/tort-concepts-in-traffic-crimes. (Internal citations omitted).

Ethical Consideration 7-21 of the Model Code further explained:

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

After the Model Code was withdrawn in 1983, the new ABA Model Rules of Professional Conduct, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 92-963 which explained that DR 7-105 was not carried forward because the Model Rules provide adequate safeguards against improper threats, and DR 7-105 was redundant and/or overbroad.[10] However, many states have carried forward the DR-7-105 prohibition

[10]https://www.americanbar.org/newsletter/publications/youraba/201205article11.html

into their professional responsibility codes; these include Alabama, Connecticut, Georgia, Hawaii, Idaho, Louisiana, New Jersey, South Carolina, Tennessee, Vermont, and Wyoming. California, Colorado, and Maine have similar rules.[11]

Just as it is improper to use the criminal process to pursue a civil end, so it is even more egregious to use the civil process to pursue a criminal end. And that is precisely what civil forfeiture is all about -- using the civil justice system to further punish a criminal defendant.

The Foundation believes using civil forfeiture to pursue criminal justice ends is especially egregious because it imposes punishment upon a criminal defendant without affording that defendant the protections of the criminal justice system. The many rights afforded the criminal defendant include the right to be free from unreasonable search and seizure, protection against self-incrimination, protection against double jeopardy, public trial by jury, the right to confront and cross-examine witnesses, the right to counsel, the presumption of innocence until proven guilty beyond a reasonable doubt, and many others.

This could lead to all sorts of abuses, such as a prosecutor withholding all mention of civil forfeiture until the criminal case is completed, or worse, a prosecutor using the threat of civil forfeiture to coerce a guilty plea on the criminal charge.

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[11] *Id.*

By contrast, civil forfeiture processes afford none of these protections. The government's burden is at most preponderance of evidence, and sometimes less than that, because sometimes the defendant must bring legal action to recover his property and bears the burden of proof himself. In many jurisdictions he must bring the action within a very short period of time and must provide his own counsel and bear all of the expenses of the civil action. And the civil forfeiture is not necessarily the result of a criminal conviction; a civil forfeiture action may occur before, during, or after the criminal case, or even in the absence of a criminal case. The government may pursue a civil forfeiture even if the defendant has been acquitted, the charges have been dismissed, or even if the government has not brought any criminal charges at all. Furthermore, the government may bring the civil forfeiture action even if the property belongs to someone other than the criminal defendant (a spouse, parent, neighbor, or friend), regardless of whether that person had any involvement in or even knowledge of the alleged crime.[12]

Subjecting people to these types of punishments not only violates the Excessive Fines Clause of the Eighth Amendment; it also violates the Due Process Clause of the Fourteenth Amendment, because it deprives a person of property without the kind of due process that is necessary for an action with such dire

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[12] *Forfeiture - The Distinction Between Criminal and Civil Forfeiture*, JRank, http://law.jrank.org/pages/1230/Forfeiture-distinction-between-criminal-civil-forfeiture.html (last visited Sep. 7, 2018).

consequences. *See Leonard v. Texas,* 137 S.Ct. 847, 847 (2017) (Thomas, J., statement respecting the denial of certiorari).

CONCLUSION

It is time to stop pretending that civil forfeitures are not punishment. The man on the street knows that instinctively, and the courts have come to recognize it as well: civil forfeiture simply gives the government a second opportunity to inflict punishment on the defendant, this time without having to provide the protections of the criminal justice system.

If the laws of the criminal justice system do not provide sufficient punishment for certain crimes, then the legislature can change those laws to make criminal punishments more severe -- provided the requirements of due process are met through the protections of the criminal justice system. But this Court should not allow state and local governments to circumvent the requirements of due process by punishing through this system that is wrongly called "civil" forfeiture.

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