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 Indiana Supreme Court

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. The Excessive Fines Clause applies to the States under the Fourteenth Amendment's Due Process Clause.

The State of Indiana does not dispute Tyson Timbs's (Petitioner) straightforward answer to the Question Presented: The Excessive Fines Clause applies to the States. The State also does not dispute that the Indiana Supreme Court erred in holding otherwise. Instead, the State proposes to reinvent the wheel—first, for the incorporation doctrine, and, failing that, for the Excessive Fines Clause. Both arguments are without merit.

The State devotes most of its brief to arguing that the Excessive Fines Clause should apply to the States under a different—and more lenient—standard than applies to the federal government. Even though civil forfeitures are "fines" at the federal level, the State suggests that they are not fines at the state level. Accepting that view would "undermine[]" "decades of decisions," *see McDonald* v. *City of Chicago*, 561 U.S. 742, 788 (2010) (plurality opinion), and give rise to uncertainty about the scope of core Bill of Rights protections. There is no reason to upset the "well established" incorporation standard in this way. *Id.* at 750.

The State's alternative argument is equally extreme. The State proposes to neuter the Excessive Fines Clause's protections across all types of government—federal, state, and local alike. In the State's view, the Court should overrule the leading decision

construing the Clause, *Austin* v. *United States*, 509 U.S. 602 (1993), and announce a categorical rule that the Clause can never apply to civil forfeitures. Yet the State offers no reason to address that issue in this case, not least because *Austin* was rightly decided. At base, the correct approach is the simplest one. Rather than overrule settled authorities, the Court should apply those authorities, reverse the Indiana Supreme Court's judgment, and remand for further proceedings.

A. The Clause applies to the States in the same way it applies to the federal government.

The State does not appear to contest that the Excessive Fines Clause should be incorporated. It focuses, instead, on the procedural device by which it is attempting to take Petitioner's property. Civil *in rem* forfeitures, the State contends, were traditionally understood as nonpunitive. Resp. Br. 37–41. And for that reason, the right to be free from excessive penalties through civil forfeiture—specifically—is not fundamental and does not merit incorporation. Resp. Br. 11–13, 58–59. This argument was not the basis for the Indiana Supreme Court's judgment. The court rejected the Clause in all circumstances, whether a given proceeding is labeled criminal or civil, *in personam* or *in rem*. *See* Pet. App. 2, 8. Even setting that aside, the State's effort to rehabilitate the Indiana Supreme Court's judgment lacks merit; not only does it break with a half-century of incorporation precedent, it also misunderstands the right at issue.

1. In *Austin* v. *United States*, this Court held that the Excessive Fines Clause applies to civil *in rem* forfeitures when they "serv[e] in part to punish." 509 U.S. 602, 610 (1993); *see also id.* at 626 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he *in rem* forfeiture in *this* case is a fine."). That decision applies to civil-forfeiture statutes enforced by the federal government. But the State argues that a different standard should apply to forfeiture laws enforced by the States. *See, e.g.*, Resp. Br. 7, 43–44, 57–58. "Although the Court's decision in *Austin* applied the Excessive Fines Clause to *federal in rem* forfeitures," the State says, "*Austin* said nothing about *state* forfeitures." Resp. Br. 44.

That "two-track approach" to incorporation is one this Court has repudiated "for the past half century." *McDonald*, 561 U.S. at 788 (plurality opinion). The Court has "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Id.* at 765 (majority opinion) (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10–11 (1964)). "Instead, the Court decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* (quoting *Malloy*, 378 U.S. at 10).

This precedent forecloses the State's position. The State appears not to dispute that the Excessive Fines Clause applies to the States. *Austin* holds that the

Clause covers punitive civil forfeitures imposed by the federal government. And *McDonald*, *Malloy*, and similar decisions reflect a "single, neutral principle" under which incorporated protections apply identically to the federal government and to the States. *See McDonald*, 561 U.S. at 788–89 (plurality opinion); *see also id.* at 765–66 (majority opinion) (collecting authority). Together, these decisions apply the Excessive Fines Clause to federal civil forfeitures and confirm that the Clause must apply to the States in the same way.

2. The State gives no reason to depart from this precedent. Instead, it parses the Excessive Fines Clause beyond recognition. The right to be free from excessive fines, the State contends, is entirely different from the right to be free from "disproportionate *in rem* forfeitures." Resp. Br. 4. By this logic, Petitioner must show that the right to be free from excessive *in rem* forfeitures—specifically—is fundamental to our legal tradition. *See* Resp. Br. 8.

This "right-specific approach" (Resp. Br. 9) misreads both the Excessive Fines Clause and the incorporation doctrine. Contrary to the State's view, the Excessive Fines Clause secures a single, unitary right: freedom from excessive economic sanctions that are at least partly punitive. To be sure, that right can be violated in countless ways, using countless tools; in this regard, governments are endlessly innovative, "with more and more civil laws bearing more and more extravagant punishments." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). But whatever

new tools governments may contrive, the Excessive Fines Clause ensures that when the government takes property as punishment, it cannot take an "excessive" amount. That right is fundamental to ordered liberty and built into the bedrock of our legal tradition. *See* Pet. Br. 10–25. And it remains so no matter what procedural device the government uses. Petitioner need not establish a "fundamental" right to be free from excessive *in rem* forfeitures any more than capital defendants need to reargue incorporation for each new lethal-injection protocol.

The State's survey of nineteenth-century *in rem* forfeitures only reveals its approach to be unworkable. Even if the State were correct that historical *in rem* forfeitures were uniformly understood as nonpunitive and outside the scope of the Excessive Fines Clause—and there is reason to doubt both propositions, *see* pp. 11–18, *infra*—that says nothing about the right to be free from excessive economic sanctions that *are* punitive. Nor does the State's account shed light on the separate question—not at issue here—whether modern *in rem* forfeitures *can be* punitive. As four Justices noted in *Austin*, modern *in rem* forfeitures have punitive features that eighteenth- and nineteenth-century forfeitures may have lacked. *See Austin*, 509 U.S. at 626 (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 628–29 (Kennedy, J., concurring in part and concurring in the judgment). And since *Austin*, the Court has noted that although "traditional" forfeitures were sometimes nonpunitive, "[i]t does not

follow, of course, that all modern civil *in rem* forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause." *United States* v. *Bajakajian*, 524 U.S. 321, 331 & n.6 (1998).

The State's "right-specific approach" raises serious questions about the incorporation of other rights as well. In the State's view, the relevant question is not whether a *right* is fundamental, but whether preventing the government from violating that right *in a specific way* is fundamental. The problems with that approach are self-evident. The Fourteenth Amendment did not "fundamentally alter[] our country's federal system," *McDonald*, 561 U.S. at 754, to address only the specific abuses of 150 years ago, *see id.* at 787 (plurality opinion). It serves to ensure that everyone in the Nation has the same basic rights. And Americans routinely exercise those rights—and governments routinely violate them—in ways unimaginable two decades ago, much less two centuries. If the State's theory were correct, Mark Janus would have had to establish that his right not to pay union dues was fundamental in the nineteenth century. *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2460 (2018). David Riley would have had to show the historical pedigree of his right not to have "digital information on a cell phone seized." *Riley* v. *California*, 134 S. Ct. 2473, 2480 (2014). Lester Packingham would have needed historical proof of a right "to gain access to . . . commonplace social media websites like Facebook and Twitter." *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1733 (2017).

To state the obvious, that is not how incorporation works. Nor do the three decisions the State cites suggest otherwise. Resp. Br. 9 (discussing *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), *Wolf* v. *Colorado*, 338 U.S. 26 (1949), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964)). The majority in *McDonald* made clear, for example, that *Apodaca* "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." 561 U.S. at 766 n.14. Indeed, what the State styles as the holding of "the Court" in *Apodaca* (Resp. Br. 12) reflected the views of one Justice. *See McDonald*, 561 U.S. at 766 n.14; Pet. Br. 25 n.5; *see generally* Br. of Amicus NAACP Legal Def. & Educ. Fund 22–29 (calling on the Court to reevaluate *Apodaca* based on historical evidence that Oregon's and Louisiana's non-unanimous jury rules were inspired by racial and religious animus).

Also mistaken is the State's view that the Fourth Amendment has been incorporated in the manner that it proposes for the Excessive Fines Clause. Resp. Br. 9. The two decisions the State cites involved two different guarantees of the Fourth Amendment, making it unremarkable that the Court recognized their incorporation in different cases. *See Aguilar*, 378 U.S. at 110 (warrant requirement); *Wolf*, 338 U.S. at 27–28 (freedom from unreasonable searches and seizures). In fact, the Court in *McDonald* cited *Aguilar* for the very proposition the State resists—that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to

the same standards that protect those personal rights against federal encroachment.'" 561 U.S. at 765–66 (majority opinion). And to the extent *Wolf* "held that particular Bill of Rights guarantees or remedies did not apply to the States," the Court "overruled" that decision in 1961. *See id*. at 766 (citing *Mapp* v. *Ohio*, 367 U.S. 643, 655–57 (1961)).

Put simply, the right to be free from excessive economic sanctions is deeply rooted in our Nation's history and tradition. And Petitioner is entitled to an opportunity to argue that forfeiture of his property would infringe that right. The Indiana Supreme Court denied him that opportunity based on the view that the Eighth Amendment does not apply to any economic sanction imposed by the States—no matter how punitive or excessive, no matter the procedural device. Because that legal conclusion was mistaken, the Indiana Supreme Court's judgment should be reversed and the case remanded so that Petitioner can argue excessiveness on the merits.[1]

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[1] The State's supporting amici devote a notable amount of their brief to Petitioner's "adventures in heroin trafficking." Br. of Amici Nat'l Ass'n of Counties et al. 34. Because Petitioner's conduct does not bear on the Question Presented, we do not address those characterizations at length. We note, however, that the record shows only one instance of there being heroin in Petitioner's vehicle: two grams, in a controlled buy. Hrg. Tr. 26:03–27:25, 37:03–37:12 (July 15, 2015). And to the extent there is evidence that heroin was in his vehicle at any other time (the record is far from clear on that point), the Indiana Court of Appeals concluded that "it was apparently for [Petitioner's] own use." Pet. App. 22. The court also believed that, under Indiana pleading rules, the State's complaint failed even to allege those "other criminal acts"

B. *Austin* v. *United States* was correctly decided and should not be overruled.

Perhaps recognizing that *Austin* forecloses its leading theory, the State argues in the alternative that *Austin* should be overruled, so that all governments—federal, state, and local—can impose excessive civil forfeitures without Eighth Amendment limits. *See* Resp. Br. 44–57. This argument is meritless. The State offers no persuasive reason to question *Austin* or the decisions that have reaffirmed it. And the State ignores the grave consequences of giving governments more power to strip Americans of their property.[2]

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as predicates for forfeiture. Pet. App. 22. Of course, these questions are all ones the Indiana Supreme Court would be free to consider on remand.

[2] This argument, too, was not the basis for the judgment of the Indiana Supreme Court. And although this Court has discretion to "affirm on any ground that the law and the record permit and that will not expand the relief granted below," *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984), this case is an exceptionally poor candidate for exercising that discretion. Far from being "permit[ted]" by law, the State's new basis for affirmance is foreclosed by law; that is why the State is calling for *Austin* to be overruled. Additionally, the premise of the State's argument—that civil forfeitures are categorically nonpunitive—contradicts the State's repeated concessions before the Indiana Supreme Court that "most of what is occurring here is punitive" and that a "grossly disproportionate" forfeiture would indeed violate Petitioner's rights. Oral Arg. 15:01–15:04, *State* v. *Timbs*, No. 27S04-1702-MI-70 (Ind. Mar. 23, 2017), https://tinyurl.com/y8slhl3p; *see also id.* 1:41–2:28, 9:17–9:37, 11:39–13:10, 14:13–15:18. As in *McDonald*, there is thus no reason to "reopen the question" of the Excessive Fines Clause's scope in deciding whether the Clause is incorporated. *See* 561 U.S. at 788 (plurality opinion).

1. The State offers no reason to reevaluate *Austin*'s holding. The Court in that case was unanimous that the Excessive Fines Clause applies to economic sanctions that "can only be explained as serving in part to punish." 509 U.S. at 610; *see also id.* at 623, 626–27 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 628 (Kennedy, J., concurring in part and concurring in the judgment). The Court then held—and the concurring Justices agreed—that *in rem* forfeitures under federal law "constitute[ ] 'payment to a sovereign as punishment for some offense.'" *Id.* at 622 (quoting *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). Several features of the relevant federal laws supported this conclusion. For example, the laws "expressly provide[d] an 'innocent owner' defense," which "focus[ed] the provisions on the culpability of the owner in a way that makes them look more like punishment, not less." *Id.* at 619. They were "tie[d] . . . directly to the commission of drug offenses." *Id.* at 620. And they extinguished title to property whose value had "absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." *Id.* at 621 (quoting *United States* v. *Ward*, 448 U.S. 242, 254 (1980)). Whatever remedial purposes the laws might serve, they were at least partly punitive and thus "subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Id.* at 622.

a. The State does not appear to quarrel with *Austin*'s reasoning that the Excessive Fines Clause applies to economic sanctions that are at least partly punitive. *See, e.g.*, Resp. Br. 6, 45. Instead, the State contends that modern *in rem* forfeitures can never come within the Clause because—as a blanket rule—"*in rem* forfeitures are *not* punishments." Resp. Br. 45; *see also* Resp. Br. 52. But the State's historical "distinction between *in rem* forfeitures and *in personam* fines" (Resp. Br. 37) ignores modern forfeiture laws and precedent. Whatever might be said of *in rem* forfeitures historically (and the State says a lot), modern "forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture." *Bajakajian*, 524 U.S. at 331 n.6. That is why the Court held in *Austin*—and reaffirmed in *Bajakajian*—that "a modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*." *Id.*; *see also Kokesh* v. *S.E.C.*, 137 S. Ct. 1635, 1645 (2017) ("[W]e have emphasized 'the fact that sanctions frequently serve more than one purpose.' ").

Indiana's forfeiture statute illustrates the point. The State asserts that "[t]he validity of the forfeiture . . . turns not on *Timbs's* culpability but on the *Rover's*." Resp. Br. 10. But unlike in the historical forfeiture cases the State relies on, the State of Indiana had to prove Petitioner's individual culpability *as part of its case-in-chief*. To forfeit Petitioner's vehicle, the State had to show not only a link between the property and

a crime, but "also" that "a person who has an ownership interest . . . knew or had reason to know that the vehicle was being used in the commission of the offense." Ind. Code § 34-24-1-4(a); *see also id.* § 34-24-1-5. In this way, the Indiana forfeiture statute is designed to punish wrongdoing even more than were the statutes in *Austin*. Innocence is merely an affirmative defense under 21 U.S.C. §§ 881(a)(4) and (a)(7); in Indiana, by contrast, the State could take Petitioner's vehicle only by proving a degree of personal negligence or fault "by a preponderance of the evidence." Ind. Code § 34-24-1-4(a); *see also Curtis* v. *State*, 987 N.E.2d 523, 524 (Ind. Ct. App. 2013). That, presumably, is why the State conceded in the Indiana Supreme Court that "most of what is occurring here is punitive." Oral Arg. 15:01–15:04, *State* v. *Timbs*, No. 27S04-1702-MI-70 (Ind. Mar. 23, 2017), https://tinyurl.com/y8slhl3p.

b. The State's catalogue of eighteenth- and nineteenth-century forfeiture cases does not change the analysis. The State devotes much of its brief to arguing that *in rem* forfeitures in centuries past were sometimes viewed as nonpunitive. *See* Resp. Br. 17–44. But that is of little help in determining whether modern civil-forfeiture laws can have punitive dimensions. In *Austin*, for example, the government analogized at length to historical *in rem* forfeitures. *See* Br. for United States 12–26, *Austin* v. *United States*, No. 92-6073. And four Justices in *Austin* noted that "personal culpability" may not have always been "essential" for "traditional *in rem* forfeiture." *See Austin*, 509 U.S. at 626 (Scalia, J., concurring in part and concurring in the

judgment); *see also id.* at 628–29 (Kennedy, J., concurring in part and concurring in the judgment). Even so, the Court spoke with one voice in holding that modern *in rem* forfeitures have punitive features that bring them within the Excessive Fines Clause. Likewise in *Bajakajian*, the Court noted that, although *in rem* forfeitures may not have been uniformly considered punitive in the past, "[i]t does not follow, of course, that all modern civil *in rem* forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause." 524 U.S. at 331 n.6; *accord Hughley* v. *State*, 15 N.E.3d 1000, 1005 (Ind. 2014) (acknowledging that civil forfeitures "have significant criminal and punitive characteristics" and are "criminal-like penalties").

The State's survey of historical cases only further undermines its criticisms of *Austin*. For example, the State suggests that *Austin* misconstrued the word "fines" to include punitive *in rem* forfeitures. Resp. Br. 50–51. Yet the State's leading authority suggests the opposite. *See Hanscomb* v. *Russell*, 77 Mass. 373 (1858). The court in *Hanscomb* observed that "the word 'fine' was . . . used in a 'restricted and technical sense'" to denote only criminal "pecuniary punishments." Resp. Br. 51. But having identified that "restricted and technical" meaning, the court rejected it as inconsistent with "the common and approved usage of the language." 77 Mass. at 375 (citation omitted). "[T]he word 'fines' means forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence." *Id.*

Equally without merit is the State's claim that *in rem* forfeitures were never "regarded as punishments" in the nineteenth century. Resp. Br. 51 (quoting 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law*, § 723, at 402 (3d ed. 1865)). In fact, the State's own authority acknowledges that some *in rem* forfeitures could indeed be punitive. "[D]isguise the matter as we may, under whatever form of words," Professor Bishop remarked, "if the intent which the owner of property carries in his bosom is the gist of the thing on which the forfeiture turns, then the question is one of the criminal law, and the forfeiture is a penalty imposed for crime." Bishop, *supra*, § 708, at 395.

Other contemporary authorities also recognized that *in rem* forfeitures could be punitive and thus subject to constitutional limits. For example, one commentator voiced concern that forfeiting "a whole cargo for the illegal character of a distinct part . . . may be regarded as extreme, if not excessive." 2 Theophilus Parsons, *A Treatise on Maritime Law* 95–96 (1859). Another noted that "forfeiture of . . . property used to commit [an] unlawful act" is "subject to no express constitutional restraint except where the constitution provides that every penalty must be proportionate to the offense." Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* § 525, at 558 (1904). And this Court in 1886 declared itself "clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd* v. *United*

States, 116 U.S. 616, 633–34. In sum, the State's absolutist view of "traditional" forfeitures is not just beside the point—it is wrong.

c. The State is also incorrect that "subsequent decisions have undermined *Austin*'s reasoning." Resp. Br. 46. The State notes that *in rem* forfeitures "do not constitute 'punishment' for purposes of the Double Jeopardy Clause," *United States* v. *Ursery*, 518 U.S. 267, 270–71 (1996), and suggests that the same rule should apply under the Excessive Fines Clause, *see* Resp. Br. 46–49. Yet the Court in *Ursery* confirmed emphatically that "*Austin* . . . did not involve the Double Jeopardy Clause at all," that the reasoning in *Austin* was "wholly distinct" from the double-jeopardy analysis, and that "[t]he holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment." 518 U.S. at 286, 287. Two Terms later, the Court justified reading the Double Jeopardy Clause narrowly in part *because* the Excessive Fines Clause applies to both criminal fines and civil forfeitures. *See Hudson* v. *United States*, 522 U.S. 93, 103 (1997) (citing *Austin*, 509 U.S. 602).

The State posits that the Court erred in all of this. *See* Resp. Br. 48–49. Yet there are obvious reasons for construing the two Clauses differently. The Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense," *Hudson*, 522 U.S. at 99, while the Excessive Fines Clause "includes no similar limitation," *Austin*, 509 U.S. at 608. And the consequences of deeming a legal sanction "punishment" are vastly different under

the two Clauses. When successive "punishment" is imposed under the Double Jeopardy Clause, the second proceeding must end. But if a sanction is "punishment" under the Excessive Fines Clause, courts go to "the second stage of inquiry," which "asks whether the particular sanction in question is so large as to be 'excessive.'" *Ursery*, 518 U.S. at 287.

Summarizing the first two decisions that the State says "undermine" *Austin*: In one, the Court emphasized that it was not disturbing *Austin* at all, *see id.* at 286, and in the other, the Court cited *Austin* approvingly for the very proposition the State now disputes—that "[t]he Eighth Amendment protects against excessive civil fines, including forfeitures." *Hudson*, 522 U.S. at 103. And *Bajakajian*—the final decision the State relies on (Br. 49)—ratifies *Austin*'s holding even more directly. The State is correct that the Court in *Bajakajian* observed that "[t]raditional *in rem* forfeitures were . . . not considered punishment against the individual for an offense." 524 U.S. at 331. But the Court contrasted those "[t]raditional" forfeitures with "*modern* civil *in rem* forfeitures," which "have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture." *Id.* at 331 n.6 (emphasis added). Far from "vitiat[ing]" *Austin*, Resp. Br. 49, the Court in *Bajakajian* reaffirmed *Austin*'s holding: "a modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*." 524 U.S. at 331 n.6 (citing *Austin*, 509 U.S. at 621–22).

In short, *Austin* harmonizes perfectly with all the precedent identified by the State. Far from being "undermined," *Austin* has been reaffirmed at every turn—even in the State's cited authority. *Austin* also has commonsense appeal. "Modern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes." *Leonard* v. *Texas*, 137 S. Ct. 847, 847 (2017) (statement of Thomas, J., respecting denial of certiorari) (citing *Austin*, 509 U.S. at 618–19). And often, they "impose penalties far more severe than those found in many criminal statutes." *Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J., concurring in part and concurring in the judgment); *see also id.* (noting "forfeiture provisions that allow homes to be taken"). These "law enforcement Weapons of Mass Destruction" are punitive, *see Sargent* v. *State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting), and *Austin* was correct in so holding.

d. The State's residual criticisms of *Austin* lack merit also.

First, the State perceives a tension between applying the Excessive Fines Clause to *in rem* forfeitures and the notion that innocent people can—under current doctrine—lose their property to forfeiture. Resp. Br. 24–26, 41. But when forfeitures are at least partly punitive, innocent owners can interpose a defense under the Excessive Fines Clause. In fact, in the Court's most recent case involving constitutional protections for innocent owners, three dissenting Justices suggested that the blameless property owner should have done just that. *See Bennis* v. *Michigan*, 516 U.S. 442,

471 (1996) (Stevens, J., dissenting) ("[T]he forfeiture of petitioner's half interest in her car is surely a form of 'excessive' punishment."). And this is nothing new. In 1844, for example, this Court affirmed the forfeiture of the brig *Malek Adhel*, even though its owners were innocent of the master's acts of piracy. *Harmony* v. *United States* (*Malek Adhel*), 43 U.S. (2 How.) 210, 234 (Story, J.). At the same time, however, the Court ruled that the cargo, belonging to the innocent owners, must be returned. *Id.* at 237–38 ("We see no reason why the innocent cargo, under such circumstances, should be loaded with any cumulative burdens.").

Second, the State contends that the Excessive Fines Clause was meant only to protect against prison terms that could follow from unpaid pecuniary fines. Because "*in rem* forfeitures *cannot* deprive individuals of their liberty," the State asserts, they are unrelated to that "central original concern." Resp. Br. 42. That is incorrect. The amici the State relies on make clear that the Clause (and its precursors) also protected against impoverishment and disproportionate and unequal punishments. Br. of Amici Eighth Amend. Scholars 20–21, 24, 30 & nn.19–20. After all, "[f]or the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form of the Star Chamber abuses that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives." *Austin*, 509 U.S. at 624 (Scalia, J., concurring in part and concurring in the judgment).

2. With little elaboration, the State asserts that *stare decisis* considerations "all weigh in favor of overturning" *Austin*. Resp. Br. 56–57. But even setting aside the fact that *Austin* was rightly decided, the State's nonchalance is misplaced. Giving federal, state, and local governments *more* power to strip people of their property is serious business. If anything, the 25 years since *Austin* have shown that civil forfeiture demands more checks, not fewer. During this period, civil forfeiture has skyrocketed. "From 2001 to 2014, deposits to the DOJ and Treasury forfeiture funds exploded by more than 1,000 percent," with "[t]otal deposits across those years approach[ing] $29 billion." Institute for Justice, Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (2d ed. 2015) ("From 2001 to 2014, net assets in the DOJ and Treasury forfeiture funds increased 485 percent.").[3]

Across all levels of government, this phenomenon "has led to egregious and well-chronicled abuses." *Leonard*, 137 S. Ct. at 848 (statement of Thomas, J., respecting denial of certiorari). Earlier this year, for example, a federal court in New Mexico declared unconstitutional Albuquerque's self-financing forfeiture program. *Harjo* v. *City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018). In September, Philadelphia entered into a consent decree, which, if approved by the district court, will overhaul the city's forfeiture program.

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[3] These figures include the federal government's civil and criminal forfeitures combined. Between 1997 and 2013, however, 87 percent of the Department of Justice's forfeitures were civil. Carpenter, *supra*, at 12–13.

See Philadelphia's Forfeiture Landmark: No longer can cops and prosecutors seize assets to fund their own pay, Wall St. J., Sept. 18, 2018. The list goes on.[4]

The State's perspective is also too narrow. For example, it notes that *Austin* "expressly declined to articulate any standard for assessing the excessiveness of *in rem* forfeitures." Resp. Br. 56–57. But this Court remanded for the lower court to consider that very question. *Austin*, 509 U.S. at 604, 622–23. And in the decades since, at least eight courts of appeals have done just that. *See generally* Brent Skorup, Comment, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 Geo. Mason U. Civ. Rts. L.J. 427, 440–45 (2012). The State ignores this body of law, even though overruling *Austin* would wipe it from the books.

The State next asserts that "*Austin* has prompted no significant practical consequences," because federal courts have held *in rem* forfeitures to be excessive

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[4] *See*, *e.g.*, Br. of Amici Drug Policy Alliance et al. 4–7 (charting the rise of federal forfeiture activity); Br. of Amici Scholars 19–20 (noting that violent crimes are solved at lower rates in cities that depend on fines, fees, and forfeitures for revenue); Br. of Amici DKT Liberty Project et al. 18–22 (similar); Br. of Amici ACLU et al. 22–30 (explaining how recidivism has increased where law enforcement has a financial incentive to impose excessive fines, fees, and forfeitures); *see also* Br. of Amicus Am. Bar. Ass'n 13–20 (explaining that local governments are defying *Bearden* v. *Georgia*, 461 U.S. 660 (1983), and imposing automatic debtors-prison sentences in at least 15 States); Br. of Amici Juvenile Law Ctr. et al. 8–10 (noting that the juvenile justice system is not immune to similar trends, with sometimes tragic results for youth and their families).

"only a dozen times." Resp. Br. 57. But that claim deserves more analysis than the two sentences the State gives it. To start, it is not clear why the State's numerator of federal-court decisions matters; almost by definition, "excessive" fines make up a small fraction of all fines. On top of that, the State's survey is incomplete. *See, e.g.*, *United States* v. *3814 NW Thurman St.*, 164 F.3d 1191, 1198, *opinion amended on denial of reh'g*, 172 F.3d 689 (9th Cir. 1999); *cf. United States* v. *1,679 Firearms* (*United States* v. *Ferro*), 659 F. App'x 422, 429 (9th Cir. 2016) (remanding for new excessiveness inquiry). And by citing federal decisions alone, the State overlooks the state high courts and state intermediate courts that have ruled against the government in Eighth Amendment challenges to civil forfeitures. *See generally* Pet. 13–18 & n.5.

The State's denominator is also flawed. The number of federal excessiveness rulings may be "low," Resp. Br. 57, but that is in part because most forfeitures never make it to court. Between 1997 and 2013, 88 percent of the Department of Justice's civil forfeitures were "administrative"—that is, performed by executive-branch officials. *See* Carpenter, *supra*, at 12–13 ("Absent judicial review, the sole determination of whether a forfeiture is warranted is made by the seizing agency, which usually stands to gain from the proceeds.").

II. The Excessive Fines Clause applies to the States under the Fourteenth Amendment's Privileges or Immunities Clause.

The freedom from excessive fines is one of the "privileges or immunities of citizens," which no State may abridge. *See* U.S. Const. amend. XIV, § 1. This alternative basis for incorporation prohibits state and local authorities from violating Americans' federal constitutional rights. The State ignores the text and history of the Privileges or Immunities Clause and asks only whether the Clause protects non-citizens and whether it protects rights beyond those in the first eight amendments. *See* Resp. Br. 13–17. Those questions can easily be avoided—either by applying the "well established" due-process framework discussed above or by resolving those questions in future cases that present them. No matter the answers, the Privileges or Immunities Clause protects Petitioner and protects the freedom from excessive fines enshrined in the Eighth Amendment.

1. The State correctly notes that the Privileges or Immunities Clause applies to "citizens" while the Due Process Clause applies to "any person." Resp. Br. 15. But this textual difference would hardly "leave the country wondering which provisions of the Bill of Rights would apply only to citizens," Resp. Br. 15, because the Court has already "incorporated almost all of the provisions of the Bill of Rights" through the Due Process Clause, *McDonald*, 561 U.S. at 764 & n.12 (majority opinion). The fundamental and deeply rooted rights guaranteed to "any person" under the Due

Process Clause will continue to apply to the States regardless of the Court's reasoning here.

In any event, Petitioner is a citizen, Timbs C.A. App. vol. 2, p. 21 (sealed presentence report), so nothing requires the Court to decide whether non-citizens enjoy the same "privileges or immunities." If the Court shares the State's concern, however, the solution is to hold that the Excessive Fines Clause is *also* incorporated through the Due Process Clause.

2. The State's other "urgent" questions are even further afield. Should this Court recognize that the Excessive Fines Clause is incorporated by the Privileges or Immunities Clause, that would not call into question whether "other provisions of the Bill of Rights remain 'clearly established' for the purpose of the Court's qualified immunity doctrine" (Resp. Br. 16) or whether "prior decisions remain 'clearly established Federal law' for the purpose of federal habeas proceedings." Resp. Br. 16. Other constitutional rights that are "clearly established" today will remain so, no matter how the Court chooses to resolve this case. It is also difficult to see how the incorporation of a federal constitutional right could undermine "clearly established Federal law." Incorporated rights are always clearly established federal rights.

CONCLUSION

The State's preferred approach would contradict many decisions of this Court and reopen the incorporation status of the entire Bill of Rights. The State's alternative approach would diminish the Excessive Fines Clause's protections across all levels of government. Because both approaches are misguided, the judgment of the Indiana Supreme Court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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