

Petitioner Brief

To be in the Supreme Court of the United States
June 18, 2018

Tyson Timbs, Petitioner
v.
United States, Respondent

PETITIONER’S OPENING BRIEF
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QUESTION PRESENTED

Should the Eighth Amendment’s Excessive Fines clause be incorporated through the Due Process clause of the 14th amendment or the Privileges or Immunities Clause of the 14th amendment?

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Statement of Authorities

Cases

Harmelin v. Michigan 501 U.S. 957, 978 n.9 (1991)
Austin v. United States 509 U.S. 602, 607 (1993)
McDonald v. City of Chicago 561 U.S. 742, 767 (2010)
Duncan v. Louisiana 391 U.S., at 149, 88 S.Ct 1444
Hall v. Florida, 572 U.S. (2014)
Roper v. Simmons 543 U.S. 551, 560 (2005)

Cooper Indus. V. Leatherman Tool Grp. , 532 U.S. 424, 433-34 (2001)
Hudson v. United States, 522 U.S. 93, 103 (1997)
Victor v. Nebraska, 511 U.S. 1 (1994)
Burlington & Quincy Railroad Co. V. City of Chicago, 166 U.S. 226 (1897)
Neal v. Delaware, 103 U.S. 370
Malloy v. Hogan, 378 U.S. 1, 10 (1964)
United States v. One 1976 Mercedes Benz 280S, 618 F .2d 453 (7th Cir. 1980)
Leonard v. Texas, 137 S. Ct 847, 848 (2017)
Horner v. Curry Court of Appeals Case No. 18A-PL-00916.
Sargent v. State, 27 N.E.3d at 735 (2015)
Browning Ferris Indus. V. Kelco, 492 U.S. at 271

Other Authorities

Constitution Provisions

U.S. Const. Amend. XIII (1791)
U.S. Const. Amend. XIV (1868)
Ind. Const. Art, I, §16 N. Webster, An American Dictionary of the English Language 1039 (C. Goodrich & N. Porter rev. 1865)
Va. Decl. of Rights of 1776, §9
Del. Const. Of 1776, art. 30; De. Decl. of Rights §16 (Sept. 11, 1776)

Other Authorities

Magna Carta, 9 Hen. III, ch. 14 (1225). 1 Stat. at Large 5 (1769), confirmed, 25 Edw. I ch. 1 (1297)
The Statutes of Westminster, 3 Edw. I, ch 6 (1275), in 1 Statutes of the Realm 28 (reprint 1963)
William Stubbs, The constitutional History of England §127, 438 (1880)
Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitution When the Fourteenth Amendment was ratified in 1868: What rights are deeply rooted in American history and tradition? , 87 Tex. L. Rev. 7 (2008)
David B. Smith, Prosecution and Defense of Forfeiture Cases ¶1. 01, at 1-13 (2018)
Institute for Justice, Dick M. Carpenter II et al., Policing for Profit: The Abuse of Civil Asset Forfeiture 11 (2d ed. 2015)

Statement of the Case

In January 2013 Mr. Tyson Timbs purchased a Land Rover for approximately \$42,000, following the death of his father. Around this time, Mr. Timbs was prescribed and became addicted to hydrocodone, an opioid medication prescribed to him to alleviate persistent foot pain until his prescription ran out and he subsequently turned to heroin. In May a confidential informant connected Timbs to heroin dealers and told police officers that he would be able to buy heroin from Timbs, which led the officers to set up two controlled drug buys. At the first buy the informant and the police officers acquired two grams of heroin from Timbs for \$225. They

acquired another two grams of heroin for \$160 during the second buy. In June 2013, the State charged Timbs with two counts of dealing a controlled substance and one count of conspiracy to commit theft. He later pleaded guilty to one charge of felony dealing and one charge of conspiracy to commit theft in exchange for the state dismissing the remaining charge. After accepting the plea, the trial court sentenced Timbs to six years, five of which were to be suspended. Timbs also agreed to pay fees and costs totaling approximately \$1200. In addition, the State sought to forfeit Timbs Range Rover. The trial court concluded that the forfeiture would be an Excessive Fine under the Eighth Amendment, stating that it would be grossly disproportionate to the seriousness of Timbs offense. The court also noted that the maximum statutory fine for Timbs' felony dealing charge was \$10,000, and the vehicle was worth roughly four times that amount when Timbs purchased it. The trial court ordered the state to release the vehicle immediately. The court of appeals affirmed.

Statement of Argument

The right to be free from Excessive Fines is a fundamental right and applies to the State. The history and case precedent surrounding both the Eighth and Fourteenth Amendments dating back to the 1800's confirm that the right to be free from Excessive Fines is "among those fundamental rights necessary to our system. *See McDonald, 561 U.S. at 778*. The Privileges and Immunities Clause of the Fourteenth Amendment is best suited to incorporate the Excessive Fines Clause and offer protections for citizens from state's abuse of power. However, even applying the Due Process clause, the right to be free from Excessive Fines is fundamental and deeply rooted in American history. Mr. Timbs due process rights were violated by the civil standard and excessive fine placed on him.

Argument

1. Excessive Fines should be incorporated through the Privileges and Immunities Clause

The Eighth Amendment provides that "Excessive Bail shall not be required, nor Excessive Fine imposed, nor cruel and unusual punishment inflicted." *U.S. Constitution, Amendment XIII (1791)*. Section 1 of the fourteenth amendment provides, in relation to the eighth amendment, that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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". *U.S. Constitution, Amendment XIV (1868)*. All penalties shall be proportional to the nature of the offense. *Ind. Const. Art, I, § 16*. *N. Webster, An American Dictionary of the English Language 1039 (C. Goodrich & N. Porter rev. 1865)*. Defines privilege as a right or immunity not enjoyed by others or by all and listing among its synonyms the words immunity, right and liberty at 661 and defines immunity as a right to obligation or particular privilege at 1140. The Magna Carta provides that "a Freeman shall not be amerced for a small fault, but after the

manner of the fault; and for great after the greatness thereof, saving to him his contentment.” *Magna Carta*, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 5 (1769), confirmed, 25 Edw. I, ch. 1 (1297), 1 Stat. at Large 131–32, quoted in *Browning-Ferris Indus.*, 492 U.S. at 270 n.14. Sixty years later, Parliament prohibited Excessive Fines by statute, providing that no man might be amerced, without reasonable cause and according to the quantity of his trespass. Mr. Timbs maximum statutory fine was \$10,000 for his felony on the day he was arrested. The forfeiture would be 4 times the maximum amount the trial court could fine him. A forfeiture of approximately four times the maximum monetary fine is disproportional to Timbs illegal conduct. *Pet. App.* 30 ¶ 9.

Parliament provides that “Excessive Bail out not to be required nor Excessive Fines imposed nor cruel and unusual Punishments inflicted.” *Id.* Freedom from Excessive Fines, the Bill of Rights confirmed, was one of the ancient Rights and Liberties of English subjects. The sovereign power to fine also remains prone to abuse. Unlike every other form of punishment, “fines are a source of revenue.” *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of *Scalia, J.*). Because “the State stands to benefit,” *Id.*, there is a pronounced risk that governments—federal, state, and local alike—will exercise their prosecutorial powers not to do justice, but to raise revenue. Concerns about the abuse of sovereign power to fine date back to at least to Norman times. One nineteenth century scholar wrote: “that it was mainly for the sake of the profits that justice was administered at all. *William Stubbs, The Constitutional History of England* § 127, 438 (1880). Applying the Excessive Fines Clause to the States is also consistent with this court’s Eighth Amendment precedent. Like the protections against “cruel and unusual punishments” and “Excessive Bail”- which have long been understood to apply to the States- the Excessive Fines Clause “prevents government from abusing its power to punish.” *Austin v. United States*, 509 U.S. 602, 607 (1993). The Privileges and Immunities Clause provides an alternative path for holding that the Excessive Fines Clause applies to the States. Like other rights secure in the first eight Amendments, the right to be free from Excessive Fines is one of the privileges or immunities of citizens of the united States,” which no State may abridge. In 1776, the Virginia Convention adopted a Declaration of Rights, which drew verbatim from the English Bill of Rights: Excessive bail ought not be required, nor Excessive Fines be imposed, nor cruel and unusual punishments inflicted. *Va. Decl. of Rights of 1776*, § 9. Delaware followed suit later that year with a declaration of rights and fundamental rules of this State that mirrored Virginia’s Section 9 almost word for word. *Del. Const. Of 1776*, art. 30; *De. Decl. of Rights* § 16 (Sept. 11, 1776). When the fourteenth Amendment was ratified, in 1865, 35 of the 37 states included provisions in their state constitutions mirroring the language of the Excessive Fines Clause. *See*. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 *Tex. L. Rev.* 7 (2008). As a result, every state that ratified the Fourteenth Amendment ranked protection from Excessive Fines as essential to our Nation’s legal system. *Cf. McDonald*, 561 U.S. at 777.

Even opponents of the Bill of Rights viewed the right to be free from Excessive Fines as fundamental to the new Nation's legal system. The history surrounding the Eighth and Fourteenth Amendments thus confirms that the right to be free from Excessive Fines is "among those fundamental rights necessary to our system. *See McDonald, 561 U.S. at 778. McDonald* evaluated not only the rights history, but also whether it had "remained fundamental over time. *561 U.S. at 917 (Breyer dissenting)*. Their analysis includes the extent to which incorporation will further other constitutional aims, and whether incorporation would protect laws targeting discrete and insular minorities. *Id.* By the metrics, the right to be free from Excessive Fines continues to be fundamental today. Like imprisonment, economic sanctions can effectively control a person's life of their freedom. And as Indiana illustrates, these sanctions remain prone to abuse, with the government's impulse to raise royal revenue competing with its duty to act fairly and justly *See Browning Ferris Indus, 492 U.S. at 271*. Local officials in Indiana have even used economic sanctions to drive people from their homes. Since 2016, code-enforcement officer in Charleston, Indiana have flooded a low income neighborhood with millions of dollars in property citations. Using fines, the mayor and the city sought to help a developer buy property in the neighborhood. A court later found that the mayor anticipated that the plan to enforce the ... property maintenance code would impose such steep fines on the owners of the properties that they would be willing to sell to a developer for demolition. Even before then King Charles I, to target those of higher pretensions and more ample means, the king revived other obsolete laws. *Fairfax Correspondence 213*. He declared enormous tracts of forest land "forest"- and thus his personal domain- and fined those who already lived there.

And that state of Indiana highlights some of the most dangerous practices in the Nation today. Unlike every other state, Indiana statutes allows prosecutors to outsource civil forfeiture cases to private lawyers on a contingency fee basis. This case, for example, was prosecuted by a private law firm. *See State C.A. App. pp. 10-11 (complaint)*. And even while the Petition for Certiorari was pending, Indiana codified fixed percentages of civil-forfeiture revenue that private-sector lawyers can collect. *Ind. P.L. 47-2018, § 5; see generally David B. Smith, Prosecution and Defense of Forfeiture Cases ¶ 1.01, at 1-13 (2018)*. Although this Courts incorporation "have been built upon the substantive due process framework," *McDonald, 561 U.S. at 812 (Thomas, J., concurring in part and concurring in the judgment)*, the Privileges and Immunities Clause provides an alternative basis for applying the Excessive Fines Clause to the states. The original public meaning of privileges and immunities was synonymous with rights *id. At 813* and the right to be free from excessive fines rank among those rights of citizenship that the Privileges and Immunities Clause protects. At the time of ratification, the Clause was publicly understood to enforce at least those fundamental rights enumerated in the Constitution against the States. *Id. at 835*. Not only was the right to keep and bear arms, then, the right to be free from excessive fines fits comfortably within the original public meaning of the privileges and Immunities Clause.

2. Excessive Fines are incorporated under the Due Process Clause

Even if the court were to look past the compelling reasons to incorporate Excessive Fines under the privileges and immunities clause of the 14th amendment, the due process clause of that very same amendment also offers protections that would restrict the state of Indiana from using civil forfeiture to place an unreasonable fine on Mr. Timbs because the right to be free from Excessive Fines is fundamental and historically recognized. As recognized by the courts long-held history, a citizen is guaranteed protection of due process, when a right is “fundamental to our scheme of ordered liberty” *Duncan v. Louisiana* 391 U.S., at 149, 88 S.Ct. 1444, or “deeply rooted in this Nation’s history and tradition.” *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

The right to be free from Excessive Fines is fundamental to the nation’s scheme of liberty. In addition to being fundamental under the Privileges and Immunities clause, this right has also been considered fundamental in both the court’s precedent and this nation's history when looking through the Due Process clause. As recognized by Justice Bradley in the Slaughterhouse cases, the right to property and its protection is one of “the great threefold division of the rights of freemen, fundamental rights which can only be taken away by due process of law, and belong to the citizens of every free government,” and were sought to be protected by the Founders and, later, Congress. Those great fundamental rights as “secured by the Constitution of the United States, and defined in the Declaration of Independence, are the rights to personal liberty, to hold and enjoy property, to transmit property, and to make contracts.” *Brief of the Constitutional Accountability Center*. The Founders intended the Amendment’s “primary focus to be the potential for governmental abuse of its ‘prosecutorial’ power,” *Browning-Ferris Indus. V. Kelco*, 492 U.S. at 266. Thus, the right to hold and enjoy property without fear of a state’s abusive prosecutorial power is not only fundamental to American liberty, it is one of the main concerns of the founders when they passed the 8th amendment. Even those who opposed the amendments recognized the many of the rights they protect were fundamental. Edmund Randolph spoke against the 8th amendment, not because he thought the protections it offers were incorrect, but because he thought the rights were so fundamental that it would be foolish to enumerate them: “As to the exclusion of Excessive Bail and Fines, and Cruel and Unusual Punishments,” he argued, “this would follow of itself, without a bill of rights.” *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* as cited by *Brief of Petitioner Tyson Timbs*.

The right to be protected against unreasonable fines is also deeply rooted in our nation's history. The belief that citizens have a fundamental right to be protected from Excessive Fines can be found as early as the introduction of fundamental rights themselves. While beginning to explore the idea of inalienable rights, people demanded the right to be protected from government abuse through Excessive Fines, and fought against the abuse of such policing power. In 1683 Settlers in Maryland revolted against the fines pressed upon them “Maryland's Grievances Why They Have Taken Up Arms...The Imposing Excessive Fines Contrary to Magna Charta.” (1942), and by 1790, three quarters of the American population was protected from

unreasonable fines through their states constitution. The Eighth Amendment's language was even lifted almost word for word from the Virginia Declaration of Rights and the English Bill of Rights, which declared: "Excessive Bail ought not to be required, nor Excessive Fines imposed; nor cruel and unusual Punishments inflicted." *Steven G. Calabresi et al., State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?* Today the number of states that offer protections have expanded from three quarters, to all 50 states, a significant agreement to protect from excessive fines shared between each state that shows that, the American legislatures have long recognized the rationale behind the 8th amendment to be applicable to the policing powers granted to the states.

Contrary to the position of the State of Indiana, the incorporation of the Excessive Fines clause is not unclear or contradicted within the courts precedent. "Like the protections against cruel and unusual punishments and Excessive Bail-which have long been understood to apply to the states-the Excessive Fines clause prevents the government from abusing its power." *Austin v. United States*, 509 U.S. 602, 607 (1993) and "The Fourteenth Amendment applies those restrictions to the States." *Hall v. Florida*, 572 U.S. (2014); "the Eighth Amendment as a whole is applicable to the States through the Fourteenth Amendment." *Roper v. Simmons* 543 U.S. 551, 560 (2005); "the Fourteenth Amendment makes the Eighth Amendment's prohibition against Excessive Fines and Cruel and Unusual Punishments applicable to the States." *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 433-34 (2001); "The Eighth Amendment protects against Excessive Civil Fines, including forfeitures." *Hudson v. United States*, 522 U.S. 93, 103 (1997). In fact, out of the 20 cases that are paramount to this issue, 16 have found that the Excessive fines clause should be incorporated. The state of Indiana argues they should be exempt from the long-held standard against excessive fines because the fines placed on Mr. Timbs were civil in rem forfeiture, which are not applicable to the 8th Amendment's protections. This position, too, is incorrect and unsubstantiated by the courts precedent. In *Austin v. United States*, this Court held that the Excessive Fines Clause applies to civil in rem forfeitures when they "serve in part to punish." 509 U.S. 602, 610 (1993); see also *id.* at 626. 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 because "Austin said nothing about state forfeitures." See, e.g., Resp. Br. 7, 43-44, 57-58. However this issue of federal versus state forfeiture has been resolved by *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) where the courts have declared that incorporated Bill of Rights provisions "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" *Scott W. Howe, The Implication of Incorporating The Eighth Amendment Prohibition on Excessive Bail*. Considering the deeply rooted tradition of requiring moderate and proportionate punishments within American history, and the surplus of court precedent recognizing that the all of the Eighth Amendment, including the Excessive fines clause, has been incorporated, it is clear that Mr. Timbs is guaranteed due process of law. However, the State of Indiana has failed to follow the protective standards that are set to prevent federal encroachment. Indiana has used the civil court system to circumvent the law and apply a

less rigorous standard when determining whether property should be taken, violating Mr. Timbs right to due process in two crucial ways. First, Indiana has applied the civil standard of the preponderance of evidence when determining if Mr. Timbs should be forced to sacrifice his vehicle and if the forfeiture was excessive, and second Indiana has denied Mr. Timbs the right to a jury. First, when dealing with an issue brought before a criminal court, “The beyond a reasonable doubt standard is a requirement of due process, *Victor v. Nebraska*, 511 U.S. 1 (1994). The same standard must also apply to civil court cases brought forth by agents of the state, or on behalf of the state as the private law firm in case at bar did. *Chicago Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897) “Whoever deprives another of any right protected against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.” This means that a private law firm in a civil trial should be to the same evidentiary standards as the state in a criminal trial, when that firm is acting on behalf of the state during a criminal proceeding, and offering punishment for a criminal action. Allowing states to use civil cases to lower their burden of proof forces the constitutional prohibition against Excessive Fines to have no meaning because “the State has clothed one of its agents with power to annul or evade it.” *Neal v. Delaware*, 103 U.S. 370, as the State of Indiana has done in today’s case. This danger is even more evident when the law firm acting on behalf of the state begins the civil case to forfeit a citizens property before the citizens had been determined guilty or innocent for the criminal charges, which is exactly what happened in the case before the court today. The lack of regulation and protection of Due process allows “Law enforcement Weapons of Mass Destruction” like civil forfeiture to have been increasingly deployed against “pedestrian targets.” that were low-level offenders or innocent property owners *Sargent v. State*, 27 N.E.3d at 735 (2015) (*Massa, J., dissenting*), before the verdict came in on a criminal charge, all because of the revenue-generating aspects of the Civil Forfeiture Statutes like the one in Indiana. *Horner v. Curry Court of Appeals Case No. 18A-PL-00916*. Second, in Indiana, forfeiture jury trials are not available. However, the right to a jury trial in a civil in rem forfeiture action was given in *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980), So property owners proceeding in either federal or state court should be able to enjoy the rights established by that case because rights granted by the Bill of Rights, especially those dealing with such a momentous power that the state benefits greatly from abusing, must be protected under the same standard regardless of if it is a state or federal action.

Even bypassing the differing standards and the lack of rights typically offered in civil forfeitures, Mr. Timbs was still denied due process of the law because the state of Indiana subjected him to an Excessive Fine, one that is clearly disproportionate to his crime. “Based on the record, the trial court determined that forfeiture would be grossly disproportionate to the gravity of Timbs offense and thus unconstitutional under the Eighth Amendment Excessive Fines Clause” *Brief for Petitioner Tyson Timbs*. The original purpose of the Excessive Fines clause was to prevent “prevent the government from abusing its power to punish.” *Austin v. United States*, 509 U.S. 602, 622 (1993). “And unlike every other form of punishment, fines and

forfeitures are a source of revenue for the government, making them uniquely prone to abuse.” Id. Nationwide, and especially in the few states like Indiana, Montana, Mississippi, and Michigan, where the State Supreme Courts have refused to acknowledge the incorporation of the Excessive Fine clause in modern civil-forfeiture cases “has led to egregious and well-chronicled abuses.” *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017). Placing a forfeiture that was 4 times larger than the maximum fine, in addition to the court fines already levied on Mr. Timbs, is clearly an example of such an abuse of the government's powers and should not be permitted because of the increased potential for abuse that this power has. In many States, when property is forfeited most of the resulting proceeds go directly to law enforcement, frequently into the coffers of the seizing agency itself, giving the agency more motivation to place civil forfeitures on more property and more expensive items. In 2012, agencies in 26 States and the District of Columbia took in more than \$254 million through forfeiture under state laws alone. *Institute for Justice, Dick M. Carpenter II et al., Policing for Profit: The Abuse of Civil Asset Forfeiture 11* (2d ed. 2015). The importance placed on protection from excessive fines that can be found through history and legal precedent make it clear that a line must be drawn between permissible punitive punishments and excessive civil forfeitures to prevent states from using the civil forfeiture system to bypass criminal safeguards such as maximum fines, a higher evidentiary standard, and a jury.

Conclusion

The Eighth Amendment Excessive Fines Clause should be incorporated through the Privileges and Immunities Clause of the 14th amendment because the clause creates better protections for citizens from states that abuse their power to punish. *McDonald*, 561 U.S. at 778. As stated in *Austin*, 509 U.S. 602, 607 (1993) Applying the Excessive Fines Clause to the States is also consistent with this court’s Eighth Amendment precedent. Like the protections against “cruel and unusual punishments” and “Excessive Bail”- which have long been understood to apply to the States- the Excessive Fines Clause “prevents government from abusing its power to punish. Like other rights secure in the first eight Amendments, the right to be free from Excessive Fines is one of the privileges or immunities of citizens of the United States,” which no State may abridge. Even viewing the Excessive Fines clause under the Due Process clause, the right to be protected is fundamental to our system of liberty and deeply rooted in our nation's history. Therefore Due process of law must be given, however, Indiana has used the civil court system to deny Mr. Timbs due process by denying him a more protective standard, a jury, and by setting a fine that is four times the maximum punishment for Mr. Timbs crime.

Prayer

It is for these reasons we pray the court rule in favor of the Petitioner, Tyson Timbs, and reverse the lower court ruling.