No. 17-1091

In The
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioner,
v.
STATE OF INDIANA
Respondent.

On Writ of Certiorari to
the Indiana Supreme Court

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause should be incorporated against the states through the Due Process Clause of the Fourteenth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.

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SUMMARY OF ARGUMENT

As this Court has observed, "the Due Process Clause of the Fourteenth Amendment … makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001). Under this Court's precedent, the question of the rights protected by the Fourteenth Amendment against state infringement must be analyzed under the Due Process Clause. Because the Excessive Fines Clause protects a fundamental right perfectly situated for due process incorporation, there is no reason to consider Petitioners' privileges or immunities submission. Even on its own terms, however, Petitioners' historical argument is dubious.

At bottom, Petitioners cannot meet their burden of providing a "special justification" to jettison the due process incorporation doctrine. A mere belief that the prior cases were incorrectly decided is not sufficient. Were the Court to divest itself of its prior precedent, this would send our nation's legal systems into chaos and erode trust in the courts, opening up a Pandora's Box of threats to personal liberty -- particularly for non-citizens. "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 844 (1992).

Finally, while the Eighth Amendment prohibits some civil forfeitures, it does not prohibit non-punitive forfeitures, or non-excessive ones. Indiana's conduct here plainly passes muster. The Court should incorporate the Excessive Fines Clause through the Due Process Clause, but should hold that the civil forfeiture at issue was not an unconstitutional excessive fine.

ARGUMENT

I. INCORPORATION THROUGH THE DUE PROCESS CLAUSE IS REQUIRED BY THIS COURT'S PRECEDENTS

A. This Court Has Explicitly Stated That the Due Process Clause Incorporates the Excessive Fines Clause, A Conclusion in Harmony With Anglo-American History Showing The Right's Fundamental Character

In a prior case, this Court *explicitly stated* that "the Due Process Clause of the Fourteenth Amendment … makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001). This conclusion makes sense, because "the question of the rights protected by the Fourteenth Amendment against state infringement" must be "analyzed under the Due Process Clause of that Amendment." *McDonald* v. *Chicago*, 561 U.S. 742, 758 (2010). Moreover, that conclusion makes sense because this Court has "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause." *Id.* at 764. There is no special reason for reluctance here. To the contrary, the right to be free from excessive fines is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968), and is "deeply rooted in this Nation's history and tradition." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997).

The Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689," *United States* v. *Bajakajian*, 524 U.S. 321, 335 (1998), but its origins go back even farther. The Charter of Liberties of Henry I, issued in 1101, stated that "[i]f any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, *but according to the measure of the offence so shall he pay …* " *Sources of English Legal and*

Constitutional History ¶8, p. 50 (M. Evans & R. Jack eds. 1984) (emphasis added).

A century later, the famous Magna Carta provided: "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude … " *Magna Carta*, ch. 20 (1215), *in* A. Howard, *Magna Carta: Text & Commentary* 42 (rev. ed. 1998). These principles remained fundamental in the following centuries. *See, e.g., Case of Earl of Devonshire*, 11 State Trials 1354, 1372 (K.B. 1687) (overturning "excessive and exhorbitant" £30,000 fine).

Thus, it is not at all surprising that the right to be free of excessive fines was likewise considered fundamental in the American colonies (and eventually states). One indication: In 1787, the year the original Constitution was signed in Philadelphia, the constitutions of no fewer than *eight* states prohibited excessive fines. *See* Steven G. Calabresi, Sarah E. Agudo, & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791*, 85 S. Cal. L. Rev. 1451, 1517 (2012).

By 1868, when the Fourteenth Amendment was ratified, the constitutions of 35 of the 37 states prohibited excessive fines. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 Texas L. Rev. 7, 82 (2008).

Today, all 50 states have constitutional provisions restricting in some way the imposition of unfair fines. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 876–77 & n.177 (2013).

In sum, there can be no doubt that the right protected by the Excessive Fines Clause is "fundamental to our scheme of ordered liberty," and indeed is as "deeply rooted in this Nation's history and tradition" as a right can be. *McDonald*, 561 U.S., at 754 (internal quotation marks omitted). Because the Excessive Fines Clause passes this Court's due process incorporation test with flying colors, there is no reason to

consider the Privileges or Immunities Clause argument put forth by Petitioners.

B. Incorporation Doctrine Has Long Rested on the Due Process Clause

Ever since this Court's earliest Fourteenth Amendment case incorporating a Bill of Rights provision, *Chicago Burlington & Quincy Railroad Co.* v. *City of Chicago,* 166 U.S. 226 (1897), incorporation has rested on the Due Process Clause. *See id.* at 241 ("In our opinion, a judgment of a state court … whereby private property is taken … is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States."). Similarly, in *Gitlow* v. *New York,* 268 U.S. 652 (1925), this Court noted that "we may and do assume that freedom of speech and of the press which are protected by the First Amendment are … protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666. With respect to the Eighth Amendment's Cruel and Unusual Punishments clause, this Court held that it is "applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." *Robinson* v. *California*, 370 U.S. 660, 675 (1962). Numerous other cases have likewise used the Due Process Clause for incorporation. *See McDonald*, 561 U.S. at 764, n. 12 (citing cases). *McDonald* itself confirmed that due process incorporation is alive and well. *See id.* at 758.

C. Revival of the Privileges or Immunities Clause Would Require Overruling Longstanding Precedent

The Privileges or Immunities Clause has long lain largely dormant in this Court. *See McDonald*, 561 U.S. at 808-09 (Thomas, J., concurring in part and concurring in the judgment). Case law conclusively states that Bill of Rights incorporation must be analyzed under the Due Process Clause -- as eight justices of this Court recognized less than a

decade ago. *See McDonald*, 561 U.S. at 758; *id.* at 859-60 (Stevens, J., dissenting); *id.* at 934 (Breyer, J., dissenting).

In the *Slaughterhouse Cases*, 16 Wall. 36 (1873), which dealt with a Louisiana state-granted monopoly on slaughterhouses, this Court construed the Privileges or Immunities Clause narrowly as protecting only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*, at 79. While the Court "arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship," *McDonald*, 561 U.S. at 808 (Thomas, J., concurring in part and concurring in the judgment), the Court subsequently clarified its holding: "Privileges or immunities of citizens of the United States" did not include rights that "existed long before the adoption of the Constitution." *United States* v. *Cruikshank*, 92 U.S. 542, 551 (1876). Therefore, the freedom of assembly and the right to bear arms were not protected by that clause.[1] The Court has since reaffirmed those central principles regarding the reach and scope of the clause. *See, e.g., Madden* v. *Kentucky*, 309 U.S. 83, 90–91 (1940); *Twining* v. *New Jersey*, 211 U.S. 78, 93–99 (1908); *Maxwell* v. *Dow*, 176 U.S. 581, 597 (1900); *O'Neil* v. *Vermont*, 144 U.S. 323, 332 (1892); *In re Kemmler*, 136 U.S. 436, 446 (1890).

Presumably recognizing the doctrinal hurdles belying their approach, Petitioners half-heartedly argue that "[b]because nothing in this Court's precedents answers the question whether the Privileges or Immunities Clause incorporates protection from excessive fines, no precedents necessarily need to be overruled to follow the original public meaning of the Privileges or Immunities Clause." Pet. Merits Br. at 39. But the 19th century cases heretofore cited announced

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[1] *Cruikshank*'s Privileges or Immunities holding remains good law, and was not overruled, but rather distinguished, in *McDonald*. *See McDonald*, 561 U.S. at 758 ("[T]his Court's decision[] in *Cruikshank* … [does] not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States.").

doctrines of broad reach, not confined to the specific Bill of Rights provisions at issue -- a fact the Court has recognized. *See, e.g., Maxwell*, 176 U.S. at 587-97 (citing *Slaughterhouse*, *Cruikshank*, and other cases in deciding Fifth Amendment right to grand jury and Sixth Amendment right to trial by jury are not "privileges or immunities" protected by the Fourteenth Amendment); *Twining*, 211 U.S. at 99 (stating *Slaughter-House* and its progeny held that "[the Privileges or Immunities] clause of the Fourteenth Amendment did not forbid the States to abridge the personal rights enumerated in the first eight Amendments."); *see also McDonald*, 561 U.S. at 758 (implicitly recognizing that adopting challengers' Privileges or Immunities argument would require "reconsider[ing]" the correctness of *Slaughter-House*).

In essence, Petitioners try to finesse the *stare decisis* issue by claiming that this Court's 19th century precedents do *not* in fact foreclose future incorporation through the Privileges or Immunities Clause. *But see, e.g.,* Reply Brief of Petitioners at 21-24, *McDonald*, 561 U.S. 742 (No. 08-1521); Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 Minn. L. Rev. 102, 139 (2009). Petitioner's grudgingly narrow interpretation of this Court's precedent flies in the face of common sense, and must be rejected. Ultimately, Petitioners must face up to the inevitable consequences of their argument -- consequences that include dislodging more than a century of established precedent.

II. PETITIONER'S PROFFERED EVIDENCE OF ORIGINAL UNDERSTANDING IS INCONCLUSIVE AT BEST

A. Historians Profoundly Disagree About the Original Scope of the Privileges or Immunities Clause

Even those who believe *Slaughter-House* was wrongly decided "agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873." *Saenz* v. *Roe*, 526 U.S. 489, 522, n. 1 (1999) (Thomas, J., dissenting). This is not surprising, since historians have found "some support in the legislative history for no fewer

than four interpretations" of the clause. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 406 (2008).

For example, noted originalist scholar Philip Hamburger has concluded that the Privileges or Immunities Clause protected rights of interstate equal treatment against state infringement, and did not incorporate Bill of Rights provisions. *See* Hamburger, *Privileges or Immunities*, 105 Nw. U. L. Rev. 61, 61-74 (2011). Meanwhile, fellow originalist scholar David Upham has found support only for "partial incorporation" of certain rights (particularly the freedom of speech and of the press). *See* Upham, *The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War*, 91 Notre Dame L. Rev. 1117, 1165 (2016).

Most strikingly, historian James E. Bond undertook an exhaustive analysis of the Fourteenth Amendment ratification debates in the states and found *no significant support* for Privileges or Immunities incorporation. *See* Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* 10 (1997); Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 464 (1985) ("[N]o one in these states ever claimed that the privileges and immunities clause incorporated the Bill of Rights.").

Even among those who believe the Privileges or Immunities Clause incorporates the personal rights found in the Bill of Rights, there remain major disagreements as to how far beyond that the clause's reach extends. *Compare, e.g.,* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art,* 98 Geo. L.J. 1241 (2010) (arguing the clause protects only constitutionally enumerated individual rights), *with* Christopher R. Green, *Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause* (2015) (arguing for a broader reading of the clause); *see also McDonald*, 561 U.S. at 758 ("[P]etitioners are unable to identify the Clause's full scope.").

Certainly, Petitioners here are correct that much new evidence has been discovered in recent years that can be read to support total incorporation through the Privileges or Immunities Clause. But the level of disagreement that still remains suggests that "the original meaning of the Clause is not … nearly as clear as it would need to be to dislodge 137 years of precedent. The burden is severe for those who seek radical change in such an established body of constitutional doctrine." *McDonald*, 561 U.S. at 859-60 (Stevens, J., dissenting). Indeed, because of the historical disagreement over the clause's scope, it is not at all clear how this Court would appropriately determine the contours of a new, robust Privileges or Immunities Clause jurisprudence. *See ibid.*

B. Since the Founding, "Privileges" and "Immunities" Have Referred to Benefits Granted By Law, Not Inherent Rights

Article IV of the original 18th-century Constitution contains a Privileges *and* Immunities Clause very similar in wording to the Reconstruction-era Privileges *or* Immunities Clause: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.

At the time of the American Founding and for long afterward, this language was well-understood: It "guarantee[d] to an American visiting another state equal access to those privileges and immunities that the host state granted its own citizens as an incident of citizenship." Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 Ga. L. Rev. 1117, 1192 (2009). "[T]he phrase 'privileges and immunities' had a clear denotation. It referred to special benefits conferred by positive law." *Ibid.*

A prominent 18th-century law dictionary defined a "privilege" as "a private or particular Law, whereby a private Person or Corporation is exempted from the Rigour of the Common Law; or it is some Benefit or Advantage granted or allowed to any Person contrary to the Course of Law, and is sometimes used for a Place that hath a special Immunity: A

Privilege is therefore Personal, or Real; Personal, as of Members of Parliament, and of Convocation, and their menial Servants, not to be arrested in the Time of Parliament or Convocation, nor for certain Days before or after; Peers, Ambassadors and their Servants, &c. Real, that which is granted to a Place, as to the King's Palaces, the Courts at Westminster, the Universities, &c. that their Members or Officers must be sued within their Precincts or Courts, and not in other Courts." Giles Jacob, *A New Law-Dictionary* (London, Woodfall & Strahan, 1762) (unpaginated).

"The frequency and variety of privileges and immunities in the legal literature of the time show that the concepts … were the stuff of daily life, used much as the terms 'license' or 'permit' are used today." Natelson*, supra*, at 1140. Privileges and immunities were often granted to numerous entities by legislation or conveyances. *Id.* at 1139. *See*, *e.g.*, Mass. Const. of 1780, pt. 2, ch. V, § 1, art. I (referring to "the powers, authorities, rights, liberties, privileges, immunities and franchises" of Harvard College); 1 T. Cunningham, *The Merchant's Lawyer* 118 (London, Kearsly 1762) (discussing the "privileges [and] immunities" conferred by Parliament on the Bank of England).

While it was common to see "privileges" and "immunities" listed in conjunction with other related words, "One must be careful not to identify the words 'rights' or 'liberties,' when coupled with 'privileges' and 'immunities,' as signifying natural rights." Natelson, *supra*, at 1139-40. Indeed, the Privileges and Immunities Clause of Article IV "did not protect visitors in the exercise of mere natural rights, such as the right to keep and bear arms, the right of property, the right to earn a living, or the freedoms of speech, press, assembly, or religion." *Id.* at 1187-88. "This was true even when those rights were enumerated in the host state's constitution." *Id.* at 1188.

It was not uncommon for Founding-era writers to draw a purposeful distinction between rights and privileges. *See, e.g.*, Stephen Hopkins, *The Rights of Colonies Examined* (1764), *reprinted in* 1 *American Political Writing During the Founding Era: 1760-1805* (Charles S. Hyneman & Donald S.

Lutz eds., 1983), at 45 ("[T]he British subjects in America have equal *rights* with those in Britain ... they do not hold those rights as a *privilege* granted them, nor enjoy them as a grace and favor bestowed, but possess them as an inherent, indefeasible *right*.") (emphases added).

There is no evidence that this traditional understanding of "privileges" and "immunities" as covering only benefits conferred by positive law on particular groups changed significantly in the antebellum period. *See, e.g.,* J.V. Smith, Ohio Constitutional Convention, *Ohio Daily Statesman*, Feb. 14, 1851, at 2 (legislature shall have a right "to alter, revoke, repeal or abolish … any grant or law conferring special privileges or immunities, upon any portion of the people, which cannot reasonably be enjoyed by all"). While one can certainly find occasional examples of natural rights being referred to as "privileges," that usage was informal and was not proper legal terminology. *Cf.* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 Wm. & Mary L. Rev. 1321, 1356, 1358 (2018) ("The Constitution is written in the language of the law," which "communicates … matters more precisely" than ordinary language).

Consistent with this understanding, the men who drafted and ratified the Fourteenth Amendment intended the Privileges or Immunities Clause to protect government-granted privileges, not pre-existing natural rights. Specifically, the clause in large part was designed to protect the privileges and immunities from discrimination conferred by the Civil Rights Act of 1866.[2] *See McDonald*, 561 U.S. at 775 ("Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.").

To be sure, even if the fundamental natural rights guaranteed in the Bill of Rights were not incorporated by the Privileges or Immunities Clause, it does not follow that they

[2] These would have been viewed as "privileges" or "immunities" because they altered the default common law rule, prohibiting discrimination that would otherwise have been lawful under the common law.

were not incorporated at all. Section 1 of the Fourteenth Amendment included the Citizenship, Privileges or Immunities, Due Process, and Equal Protection clauses. The Due Process Clause is in fact the most historically sound clause under which to incorporate.

As a leading historian has stated, while there are "over thirty examples of statements by Republicans during the Thirty-eighth and Thirty-ninth Congresses indicating they believed that at least some Bill of Rights liberties limited the states," that does not necessarily end "the contest … between selective and full application of the provisions of the Bill of Rights to the states." Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 112 (1986).

Senator Jacob Howard's 1866 speech introducing the Fourteenth Amendment is often cited as supporting full Privileges or Immunities incorporation. Yet Senator Howard's description of the Amendment's first section actually suggested a *contrast* between privileges and immunities of citizens and natural rights of the people: "To these privileges and immunities … should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as … the right to be secured against excessive bail and against cruel and unusual punishment." 78 Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). Howard's speech thus "suggests incorporation under the Due Process Clause; and not the Privileges or Immunities Clause." Stephen P. Halbrook, *Heller, the Second Amendment, and Reconstruction: Protecting All Freedmen or Only Militiamen?*, 50 Santa Clara L. Rev. 1073, 1082 (2010).

The Due Process Clause "embodies the premise that life, liberty, and property are 'rights,' and that the people, not just citizens, hold them." *Ibid.* "There is thus a textual basis for incorporation under the Due Process Clause, because a 'right of the people' may be said to be not synonymous with a 'privilege or immunity of the citizen.'" *Ibid.*; *see also* Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & Liberty 115, 172 (2009) ("Rightly understood, *both* the Privileges or Immunities

Clause and the Due Process Clause provide 'substantive' protection for individual rights against intrusions by the states.") (emphasis added).

Further support for due process incorporation as an original matter came from an 1860s commentator writing under the pseudonym "Madison." He explained in the *New York Times* that while Section 1 *as a whole* would protect fundamental liberties enumerated in the Bill of Rights (such as "the right to speak and write" and "to keep and bear arms"), the Privileges or Immunities Clause only protected the limited set of benefits discussed in the landmark case of *Corfield* v. *Coryell* (C.C.E.D.Pa. 1823): "What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue happiness and safety; the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of habeas corpus; to take, hold, and dispose of property, either real or personal, &c., &c. These are the long defined rights of a citizen of the United States, with which States cannot constitutionally interfere." Madison, Letter to the Editor, "The Constitutional Amendments—National Citizenship," *N.Y. Times*, Nov. 10, 1866, at 2.

"Madison" was even clearer about the limited scope of the clause in his next essay, reprinting the text of the Privileges or Immunities Clause before explaining that it "is intended for the enforcement of the Second Section of the Fourth Article of the Constitution, which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States.'" Madison, Letter to the Editor, "The Proposed Constitutional Amendment—What It Provides," *N.Y. Times*, Nov. 15, 1866, at 2.

Plainly, "Madison" did not understand the Privileges or Immunities Clause as incorporating the first eight amendments. Rather, he saw the Due Process Clause as accomplishing that goal (at least with respect to particularly

fundamental rights): "But the inhibition goes further. It says: '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.' There is no doubt but that in spirit the Constitution always meant this … For thirty years no man could speak or write or think that slavery was not of all institutions the most wise, economical, humane, Christian and divine … But this amendment will not expend itself upon the red man, the black man, and the man of mixed color … This protection must be co-extensive with the whole Bill of Rights in its reason and spirit." *Ibid.* This was "an indication of due process clause incorporation, under original public understanding." David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 Whittier L. Rev. 695, n. 103 (2009).

As the House Judiciary Committee, led by Fourteenth Amendment drafter John Bingham, explained in 1871 regarding the Privileges or Immunities Clause: "The clause of the Fourteenth Amendment, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article four, section two … It had been judicially determined that the first Eight Amendments of the Constitution were not limitations on the power of the States, and it was apprehended that the same might be held of the provision of the second section, fourth article." Curtis, *supra*, at 168 (quoting the report).

While "the evidence provides support for what may be called partial incorporation," Upham, *supra*, at 1165, there is "no evidence supporting the claim that anyone before the Civil War believed that the 'privileges and immunities of citizens' encompassed all the rights secured against federal violation by the first eight amendments." *Ibid.*

Thomas Cooley's 1873 edition of Joseph Story's leading constitutional law treatise noted "the difficulty to be encountered in any attempt at a satisfactory enumeration" of the privileges and immunities protected by the Fourteenth Amendment. 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1934 (4th ed. Thomas M. Cooley rev. 1873).[3] "We have already given the first section of the Civil Rights Act, so called, enacted by Congress a short time before this amendment was submitted by that body to the States for ratification, and which undertook an enumeration of the rights which the freedmen, by virtue of the citizenship which the act proposed to assure to them, should possess and enjoy. These rights, we may safely infer, were understood by Congress to be the same with the privileges and immunities of citizens in general. The freedmen were to 'have the same right in every State and territory of the United States to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and to be subject to the like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.'" *Id.* § 1935. If the Privileges or Immunities Clause had incorporated the Bill of Rights, Cooley certainly didn't mention it.

This Court was thus entirely correct to explain, shortly after the Fourteenth Amendment's adoption, that the Privileges or Immunities Clause protected only government-granted benefits, not pre-existing rights. *See Cruikshank*, 92 U.S. at 553 ("The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."); *see also id.* at 552.

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[3] Petitioners might argue that this analysis of original meaning was tainted by the holding in *Slaughterhouse*, decided the same year. But Cooley never mentions that case -- presumably, it was decided after publication.

Into the 20th century, this Court consistently reaffirmed the distinction between privileges and immunities, on the one hand, and pre-existing natural rights, on the other. *See, e.g., Madden* v. *Kentucky*, 309 U.S. 83, 90–91 (1940) ("[T]he privileges and immunities clause protects all citizens against abridgement by states of rights of national citizenship *as distinct from the fundamental or natural rights inherent* in state citizenship.") (emphasis added).

III. INCORPORATION THROUGH THE DUE PROCESS CLAUSE WILL BETTER ACHIEVE STABILITY AND AVOID UNCERTAINTY

A. Incorporation of Different Clauses in the Same Amendment Through Radically Different Means Is Bizarre and Unworkable

The Cruel and Unusual Punishment and Excessive Bail clauses of the Eighth Amendment have already been incorporated through the Due Process Clause, and it is quite bizarre to suggest that the Due Process Clause somehow does not incorporate one clause of *the same sentence* even though it incorporates the other two clauses. There is simply "no reason to distinguish one clause of the Eighth Amendment from another for purposes of incorporation." *Browning-Ferris*, 492 U.S. at 283–84 (opinion of O'Connor, J.); *see also* Rotunda & Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 15.6 (1999) (arguing for the incorporation of the Excessive Fines Clause "because it is intertwined with the other two clauses of the Eighth Amendment").

B. Lower Courts -- Federal and State -- Have Assumed That the Due Process Clause Is the Proper Vehicle for Incorporation of the Excessive Fines Clause

Of the at least 16 state and federal courts that have held the Excessive Fines Clause applicable to the states, not a single one mentioned the Privileges or Immunities Clause to defend its holding. Rather, when a specific clause was cited, it was always the Due Process Clause. *See, e.g., Qwest Corp*. v.

Minnesota Public Utilities Commission, 427 F.3d 1061, 1069 (8th Cir. 2005); *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420 (Cal. 2005), *as modified* (Jan. 18, 2006); *Public Employee Retirement Admin. Comm'n* v. *Bettencourt*, 47 N.E.3d 667, 672 n.7, 681 (Mass. 2016). Other courts, in the course of assuming without deciding that the clause applied to the states, have also treated the matter as exclusively about due process. *See, e.g., Pueblo School Dist. No. 70* v. *Toth*, 924 P.2d 1094, 1099 (Colo. App. 1996); *Disc. Inn, Inc.* v. *City of Chi.*, 803 F.3d 317, 320 (7th Cir. 2015).

As for the federal cases, they clearly evince a firm reliance and expectation -- one this Court should be reluctant to upset absent the most compelling of reasons. Yet even were one to deny that proposition, the *state* cases must be entitled to substantial deference, since this deference "helps build a cooperative judicial federalism." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974).

As a former justice of this Court explained, "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc*. v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

Appropriate deference to the practice of state courts furthers the Framers' goals.

C. Privileges or Immunities Incorporation Would Destabilize the Law, Putting at Risk the Rights of Non-Citizens and Raising Difficult Questions in Other Areas

The Privileges or Immunities Clause states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. Plainly, this language only provides benefits to citizens of the United States. However, this Court's incorporation jurisprudence, stretching back to

Mapp v. *Ohio*, 367 U.S. 643 (1961)*, Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), has consistently extended protections to all persons, excepting only those individuals engaged in a hostile invasion of U.S. territory. Non-citizens residing in the U.S. depend on a workable criminal justice system that protects and punishes equally.

Incorporation by the Privileges or Immunities Clause, coupled with the inevitable ruling that determines that the clause only protects citizens, would set a dangerous precedent that non-citizens are constitutionally inferior to citizens. With some understandable exceptions in areas like voting, election contributions*, see Bluman* v. *Federal Election Com'n.*, 800 F. Supp. 2d 281 (D.D.C. 2011), and (arguably) firearms ownership, non-citizens have always held comparable rights to citizens. For example, "Foreign nationals arrested for a crime, like anyone else in our country, are entitled to the panoply of Miranda rights." *Sanchez-Llamas* v. *Oregon,* 548 U.S. 331 (2006).

In sum, there is no precedent that would suggest that the Constitution's protections apply to non-citizens to any lesser extent than citizens. Incorporation through the Privileges and Immunities Clause could well lead us to that conclusion, and this could have terrible ramifications going forward, both legal and practical.

Discarding the Court's current approach could raise other vexing questions. What Bill of Rights amendments would still count as "clearly established" law in qualified immunity doctrine if this Court upends the doctrinal foundations of incorporation? *See Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1866 (2017). What about "clearly established Federal law" in federal habeas proceedings? *See* 28 U.S.C. § 2254(d)(1). All these questions would be necessary to answer were this Court to accept Petitioners' argument. But it is not necessary to answer those questions, because it is not necessary to decide this case using anything other than longstanding due process doctrine.

D. *Stare Decisis* Counsels Against Revamping Incorporation Doctrine at Such a Late Hour, Particularly Given the Fundamental Rights at Stake

This case examines and reexamines several old, longstanding precedents, all of which indicate that the Eighth Amendment, in its entirety, should be incorporated by the Due Process Clause of the Fourteenth Amendment. To depart from this, as Petitioners urge, would require special circumstances. As the Court said in *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984): "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." No such "special justification" has been provided. To overrule precedent, especially long-standing precedent, without such justification, would be improper, and undermine the integrity of the Court. *See Casey*, 505 U.S. at 844 ("Liberty finds no refuge in a jurisprudence of doubt.").

This case merely demands "straightforward application of settled doctrine." *McDonald*, 561 U.S. at 791 (Scalia, J., concurring). Petitioners' argument ultimately comes down to an assertion that this Court's Privilege or Immunities cases were wrongly decided. Even if Petitioners were correct, *but see supra*, that is not, by itself, a valid justification for overturning precedent -- if it were, *stare decisis* would have no force.

III. THE FORFEITURE IMPOSED ON PETITIONER DOES NOT VIOLATE THE EIGHTH AMENDMENT AS INCORPORATED THROUGH THE DUE PROCESS CLAUSE[4]

[4] In the alternative, *if* this Court were to accept incorporation through the Privileges or Immunities Clause it should nonetheless hold that the particular forfeiture at issue here did not violate the incorporated right, for the reasons given below. Indeed, Justice Thomas's opinion in *McDonald* suggests that, even under the Privileges or Immunities view, an incorporated right is the exact same right as is applicable to the national government -- and, moreover, that precedent on the federally-applicable right can control the incorporated right's scope. *See McDonald*, 561 U.S. at 806 (Thomas, J., concurring in part and concurring in the judgment)

A. Incorporated Bill of Rights Guarantees Have the Same Scope Against the States As They Do Against the Federal Government

According to longstanding Court tradition, provisions of the Bill of Rights, when they are incorporated against the states, have the exact same scope as against the federal government. This formula can be seen in action in the two cases *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), and *McDonald* v. *Chicago*, 561 U.S. 742 (2010), where the Court first outlined the protections entailed by a provision of the Bill of Rights, and then incorporated those exact protections against the states. Excepting such circumstances where the intricacies of federalism preclude certain powers, either to the states or the federal government, the exact same protections of the Bill of Rights apply in both jurisdictions.

In other words, incorporated Bill of Rights guarantees are "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* at 765 (internal quotation marks omitted).

B. The Excessive Fines Clause Applies to Some, But Not All, Civil Forfeitures

The Excessive Fines Clause, while it does apply to some civil forfeitures, does not apply to all. The Clause has never offered significant protection against *in rem* forfeitures of property -- the method Indiana used in this case to take Petitioner's vehicle. It must be remembered that "the condemnation power does not 'compel' anyone to do anything. It acts *in rem*, against the property that is condemned." *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 659, n. 3 (2012) (joint dissent); *see also The Palmyra*, 12 Wheat. 1, 15 (1827) (Story, J.) ("But

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("In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense … The question in this case is whether the Constitution protects *that right* against abridgment by the States.") (emphasis added).

the practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam*.").

In rem forfeitures originated in England as a device for preventing piracy, smuggling, and other illegal activities. This practice was imported to the Americas in the 1700s, including with the Navigation Acts, and was first used by a sovereign American government in the late 1700s to prevent piracy. American colonies had used the practice for decades in such manner. *See C. J. Hendry Co.* v. *Moore*, 318 U.S. 133, 137-51 (1943). Laws akin to the one in question continued to be used throughout the Civil War and into the 20th century, where they became a tool for enforcing Prohibition. Indeed, alcohol legislation is where *in rem* forfeitures have been used the most. *See, e.g., Commonwealth* v. *Certain Intoxicating Liquors*, 107 Mass. 396, 399 (1871). Not only have they been used to prevent illegal smuggling, but they have been used to entice distributors to trade their product in legitimate markets, so that they may be taxed. It is in this way that *in rem* forfeitures serve the purpose of increasing the government's tax incomes, and making up for tax losses incurred as a result of illegal smuggling. It is this purpose, protecting the government's tax earnings and preventing illegal smuggling, that justifies the seizure of property that other circumstances may not. The government's interest in preventing criminal activity, and protecting the public safety, may necessitate the seizure of property that, by a preponderance of the evidence, is engaged in illegal activity. The property itself is engaged in activities that are illegal. It is much easier to prove, for example, that a crate of moonshine was smuggled across a border, than to prove that a specific person smuggled it. Likewise, it is easier to prove that a Land Rover was used to smuggle and sell drugs than it is to prove that Tyson Timbs sold those drugs. The substantive question is whether the property was engaged in illegal activity.

This historical examination shows that *in rem* forfeitures are not generally punishments, but are tools that the

government can use to prevent smuggling and ensure the public safety. The Eighth Amendment prohibits excessive punishments, be they corporal or financial, for crimes in which a defendant, following a fair trial, shall have been convicted by a jury of her peers. At the time the Eighth Amendment was ratified, the term "fine" was "understood to mean a payment to a sovereign as punishment for some offense." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). *In rem* forfeitures, being actions taken against property to prevent smuggling and piracy, and recoup past tax losses, are generally not punishments, nor can they reasonably be considered to be *in personam* proceedings. In fact, they are not even considered criminal proceedings. *See United States* v. *Ursery*, 518 U.S. 267, 278 (1996). Therefore, there is a strong presumption that the Eighth Amendment prohibition against excessive fines does not apply in this case.

Unsurprisingly given this overwhelming historical evidence, lower courts have frequently rejected applying the Excessive Fines Clause to *in rem* forfeitures. *See, e.g., House and Lot* v. *State*, 204 Ala. 108 (1920); *State* v. *Thornson*, 170 Minn. 349, 352–53 (1927); *Henry* v. *Alquist*, 127 A.D.2d 60, 65 (N.Y. App. Div. 1987).

This Court's precedent also aligns perfectly with the history laid out above. In *Austin* v. *United States*, 509 U.S. 602 (1993), this Court held that civil *in rem* forfeitures fall within the Clause's protection if -- and only if -- they are punitive. *See id.* at n. 12. Thus, the traditional *in personam* proportionality test (of how closely the severity of a crime is matched to the severity of the punishment) is ill-suited to *in rem* forfeitures. "The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense." *Id.* at 628 (opinion of Scalia, J.). It must be remembered that the Eighth Amendment only protects against "excessive" fines, not all punitive forfeitures, much less all forfeitures in general.

C. The Forfeiture at Issue Here Was Not "Punitive" Under *Austin*, Nor Was It Constitutionally Excessive

Indiana's civil forfeiture law applies to both real and personal property, including currency and vehicles. Ind. Code § 34-24-1-1. Indiana law sets $10,000 as the maximum pecuniary fine for all felonies, including murder, Ind. Code §§ 35-50-2-3 to -7.

As an initial matter, a forfeiture is not subject to the Excessive Fines Clause at all unless it is "punishment." *Austin* v. *United States*, 509 U.S. 602, 610 (1993). The forfeiture of Timbs' Land Rover was not punishment. Indeed, proceedings for forfeiture of the vehicle began while criminal proceedings against Timbs *were still ongoing* -- something that would make no sense if the forfeiture were intended as punishment for his crime. *See* Compl. for Forfeiture (Aug. 5, 2013).

Moreover, it is clear that Indiana's statute is not punitive because "Indiana affords no protection for innocent owners of real property and minimal protections for innocent owners of vehicles." Brief for Indiana Criminal Defense Lawyers as *Amicus Curiae* at 12.[5] That is, except as to vehicles, Indiana reserves the right to seize property even if the crime allegedly committed with the property was committed by someone other than the actual owner (so the owner was completely innocent). Plainly, Indiana's statute is not punitive -- it makes no sense to *punish* a *person* who is completely innocent of wrongdoing. It *does* make sense to take *property* engaged in wrongdoing, regardless of the owner, and that is all Indiana's statute should be understood as doing.

As mentioned, Indiana has chosen, using its broad discretion in this area, to allow some protection to vehicle owners like Timbs, in that the statute only allows the government to take property from vehicle owners who were

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[5] The vehicle protection referenced is as follows: "If the property seized was a vehicle, the prosecuting attorney must also show by a preponderance of the evidence that a person who has an ownership interest of record in the bureau of motor vehicles 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).

actually culpable in some way. However, this policy decision does not turn the otherwise non-punitive statute into a punitive statute. *See* Rufus Waples, *Treatise on Proceedings In Rem* § 148 (1882) ("[T]he general principle, that forfeiture is irrespective of owner, is subject to legislative modification."); Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 709 (3d ed. 1865) (an *in rem* forfeiture "is *not to be deemed a punishment* inflicted on its owner," and "it follows, that, if the law, in its clemency, permits the owner still to retain his property and avoid the forfeiture on showing himself innocent of any wrong in the matter, *there is no more a punishment involved in the case than there was before*.") (emphases added).

Even if this Court were to find that this forfeiture was punitive, however, it should still find that it was not an "excessive" fine. Indeed, Timbs' crime is hardly a trivial one. It is a felony punishable by up to 20 years in prison. *See* Ind. Code § 35-48-4-2(a)(1)(C). Although Timbs received a 6-year suspended sentence, that should not mask the gravity of the crime under the law. Indeed, dealing heroin is particularly concerning today, given the massive opioid epidemic throughout America. There is nothing "excessive" about taking a car that was used to transport a dangerous and life-destroying drug.

To be sure, some Americans may feel that drug-related crimes such as this one are relatively benign, or even that drug-related crimes should not be on the statute books at all. But that belief is not one this Court should impose on Indiana and its fellow states.

Some may fear that a decision in favor of Respondents here would leave American citizens entirely unprotected from state forfeiture. But this worry is overstated. There may be, for example, substantive due process concerns with certain forfeitures. But Petitioners do not raise a freestanding substantive due process claim in this Court, so that issue must be left for another case.

Moreover, the requirement to prove actual nexus to the crime limits the property that states may take. For example, Indiana could not have taken Timbs' television or furniture

because those items were not directly used in the commission of the crime.

Respondents do not make light of the burden that forfeitures can place upon individuals like Timbs. But where, as here, an item was directly used in serious criminal activity, it is within the state's power to take it away. If citizens believe that discretion has been exercised unwisely, their recourse must be found at the ballot box, not in this Court.

CONCLUSION

Incorporation of the Excessive Fines Clause through the Due Process Clause of the Fourteenth Amendment is preferable to incorporation through the Privileges or Immunities Clause of the amendment; the latter course would be extremely disruptive and unsupported by precedent. To start, this Court has never incorporated a provision of the Bill of Rights through the Privileges or Immunities Clause, let alone one of the provisions of the Eighth Amendment. Only a handful of court cases have seriously flirted with such an idea; most of them are lower court cases from before 1900. All other incorporation, of any provision, and in every other era, has been done through the Due Process Clause. Never in this Court's long Fourteenth Amendment jurisprudence has a case that incorporated a provision of the Bill of Rights through the Due Process Clause proven unreasonable, legally or practically unworkable, morally repugnant, or been rejected by the legal world at large for any reason pertaining to the method of its incorporation. There is accordingly no good reason to depart from longstanding doctrine.

Additionally, there would be numerous practical issues stemming from such a radical shift in doctrine. First, there is a good deal of problematic and ambiguous historical controversy behind the meaning of the phrase "privileges or immunities." Historians disagree about what the phrase meant at the time of the Fourteenth Amendment's ratification, and what protections it ensured. Historically, privileges and immunities referred to benefits granted by law, not inherent rights. Finally, the protections of the Privileges

or Immunities Clause apply only to American citizens, which would have equally catastrophic legal ramifications going forward.

Although this Court should hold that the Excessive Fines Clause is incorporated, it should not hold that the particular *in rem* forfeiture at issue here violated the clause. Under this Court's precedent, forfeitures must be punitive to be subject to the clause in the first place -- and even then must also be excessive in order to be barred. As analysis of Indiana's statutory scheme and the history of *in rem* forfeiture in America demonstrate, the forfeiture of Timbs' Land Rover was neither punitive nor excessive.

* * *

For the foregoing reasons, the Excessive Fines Clause of the Eighth Amendment should be incorporated against the states through the Due Process Clause. However, this Court should hold that the forfeiture of Petitioner Timbs' vehicle was not an "excessive fine" prohibited by the Constitution.

Respectfully submitted,

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