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

BRIEF FOR RESPONDENT

Tobin F. Hirsch

Lucas T. Gazianis

Counsel for Respondent

QUESTION PRESENTED

Whether the prohibition of excessive *in rem* forfeitures is incorporated against the states under the 14th Amendment.

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INTRODUCTION

In May of 2013, petitioner Timbs was apprehended at a traffic stop, and his Range Rover was seized by police. Timbs argues that the forfeiture of his Range Rover, valued at $40,000, was excessive given the nature of his crime of trafficking heroin, and that the Eighth Amendment's Excessive Fines Clause should be incorporated and applied to this case.

This argument fails for several reasons. The forfeiture proceeding against Timbs was an entirely nonpunitive *in rem* proceeding, and therefore is not a punishment as described by the Excessive Fines Clause. Instead, it served to remedy the societal cost, in the form of healthcare costs, criminal justice costs and loss of productivity, caused by the sale and manufacturing of illicit drugs.

Secondly, the protection against excessive *in rem* forfeitures that has developed in the last 30 years is neither "fundamental" nor "deeply rooted," as required for incorporation by *McDonald v. Chicago*, 561 U.S. 742 (2010). Because the Court has always taken a right-by-right approach to incorporation, it should analyze the question of *in rem* forfeitures independently. This analysis will reveal that the historical understanding of *in rem* forfeitures, including from the time of the creation of the Eighth and 14th Amendments, held that they were not punitive and thus not subject to proportionality.

STATEMENT OF THE CASE

In January, 2013, petitioner Timbs purchased a Land Rover at the price of $42,058.30. Four months later, a confidential police informant brought Timbs' heroin trafficking to the attention of the Joint Effort Against Narcotics team. The police set up a controlled buy, where the informant and an undercover detective purchased two grams of heroin for $225. Several weeks later, the two purchased another two grams of heroin for $160 and set up a third controlled buy. On the day the buy was supposed to occur, police apprehended Timbs at a traffic stop.

That June, Timbs was charged with two counts of Class B felony dealing in controlled substances and one count of Class D felony conspiracy to commit theft. In 2015, he plead guilty to one count of each felony and was sentenced to six years: one in community corrections and five suspended to probation. He also agreed to pay $385 in police costs, a $200 interdiction fee, $168 in court costs, a $50 bond fee and $400 for undergoing a drug-and-alcohol assessment with the probation department for a total of $1,203 in fees and costs.

After being charged, the state of Indiana also pursued an *in rem* forfeiture against his Land Rover under Ind. Code § 34-24-1-3(a), authorizing the state to bring "an action for forfeiture" against vehicles used to transport heroin and other illicit substances. This proceeding is considered *in rem* because the action was "taken directly against property, and has for its object the disposition of

the property, without reference to the title of individual claimants." *Pennoyer v. Neff,* 95 U.S. 714, 734 (1878). It is important to note that the forfeiture took place *before* Timbs plead guilty. *State v. Timbs,* 84 N.E.3d 1181.

The trial court denied the State's actions on the grounds that the forfeiture would constitute an excessive fine under the Eighth Amendment. The Court of Appeals affirmed in *State v. Timbs,* 62 N.E.3d 472 (Ind. Ct. App. 2016). The Indiana Supreme Court reversed upon appeal. *State v. Timbs,* 84 N.E.3d 1181, saying that the Excessive Fines Clause has not been incorporated against the states.

STATEMENT OF THE ARGUMENT

The forfeiture of the Timbs' Range Rover, even if it had been conducted by the federal government, would not violate the Excessive Fines Clause.

First, the seizure was entirely independent of Timbs and his pending conviction. The statute under which Timbs' vehicle was seized contains no requirement that the owner be convicted of any crime. Instead, the proceeding, which took place before Timbs was convicted, was carried out against his Land Rover.

Second, the forfeiture served a significant remedial purpose. It served to offset the cost imposed by drug dealers on society. Even if the Court does wish to consider incorporating the constitutional prohibition on excessive fines to the states, the facts of this case make it a poor vehicle to do so.

Third, the rights to proportionality for forfeitures *in rem* and *in personam* are distinct, and the Court has always taken a right-by-right approach to incorporation. The Court should follow its established incorporation methods and exclusively consider the question of nonpunitive, remedial *in rem* forfeitures.

Throughout the vast majority of American history, *in rem* forfeitures have never been subject to a proportionality requirement. Such a requirement, regardless of more recent precedent, is neither "fundamental" nor "deeply rooted" in American legal tradition.

Whether or not the Court decides to take on incorporation of the Excessive Fines Clause, the seizure of Timbs' Land Rover was legitimate. American legal tradition and the facts of this case compel that decision.

ARGUMENT

I. The forfeiture of Timbs' vehicle was not constitutionally excessive.

A. The forfeiture was entirely independent of Timbs and his guilt.

Under Indiana law, the state is authorized to seize all vehicles used "to transport or in any manner to facilitate the transportation of the following: (A) A controlled substance for the purpose of committing, attempting to commit, or conspiring to commit any of the following: … (iv) Dealing in a schedule I, II, or III controlled

substance." Ind. Code § 34-24-1-1(a)(1). This grants the state authority to seize property that is "guilty" regardless of the guilt of the owner.

The most cited case on the application of the Excessive Fines Clause to *in rem* forfeitures held that two federal statutes were subject to proportionality because "nothing in these provisions contradicts the historical understanding, since both sections clearly focus on the owner's culpability by expressly providing innocent owner defenses." *Austin v. U.S.* 509 U.S. 602, 603 (1993). By not providing an innocent owner defense, the Indiana code makes it clear that the forfeiture of Timbs' vehicle was entirely independent of his guilt. Therefore, to apply proportionality to this forfeiture "contradicts the historical understanding" and the decision in *Austin. Id.*

Even more explicitly, however, applying proportionality to forfeitures that do not require the guilt of owners directly contradicts the principle of proportionality, which is "the touchstone of the constitutional inquiry under the Excessive Fines Clause." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). If an owner is innocent of a crime, then no punishment can be proportional. This interpretation does not conflict with *Austin,* which "declines to establish a test for determining whether a forfeiture is constitutionally excessive," 509 U.S. at 622, instead confining its analysis to the statute in question, which *does* provide an innocent owner defense. Therefore, to impose a proportionality requirement on the statute in question, which does not provide an innocent owner defense, would require centuries of jurisprudence

upholding the forfeiture of property from innocent owners to be overturned. *See, e.g., The Little Charles,* 26 F.Cas. 979, 982 (C.C.D. Va. 1818), *Van Oster v. Kansas,* 272 U.S. 465, 468 (1926), *Logan v. United States*, 260 F. 746, 748–49 (5th Cir. 1919), *Tax Lot 1500, 861 F.2d at 234; accord 508 Depot St.,* 964 F.2d at 817.

B. The forfeiture served a significant remedial purpose.

The Justice Department estimates that the "cost of illicit drug use to society for 2007 was more than $193 billion."[1] Given that Indiana represents 2% of the population, it is reasonable to say that the cost of drug use in Indiana is roughly $3.9 billion.[2] In 2012, fewer than 7,500 people in Indiana were arrested for the manufacturing and sale of drugs. Renowned statistical analysis group FiveThirtyEight used the fermi estimation technique to surmise that there were roughly 121,600 marijuana dealers in the United States in 2011.[3] In 2017, the number of arrests for the manufacturing and sale of marijuana was roughly half of that number, indicating

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[1] National Drug Threat Assessment 2011 (2011), 1, accessed February 22, 2019, https://www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf.

[2] "U.S. Census Bureau QuickFacts: United States," United States Census Bureau, accessed February 22, 2019, https://www.census.gov/quickfacts/fact/map/US/PST045218.

[3] Walt Hickey, "The Number of Marijuana Dealers in the United States," FiveThirtyEight, accessed February 22, 2019, https://fivethirtyeight.com/features/the-number-of-marijuana-dealers-in-the-united-states/.

that drug dealers are arrested at roughly a 50% rate. This would mean that there are about 15,000 drug dealers in Indiana, so the average drug dealer in Indiana is responsible for approximately $250,000 in healthcare costs, criminal justice costs and lost productivity. While these figures rely on many approximation techniques and even data from different years due to a lack of available public data, the fact that the average per drug dealer comes out at more than six times the value of Timbs' vehicle, $40,000, shows that the seizure is quite reasonable as a purely remedial measure.

While the fact that a forfeiture serves a remedial purpose does not necessarily mean that it is not also punitive, *see Austin v. U.S.* 509 U.S. 602 (1993) ("Because sanctions frequently serve more than one purpose, the fact that a forfeiture serves remedial goals will not exclude it from the Clause's purview, so long as it can only be explained as serving in part to punish."), the facts of this case show that the forfeiture of Timbs' vehicle is not.

Austin goes on to say that a civil proceeding is subject to proportionality only if it is "so punitive that the proceeding must reasonably be considered criminal." Throughout the case, the Court uses the definition of a punishment from *United States v. Halper,* 490 U.S. 435 (1989): "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Austin v. U.S. 509 U.S. 602, 603 (1993).* This

argument is fundamentally incompatible with the lack of an innocent owner provision in Ind. Code § 34-24-1-1(a)(1)(A)(iv); intuitively, the goals of retribution and deterrence are not advanced through the punishment of individuals who are not guilty of any crimes. "With respect to retribution--the interest in seeing that the offender gets his "just deserts"--the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins v. Virginia*, 536 U.S. 304 (2002). If an offender is innocent of all crimes, they have no culpability, and therefore seizing their property serves no retributive purpose.

Because Timbs' conviction did not hinge on his guilt, as described in subsection A, the forfeiture of the vehicle was independent of his culpability and therefore could not serve any retributive purposes. The point *Austin* makes about deterrence is reversed in several later cases, including *Bennis v. Michigan,* 516 U.S. 442 (1996), which says that "The absence of any deterrent value reinforces the punitive nature of this forfeiture law." In contrast with *Austin,* this argues that having a deterrent decreases the punitivity of a statute. In the statute under which Timbs' vehicle was forfeited, there is no innocent owner protection, but there is a weaker protection requiring that it can be shown by a preponderance of the evidence that the owner "knew or had reason to know" of the illegal activity occurring. Ind. Code § 34-24-1-4(a). The distinction between "knowledge, consent or willful blindness," as described in *Austin,* and "reason to know," as in the current statute, is one of a contrast between

culpability and deterrence. An individual can have "reason to know" that their property is being used without having *mens rea,* or criminal intent or knowledge, whereas a person with "knowledge, consent or willful blindness" has demonstrated *mens rea*. Thus, the culpability of owners convicted under the statute in *Austin* is greater, given that intent is required, where as the deterrent in Indiana's statute is greater because it requires owners to take greater responsibility for their property but does not necessarily require *mens rea*. Therefore, the statute in question complies with the requirement from *Austin* that it not have a retributive purpose and also complies with the requirement from *Bennis* that it should have a deterring purpose.

II. The right to proportionality for *in rem* forfeitures should not be incorporated.

If the Court determines that the forfeiture of Timbs' vehicle would be excessive under federal law, it still should not side with Timbs. The Court has never incorporated a right that is not "fundamental" and "deeply rooted" to our nation's legal tradition. *McDonald v. Chicago*, 561 U.S. 742 (2010), and the right to protection against *in rem* forfeitures is neither.

A. The Court has always taken a right-by-right approach to incorporation.

The question of incorporation has never been examined amendment-by-amendment or even clause-by-clause, but instead has always been addressed on a right-by-right basis. While clauses often tend to contain only one right, this does not mean that the Court always must incorporate an entire clause in a single case. In *Powell v. Alabama,* 287 U.S. 45, 46 (1932), the Court held that "In a capital case… where the defendant is unable to employ counsel… it is the duty of the Court, whether requested or not, to assign counsel for him." The Sixth Amendment's protection of the right to a jury reads "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. There is no explicit distinction made between capital crimes and all other crimes, but the Court chose to incorporate only the right to a jury in the case of capital crimes.

Thirty-one years later, the Court held, in *Gideon v. Wainwright,* 372 U.S. 335 (1963), that right to counsel in all felony cases should be incorporated. Still nine years later, *Argersinger v. Hamlin,* 407 U.S. 25 (1972) incorporated the right to counsel for all imprisonable misdemeanors.

Even rights that are not explicitly contained in any clause have been examined individually. In *Mapp v. Ohio*, 367 U.S. 643, 650 (1961), the Court incorporated the exclusionary rule, which is not contained explicitly in any amendment or clause, but is instead "an essential ingredient of the Fourth Amendment." Essential to this

decision was an analysis of the underlying purpose of the exclusionary rule, which is "to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it." *Id.* This is telling of the Court's method of incorporation. The fact that the exclusionary rule is not a Constitutional clause is irrelevant because it is a "fundamental… deeply rooted" protection. *McDonald v. United States*, 561 U.S. 742 (2010).

The language used in *McDonald* is also very telling, saying that incorporation decisions are a question of "whether a *particular Bill of Rights guarantee* is fundamental to our scheme of ordered liberty and system of justice" (emphasis added). The Court in *McDonald* does not say that a clause or amendment as a whole should be incorporated, but instead a specific guarantee.

B. The right to proportionality for forfeitures *in rem* and *in personam* are distinct.

The American legal tradition has always recognized the practice of *in rem* forfeitures as separate from that of *in personam* fines. In the colonial era, *in rem* forfeitures were used against property used to violate the Navigation Acts. This practice served two principal goals over *in personam* penalties. The first is that it provides remedy for the wrongs committed against the crown through the monetary value of the property. *In rem* forfeitures have always been considered civil proceedings because they are

designed not to punish but to remedy. The second is that seizing the ship used prevents it from being used in future crimes. While ships are not inherently criminal, this form of reparation was especially effective because it decreased the risk of repeated infractions.[4]

When the colonies broke free of British control, states continued the practice of *in rem* forfeitures, setting up courts that took on the previous role of vice-admiralty courts, taking on many early cases regarding forfeitures. *See e.g., Dali v. Ship Betsey* (N.Y. 1784), *March v. Sundry Goods from a Deserted Vessel* (N.Y. 1787), *Terrasson v. Ship Diligent* (N.Y. 1785).[5]

After the ratification of the Constitution, several of the earliest federal statutes involved *in rem* forfeitures, and the federal court system upheld these forfeitures, *See* 1 Stat. 287 (1792), 1 Stat. 55 (1789), ruling with respect to an *in rem* forfeiture that "the thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing… the proceeding in rem stands independent of and wholly unaffected by any criminal proceeding in personam." *The Palmyra*, 25 U.S. 1 (1827). *The Palmyra* remains the most cited case on the distinction between *in rem* forfeitures and *in personam* fines.

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[4] Matthew P. Harrington, "Rethinking in Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture," Yale Law and Policy Review 12, no. 2 (1994): 292-293, accessed February 22, 2019, https://digitalcommons.law.yale.edu/ylpr/vol12/iss2/2.

[5] Matthew P. Harrington, "Rethinking in Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture," Yale Law and Policy Review 12, no. 2 (1994): 292-293, accessed February 22, 2019, https://digitalcommons.law.yale.edu/ylpr/vol12/iss2/2.

This understanding persisted throughout the period of the 14th Amendment's ratification. In 1864, Judge Conkling's "Treatise on the Organization, Jurisdiction, and Practice of the Courts of the United States" described *in rem* forfeitures as "strictly a prosecution against a thing" and said that "no inquiry is instituted . . . concerning [its] ownership." Alfred Conkling, Treatise on the Organization, Jurisdiction, and Practice of the Courts of the United States (1864). This treatise has been cited many times by the Court, *see Tennessee v. Davis,* 100 U.S. 257, 276 (1879), and was described by Justice Bradley as "a work long used with approbation by the profession." *Gaines v. Fuentes*, 92 U.S. 10, 24 (1875) (Bradley, J., dissenting).

Furthermore, the Court *to this day* distinguishes between civil and criminal rights during incorporation questions. While the Sixth Amendment's right to trial by jury in criminal cases has been incorporated, *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court still has not incorporated the Seventh Amendment right to a jury in civil cases. *See McDonald v. U.S.,* 561 U.S. 742 n.13 (2010) ("In addition to the right to keep and bear arms… the only rights not fully incorporated are… the Seventh Amendment right to a jury trial in civil cases… ").

From Common Law to the ratification of the Constitution to the ratification of the 14th Amendment, the American legal tradition has always understood *in rem* forfeitures to be distinct from *in personam* fines. This decision was reflected by the jurisprudence on the Excessive Fines Clause. Before 1988, only five state

courts even considered Excessive Fines challenges to *in rem* forfeitures. *House and Lot v. State*, 204 Ala. 108 (1920); *State v. Thornson*, 170 Minn. 349, 352–53 (1927); *Moore v. Commonwealth*, 293 Ky. 55 (1943); *Commonwealth v. One 1970, 2 Dr. H. T. Lincoln Auto.*, 212 Va. 597, 599 (1972); *Henry v. Alquist*, 127 A.D.2d 60, 65 (N.Y. App. Div. 1987). The silence on this issue reveals a consensus among the American legal community that there was a clear distinction between *in rem* forfeitures, which were not understood to be subject to an Excessive Fines restriction, and *in personam* penalties, which clearly were.

C. The right to proportionality for *in rem* forfeitures is neither fundamental nor deeply rooted.

The historical evidence cited above reveals a longstanding consensus in the American legal community that *in rem* forfeitures are independent of the owner's culpability and cannot be subjected to any proportionality requirement. In determining whether a right is "fundamental… and deeply rooted" to the American legal tradition, *McDonald v. Chicago*, 561 U.S. 742 (2010), the last three decades of precedent are largely irrelevant in comparison with the two centuries of jurisprudence that preceded it.

In the 1833 *Louisa Barbara* case, there was a limit on the weight and number of passengers that a ship could hold. When one of these ships was found to be over the

limit by a single child, the entire four-hundred-ton ship was seized, a decision that was upheld by the Supreme Court. *United States v. The Louisa Barbara*, 26 F. Cas. 1000, 1001 (E.D. Pa. 1833).

According to Justice Blackmun, "the primary concern which drove the Framers of the Eighth Amendment was the potential for governmental abuse of prosecutorial power." *Browning-Ferris v. Kelco,* 492 U.S. 57 (1989). He notes that "some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Id. In rem* forfeitures, by their very nature, cannot be 'unpayable' and cannot have any criminal implications.

Throughout the entire American legal tradition, and even in Common Law, it was understood that the Excessive Fines Clause applied only to fines *in personam,* allowing the practice of *in rem* forfeitures to thrive for centuries.

III. Conclusion

In this case, there are two conclusions that the Court can reach. The first is that the forfeiture of Timbs' vehicle would not be constitutionally excessive, even if his vehicle had been seized by the federal government. The second is that the forfeiture is excessive, but the prohibition on excessive *in rem* forfeiture should not be applied to the states.

The first interpretation is the only one that is square with the historical understanding of *in rem* forfeitures.

The value of Timbs' seized vehicle is less than the harm caused to society by the average drug dealer, justifying the seizure entirely in a remedial context. The seizure cannot plausibly be seen as punitive because it does not require criminal intent and was conducted prior to Timbs' conviction, so it does not hinge in any manner on Timbs' culpability.

Even if the Court decides that this forfeiture would be excessive under federal law, it should not apply that decision to the states. The Court has always viewed incorporations based on the specific right protected, not the clause that contains the rights. It has even specifically distinguished the incorporation of the right to a trial by jury based on whether the trial is civil or criminal. To examine civil *in rem* forfeitures and criminal *in personam* fines in conjunction in this case would be out of line with the Court's incorporation precedent and incompatible with the American legal tradition.

When *in rem* forfeitures are examined alone, it is clear that a proportionality requirement is neither fundamental nor deeply rooted. In the first century and a half of the Union's existence, no challenge on these grounds was ever raised in a state court, and only in very recent history has any court accepted this argument. Siding with the petitioner in this case would upset nearly two centuries of incorporation history and nearly three centuries of consensus on *in rem* forfeitures.