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 Petition For A Writ Of Certiorari To The Indiana Supreme Court

REPLY BRIEF FOR PETITIONERS

SAMUEL B. GEDGE
DARPANA M. SHETH
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org
dsheth@ij.org

WESLEY P. HOTTOT*
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org
**Counsel of Record*

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

In 1989, this Court remarked that it had yet to "decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment." *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989). In the intervening 29 years, courts have split on whether the Excessive Fines Clause is incorporated. Still, the State of Indiana asks this Court to "avoid rushing" to decide the issue. Br. in Opp. 1.

The State's Brief in Opposition, however, confirms that this is a perfect case in which to resolve the issue. The State agrees there is an entrenched split of authority (although it views the divide as "[o]nly" a 5-4 split, *see id.* 10, rather than the 16-4 split detailed in the Petition, *see* Pet. 13-21). The State does not dispute that the Indiana Supreme Court's decision conflicts with this Court's precedent. And the State does not deny that the question presented is a nationally important one that only this Court can resolve.

The State nonetheless contends that this case is a "flawed vehicle." Br. in Opp. 8. It is not, and the State's arguments to the contrary lack merit. First, the State asserts that answering the question presented—whether the Excessive Fines Clause applies to the States—would require the Court to also answer "whether and how the Excessive Fines Clause applies to state civil asset forfeitures specifically." *Id.* 1. But the Court has already held that the Clause "protects against excessive civil fines, including forfeitures." *Hudson* v. *United States*, 522 U.S. 93, 103 (1997) (citing *Austin* v. *United States*, 509 U.S. 602 (1993)). That

same standard will apply to state civil forfeitures if this Court holds (as it should) that the Excessive Fines Clause applies to the States.

Second, the State suggests that the Indiana Supreme Court's decision might have been more "refined" had the parties made better arguments. Br. in Opp. 5. But the court's opinion represents the most in-depth discussion from any court on whether the Excessive Fines Clause applies to the States. Although the court reached the wrong conclusion, it could not have been clearer about its rationale: It "decline[d] to find or assume incorporation until the Supreme Court decides the issue authoritatively." Pet. App. 8. This Court should grant the Petition and decide the issue authoritatively.

REASONS FOR GRANTING THE PETITION

I. The State does not dispute that there is a split of authority on the question presented.

The Indiana Supreme Court's decision deepens a split with 14 other state high courts and two federal courts of appeals, all of which have applied the Excessive Fines Clause to the States. *See* Pet. 13-18. Indiana now joins the supreme courts of Montana and Mississippi, and Michigan's court of appeals, in holding that the Clause is not incorporated. *See id.* 19-21.

The State does not dispute that the split of authority is substantial. In favor of incorporation, the State

counts four state supreme courts and a federal court of appeals. Br. in Opp. 10 (listing Eighth Circuit, California, Massachusetts, Pennsylvania, and West Virginia). Against incorporation, the State counts three supreme courts, *id.* 1, 10 (listing Indiana, Montana, and Mississippi), and it does not dispute that Michigan's intermediate court has also held, several times, that the Clause is not incorporated, *see* Pet. 20-21.

This Court's intervention would be warranted even if the split were as the State describes it. But of course, the split is far deeper. The Petition details 10 additional state high courts (along with the Ninth Circuit) that have also applied the Excessive Fines Clause to the States. *See id.* 13-18. The State attempts to dismiss these decisions by asserting they "held that the Clause applies to state *forfeitures* without addressing whether it applies to States at all." Br. in Opp. 11 (emphasis in original). But a court applying the Excessive Fines Clause to "state forfeitures" has necessarily applied the Clause "to States." The Delaware Supreme Court, for example, holds that "it is clear that civil forfeitures imposed pursuant to Delaware law are subject to the constraints of the Excessive Fines Clause of the Eighth Amendment." *In re 1982 Honda*, 681 A.2d 1035, 1039 (Del. 1996). Even without using the word "incorporation," that holding leaves no room for doubt: Punitive economic sanctions in Delaware "are subject to the constraints of the Excessive Fines Clause of the Eighth Amendment." *Id.* The other jurisdictions that the State would exclude from the split are equally clear that the Clause applies within their

borders. *See* Pet. 13-18; *see also id.* 18 n.5 (listing intermediate courts in nine additional states that have applied the Clause).

In sum, both the Petition and the State's Brief in Opposition demonstrate a substantial split of authority on the question presented.

II. The State does not dispute that the Indiana Supreme Court's decision conflicts with this Court's precedent.

Certiorari is also warranted because the Indiana Supreme Court's decision conflicts with this Court's precedent. The court overlooked a half-dozen instances where this Court has said that the Excessive Fines Clause is incorporated. *See* Pet. 10. And finding no sufficiently "definitive" decision from this Court, Pet. App. 9, the Indiana Supreme Court declined to perform the incorporation analysis on its own. The result is a holding that departs from this Court's precedent, breaks with "well established" incorporation principles, *McDonald* v. *City of Chicago*, 561 U.S. 742, 750 (2010), and strips the residents of Indiana of a federally protected right. *See* Pet. 21-27.

Again, the State does not disagree; it offers no defense of the Indiana Supreme Court's decision to "opt not" to give effect to the Excessive Fines Clause. Pet. App. 4. Instead, the State asserts that the best way to address this error is to overlook it. That is because, in the State's view, denying the Petition might "implicitly reiterate the obligation of lower courts to apply the

appropriate test rather than await an answer from th[is] Court." Br. in Opp. 12. But "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *North Carolina* v. *N.C. State Conference of NAACP*, 137 S. Ct. 1399, 1400 (2017) (statement of Roberts, C.J., respecting denial of certiorari) (quoting *United States* v. *Carver*, 260 U.S. 482, 490 (1923)). If—as the parties seemingly agree—state courts must enforce federally protected rights, the way to reiterate that obligation is to grant the Petition and reverse the judgment of the Indiana Supreme Court.

III. The question presented is important and should be resolved in this case.

As discussed in the Petition and supporting *amicus* briefs, the Excessive Fines Clause is a key check on disproportionate economic sanctions. Given the recent explosion in fines and forfeitures at the state and local levels, the Clause is as essential now as ever. Whether the Clause applies to the States is thus a question of pressing national importance. *See* Pet. 27-36.

The State does not dispute the importance of the question presented. It contends instead that this case is a "flawed vehicle," Br. in Opp. 8, but each of the State's vehicle arguments lacks merit.

First, the State asserts that the incorporation issue was "not briefed below." *Id.* 1. That is incorrect; the State's court-of-appeals brief devoted over 10 percent of its argument section to the "threshold question" of incorporation. Appellant's Br., *State* v. *Timbs*, No.

27A04-1511-MI-1976, 2016 WL 11200867, at *11 n.1 (Ind. Ct. App. Mar. 30, 2016); *see also* Br. in Opp. 5 (acknowledging that the State raised this issue). Having argued incorporation—and won—the State cannot credibly claim that the issue was never raised.*

The State also considers the Indiana Supreme Court's opinion insufficiently "refined" for review. *See* Br. in Opp. 5. But this Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). And regardless, the Indiana Supreme Court absolutely "focus[ed]" (Br. in Opp. 6) on whether the Excessive Fines Clause applies to the States. Despite reaching the wrong conclusion, the court's opinion is the most comprehensive of any decision—state or federal—to have considered the issue. And the State offers no reason to think that future courts will shed further light on the issue by "engag[ing] in the substantive 'selective incorporation' analysis" the State envisions. *Id.* 12. If the past three decades are any guide, no court is likely to do so anytime soon. *Cf. id.* 10-12 (faulting the depth of analysis

* The State also notes that Petitioners did not invoke the Eighth Amendment in their answer. Br. in Opp. 3. That is irrelevant, and the State does not argue otherwise. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 197 (10th ed. 2013) ("Once it is clear that the highest state court has actually passed on the federal question, any inquiry into how or when the question was raised in the state courts is considered irrelevant to the exercise of the Court's jurisdiction. An irrebuttable presumption is created that the federal question was timely and properly raised."); *see also Burch* v. *Louisiana*, 441 U.S. 130, 133 n.5 (1979).

of other courts that have confronted the Clause's incorporation).

Second, the State contends that apart from whether the Excessive Fines Clause is incorporated, this case presents a "complicate[d]" secondary question about whether the Clause applies to "state civil asset forfeitures specifically." *Id.* 1, 7. It is hard to see why. The Indiana Supreme Court's decision did not turn on any special feature of Indiana's civil-forfeiture regime. Instead—as the State acknowledges (*id.* 1, 5)—the court rejected federal excessive-fines protections in all circumstances. In Indiana, the Clause does not apply to any form of punitive economic sanction—forfeiture or otherwise—imposed by state and local officials. Contrary to the State's view, the decision "cleanly presents the question of incorporation alone." *See id.* 7.

The State also misconstrues the incorporation analysis at a more basic level. The question presented—whether the Excessive Fines Clause applies to the States—does not require this Court to answer "whether and how the Excessive Fines Clause applies to state civil asset forfeitures specifically." *Id.* 1, 6-8. If the Clause applies, then it will apply to state civil-forfeiture laws in the same way it applies to federal civil-forfeiture laws. *See McDonald*, 561 U.S. at 765 ("[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' ") (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1964)). And this Court has already held that

forfeiture "constitutes 'payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin*, 509 U.S. at 622 (citation omitted). Indeed, state courts—including the Indiana Court of Appeals—have long applied *Austin* to civil forfeiture. *$100* v. *State*, 822 N.E.2d 1001, 1010-11 (Ind. Ct. App. 2005); *see also, e.g.*, *Dean* v. *State*, 736 S.E.2d 40, 47-48 (W. Va. 2012); *Ex parte Kelley*, 766 So. 2d 837, 839-40 (Ala. 1999); *In re 1982 Honda*, 681 A.2d at 1039. As a result, the State is wrong to question whether "individuals ha[ve] a legal right to be free from 'excessive' forfeitures." Br. in Opp. 7. They do. The only question is whether that right is incorporated.

Third, the State stresses the lack of "record evidence" concerning "the historical practice of state civil asset forfeitures." *Id.* 6. But what the State characterizes as "record evidence" is nothing more than the legal research required for any constitutional case before this Court. *See, e.g.*, *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373-78 (2018). The fact that legal research may be "time-consuming" and "labor-intensive" (Br. in Opp. 7) is not a vehicle problem.

The State's understanding of the necessary "historical evidence" (*id.*) also repeats its mistaken view of the question presented. The State foresees a deep dive into "the historical practice of state civil asset forfeitures." *Id.* 6; *see also id.* 7. But as just discussed, this Court has already held that civil-forfeiture laws are subject to the Excessive Fines Clause when they are at

least partly punitive. There is no reason to reopen that issue in resolving the question of incorporation.

Fourth, the State suggests that "waiting" to address the question presented would "pose[] little risk of harm because state constitutions already limit the fines States can impose." Br. in Opp. 8. But the same could have been said of the right incorporated in *McDonald*. Like the Bill of Rights, the Illinois Constitution guarantees the right to keep and bear arms. *See* Ill. Const. art. I, § 22. Even so, the plurality in *McDonald* applied "a single, neutral principle" of incorporation to establish a floor of federal protection nationwide. 561 U.S. at 788. And that makes sense. The federal Constitution's guarantees are "not the less valuable and effective because of the prior and existing inhibition[s] . . . in the constitutions of the several states." *O'Neil* v. *Vermont*, 144 U.S. 323, 363 (1892) (Field, J., dissenting).

Nor is it clear how giving state courts more time to "expound" (Br. in Opp. 9) on their own constitutions would affect the question presented. No matter how a State's constitution might be construed, Section 1 of the Fourteenth Amendment establishes "federal enforcement of constitutionally enumerated rights against the States." *McDonald*, 561 U.S. at 840-41 (Thomas, J., concurring in part and concurring in the judgment). That is why the First Amendment has long been incorporated, notwithstanding the prevalence of state protections for expressive and religious rights. The same is true of the Second and Fourth Amendments, and parts of the Fifth, Sixth, and Eighth

Amendments, all of which have state equivalents. If anything, the popularity of state excessive-fines protections suggests that—like other federal rights with state analogues—the Eighth Amendment's Excessive Fines Clause secures a fundamental right and merits incorporation under Section 1 of the Fourteenth Amendment. *See* Pet. 25.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL B. GEDGE
DARPANA M. SHETH
INSTITUTE FOR JUSTICE
901 North Glebe Road,
Suite 900
Arlington, VA 22203
(703) 682-9320
sgedge@ij.org
dsheth@ij.org

WESLEY P. HOTTOT*
INSTITUTE FOR JUSTICE
600 University Street,
Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org
**Counsel of Record*

Counsel for Petitioners