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

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONERS

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September 10, 2018

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that works to protect and defend the rights to free speech, assembly, press, and petition. As part of that mission, the Institute represents individuals and civil society organizations, *pro bono,* in cases raising First Amendment objections to the regulation of core political activity. The Institute's clients often face burdensome civil fines for even minor technical violations of these laws.

In addition, the Institute has participated as *amicus curiae* in many of this Court's most important First Amendment cases, including *McCutcheon v. Federal Election Commission,* 572 U.S. 185 (2014), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Last Term, the Institute also participated as *amicus curiae* to address the First Amendment implications of *Carpenter v. United States*, 585 U.S. __; 138 S. Ct. 2206 (2018), and the political speech questions raised by *Lozman v. City of Riviera Beach*, 585 U.S. __, 138 S. Ct. 1945 (2018).

SUMMARY OF THE ARGUMENT

The Bill of Rights protects discrete, enumerated liberties. But it also protects "our scheme of ordered liberty" by serving the Constitution's

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. Both Parties have filed blanket consent to briefs of *amicus curiae* in this case.

larger, interlocking machinery. *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010) (emphasis removed). Accordingly, when deciding whether to incorporate one of its protections against the States, this Court should consider the effect on other enumerated rights.

Here, incorporating the Excessive Fines Clause will bolster the rights protected by the First Amendment. That is because state regulators have threatened outrageous fines for even minor, technical violations of campaign finance provisions. As a result, the threat of excessive fines itself works to chill protected expression.

This is troubling because courts cannot directly address the fines themselves. Instead, until this Court incorporates the Excessive Fines Clause, they must take a detour through the hopelessly complex law governing campaign finance, choosing among and applying the mosaic of standards articulated by this Court in the First Amendment context. That approach is inefficient and fails to provide the protections clearly anticipated by the Eighth Amendment's text.

ARGUMENT

I. This Court ought to consider the positive effects incorporation of the Excessive Fines Clause will have on speech and association protected by the First Amendment.

"The first ten amendments were proposed and adopted largely because of fear that [the Federal] Government might unduly interfere with prized

individual liberties," and, accordingly, "[t]he amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments." *Adamson v. Calif.*, 332 U.S. 46, 70 (1947) (Black, J., dissenting).

These amendments operate together, protecting a "scheme of ordered liberty." *McDonald*, 561 U.S. at 764. [2] For example, the Fourth Amendment requires the government to obtain a warrant before installing a GPS tracker, and that requirement can in turn prevent the police from infringing on an individual's First Amendment right to privacy in "her familial, political, professional, religious, and sexual associations." *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring); *see also NAACP v. Ala.*, 357 U.S. 449, 466 (1958) (First Amendment protects "the right…to pursue [one's] lawful private interests privately and to associate freely with others in so doing").

But as mere "checks and limitations upon the government which that instrument called into existence," those amendments had no effect "on…the States, which existed when the Constitution was adopted." *Slaughter-House Cases*, 83 U.S. 36, 124 (1873) (Swayne, J., dissenting). After a long train of abuses necessitated "a new Magna Charta," the People adopted the Fourteenth Amendment. *Id.* at 125. As presently understood by this Court, that article may "prevent[] state invasion of rights

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[2] While Justice Alito's justification of the Court's judgment was a plurality opinion, his explanation of the how rights are incorporated under the Fourteenth Amendment commanded a majority of the Court.

enumerated in the first eight Amendments," *Malloy v. Hogan*, 378 U.S. 1, 4 (1964), where "a particular Bill of Rights guarantee is fundamental to" the American "scheme of ordered liberty and system of justice." *McDonald*, 561 U.S. at 764.

When considering whether a clause of the Bill of Rights is "fundamental to our scheme of ordered liberty," *id.* (emphasis removed), the Court should not treat that particular provision in a vacuum. Instead, it should consider whether it might also provide a constitutional prophylaxis protecting other freedoms essential to that order. *See Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence…").

Such is the case here: incorporation of the Excessive Fines Clause will also protect against State action threatening political activity, a context where "the First Amendment 'has its fullest and most urgent application.'" *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

II. Incorporation of the Excessive Fines Clause will provide additional security for rights guaranteed by the First Amendment.

Although the First Amendment protects political speech and association, those rights are "not absolute." *McCutcheon*, 572 U.S. at 191 (Roberts, C.J., controlling op.). Accordingly, the federal government and the States have imposed various restrictions on political freedom, including the ability to finance

political campaigns and make electoral communications.

The First Amendment applies at all levels of government. *Gitlow v. N.Y.,* 268 U.S. 652, 666 (1925); *De Jonge v. Or.*, 299 U.S. 353, 364 (1937); *NAACP*, 357 U.S. at 466. But while Congress is bound by the Eighth Amendment, unless this Court rules for Petitioners, the States will not be so encumbered.

This is not an ephemeral concern. Penalties that would appear to implicate the Excessive Fines Clause are already being imposed or threatened, sometimes for merely technical violations of state reporting requirements.

In Vermont, Dean Corren, a candidate for lieutenant governor, was threatened with a $72,000 penalty "because of an email inviting citizens to a rally." Nick Rummell, *Vermont Campaign-Finance Limits Survive Appeal*, Courthouse News Service (July 31, 2018).[3] Attorney General William Sorrell argued that the email, which was sent by the state Democratic Party, constituted an impermissible contribution to a publicly financed campaign. *Id*.

Although the candidate offered to pay the value of the email—$255—the Attorney General held fast, demanding that Mr. Corren forfeit his $52,000 in public financing, itself a substantial penalty, and pay an additional $20,000 fine on the $255 expenditure. *Id*. It took a lawsuit against Mr. Sorrell's office for the Attorney General to back down. That case was ultimately settled for $255. *Id*.

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[3] *Available at:* https://www.courthousenews.com/vermont-campaign-finance-limits-survive-appeal/

A case in the State of Washington went further still. In November 2016, an $18 million penalty ($6 million plus treble damages) was levied against the Grocery Manufacturers Association for inadvertently failing to register as a political committee. *State of Wash. v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. Nov. 2, 2016).[4]

The trial court based its fine on its previous order that there was no need to show "'subjective intent to violate the law. In other words, [treble damages were] not limited to only those instances where the person subjectively knew their actions were illegal and acted anyway.'" Slip Op. at 33, *State of Wash. v. Grocery Mfrs. Ass'n*, Nos. 49768-9-II, 50188-1-II (Wash. Ct. App. Sept. 5, 2018) (citation omitted).[5]

It was not until nearly two years later, on appeal, that the Grocery Manufacturer's Association learned that it "only" owed $6 million because "a party must have knowledge that it was violating the law to be subject to treble damages." Slip Op. at 34, *Grocery Mfrs. Ass'n*, Nos. 49768-9-II, 50188-1-II; *compare Citizens United*, 558 U.S. at 334 ("Today, Citizens United finally learns, two years after the fact, whether it could have spoken…."). But the appellate court ruled purely as a matter of statutory interpretation. *Compare United States v. Bajakajian*, 524 U.S. 321, 334 (1998), *superseded by statute on*

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[4] *Available at* :
https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/GMA%20Ruling%20110216.pdf.

[5] *Available at* :
http://www.courts.wa.gov/opinions/pdf/D2%2049768-9-II%20Published%20Opinion.pdf

other grounds[6] ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality…."). And the State has vowed to appeal. Don Jenkins, *Washington AG to press for $18 million fine against foodmakers*, Capital Press (Sept. 6, 2018).[7]

These cases involve candidates and organizations that secured counsel and fought back. That luxury is often unavailable to smaller organizations that are more likely to be intimidated by the prospect of a grossly disproportionate fine. Such groups are common at the state and local level, and it is precisely those organizations that require the Eighth Amendment's protection. *See Sampson v. Buescher*, 625 F.3d 1247, 1251-1253 (10th Cir. 2010) (complaint filed against organization that made "nonmonetary contributions…totaling $782.02").

In the State of Montana, a small group failing to follow the law can face statutory treble damages in civil penalties "in a civil action brought by the commissioner [of political practices]." Mont. Code Ann. 13-37-128(1). Colorado provides a more extreme example: its *constitution* imposes "a civil penalty of *at least double and up to five times* the amount contributed, received, or spent" for certain campaign finance violations. Colo. Const. art. XXVIII, § 10(1) (emphasis supplied).[8] Of the other States that have

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[6] As stated in *United States v. Toro-Barboza*, 673 F.3d 1136, 1154 (9th Cir. 2012).

[7] *Available at*: http://www.capitalpress.com/Washington/20180906/washington-ag-to-press-for-18-million-fine-against-foodmakers.

[8] The Colorado Constitution also requires penalties of $50 per day for failure to file a disclosure report, and those fines are not

expressly disclaimed incorporation of the Excessive Fines Clause, Michigan imposes treble damages for some independent expenditure committee violations, Mich. Comp. Laws § 169.224b(5)(b), while Indiana imposes double or triple damages in certain cases. Ind. Code § 3-9-4-16(e) – (g).

These harms are compounded by the complicated nature of political regulation. Notwithstanding this Court's pronouncement that speakers need not "retain a campaign finance attorney" before acting, if states levy exorbitant fines for technical violations, it will be very unwise to take this Court's advice on the question.[9] *Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney…before discussing the most salient political issues of our day.").

Campaign finance law is famously complicated, as demonstrated by both social studies and the real-

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subject to an aggregate cap. *See* Colo. Const. art. XXVIII, § 10(2). A $1,000 group unaware of this fact would, within 20 days, forfeit its entire bank balance to the state.

[9] Especially where the state has created an independent agency specifically to identify and punish errors. In such cases, the temptation toward aggressive enforcement will be acute. *See* Mike Dennison, *'Partisan hack' or 'thorough professional?' Crusading political commissioner has been called both*, Helena Independent Record (Jan. 26, 2014), https://helenair.com/news/local/partisan-hack-or-thorough-professional-crusading-political-commissioner-has-been/article_82f1ad02-8657-11e3-90df-0019bb2963f4.html ("'[The Commissioner] targeted specific candidates, and he just took over the investigations, directed everything I did, from day one…Every commissioner I worked for before…stayed out of investigations, and now he's directing them.'") (second ellipsis in original).

world experiences of those seeking to engage in the political arena. Tr. of Oral Arg. 17, *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (Oct. 8, 2013) (Scalia, J.) ("I agree that – that this campaign finance law is so intricate that I can't figure it out.").

In one study of 255 people "asked to complete the actual disclosure forms for California, Colorado or Missouri based on a simple scenario typical of grassroots political activity…[n]o one completed the forms correctly." Jeffrey Milyo, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate* 3-4 (Institute for Justice, Oct. 2007). [10] Even individuals with advanced degrees can struggle. *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1178, 1179 n.2 (D. Colo. 2014) ("Her initial research suggested [that her small nonprofit] was 'in the clear,' but when a friend familiar with Colorado's campaign finance regime second-guessed that conclusion, she investigated further. Reviewing the relevant statutes and constitutional provisions, Dr. Hsieh found it 'impossible' to figure out what she was supposed to do. Concerned…she decided to register."). [11]

Allowing the States to threaten $20,000 fines for a $255 mistake will necessarily chill political debate, betraying our Constitution's "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

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[10] *Available at*:
http://ij.org/wp-content/uploads/2015/03/CampaignFinanceRedTape.pdf

[11] *Aff'd sub nom. Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 173 (2016).

III. Incorporation of the Excessive Fines Clause will protect this Court's complicated campaign finance jurisprudence from misapplication.

Furthermore, incorporation will provide a means of invalidating outrageous fines without entering the thicket of this Court's campaign finance jurisprudence.

Limits on political expenditures are reviewed under strict scrutiny. *Citizens United*, 558 U.S. at 340. But laws that merely limit the right to make a contribution are considered under a unique standard of review known as "closely drawn" scrutiny. *Randall v. Sorrell*, 548 U.S. 230, 247 (2006). Further, a disclosure reporting requirement, or an on-communication proclamation [12] of sponsorship, is reviewed under something called "exacting scrutiny," *Citizens United*, 558 U.S. at 366-367, which may—or may not—be equivalent to strict scrutiny. *See Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013) ("Though *possibly* less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp.") (quoting *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (*en banc*) (emphasis supplied)).

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[12] Although such compelled speech is often referred as a "disclaimer," Judge Easterbrook has properly noted that such requirements could better be described as "proclaimers." *Majors v. Abell*, 361 F.3d 349, 358 (7th Cir. 2004) (Easterbrook, J., *dubitante*).

So: is a $10,000 fine appropriate if it were levied for an improper contribution of $1,000, but not for an improperly reported expenditure of $1,000?[13]

Another issue: under this Court's First Amendment jurisprudence, corporations, unlike individuals, may be banned from making contributions. *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 149 (2003). Nevertheless, 27 States permit corporations to make such contributions, although they must be properly reported. Institute for Free Speech, *Free Speech Index: Grading the 50 States on Political Giving Freedom* 28 (2018)[14]; *see, e.g.*, Va. Code Ann. § 24.2-949.5(B)(2) (contributor reporting regime for donations to political committees in Virginia, which permits unlimited corporate contributions). What is the relevance of this reduced constitutional protection? If a state or local government imposed a massive fine for improperly reporting a contribution, would it matter whether the funds were given by a small nonprofit corporation rather than an individual?

Such questions are inescapable and cannot be answered by simply applying precedent. These scenarios are ripe for the *mis*application of this Court's First Amendment decisions, precisely because the underlying question is not, properly, about the validity of the statute (a First Amendment inquiry)

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[13] For that matter, is a reporting error less grave in a legislative election than a judicial one? *Williams-Yulee v. The Fla. Bar*, 576 U.S. __; 135 S. Ct. 1656 (2015).

[14] *Available at*:
https://www.ifs.org/wp-content/uploads/2018/03/IFS-Free-Speech-Index-Grading-the-50-States-on-Political-Giving-Freedom.pdf

but rather of the penalty (an Eighth Amendment question).

This case cannot, obviously, resolve the tensions inherent in this Court's campaign finance jurisprudence. *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501-02 (D.C. Cir. 2016) (noting that the "fragile arrangement" upon which this "Court's campaign finance jurisprudence subsists…cannot hold") (internal quotation marks omitted). Nevertheless, a victory for Petitioners "has the benefit of both being a correct application" of the Fourteenth Amendment and a mechanism for the protection of the First. *Van Hollen*, 811 F.3d at 501.

CONCLUSION

For the foregoing reasons, the decision of the Indiana Supreme Court should be reversed.

Respectfully submitted,

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