No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS, *et al.*,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
932 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888

D. ALICIA HICKOK
Counsel of Record
MARK D. TATICCHI
DRINKER BIDDLE
& REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alicia.Hickok@dbr.com

S. VANCE WITTIE
MATTHEW C. SAPP
DRINKER BIDDLE
& REATH LLP
1717 Main Street
Ste. 5400
Dallas, TX 75201
(469) 357-2500

Counsel for Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the resolution of this case because it touches on core questions of individual liberty, which both the federal elements of our constitutional structure and the first eight Amendments in the Bill of Rights were created to protect and preserve. The Rutherford Institute writes in support of Petitioners on these issues.

SUMMARY OF ARGUMENT

1. The Excessive Fines Clause, and the goal of checking arbitrary exercises of a government's penal authority that it promotes, is deeply rooted in the Anglo-American legal tradition. Indeed, prohibitions on excessive governmental exactions predates our Republic by centuries, tracing their roots to the Magna Carta and the English Bill of Rights. Nor is there any basis in the text, purpose, or history of the Clause that justifies treating it differently than the Cruel and Unusual Punishments and Excessive Bail

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[1] This amicus brief is filed with the parties' consent. Petitioners filed their consent on July 12, 2018, and Respondent filed its consent on July 23, 2018. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

Clauses, both of which have been incorporated against the States.

Moreover, current practices by Indiana and other States that do not believe themselves bound by the Clause shows the wisdom of the Framers' efforts to restrain governments' power to fine. States and municipalities, always under budgetary pressure and seeking to raise revenue without raising taxes, face a strong temptation to use fines, civil penalties, and asset forfeitures to bridge their fiscal shortfalls. Resort to such revenue sources sours the relationship between citizens and their representatives, increases cynicism toward government at all levels, and erodes the public's trust in state and local justice systems. Applying the Excessive Fines Clause to the States helps assure that penal exactions are used for their proper purpose and do not become an instrument of tyranny.

2. The Indiana Supreme Court declined to find incorporation in this case because this Court had not yet found the Excessive Fines Clause incorporated. That decision—declining to address the merits of a federal-law defense properly raised in case before it on direct review—cannot be squared with the role of that court, and, more importantly, the role of *all* state courts, in the constitutional structure. Both the Supremacy Clause itself and the oath of support and defense of the Constitution that all state judicial officers are required to take mandate that state courts adjudicate issues of federal law on the same basis as they would issues of state law. Indeed, this is essential to our federal system because the Constitution does not create, and does not require Congress to create, inferior federal courts. As such, it would be perfectly consonant with the constitutional

design for the *only* trial-level forum for raising a federal-law issue to be a *state-court* forum.

ARGUMENT

I. THE EXCESSIVE FINES CLAUSE APPLIES TO STATE AND LOCAL GOVERNMENTS THROUGH THE FOURTEENTH AMENDMENT.

The Eighth Amendment prohibition against excessive fines easily meets the standard for incorporation through the Fourteenth Amendment. It is both "implicit in the concept of ordered liberty," and "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010) (Alito, J.).

Any orderly system of justice requires that punishment be reasonably proportionate to the gravity of the offense. Disproportionate punishment not only shocks the conscience, but the capacity to inflict it also gives government coercive power that threatens the liberty of its citizens. Chief Justice Marshall famously observed, "[T]he power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The power to fine carries the same potentially destructive power. Left unchecked, the sovereign can employ its power to punish by means of financial exactions that can operate to deprive citizens of their livelihoods, homes or even their ability to function as citizens. Indeed, the Eighth Amendment was enacted to constrain the government's power to punish. *Austin v. United States*, 509 U.S. 602, 609 (1993).[2]

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[2] Review of the proportionality of punishment, while deferential to legislative judgments, has invalidated excessive punishment even when authorized by statute. *See United States*

That a punishment takes the form of a deprivation of property does not lessen this concern. The text of the Fourteenth Amendment protects rights in property as well as life and liberty. The Court has long recognized that the Bill of Rights provisions protecting property may be sufficiently fundamental to be incorporated through the Fourteenth Amendment. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (extending the Fifth Amendment prohibition against taking property without just compensation to the States).

"The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983). For example, three separate chapters of the Magna Carta prohibited excessive "amercements." *Id*. A prohibition against excessive fines also appeared in England's Bill of Rights. Its language was adopted verbatim by the drafter of Virginia Declaration of Rights and ultimately by the framers of the Eighth Amendment itself. *Browning-Ferris Ind. of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 266-67 (1989). At the time of the adoption of the Federal Constitution, many State constitutions included prohibitions against excessive fines; the matter was uncontroversial. *Id.* at 264-65.

There is no textual or historical basis for excluding the Excessive Fines Clause from incorporation. The Cruel and Unusual Punishment and Excessive Bail Clauses have already been incorporated and there is

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v. Bajakajian, 524 U.S. 321, 337-40 (1998) (forfeiture of entire amount of unreported currency constituted excessive fine although expressly authorized by statute); *Weems v. United States*, 217 U.S. 349, 380-82 (1910) (invalidating excessive prison sentence authorized by statute).

no apparent rationale for concluding differently with respect to the Excessive Fines Clause. *Browning-Ferris*, 492 U.S. at 284 (O'Connor, J. concurring in part and dissenting in part). Indeed, a majority opinion of the Court has already remarked in dicta 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 Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34 (2001). Moreover, the Excessive Fines Clause forms part of the text of the Eighth Amendment itself. The few instances where rights guaranteed in the Bill of Rights have not been incorporated against the States have largely been derivative rights, such as the right to a unanimous jury, not found in the text of the amendment but accepted as part of the judicial gloss accompanying and implementing it. *United States v. Basurto*, 117 F. Supp. 3d 1266, 1282 n.6 (D.N.M. 2015).

The treatment of punitive damage also supports the incorporation of the Excessive Fines Clause. Substantive due process rights under the Fourteenth Amendment, without reference to any incorporated portion of the Bill of Rights, limit a State's ability to punish through a punitive damages award in civil litigation. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). The Court has adopted substantial guidelines to assure that punishment meted out in civil lawsuits is not excessive. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).[3]

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[3] The standards adopted in *Campbell* and similar cases for determining the constitutional excessiveness of punitive damages awards probably provide the best available method for determining whether a particular state exaction is excessive under the Eighth Amendment. David Pimentel, Forfeitures and

Punitive damages and fines (including criminal forfeitures) are strikingly similar. The only legal distinction between financial punishment imposed through punitive damages payable to private litigants and fines and forfeitures is that only punitive exactions payable to a governmental entity implicates the Eighth Amendment. *Browning-Ferris*, 492 U.S. at 271-73. Otherwise, both forms of exactions are intended for punitive purposes, are financial in their impact, and can be measured in quantitative terms. The treatment of punitive damages provides a "logical constitutional analogue for forfeitures." David Pimentel, Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures, 11 Harv. L. & Pol'y Rev. 541, 566 (2017).

The power to fine is at least as great a threat to property rights as the power to award punitive damages. If anything, scrutiny of fines should be more robust than that of punitive damages because governments may impose them for reasons having nothing to do with a legitimate penal purpose. The protections developed in English law were "aimed at putting limits on the power of the King on the 'tyrannical extortions under the name of amercements, with which John had oppressed his people,' whether that power be exercised for purposes of oppressing political opponents, for raising revenue in unfair ways, or for any other improper use." *Browning-Ferris*, 492 U.S. at 271-72 (citations omitted). The inclusion of the prohibition against excessive fines in the English Bill of Rights was a reaction to abuses of the royal judges during the reigns

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the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures, 11 Harv. L. & Pol'y Rev. 541, 569-71 (2017).

of the Stuarts in levying large fines against the King's political enemies. *United States v. Bajakajian*, 524 U.S. 321, 335 (1998). None of the potential abuses of the power to fine are unique to the federal government rather than the States; there is no reason to believe that the property rights of citizens are less at risk when a State seeks to impose the fine.

Indeed, if anything, state and local governments are *more* likely to succumb to the temptation to abuse fines because of their need for revenue and their often significant constraints (whether legal or political) on their ability to raise that revenue. The governmental entity levying a fine or penalty also receives the financial benefit of the exaction. "A government has a greater incentive to abuse monetary impositions when it is the direct recipient of money than when it is refereeing a dispute between private third parties." *SFF-TIR, LLC v. Stephenson*, 262 F. Supp. 3d 1165, 1229 n. 78 (N.D. Okla. 2017).

Ample evidence suggests that some local governments have abused the power to fine. In some instances, fines and other exactions form a substantial portion of the local government's budget. In its investigation of the Ferguson, Missouri police force the Department of Justice found that for fiscal year 2015 fines comprised $3.09 million of the city's projected $13.26 million general fund revenues. United States Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 9-10 (March 4, 2015). Police and other participants in the city's municipal justice system were urged to maintain revenues through the enactment of fines. *Id.* at 10-15. Indeed, the Justice Department investigation revealed that generating revenue had become a higher priority in the system than fairness in adjudicating cases or the needs of public safety. *Id*.

Ferguson is not an isolated case. A 2010 study by the American Civil Liberties Union reported that a substantial portion of the revenue for operating the New Orleans municipal courts was supplied by the very fines those courts imposed. American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons*, 25 (Oct. 2010). Unsurprisingly, this arrangement placed pressure on the participants to maintain a high level of revenues by imposing fines and other levies. *Id.* at 25-28.

The same perverse incentives are a feature of the forfeiture system. Many States have laws that grant law enforcement agencies or prosecutors' offices a share in the value of forfeited property. *See* Darpana Sheth, *Policing for Profit: The Abuse of Forfeiture Laws*, 14 Engage: J. Federalist Soc'y Prac. Groups, 24, 25-36 (Oct. 2013). The earmarking of forfeited property for law enforcement has been criticized for creating incentives to skew police and prosecution practices toward revenue collection. This has "led to egregious and well-chronicled abuses." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., dissenting from denial of petition for writ of certiorari). *See* Karis Ann-Yu Chi, Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California, 90 Calif. L. Rev. 1635 (Oct. 2002); Eric Blumenson and Eva Nilsen, Policing for Profit: The Drug War's Hidden Economic Agenda, 65 U. Chi. L. Rev. 35 (Winter 1998).

The self-funding of enforcement agencies through forfeiture also creates serious separation-of-power concerns, as the agencies may grow partially independent of political control. Sheth, 14 Engage: J. Federalist Soc'y Prac. Groups at 26; Jefferson Holcomb, Tomislav Kovandzic and Marian Williams, *Civil*

Asset Forfeiture, and Policing for Profit in the United States, 39 J. Crim. Just. 273, 283 (2011).

Excessive fines may also be imposed through civil penalties. Such penalties are, by definition, punitive rather than compensatory. *Gabelli v. S.E.C.*, 568 U.S. 442, 452-52 (2013). Many state statutes authorize the State or a subdivision to seek a civil penalty for the violation of a statute, regulation, or ordinance. In Texas, for example, more than 30 statutes authorize the imposition of civil penalties. *See Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460, 467 (Tex. 2016). These statutes frequently impose substantial civil penalties on a per-violation or per-day basis. Hawaii's consumer protection statute provides for a minimum penalty of $500 and maximum penalty of $10,000 for each violation. Haw. Rev. Stat. § 480-3.1. The Texas Deceptive Trade Practices Act authorizes a civil penalty of up to $20,000 per violation, Tex. Bus. & Com. Code § 17.47(c)(1).

Consequently, a seller of many units of even an inexpensive product can face potentially ruinous liability, disproportionate to any actual harm done by the seller's misconduct. For instance, an Arkansas court multiplied the minimum statutory penalty of $5,000 for violation of Arkansas' Medicaid fraud statute by over 200,000 prescriptions in the State for the questioned drug, with each prescription counted as a separate violation, to impose a civil penalty of over $1 billion. *Ortho-McNeil-Janssen Pharm., Inc. v. State*, 432 S.W.3d 563 (Ark. 2014) (reversing penalty on state substantive grounds).

Minimum penalty provisions are particularly problematic because they divest courts of the discretion to impose small fines, appropriately calibrated to small offenses resulting in little harm. *See Town of Orono v.*

LaPointe, 698 A. 2d 1059, 1062 (Me. 1997) (reversing lower court decision that had suspended of all but $3,000 of a $73,000 fine for operating a junkyard without license because a court is not authorized to assess a lesser penalty than the minimum prescribed by statute).

Civil penalty actions are typically brought by state attorneys general or other state officials in state court. Frequently, private attorneys working on a contingency fee basis represent the State. *See* Donald Gifford, Impersonating the Legislature: State Attorneys General and Parens Patirae Product Litigation, 49 B.C. L. Rev. 913, 964-68 (2008). Such attorneys have an incentive to seek the largest penalty possible, not only to increase the ultimate fee award but to discourage the defendant from vigorously defending the action.

Because States are not citizens of States, such actions typically cannot be removed to federal court under ordinary diversity jurisdiction. *Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973). Nor are such actions regarded as class actions removable under the Class Action Fairness Act. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 168-75 (2014). Consequently, in a civil penalty case the state government acts as prosecutor, adjudicator, and recipient of the exaction all at the same time. The potential for a State to receive a substantial financial windfall from an out-of-state defendant creates a situation rife with the potential for abuse. A federal constitutional backstop in the form of the Eighth Amendment is urgently necessary.

Where financial punishments are disproportionate to the gravity of the offense, they may force innocent defendants to accept plea deals (or settlements in civil cases) rather than face the prospect of potentially

ruinous liability. *See In re Rhone-Poulenc Rorer Inc.*, 51 F. 3d 1293, 1298-1300 (7th Cir. 1995) (Posner, J.) (describing the pressure upon defendants to settle when a large number of claims are aggregated). In this way, excessive fines not only over-punish the guilty, but may punish the innocent as well. The Eighth Amendment prohibition of excessive fines provides a measure of protection from such risks. The Court should hold that it applies to the States via the Fourteenth Amendment.

II. THE INDIANA SUPREME COURT DISREGARDED ITS CONSTITUTIONAL OBLIGATIONS IN DECLINING TO RESOLVE THE MERITS OF THE INCORPORATION QUESTION.

1. In the decision under review, the Indiana Supreme Court "decline[d] to find or assume incorporation until the Supreme Court decides the issue authoritatively." *State v. Timbs*, 84 N.E.3d 1179, 1183 (Ind. 2017). It did so because "Indiana is a sovereign state within our federal system," and the court "elect[ed] not to impose federal obligations on the State that the federal government itself has not mandated." *Id.* at 1183-84; accord *id.* at 1184 ("Absent a definitive holding from the Supreme Court, we decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." (emphasis in original)).

The Indiana Supreme Court's rationale in this regard reflects a fundamental misunderstanding of that court's—and, for that matter, *all* state courts'—role in the constitutional structure.[4] In fact, the

[4] It is possible that in reaching this conclusion, the Indiana Supreme Court misread this Court's decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which described the Excessive

Constitution clearly contemplates that questions of federal law will be raised, and must be resolved, in cases heard in state courts. Indeed, in many instances state courts are the only places where federal rights can be vindicated.

To begin, nothing in the text of the Constitution mandates the creation of inferior federal courts. *See* U.S. Const. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress *may* from time to time ordain and establish." (emphasis added)); *id.* art. I, § 8, cl. 9 (granting Congress the power "[t]o

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Fines Clause (as well as the Third Amendment and the Seventh Amendment's civil-jury requirement) as "not fully incorporated" against the States. *Id.* at 765 n.13. To be sure, the Court also framed the issue as one it "never ha[s] decided," *id.*, but the Indiana Supreme Court may have read the "not fully incorporated" language as a statement that the Clause could not apply to the States unless and until this Court issued a decision affirmatively incorporating it. *See Timbs*, 84 N.E.3d at 1183 (quoting and discussing *McDonald*). This is a serious misreading of *McDonald* because that case and other incorporation cases make clear that the Fourteenth Amendment is what incorporates any particular part of the Bill of Rights against the States, not a decision of the Supreme Court announcing that incorporation applies in a particular context. *McDonald*, 561 U.S. at 758-767 (discussing the theories of incorporation); *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) ("We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, 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 . . . ." (citations omitted) (emphasis added)). This case provides an opportunity for the Court to put the Indiana Supreme Court's misconception to rest by clarifying that state courts must address incorporation questions whenever the right in question is otherwise properly invoked in a case before them.

constitute tribunals inferior to the Supreme Court"); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850) (observing that the Constitution does not "ordai[n] and establis[h] the inferior federal courts" but instead endowed Congress with "the power to establish the courts"); *see also* 1 M. Farrand, The Records of the Federal Convention of 1787 124-25 (1911) (debating the removal of draft language that would have mandated the creation of inferior federal courts, recounting the observation of Messrs. Wilson and Madison "that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them," and recording a 9-2 vote (with one State divided) in favor of adding language "'that the National Legislature be empowered to institute inferior tribunals'"). Said otherwise, the Constitution contemplates and provides for a world in which the principal forum for the vindication of federal rights will be state (rather than federal) courts.[5]

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[5] In most instances, the existence of a defense grounded in federal law does not create a "federal question" sufficient to confer subject matter jurisdiction in the federal district courts. *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-13 (1936) (existence of federal question must be disclosed on the face of the complaint); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for Southern Cal.*, 463 U.S. 1, 14 (1998) ("[A] case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint and even if both parties admit that the defense is the only question truly at issue in the case."). Hence, where a state court refuses to address a matter of federal law, it effectively denies the assertion of federal rights *in the only forum having jurisdiction to adjudicate the matter*. Nor is it any answer to say that, in such circumstances, review of the federal issue may be sought in this Court. The present case notwithstanding, securing review in this Court is no mean feat, particularly in cases that do not present the open issues and division of authority extant here.

As a consequence, state courts are required to consider and resolve not only federal causes of action, but federal rights and privileges raised in defense against civil or criminal charges brought in those courts. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 & n.4 (1981) ("Federal law confers rights binding on state courts, the subject-matter jurisdiction of which is governed in the first instance by state laws."); *Wisconsin v. Illinois*, 281 U.S. 179, 197 (1930) (declaring that even a State's constitution "must . . . yield to an authority that is paramount to the State"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-42 (1816) ("Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an ex post facto act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries."); The Federalist No. 82 (A. Hamilton) ("[T]he national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union.").[6]

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[6] In point of fact, the essential role and obligation of state courts (and other branches of state governments) to uphold the Federal Constitution was highlighted in the public debate leading up to the Constitution's ratification. As James Madison wrote in Federalist No. 44:

> It has been asked why it was thought necessary, that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the United States, in favor of the State constitutions. Several reasons might be assigned for the distinction. I content myself

The Indiana Supreme Court's contrary views notwithstanding, nothing about this arrangement is optional. Indeed, "[f]rom the very nature of their judicial duties [state courts] would be called upon to pronounce the law applicable to the case in judgment. They [a]re not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—'the supreme law of the land.'" *Martin*, 14 U.S. at 340-41; *cf.* U.S. Const. art. VI ("[A]ll . . . judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution.").[7]

> with one, which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. *The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution.*

The Federalist No. 44 (J. Madison) (emphasis added).

[7] Were the rule otherwise, there would be reason to question the continued appropriateness of the well-pleaded complaint rule. *See* note 5, *supra*; *see also Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) ("It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. In a world where state tribunals effectively vindicate defendants' federal rights, cabining access to federal tribunals can be defended on federalism, comity, and economy grounds. But in a world where federal courts are the only forum where federal defenses will be adjudicated fairly and with dispassion—or, for that matter, adjudicated at all—such appeals to federalism, comity, and economy lose much of their force.

The Indiana Supreme Court thus erred in declining to decide whether the Excessive Fines Clause is applicable to Indiana via the Fourteenth Amendment.

2. One further point merits brief mention. The Indiana Supreme Court asserted that it would "not . . . impose federal obligations on the State that the federal government itself has not mandated." *Timbs*, 84 N.E.3d at 1183-84. This remark appears to misapprehend the courts'—and, in particular, *this* Court's—role in our constitutional architecture. When interpreting the dictates of the Federal Constitution, the courts are not "impos[ing] federal obligations" that did not previously exist, *id.*, but are instead announcing what the Constitution—in this case, the Fourteenth Amendment—has already imposed, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to *say what the law is*." (emphasis added)).

As a court whose decisions are ultimately reviewable in this Court, the Indiana Supreme Court thus had a clear and inescapable duty to answer that question in the first instance rather than await a pronouncement from this Court. *Cf. F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court . . . is one of final review, not of first view." (internal quotation marks omitted)).[8]

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[8] Many of the points above may appear somewhat academic given the small number of constitutional rights as to which the incorporation question remains open. The fact remains, however, that state courts must always stand ready to interpret and apply federal law with the same fidelity and care that they bring to bear in construing the laws of their respective States. Their failure to do so would do violence not only to the rights of individual

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Regardless of what decision it might ultimately have reached on the merits of the Question Presented, decisions of this Court dating back to the dawn of our Republic make clear that the course chosen by the Indiana Supreme Court—declining to address a fairly raised and fully preserved defense grounded in the Eighth and Fourteenth Amendments to the U.S. Constitution—was indefensibly wrong. Indeed, as Chief Justice Marshall explained in *Marbury v. Madison*:

> [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marbury, 5 U.S. at 178. The Indiana Supreme Court failed to honor this principle. Its judgment should be reversed.

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litigants but to the federal system and structure established by the Framers.

CONCLUSION

The judgment of the Indiana Supreme Court should be reversed.

Respectfully submitted,

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
932 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888

D. ALICIA HICKOK
Counsel of Record
MARK D. TATICCHI
DRINKER BIDDLE
& REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alicia.Hickok@dbr.com

S. VANCE WITTIE
MATTHEW C. SAPP
DRINKER BIDDLE
& REATH LLP
1717 Main Street
Ste. 5400
Dallas, TX 75201
(469) 357-2500

Counsel for Amicus Curiae

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