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 OF THE DKT LIBERTY PROJECT, CATO INSTITUTE, GOLDWATER INSTITUTE, DUE PROCESS INSTITUTE, FEDERAL BAR ASSOCIATION CIVIL RIGHTS SECTION, AND TEXAS PUBLIC POLICY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit organizations dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against all forms of government interference. *Amici* have a particular interest in this case because the unrestricted use of fines, fees, and civil forfeiture proceedings poses a grave threat to individual liberty and the right to use and enjoy property.

DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and protecting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance over regulation of all kinds, but especially those that restrict individual civil liberties. The Liberty Project has filed several briefs as *amicus curiae* with this Court on issues involving constitutional rights and civil liberties, including the freedom from unreasonable searches and seizures and the right to own and enjoy property.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free

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[1] Blanket consents from both parties to the filing of *amici* briefs are on file with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The Goldwater Institute was established in 1988 as a non-partisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings, and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, it litigates cases and files *amicus* briefs when its objectives or its clients' objectives are directly implicated. The Goldwater Institute has published a series of investigative reports, assisted in state-level asset-forfeiture and municipal-court reforms, and filed *amicus* briefs on the topic.

The Due Process Institute is a non-profit bipartisan public interest organization that works to honor, preserve, and restore procedural fairness in the criminal justice system.

The Civil Rights Law Section of the Federal Bar Association is committed to promoting the development of sound laws and policies in the civil rights field. The Section's members include civil rights attorneys (both

plaintiff and defense attorneys) as well as other practitioners who are interested in civil rights law.[2]

The Texas Public Policy Foundation ("TPPF") is a 501(c)(3) non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating policymakers and shaping the Texas public-policy debate with sound research and outreach.

Right on Crime is the trademarked name of TPPF's national criminal justice reform project. Right on Crime believes a well-functioning criminal justice system enforces order and respect for every person's right to property and ensures that liberty does not lead to license, and also that criminal-justice spending should be tied to performance metrics that hold it accountable for results in protecting the public.

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[2] The Civil Rights Law Section joins this brief in its name only and not in that of the Federal Bar Association. Neither this brief nor the Section's decision to join it should be interpreted to reflect the views of the Association or of any judicial member of the Association. No inference should be drawn that any judicial member has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any judicial member prior to filing.

SUMMARY OF ARGUMENT

"Individual freedom finds tangible expression in property rights," and history shows that this freedom cannot be secured when the government has absolute power to impose fines and forfeitures. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993); *see also* 3 Joseph Story, *Commentaries on the Constitution of the United States* 661 § 1784 (1833); Pet'r Br. 10-25 (recounting the abuse of fines by the English Crown and by state governments during Reconstruction). Respondent asks this Court to hold that state and local governments are entitled to this level of unrestricted power and that the Eighth Amendment's prohibition on the imposition of excessive fines does not apply to them. Under the Court's selective incorporation doctrine, Respondent is wrong for all of the reasons discussed in Petitioners' brief. *Amici* write separately to emphasize the current need for basic limitations on state and local governments' power to exact forfeitures and impose excessive fines and fees on individuals who come into contact with the criminal justice system.

Incentives matter, and state and local government officials are not immune from this basic principle of economics. In recent decades, state and local tax bases have decreased, while spending on criminal justice has increased. Faced with this economic reality, many state and local governments have turned to forfeitures, fines, and fees as a major source of revenue. This has led to excessive penalties like the one at issue here, where Petitioner Timbs's vehicle was forfeited even though the forfeiture was grossly disproportionate to the maximum

fine for his offense. More generally, the overzealous use of fines and forfeitures has distorted the criminal justice system in ways that threaten citizens' rights to liberty, property, and due process. *Amici* herein highlight some of the abuses that could go unchecked if this Court were to hold that the Excessive Fines Clause of the Eighth Amendment does not apply to the states.

First, *amici* discuss the exponential growth in the use of civil forfeiture by state and local governments and the perverse incentives civil forfeiture creates for law enforcement. By giving those responsible for enforcing the law a large share—if not all—of the bounty from civil forfeiture proceedings, states are encouraging the abuse of power. Indeed, this is the very same dangerous incentive structure that inspired the adoption of Eighth Amendment's Excessive Fines Clause and its predecessors in American and English law. Yet the lessons of the past have been lost in many jurisdictions, where the increased and egregious use of civil forfeiture is skewing law enforcement priorities and tilting the balance of power in plea bargaining even further in favor of the government.

Second, *amici* discuss the corresponding growth in the use of fines and fees by states and localities. As *amici* point out, the unrestricted use of fines and fees actually undermines the underlying goals of the criminal justice system. For incarcerated Americans, states often impose a flurry of additional fines on top of their sentences. This can prevent them from reintegrating into society by ensuring that their debt to society can never really be repaid. Further, for millions of Americans who struggle every day to lift themselves

out of poverty, excessive fines can actually foster criminality. These citizens have no assets to spare and hardly any ability to absorb the costs of an excessive fine. They are also disproportionately likely to bear the brunt of a state or local government's efforts to raise revenue through a scheme of fines. For these Americans especially, the unrestricted use of fines and fees poses a serious threat to their liberty.

These are precisely the types of social costs that the Eighth Amendment's Excessive Fines Clause was designed to prevent. The Excessive Fines Clause limits the government's power to collect fines "for improper ends." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989). It does so mainly by prohibiting fines that are "grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). When used judiciously and proportionately, fines are an effective tool for deterring criminal behavior and punishing offenders. *See Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.). But as Petitioners recount in their brief, our legal tradition has long understood that this power can be easily abused. Pet'r Br. 10-25. And the greatest risk of abuse comes when those who have the power to impose fines have a financial interest in the fines they collect. *See Browing-Ferris*, 492 U.S. at 268-73; *Harmelin*, 501 U.S. at 978 n.9.

Applying the Excessive Fines Clause to the states will at least mitigate some of the more egregious uses of forfeitures, fines, and fees in the United States. For all of these reasons, this Court should reverse the judgment of the Indiana Supreme Court.

ARGUMENT

I. The Unrestricted Use of Civil Asset Forfeiture Undermines Due Process and Tramples on Property Rights.

In 1990, Attorney General Dick Thornburgh issued a memorandum urging his United States Attorneys to seize more property from American citizens and businesses. "Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990," he wrote. *James Daniel Good*, 510 U.S. at 56 n.2 (quoting 38 United States Att'y Bulletin 180 (1990) (alterations in original)).

This was a new priority for the Department of Justice. Only six years earlier, Congress had ushered in the modern practice of civil asset forfeiture, whereby law enforcement could "seize property with limited judicial oversight and retain it for their own use." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Mem.) (Thomas, J., concurring in the denial of certiorari). As part of the 1984 amendments to the Comprehensive Drug Abuse Prevention and Control Act, Congress created the Asset Forfeiture Fund, which allowed the Department of Justice to keep 100% of the proceeds from the assets it seized and use those proceeds to fund various departmental operations. Comprehensive Forfeiture Act of 1984, Pub L. No. 98-473, § 310, 98 Stat. 1837, 2040, 2052 (codified at 28 U.S.C. § 524(c)).

Civil forfeiture began primarily as a tool to combat piracy and enforce customs regulations on the high seas, where *in personam* actions against the owners of the property were often impossible. *Leonard*, 137 S. Ct. at

848; *see also* Dick M. Carpenter II et al., Inst. For Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (2d ed. 2015). But by letting those responsible for seizing property keep the assets and benefit from the proceeds, Congress injected a powerful new incentive for federal law enforcement to seize private property from Americans. *See James Daniel Good*, 510 U.S. at 56 & n.2. It did not take long for prosecutors to respond to this new incentive. In 1986, the Asset Forfeiture Fund took in $93.7 million in assets. Carpenter et al., *Policing for Profit* at 5. By 1989, that number had risen to $580.8 million, an increase of more than 500%.[3]

The income from civil forfeitures continued to skyrocket in the following years. By 2014, the Departments of Justice and Treasury seized more than $5 billion worth of assets, an increase of $4,667% from 1986.[4] To be clear, that is more than $5 billion worth of cars, cash, houses, bank accounts, and other valuables that previously belonged to American citizens and businesses. That was more than burglars took from

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[3] *See* U.S. Dep't of Justice, Office of Attorney General, *Annual Report of the Department of Justice Asset Forfeiture Program 1991* 54, https://www.ncjrs.gov/pdffiles1/digitization/156256ncjrs.pdf.

[4] *See* Christopher Ingraham, *Law Enforcement Took More Stuff From People Than Burglars Did Last Year*, Wash. Post Wonkblog (Nov. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/?utm_term=.c81aa1dc0cda; Carpenter et al., *Policing for Profit* at 10.

American citizens in the same year, according to FBI figures.[5]

This same explosion in the use of civil forfeiture also began to take hold at the state and local levels. Shortly after Congress created the Asset Forfeiture Fund, states began passing their own civil-forfeiture statutes modeled on the federal government's lucrative program. Today, 44 states authorize law enforcement to keep at least 45% of the assets they seize. Carpenter et al., *Policing for Profit* at 14. In 30 states, law enforcement keeps 90% or more of the bounty. *Id.*

As a result, civil forfeiture at the state and local level has "become widespread and highly profitable." *Leonard*, 137 S. Ct. at 848. Unlike the federal government, many state and local agencies operate their civil-forfeiture programs with little or no transparency. So it is hard to know just how excessively state and local governments are using civil forfeiture. However, the available data show that state and local agencies in 26 states and the District of Columbia seized more than $254 million in assets in 2012. Carpenter et al., *Policing for Profit* at 11. And data from 14 states show that civil-forfeiture income grew by 136% between 2002 and 2013. *Id.*

The current use of civil forfeiture at the state and local level affects the administration of criminal justice in several pernicious ways.

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[5] *See* Ingraham, *Law Enforcement Took More Stuff*; Carpenter et al., *Policing for Profit* at 5.

1. Most importantly, once agencies are given the opportunity to benefit directly from the assets they seize, they acquire a strong incentive to view more of the property they encounter as "suspicious" or otherwise subject to forfeiture. For example, police officers patrolling roads and highways routinely ask drivers whether they are carrying quantities of cash during traffic stops, and then seize the money if the answer is yes, as though it were a crime to carry legal tender while traveling within the United States. *See, e.g.*, *Testimony Slams Drug Team Tactics*, Miami Herald, Apr. 29, 1994, at B5. Of course, sometimes the money seized *is* connected with criminal activity. In those cases, forfeiture potentially can serve as a useful tool for deterring and punishing criminal behavior. But the incentive to err on the side of seizure has led to countless examples of innocent Americans having their money taken while traveling to make large purchases or to move to a new community.

The cost of these false positives are compounded by the relative lack of protections afforded by the typical forfeiture proceeding. As Justice Thomas has observed, these proceedings "often lack certain procedural protections that accompany criminal proceedings such as the right to a jury trial and a heightened standard of proof." *Leonard*, 137 S. Ct. at 847-48; *see also* Carpenter et al., *Policing for Profit* at 11-12. For average citizens, the results of this system can be catastrophic even if they can somehow manage to prove their innocence. As this Court has previously explained in a similar context, "the availability of a postseizure hearing may be no

recompense for losses caused by erroneous seizure." *James Daniel Good*, 510 U.S. at 56.

The Court need look no further than to Fairfax County, Virginia for confirmation. In August 2012, county police pulled Mandrel Stuart over for a minor traffic violation.[6] During the stop, police discovered $17,550 in Mr. Stuart's car, which he intended to spend on equipment and supplies for his barbecue restaurant.[7] Police seized the cash, claiming that the money Mr. Stuart had earned from his business was in fact drug money.[8] Fortunately for Mr. Stuart, he had the means to hire an attorney and won a unanimous jury verdict for the return of his money.[9] Unfortunately for Mr. Stuart, the process took 14 months, and his business folded in the meantime because it lacked the cash flow to keep operating.[10]

2. The excessive use of civil forfeiture, and the profit-motive underlying that use, also affects which laws get enforced. For example, researchers have found that enforcement of drug laws is far higher in communities where state law allows police to retain the assets they seize. *See* Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 Pub. Choice 285, 285

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[6] Robert O'Harrow Jr., Michael Sallah, & Steven Rich, *They Fought the Law. Who Won?*, Wash. Post (Sept. 8, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won/?utm_term=.69ec3b9e7c74.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

(2000); *see also* Beth A. Colgan, *Fines, Fees, and Forfeitures* in *Reforming Criminal Justice – Volume 4: Punishment, Incarceration, and Release* 205, 210-11 (Erika Luna ed. 2017); Bart J. Wilson & Michael Preciado, Inst. for Justice, *Bad Apples or Bad Laws?: Testing the Incentives of Civil Forfeiture* (2014); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. Crim. Just. 171 (2001). Indeed, "[l]egislation permitting police to keep a portion of seized assets raises drug arrests as a portion of total arrests by about 20 percent and drug arrest rates by about 18 percent." Mast et al., *Entrepreneurial Police* at 301, 303. That is true even when controlling for the level of drug use in a community. *Id.* at 285.

These effects are unsurprising given the incentive structure in place when law enforcement agencies are permitted to keep the proceeds of civil forfeiture and when some crimes are more likely than others to yield those proceeds. In such situations, "like market entrepreneurs, entrepreneurial bureaucracy will respond to relative prices. When the price they expect to be 'paid' to do one thing rises relative to what they expect to be paid to do another, they will reallocate resources." *Id.* at 303.

The incentive structure underlying modern civil forfeiture likewise affects *how* agencies choose to enforce the law. And the choices agencies make are not always in the best interests of the communities they serve. In 2014, investigative journalists in Tennessee found that drug task force officers were far more likely to stop drivers in the westbound lanes of Interstate 40

than in the eastbound lanes. Carpenter et al., *Policing for Profit* at 16. The reason? Smugglers were known to transport drugs to the East Coast using the eastbound lanes of the interstate, and they were known to bring the cash back through Tennessee using the westbound lanes. *Id.* Focusing on the westbound lanes led to bigger cash hauls for the police.

Similarly, in 1989, police in a medium-sized city surveilled a stash house known to contain $7,000 to $13,000 worth of cocaine. But according to researchers, police waited to raid the house until the dealers had dwindled their supply so that there would be more cash to seize. J. Mitchell Miller and Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 Just. Q. 313, 328 (1994). In the words of one of the co-authors who had witnessed this operation first-hand, "[l]ess drugs meant more cash, and the agent's objective was to seize currency rather than cocaine." *Id.* "The case was successful as to proceeds," the authors remarked, "but perhaps not in view of the quantity of cocaine that officers knowingly permitted to reach consumers." *Id.* In other words, police sometimes choose to let dealers spread dangerous drugs in their communities so that they—the police—can benefit from the proceeds later.

3. Unsurprisingly, the unchecked use of civil forfeiture "has led to egregious and well-chronicled abuses," *Leonard* 137 S. Ct. at 848. These abuses are a predictable outcome whenever the government's coercive power is coupled with an incentive to use that power for monetary gain. Often, civil-forfeiture proceedings take the form of a classic shake-down, the

very sort of thing that was notoriously common in Stuart England. *See* Pet'r Br. 11-16. The Court is already familiar with the abuses in Tenaha, Texas, where police "regularly seized the property of out-of-town drivers passing through and collaborated with the district attorney to coerce them into signing waivers of their property rights." *Leonard*, 137 S. Ct. at 848.

But even when it is not quite so egregious, civil forfeiture still encourages garden-variety graft and irresponsible behavior. In a candid interview with the Citizens Police Review Board of Columbia, Missouri, Police Chief Kenneth Burton explained how his department approached civil forfeiture: "[w]e just usually base it on something that would be nice to have that we can't get in the budget."[11] He went on to describe the proceeds from civil forfeiture as "kind of like pennies from heaven—it gets you a toy or something that you need is the way that we typically look at it to be perfectly honest."[12]

Indeed, that is how many state and local law enforcement agencies look at it—as a chance to get a "toy." In 2007, for example, a sheriff in Georgia who had overseen the seizure of around $20 million in assets was found to have spent the money on a sports car, a boat,

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[11] Laurien Rose, *Police Chief Ken Burton Calls Forfeiture Funds 'Pennies from Heaven'*, the Maneater (Nov. 27, 2012), https://www.themaneater.com/stories/outlook/police-chief-ken-burton-calls-forfeiture-funds-pen.

[12] *Id.*

and tuition for his deputies.[13] In Tenaha, Texas, police used forfeiture proceeds to buy a popcorn machine, candy, and catering services. Carpenter et al., *Policing for Profit* at 16. Other departments used their forfeiture proceeds to pay for clowns, coffee makers, luxury cars and pick-up trucks, trips to ski resorts, and a subscription to *High Times* Magazine.[14]

4. The use of civil forfeiture in the plea-bargaining process also raises numerous concerns. This is particularly problematic given the ubiquity of plea bargaining. As this Court has explained, plea bargaining "is not some adjunct to the criminal justice system, it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L. J. 1909, 1912 (1992)). Approximately 94% of all criminal cases in state courts result in guilty pleas. *Id.*; *see also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (noting that pleas account for 95% of state and federal convictions).

Like the federal government, the states generally allow settlement of criminal charges and civil-forfeiture proceedings in a single global settlement. The federal government places some restrictions on such

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[13] John Burnett, All Things Considered, *Sheriff Under Scrutiny Over Drug Money Spending*, National Public Radio (June 18, 2008), http://www.npr.org/templates/story/story.php?storyId=91638378&ps=rs.

[14] Robert O'Harrow Jr., Steven Rich & Shelly Tan, *Asset Seizures Fuel Police Spending*, Wash. Post (Oct. 11, 2014), https://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/?utm_term=.c94295c64e72.

settlements—namely that the "Government should *not* agree to release property subject to forfeiture (civil or criminal) in order to *coerce* a guilty plea on the substantive charges, nor should the Government agree to dismiss criminal charges in order to *coerce* a forfeiture settlement."[15] However, states generally do not have such written policy restrictions.

For example, West Virginia "has no written policy specifically addressing the settlement of asset forfeiture cases through criminal plea bargains." Joseph Cramer, Note, *Civilizing Criminal Sanctions—A Practical Analysis of Civil Asset Forfeiture Under the West Virginia Contraband Forfeiture Act*, 112 W. Va. L. Rev. 991, 1013 (2010). As a result, "[p]rosecutors in criminal cases have wide discretion in deciding who to charge, what charges to bring, and the manner in which charges are pursued" and this "discretion extends to deciding the terms of plea agreements" including asset forfeiture. *Id.* There is thus every incentive for a prosecutor to use civil forfeiture as a bargaining chip in plea negotiations with a defendant. As one commentator has observed, "the threat of forfeiture is a powerful bargaining tool in the hands of the prosecutor." Lindsey N. Godfrey, Note, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 Tex. L. Rev. 1699, 1722 (2001).

Likewise in Florida, there is a significant concern that "convictions by plea bargain could present the unusual circumstance of criminal defendants turning

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[15] U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 88 (2016), https://www.justice.gov/criminal-afmls/file/839521/download.

over their property in an effort to lessen their sentence, which could be interpreted as effectively paying off the state to achieve a lesser sentence." Brittany Brooks, Note, *Misunderstanding Civil Forfeiture: Addressing Misconceptions About Civil Forfeiture with a Focus on the Florida Contraband Forfeiture Act*, 69 U. Miami L. Rev. 321, 340 (2014). The worry is that "the state's judgment in sending criminals to jail might be impaired by the attraction of assets offered up in plea agreements by wealthy criminal defendants." *Id.* Civil forfeiture thus can create perverse incentives not only for police, but also for prosecutors.

5. Civil forfeiture wreaks havoc on Americans living in poverty by taking key assets from those who can least afford to lose them. Take cars for example. In many cities and towns, it is extremely difficult to hold down a job, shop for groceries and other necessities, or deal with any number of life's contingencies without access to a car. For people in these communities, losing a car can throw life into disarray. Yet vehicles are one of the assets that civil-forfeiture programs prize the most.

In general, as Justice Thomas has observed, poor Americans "are often the most burdened by forfeiture" and "are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home." *Leonard*, 137 S. Ct. at 848. And many Americans have no means at all to fight an unjust forfeiture. Without the basic protections afforded by the Eighth Amendment's Excessive Fines Clause, poor Americans will continue to have little defense against state and local agencies that are eager to take their property.

II. The Unrestricted Use of Traditional Fines Poses A Serious Threat to Americans' Liberty.

The same perverse incentives are at work in the way state and local governments impose fines and fees upon those Americans who come into contact with law enforcement and the criminal justice system. Since 2010, 48 states have increased their civil and criminal fines and fees. Joseph Shapiro, *Morning Edition: Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, National Public Radio (May 21, 2014). This was, at least in part, in response to exploding prison populations and corresponding growth in criminal justice budgets. From 1983 to 2001, incarceration rates in the United States more than doubled. *See* Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create* 3 (2017). Between 1980 to 2000, the number of people on probation or parole rose dramatically from 1.84 million to 6.47 million. *See* Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* 133 (2009).

In order to help pay the costs associated with bringing so many new people into the criminal justice system, states increased their criminal justice budgets from roughly $35 billion to $130 billion per year between 1982 and 1997. *Id.* at 157.

Fines and fees presented themselves as an attractive option for funding these new expenditures. By imposing fines on those convicted of offenses (whether serious or petty), and fees on those who are charged with a crime or incarcerated due to conviction, state and local governments could raise revenue for their criminal

justice systems while avoiding politically unpopular tax increases. In some cases, local governments came to rely heavily on fines and fees as a way to generate revenue. For example, in Ferguson, Missouri, fines, fees, and forfeitures accounted for more than 20% of the city's general revenue fund in 2013.[16] The overall impact of this policy is staggering. Today, 10 million people in the United States collectively hold more than $50 billion in criminal debt—an average of $5,000 per person. *See* Martin et al., *Shackled to Debt* at 5.

As with civil forfeiture, efforts to make the criminal justice system pay for itself skews law enforcement priorities. This can take the form of overcharging individuals in order to squeeze the most revenue possible from them, raising the fines associated with certain offenses, or even criminalizing behaviors that were, until recently, completely innocent.

Consider, for example, fines imposed by Seattle, Miami Beach, Honolulu, and other cities against people who engage in "home-sharing"—*i.e.*, renting out their homes to visitors on nightly or weekly bases through the use of websites like Airbnb. These fines (now the subject of litigation by amicus Goldwater Institute) are excessive by any measure: Miami Beach imposes fines of $20,000 to $100,000 *per violation* on home-sharers who rent outside of a small zone in North Beach,[17] and

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[16] U.S. Dep't of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 9 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[17] Goldwater Inst., *Challenging the Highest Home-Sharing Fines in the Nation* (June 27, 2018), https://goo.gl/UCFe88.

Honolulu fines $10,000 *per day*, Christina Sandefur, *Life, Liberty, and the Pursuit of Home-Sharing*, Regulation, Fall 2016, at 12-13—all for exercising what this Court has called "one of the most essential sticks in the bundle of rights that are commonly characterized as property"—namely, the right to choose whom to allow to stay in one's home. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

1. Like civil forfeiture, the excessive use of fines and fees imposes severe financial hardships on ordinary Americans. Many families saddled with criminal debt find themselves having to choose between paying for food and shelter and paying down their criminal debt. *See* Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 J. Criminology & Pub. Pol'y 509, 517 (2011). The choice is obviously a tragic one because carrying criminal debt can have disastrous consequences. It can damage people's credit ratings, prevent them from expunging their criminal records, and cause them to lose their professional licenses or driver's licenses. Colgan, *Fines, Fees, and Forfeitures* at 211.

But most importantly, failing to pay criminal debt can result in prison or jail time. Indeed, despite this Court's holding in *Bearden v. Georgia*, 461 U.S. 660 (1983), that a person cannot be imprisoned for a non-willful failure to pay a fine or fee imposed by a court, many Americans languish in prisons and jails today simply because they cannot afford to pay their fines or fees. For example, investigators found that on any given day in Benton County, Washington, one in four of the people in jail for misdemeanor offenses in 2013 "were

there because they had failed to pay their court fines and fees." Shapiro, *Debtors Prisons*.

This results in part from the *Bearden* "exception" that many states have created for non-payment of fines or fees that were imposed as a part of a plea bargain. In these states, courts determine that in cases in which a defendant agreed to pay fines or fees as part of a plea bargain, any default on these terms is willful and thus the defendant can be jailed. *See generally* Ann K. Wagner, *The Conflict Over* Bearden v. Georgia *in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. Chi. Legal F. 383 (discussing cases). Thus, when defendants agree to pay fines rather than serve prison time, the defendants may still end up in prison even where their inability to pay is due to circumstances beyond their control.

For example, in April 2012, Thomas Barrett pleaded guilty to stealing a $2 can of beer from a convenience store in Georgia. Human Rights Watch, *Profiting From Probation*: *America's "Offender-Funded" Probation Industry* 34 (2014). The court sentenced Mr. Barrett to a $200 fine and 12 months' probation. *Id.* But Mr. Barrett could not afford to pay the more than $1,000 in probation servicing fees that he was quickly charged. He soon found himself in jail for over a month for failing to pay an $80 "start-up" fee. *Id.* After that ordeal, Mr. Barrett resorted to selling his plasma to pay his probation fees. But it was not enough. By February 2013, Mr. Barrett found himself back in jail because he could not pay the crushing fines imposed on him for a truly petty offense. *Id.* at 34-35.

In 2014, Eileen DiNino—a mother of seven from Berks County, Pennsylvania—was sentenced two days in jail for failing to pay $2,000 in fines related to her children's truancy.[18] Ms. DiNino's situation was not unusual: the county had incarcerated 1,626 people for failing to pay truancy fines from 2000 to May 2013.[19] And in fact, Ms. DiNino's two-day sentence was considered a "deal" for her because she was facing up to 45 days in jail for her unpaid fines.[20] But Ms. DiNino did not live to serve out her sentence. She was taken into custody on Friday and found dead in her cell on Saturday afternoon. Reacting with sadness and anger to the tragedy, the district court judge remarked that "[t]his woman should not have died alone in prison."[21] He added that "[o]ur ultimate goal is not to fine people or put them in jail, but that is the only tool the Legislature has given us when people can't afford to pay."[22]

2. The excessive use of fines and fees by state and local governments imposes particularly egregious hardships on persons who are already incarcerated. In 1991, only a quarter of prison inmates were assessed fines, but by 2004, that figure had risen to two-thirds. Alexes Harris, et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in Contemporary United States*, 115 Am. J. Sociology 1753, 1785-86 (2010). The

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[18] Dan Kelly, *Woman in Berks County Prison for Truancy Found Dead in Her Cell*, Reading Eagle (June 11, 2014), http://www.readingeagle.com/news/article/woman-in-berks-county-prison-for-truancy-found-dead-in-her-cell.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

vast majority of incarcerated persons rack up tremendous debt due to fees imposed while they are in prison. Researchers in 2005 found that 90% of individuals in jail or prison were regularly charged extremely high fees for things such as medical care, work release programs, and telephone use. Martin et al., *Shackled to Debt* at 5. And the fines and fees do not cease after release from prison. Approximately 85% of people on probation or parole are required to pay supervision fees, fines, and restitution. *Id.* All told, individuals who have been incarcerated—and their families—incur an average of $13,607 in fines and fees. Saneta deVuono-Powell et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design 9 (Sept. 2015).

That excessive amount of debt is more than enough to keep many individuals who have been incarcerated in poverty and prevent them from reintegrating into society. As one commentator has observed, these fines and fees serve only to "reinforce poverty, destabilize community reentry, and relegate impoverished debtors to a lifetime of punishment because their poverty leaves them unable to fulfill expectations of accountability."[23] Thus, state and local use of excessive fines and fees on incarcerated persons both before and after release

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[23] *See* Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, Atlantic (July 5, 2016), https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026 (quoting Alexes Harris, *A Pound of Flesh: Monetary Sanctions for the Poor* (2016)).

actually undermines the very law enforcement goals they are supposed to be achieving.

* * *

State and local governments have increasingly turned to forfeiture, fines, and fees as a means of raising revenue. This system creates perverse incentives because those who are charged with enforcing the law also have a profit motive for their enforcement. The effects of this system are felt most harshly by those who can least afford it. If this Court holds that state and local governments are not bound by the strictures of the Eighth Amendment's Excessive Fines Clause, the abuses of power chronicled herein will only increase.

CONCLUSION

The judgment of the Indiana Supreme Court should be reversed.

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