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 Supreme Court of Indiana

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct in both state and federal court. NACDL was founded in 1958, and has a nationwide membership of many thousands of direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL submits this brief both to voice its agreement with Petitioner that the Excessive Fines Clause of the Eighth Amendment applies to the states as well as to draw this Court's attention to the Indiana Supreme Court's refusal to consider the merits of Petitioner's federal defense, a refusal that arose out of that court's explicit discrimination against a federal right because it was "*federal*." Pet. App. 9. This is a serious error that threatens the federal rights of criminal defendants in Indiana and throughout the United States. NACDL brings a unique perspective on this issue as its members count on courts—both state and federal—to consider the merits of their arguments regardless of source.

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[1] The parties have given blanket consent to the filing of amicus briefs in this matter and have received notice of NACDL's intent to file this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

SUMMARY OF ARGUMENT

The Indiana Supreme Court did not try to hide that it was discriminating against Timbs's federal constitutional arguments because they were federal. As that court explained,

> Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated. An important corollary is that Indiana has its own system of legal, including constitutional, protections for its citizens and other persons within its jurisdiction. 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.

Pet. App. 9. In other words, the Indiana Supreme Court believed that it was not bound by the text of the U.S. Constitution in the absence of an explicit holding by this Court commanding obedience.

This is a troubling development. Not only is constitutional supremacy inherent in the very concept of a national constitution, but it is also explicitly set forth in the text so as to remove all doubt. As Article VI provides, "[t]his Constitution" as well as all laws and treaties made pursuant to it "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. In making this explicit, the framers "removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution." 3 Joseph Story,

Commentaries on the Constitution § 1839 (3d ed. 1858).

This was a prescient decision. Despite being bound by oath or affirmation to support the federal Constitution, state court judges have on occasion nevertheless discriminated against federal rights. Starting with *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816), a long line of this Court's cases has rejected such maneuvers. And it is now well established that the Constitution "forbids state courts to dissociate themselves from federal law because of disagreement with its content and a refusal to recognize the superior authority of its source." *Howlett* v. *Rose*, 496 U.S. 356, 371 (1990).

While this Court has not yet definitely held that this norm of non-discrimination applies specifically to federal defenses, the logic of *Martin*, *Howlett*, and numerous other cases dealing with federal claims compels that conclusion. Nor is there any reason for treating incorporation cases as exempt from the non-discrimination rule. As this case demonstrates, a state court's refusal to consider federal defenses can have profound consequences for individual criminal defendants, and it threatens the very principles of union and subsidiarity that makes a federalist system of government possible. NACDL therefore respectfully requests that this Court take this opportunity to clarify that states may not discriminate against federal defenses because they are federal.

ARGUMENT

I. STATE COURTS MAY NOT DISCRIMINATE AGAINST FEDERAL DEFENSES

A. The Supremacy Clause Requires State Courts to Adjudicate Federal Law When Applicable

As the founders recognized, the supremacy of the Constitution is inherent in the very nature of a national charter. To allow the contrary rule to prevail would effect "an inversion of the fundamental principles of all government," producing "a monster, in which the head was under the direction of the members." The Federalist No. 44, at 287 (James Madison) (Clinton Rossiter ed., 1961). Thus, the Supremacy Clause merely "declare[d] a truth which flows immediately and necessarily from the institution of a federal government." The Federalist No. 33, at 205 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *accord* Story, *supra*, § 1837 ("The propriety of this clause would seem to result from the very nature of the constitution."). And the concluding words of that Clause—expressly obligating state court judges to apply federal law notwithstanding any state law to the contrary—were likewise "introduced from abundant caution, to make [the Supremacy Clause's] obligation more strongly felt by the state judges" and to thereby "remove[] every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution." Story, *supra*, § 1839.

The Supremacy Clause is more than a constitutionally mandated choice-of-law provision; its very "purpose and effect" is to recognize "the fact that the States of the Union constitute a nation." *Testa* v. *Katt*, 330 U.S. 386, 389 (1947). This is because, as

Hamilton explained, "the national and State [court] systems are to be regarded as ONE WHOLE." The Federalist No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961). And state courts are thus "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." *Martin*, 14 U.S. (1 Wheat.) at 340–41; *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 489 (1954) ("The law which governs daily living in the United States is a single system of law."). "From the very nature of their judicial duties," state judges, like their federal colleagues, are "called upon to pronounce the law applicable to the case in judgment." *Martin*, 14 U.S. (1 Wheat.) at 340. Indeed, they are bound to do so by oath or affirmation. *See* U.S. Const. art. VI, cl. 3 ("[J]udicial officers . . . of the several States [are] bound by oath or affirmation, to support this Constitution.").

Thus, when "in the exercise of their ordinary jurisdiction, state courts" hear "cases arising under the [C]onstitution," they must interpret the Constitution in those cases just as federal courts must. *See Martin*, 14 U.S. (1 Wheat.) at 342; *see also* Hart, *supra*, at 507 ("if a state court undertakes to adjudicate a controversy it must do so in accordance with whatever federal law is applicable"). In fact, had Congress not elected to establish the lower federal courts under Article III § 1, state courts would have provided the *only* forum for initial enforcement of federal rights at the trial level. *See* Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1030 (1982) ("Congress is free to decide that there should be no lower federal courts at all. This would leave all questions of federal law (including the enforcement of federal rights) wholly to the

state courts in the first instance, subject to review in the United States Supreme Court.").

Those accused of crimes thus depend upon state judges to give serious attention to the federal constitutional arguments raised by counsel, regardless of whether this Court has spoken to the particular issue, and regardless of whether it is an easy or difficult question. Criminal defendants, after all, generally do not get to decide whether they are prosecuted in state or federal court, and there is no general right of removal for a defendant facing charges in state court. *See* 4 Wayne R. LaFave et al., *Criminal Procedure* § 13.5(d) (4th ed. 2017)*; see also Franchise Tax Bd.* v. *Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983).

The importance of state courts' fully considering arguments rooted in federal law can also be seen in how deferential federal courts are to state court decisions when considering federal habeas corpus petitions. A federal court can grant an application for a writ of habeas corpus only if the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," or if the decision "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). This deference assumes that the "considered conclusions of a coequal state judiciary" deserve "great weight" from the federal courts. *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985). And when state courts refuse to meaningfully consider constitutional claims raised in good faith, it is criminal defendants who suffer. *See, e.g.*, *Lafler* v. *Cooper*, 566 U.S. 156, 173 (2012) (finding that state court "identified respondent's ineffective-assistance of-counsel claim but failed to apply *Strickland* to assess it," and that federal courts could thus grant relief to defendant).

B. Where State Courts Have Attempted to Escape Their Constitutional Duty to Apply Federal Law, This Court Has Repeatedly Held Them Accountable

Thankfully, "[s]tate courts ordinarily fulfil such obligations without question." Hart, *supra*, at 516. For otherwise, the Supremacy Clause "would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue." *Martin*, 14 U.S. (1 Wheat.) at 342. But this is not to say that there has never been controversy about the matter. Quite the contrary: starting with state resistance to the Alien and Sedition Acts, the meaning of the Supremacy Clause was perhaps the central theme in American constitutional law in the decades prior to the Civil War. Throughout the early part of the Nineteenth Century, there arose "[v]iolent public controversies" on such questions, including "instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes." *Testa*, 330 U.S. at 390.

This Court therefore found it fitting in 1876, "after the fundamental issues over the extent of federal supremacy had been resolved by war," *id.*, to unanimously reaffirm that "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are." *Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876). As *Claflin* explained, state courts may not treat federal law as though it were foreign: "the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Id.* at 137.

Since *Claflin*, this Court has repeatedly held that the Constitution not only gives state courts the power to enforce federal rights but also prohibits them from refusing to enforce federal rights because they are federal. *See, e.g.*, *Testa*, 330 U.S. at 388 (Rhode Island court could not refuse to entertain a federal cause of action on the ground that it was "a penal statute in the international sense," where the same type of claim would have been enforced under state law); *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934) (Alabama court could not decline jurisdiction "based solely upon the [federal] source of law sought to be enforced"); *Howlett* v. *Rose*, 496 U.S. at 371 (Florida court could not decline jurisdiction in a § 1983 case against a local school board on the ground that the state's waiver of sovereign immunity applied only to state causes of action and not their federal equivalents).[2]

In other words, "[a] state may not discriminate against rights arising under federal laws." *McKnett*, 292 U.S. at 234. Nor may a state court refuse to enforce a federal cause of action based on a disagreement between state and federal policy. *See Mondou* v. *N.Y., New Haven & Hartford R.R.*, 223 U.S. 1, 4 (1912).

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[2] The same holds true in this Court's "valid excuse" cases. *E.g.*, *Alden* v. *Maine*, 527 U.S. 706 (1999) ("[T]here is no evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action."); *Herb* v. *Pitcairn*, 324 U.S. 117, 123 (1945) (holding that an Illinois court's dismissal on statute-of-limitation grounds did not violate the "qualification that the cause of action must not be discriminated against because it is a federal one"); *Douglas* v. *N.Y., New Haven & Hartford R.R.*, 279 U.S. 377, 387-88 (1929) (finding that a New York court's dismissal of an action under a federal statute by a nonresident against an out-of-state corporation constituted a valid excuse).

To date, this Court's precedents in this area have been limited to state court discrimination against federal causes of action. *See, e.g.*, *Bell* v. *Sellevold*, 713 F.2d 1396, 1401 (8th Cir. 1983) ("[T]he state courts would probably be constitutionally compelled to hear and decide any federal defenses." (citing *Testa*, 330 U.S. 386)); *Rodriguez* v. *Westhab, Inc.*, 833 F. Supp. 425, 427-29 (S.D.N.Y. 1993). But the force of their logic applies equally in the case of a state court's refusal to enforce a federal defense.

The reasons offered by the Indiana Supreme Court for not addressing the merits of Timbs's assertion of his constitutional rights are precisely those that this Court has time and again found to be impermissible. After first noting the absence of binding precedent from this Court on the precise constitutional question raised by Timbs, the Indiana Supreme Court "decline[d]" to decide the issue. Pet. App. 8. In doing so, the court explained—with jaw-dropping candor—that it felt no need to "impose federal obligations on the State that the federal government [had] not mandated" as this would involve "subject[ing] Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." *Id.* at 9.

These reasons unambiguously express an improper hostility toward Timbs's asserted rights because of their federal nature and, furthermore, express a policy preference for the development of state law in the Indiana Courts under the Indiana Constitution over the policy choices embodied in the text of the Fourteenth Amendment. This failure is a threat to the rights of all who might come before a state court, especially those like Petitioner who are accused or convicted of crimes. This Court should therefore use this opportunity to clarify that the Supremacy Clause

binds state courts in equal measure whether they are confronted with a federal defense or a federal cause of action.

II. FEDERAL DEFENSES BASED ON INCORPORATION ARE NOT EXEMPT FROM THE NON-DISCRIMINATION RULE

At the heart of the Indiana Supreme Court's decision was the incorrect assumption that this Court's dictum in *McDonald* v. *City of Chicago.*, 561 U.S. 742, 753-66 (2010), that the Excessive Fines Clause "remain[s] unincorporated" should be deferred to as an affirmative declaration that that guarantee does not apply to the states. Thus, while the court below acknowledged that this Court "has never held that States are subject to the Excessive Fines Clause," it nevertheless concluded that addressing the merits of the issue or holding that the guarantee applied to the states would require "ignor[ing] *McDonald*." Pet. App. 5, 8. It therefore opted for what it termed the "cautious" approach of "await[ing] guidance from the Supreme Court and declin[ing] to find or assume incorporation until the Supreme Court decides the issue authoritatively." *Id.* at 8.

In reaching this conclusion, Indiana joined a significant minority of lower courts that have adopted similar rationales for ruling against those invoking the protection of the Excessive Fines Clause against a state. For example, in *Reyes* v. *North Texas Tollway Authority*, the district court engaged in a lengthy summary of this Court's decisions regarding the incorporation of the Excessive Fines Clause, reasoning "that [that clause] has not yet been incorporated against the states through the Due Process Clause of the Fourteenth Amendment," and, as a result, "a state-created entity like the [defendant] could not have violated it." 830 F. Supp. 2d 194, 207-08 (N.D.

Tex. 2011); *see also State* v. *Forfeiture of 2003 Chevrolet Pickup*, 202 P.3d 782, 783 (Mont. 2009) ("[W]hat Warner asks this Court to do is hold that the Eighth Amendment to the federal constitution is applicable to Montana, when the federal courts have not done so. We decline this invitation."); *In Re Forfeiture of 5118 Indian Garden Rd.*, 654 N.W.2d 646, 648 (Mich. Ct. App. 2002) ("We decline to address the federal constitutional issue because 'the United States Supreme Court has never determined that the [federal] Excessive Fines Clause is applicable to the states through the Fourteenth Amendment [of the United States Constitution].'") (alterations in original) (quoting *In re Forfeiture of $25,505*, 560 N.W.2d 341, 347 (Mich. Ct. App. 1996)).

This reasoning wrongly interprets the fact that this Court has not authoritatively addressed the issue as an indication that incorporation of this right was viewed by this Court with disfavor. "That the Supreme Court has not yet issued a case expressly incorporating the Excessive Fines Clause . . . does not mean that it is not incorporated." *SFF-TIR, LLC* v. *Stephenson*, 262 F. Supp. 3d 1165, 1224 n.78 (N.D. Okla. 2017). Nor is the statement that the Excessive Fines Clause "remain[s] unincorporated" an indication about the Court's views of the matter, much less an excuse to refrain from engaging with the merits of Petitioner's defense.

As Judge Browning has thoughtfully explained, "[t]wo particularities of the incorporation context often obfuscate this seemingly mundane observation." *Id.* "First, only the Supreme Court—and not the Courts of Appeals—can bind state courts, even on matters of federal law." *Id.* And second, "state courts have little incentive to hold that a federal constitutional right is incorporated if the Supreme Court has

left the question open. The Bill of Rights is a floor, not a ceiling, and state courts can interpret their own constitutions . . . or statutes to provide for the right in question." *Id.* As explained above, the Indiana Supreme Court was unusually explicit on this point, actively discriminating against Petitioner's federal defense in order to give greater scope to Indiana's own constitution. Puzzlingly, however, it did so only after first acknowledging that *McDonald* was not binding and that it had left the question open.

The "deference" exhibited by the Indiana Supreme Court thus seems to be based on an unstated belief that incorporation is a quasi-legislative decision that is somehow the special province of this Court, performing what Professor Corwin memorably called a rite of constitutional "transubstantiation whereby the Court's opinion of the Constitution . . . becomes the very body and blood of the Constitution." Edward S. Corwin, *Court Over Constitution: A Study of Judicial Review as an Instrument of Popular Government* 68 (1957). This was a mistake. This Court is not "a legislature charged with formulating public policy." *Reno* v. *Flores*, 507 U.S. 292, 315 (1993) (quoting *Schall* v. *Martin*, 467 U.S. 253, 281 (1984)); *see also* The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (The judiciary "may truly be said to have neither FORCE nor WILL but merely judgment."). Nor does the fact that this Court has the final word on many questions of constitutional interpretation grant state courts a right to discriminate against those seeking to enforce rights that have not yet been held to be incorporated by this Court.

As the Indiana Supreme Court acknowledged, "[w]hether a Bill of Rights provision applies to the States is a purely legal question." Pet. App. 4. Specifically, it is a legal question about the meaning of the

Fourteenth Amendment. It is thus telling that the Indiana Supreme Court never quoted or discussed the meaning of the text of that provision, which is explicit in its limitation on state power: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see also McDonald*, 561 U.S. at 753–66 (discussing the history of incorporation).

As explained above, that the Indiana Supreme Court is a creature of state law is no basis for abstention—a point underscored by the Fourteenth Amendment's explicit limitations on state power. Far from serving the interests of federalism, as the Indiana Supreme Court claimed, refusing to consider the merits of Petitioner's arguments ensured that Indiana would have no voice on the issue. *Cf. E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977) (observing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

There is, in a word, no basis for treating incorporation as exempt from the Constitutional requirement that state courts consider federal rights on the same terms as state rights.

CONCLUSION

For these reasons, the judgment of the Indiana Supreme Court should be reversed, and this Court should clarify that state courts may not discriminate against federal defenses because they are federal, regardless of whether the defendant asserts that a particular right applies against the states through the Fourteenth Amendment.

Respectfully submitted,

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