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IN THE
Indiana Supreme Court

No. 20S-MI-00289

STATE OF INDIANA,	)	Appeal from the
	)	Grant County Superior Court
Appellant,	)	Court 1
	)	
v.	)	Case No.
	)	27D01-1308-MI-000092
TYSON TIMBS	)	
	)	The Honorable
Appellee.	)	Jeffrey D. Todd
	)	Judge
	)	
	)	

BRIEF OF AMICI CURIAE STATES OF TEXAS, ARKANSAS, LOUISIANA, AND OKLAHOMA.

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INTEREST OF AMICI STATES

Federal and State courts share the "solemn responsibility" to interpret the federal Constitution. Trainor v. Hernandez, 431 U.S. 434, 443 (1977). Under our common law system, courts facing issues of first impression under the federal Constitution invariably look to how courts in sister States have resolved those issues. The persuasive power of those decisions peaks when the decision comes from a State's court of last resort. Thus, this Court's decision has the potential to affect not just the law in Indiana, but around the country — particularly where, as here, the issue has divided lower courts. As the top law enforcement agencies of their respective jurisdictions, the Offices of the Attorneys General of *amici* States Texas, Arkansas, Louisiana, and Oklahoma have a strong interest in aiding this Court's decision.

SUMMARY OF ARGUMENT

Civil asset forfeiture remains an important tool for fighting drug trafficking and organized crime, supplying a critical mechanism by which States and the federal government confiscate property used in or directly related to these crimes. Texas, for instance, utilizes civil forfeiture to combat the drug trade from its southern borders and within the State.

The U.S. Supreme Court's Eighth Amendment jurisprudence does not contemplate that courts will tightly monitor state discretion over the appropriate remedies and punishments States choose for criminal activity.

Indeed, that Court has recognized that such judgments are inherently imprecise and that Legislative policy decisions in this area should be given great weight. That is why the U.S. Supreme Court adopted a standard of "gross proportionality"—rather than "strict proportionality"—in the context of the Eighth Amendment's Cruel and Unusual Punishments Clause.

It is far from clear that a proportionality analysis should be utilized *at all* in these types of civil proceedings against any property, much less, as here, property used as an instrumentality of a crime (a point thoroughly examined in Indiana's principal brief). But to the extent the Court applies a gross proportionality test to an instrumentality in the Excessive Fines Clause context, it should employ the reasoning of the U.S. Supreme Court's Cruel and Unusual Punishments Clause jurisprudence. Indeed, it is compelled to do so in keeping with the Excessive Fines Clause case United States v. Bajakajian, where the Court expressly adopted the gross proportionality test from its Cruel and Unusual Punishments Clause jurisprudence. 524 U.S. 321, 336 (1998) ("[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents.").

Most critically, the Court should avoid any suggestion that the bar for what is considered "excessive" for fines (or, as here, any fine-like punitive portion of an *in rem* forfeiture) is *lower* than the bar for what is considered "excessive" for prison sentences. Further, *in rem* civil forfeitures should, if anything, be found unconstitutionally excessive even *more* rarely than pure

fines or prison sentences because their partly-remedial nature adds an additional layer of inherent imprecision that strengthens the case for deference to State Legislatures.

Next, the considerations this Court has already embraced—harshness, gravity, and culpability—are all part of the existing Eighth Amendment gross proportionality test. Simply adopting the Cruel and Unusual Punishments Clause framework provides greater guidance to trial courts in how to properly evaluate those considerations. It would, for instance, assist in clarifying that excessiveness must be judged by examining the harshness of the punishment and gravity of the offense in *relation to one another*—not in isolation, as the trial court did here. Finally, the fact that it is not possible to conduct an apples-to-apples comparison of years-in-prison to dollars-in-fines does not suggest that two different gross proportionality tests are needed; indeed, this Court seemed to reach the opposite conclusion when it stated that sentencing guidelines inform the gravity of the offense.

Finally, the U.S. Supreme Court has acknowledged that findings of constitutional excessiveness are rare and States have significant discretion to pursue different policies. This Court should recognize that discretion by issuing an opinion giving appropriate deference to the State's determination in this instance.

ARGUMENT

I. Civil asset forfeiture remains an important and widely-used law enforcement mechanism.

A. *The roots of civil forfeiture highlight the legitimacy of the modern practice.*

Because constitutional provisions must be read in accordance with their original public meaning, we begin with the historical practice of civil forfeiture leading up to the Founding. South Carolina v. United States, 199 U.S. 437, 448 (1905) ("The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now."). Civil forfeiture's deep roots, beginning with the English Parliament and the early American colonies, inform the proper understanding of the Eighth Amendment and confirm that modern civil forfeiture practice comports with the Constitution.

The early history of *in rem* forfeiture illustrates three principles applicable to this case and the drug trafficking context more generally: (1) *in rem* forfeiture was an available remedy for governments when illegal movement of goods was involved; (2) the value of the property forfeited was untethered from (and indeed could be vastly greater than) any valuation of the criminal act itself; and (3) *in rem* forfeiture serves the important purpose of weakening the ability of criminals to engage in their criminal activities and harm to the State.

The first two of these principles are aptly demonstrated by the Navigation Act of 1660, which regulated colonial trade for England's mercantilist system. The Navigation Act required that only English ships carry imports and exports from the American colonies, under penalty of forfeiture not only of the goods and commodities carried, but also of "*the Ship or Vessell* with all its Guns Furniture Tackle Ammunition and Apparell." An Act for the Encourageing and Increasing of Shipping and Navigation 1660, 12 Car. 2 C. 18, § i (Eng.) (emphasis added) [*hereinafter* Navigation Act of 1660]; *see also* Lawrence A. Harper, THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING 50, 395 (1939). Other civil forfeiture provisions in the Navigation Act and similar trade laws likewise called for forfeiture of ships and everything aboard when a violation was discovered. *See* Navigation Act of 1660, § 18 (providing that ships and goods were forfeit for illegal transportation of certain products such as sugar, tobacco, cotton, and wool); An Act for the Encouragement of Trade 1663, 15 Car. 2 c. 7, §§ 4, 6 (Eng.) (calling for forfeiture of ships and cargo for illegal transportation of European goods directly to the colonies, rather than going through England or Wales); *see also* Harper, *supra*, at 396-97, 403-03.

The third principle is demonstrated by the *in rem* forfeitures documented in the "prize cases"—a special kind of admiralty proceeding *in rem* where laws of war allowed warring nations to capture vessels and cargos belonging to their enemies. *See* Rufus Waples, A TREATISE ON PROCEEDINGS IN REM 394 (1882). The justification for forfeiture in these proceedings was not that the

property itself had been involved in a legal infraction or used as an instrument of war. Rather, a nation could seize and condemn all property owned or possessed by the enemy's adherents on the theory that all such property adds to the enemy's strength. *See* Miller v. United States, 78 U.S. 268, 304-05 (1870) (upholding the Confiscation Acts, adopted by Congress during the Civil War).

Civil proceedings *in rem* continued to be used in the colonies for violations of the acts of trade and navigation, often taking place in the existing courts of common law. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 13 (1827). According to Justice Story's opinion for the Supreme Court in The Palmyra, the longstanding practice under statutes that authorized "both a forfeiture *in rem* and a personal penalty" was that "the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." Id. at 14-15.

As demonstrated below, this historical practice provides the foundation for interpreting the Eighth Amendment today and supports the current civil forfeiture practice common among States, including Indiana.

B. *Civil forfeiture remains widely used, allowing States to cut off the means of drug trafficking operations.*

The practice of civil forfeiture remains in wide usage across our nation. Accordingly, this Court's constitutional test for measuring the excessiveness of a civil forfeiture is likely to affect judicial outcomes in other States as well—especially given the U.S. Supreme Court used this case to announce

that the Excessive Fines Clause is incorporated against the States. *See* Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).

Nearly all States continue to utilize civil forfeiture as a crucial law enforcement tool, particularly in the areas of drug trafficking and organized crime. Michael van den Berg, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. Rev. 867, 869 (2015) (noting that forty-nine states and D.C. have civil forfeiture laws on their books). Federal law likewise contains civil forfeiture provisions. It provides that "no property right shall exist" in illegal drugs and contraband or in vehicles or other items that were used to transport or facilitate the use of illegal drugs and contraband. *See*, *e.g.*, 21 U.S.C. § 881(a)(1); *see also* Dee R. Edgeworth, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 11 (3d ed. 2014) (discussing "contraband per se"). Houses, land, and personal property are "subject to forfeiture to the United States" if used for or are proceeds of drug trafficking. 21 U.S.C. § 881(a)(4), (h). The Controlled Substances Act provides that "no property right shall exist in [these things]" and "[a]ll right, title, and interest in [them] . . . shall vest in the United States upon commission of the act giving rise to forfeiture." Id. § 881(a), (h).

The modern use of *in rem* civil forfeiture is consistent with the historical practice discussed above. In particular, *in rem* civil forfeiture in the drug trafficking context bears the same hallmarks that defined the Navigation Act forfeitures and the prize cases. *Compare* Bajakajian, 524 U.S. at 331-32 (distinguishing *in personam* forfeiture from *in rem* forfeiture, noting the

former did "not bear any of the hallmarks of traditional civil *in rem* forfeitures."). Those hallmarks include: (1) application to illegal movement of items; (2) the value of the property forfeited—now often cars or even houses, rather than ships—may sometimes be large in comparison to the value of the illegal drugs themselves or compensatory value for the crime; and (3) the forfeitures serve the important purpose of weakening the strength of illicit trade. In the context of drug-related offenses, civil forfeiture serves a continuing purpose of choking off the stream that feeds the drug trade in this country. *See* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L. J. 2446, 2516 (2016).

These remedial purposes remain major drivers for States' civil forfeiture laws, even though modern civil forfeiture jurisprudence recognizes that such laws may contain punitive elements as well. *See* Bajakajian, 524 U.S. at 334.

The Supreme Court has recognized two ends of the *in rem* forfeiture spectrum. At one end is property completely unrelated to the offense. In that instance, its forfeiture would be purely punitive and no different than a fine. *See* Id. at 333-34 & n.9. At the other end is property that is connected to the offense—either as an "instrumentality" of the offense (for instance, drug proceeds or kitchen scales used solely for weighing drugs) or otherwise having a direct relationship to the offense. In that instance, *in rem* forfeiture is "purely remedial" and not subject to a proportionality requirement. *See* Austin v. United States, 509 U.S. 602, 622 n.14 (1993); *see also* In re 1650 Cases of Seized Liquor, 721 A.2d 100, 108 (Vt. 1998). In such a circumstance,

the forfeiture "serves a deterrent purpose distinct from any punitive purpose," Bennis v. Michigan, 516 U.S. 442, 452 (1996), and "is not punishment of the wrongdoer for his criminal offense," United States v. Ursery, 518 U.S. 267, 293 (1996) (Kennedy, J., concurring); *see* id. at 278 (referring to *in rem* forfeiture as "remedial civil sanction"); *see also* Bajakajian, 524 U.S. at 341-42; Austin, 509 U.S. at 622 n.14. And "[c]ivil forfeitures, in contrast to civil penalties, are designed to do more than simply compensate the Government." Ursery, 518 U.S. at 284. The nonpunitive goals represented on this side of the spectrum include ensuring owners do not permit their property to be used for illegal purposes, abating nuisances, preventing further illicit use of forfeited property, removing illegally used property from circulation, and rendering illegal behavior unprofitable. Id. at 290-91.

The trial court's analysis below did not properly account for Indiana's legitimate remedial aims. This Court correctly recognized at an earlier stage of the case that civil forfeitures are only subject to the Eighth Amendment to the extent they are punitive rather than remedial. State v. Timbs, 134 N.E.3d 12, 36 (Ind. 2019). But on remand the trial court did not recognize or give any weight to the State's relevant remedial interests at issue here—removing the car used to purchase and transport illegal drugs from being used in such a manner in the future, and diminishing the strength of trade in opiates. Findings of Fact, Conclusions of Law and Judgment at ¶¶ 43-44, State of Indiana v. Timbs, No. 27D01-1308-MI-92 (Grant Sup. Ct. Apr. 27, 2020)

(hereinafter "Trial Court Judgment, Timbs") (acknowledging vehicle was used for transporting drugs but concluding the crime was victimless and the only harm to the State was the compensable cost to investigate Timbs). The trial court's analysis on remand shows that clarification on how to account for the remedial aspect of a forfeiture is needed, in order to safeguard the remedial aims of civil forfeiture that fall outside the bounds of the Eighth Amendment. While it may be unrealistic to expect a trial court to determine the precise percentages of remedial verses punitive aims fulfilled by a given forfeiture, the trial court must make some meaningful attempt to remove the remedial portion from the scales of any Eighth Amendment weighting of the excessiveness of a punishment as compared to its gravity.

II. Any proportionality analysis applied must follow the U.S. Supreme Court's existing Eighth Amendment test.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

This Court has already concluded that the "excessiveness of *in rem* fines"—or, here, the punitive portion of a civil forfeiture—should be measured using a standard of "gross disproportionality." Timbs, 134 N.E.3d at 34-35. While acknowledging that the same standard—"gross proportionality"—is used in the context of the Cruel and Unusual Punishments Clause, this Court previously concluded the two inquiries were too different to inform one another. Id.

As an initial matter, the State amici observe that the most significant distinction this Court drew between civil *in rem* forfeiture and criminal punishments—that "criminal punishment is imposed for the commission of a crime; *in rem* fines are imposed for the claimant's role in the property's use in a crime," id. at 38-39—suggests that *no* proportionality analysis is needed if the forfeited property was an instrumentality of the crime, a proposition supported by Justice Scalia's concurring opinion in Austin. *See* 509 U.S. at 627 (Scalia, J., concurring in part: "Unlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use, to which issue the value of the property is irrelevant. Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal.")

But to the extent this Court applies a gross proportionality analysis to "instrumentality" *in rem* forfeitures, it is bound to follow the U.S. Supreme Court's Eighth Amendment gross proportionality test developed in the Cruel and Unusual Punishments context because the U.S. Supreme Court has expressly done so.

In particular, the U.S. Supreme Court's Eighth Amendment gross proportionality test teaches two things relevant here. First, the Constitution grants States broad leeway to make policy judgments about what is excessive and what is not. Second, a State's policy judgments may be overridden only

when a fine is "grossly disproportional" to the offense—measured by comparing the harshness of the penalty to the gravity of the offense. The trial court did not apply those two key principles here. Had it done so, the forfeiture at issue would not have been found unconstitutionally excessive and judgment would have been awarded to the State.

A. *The U.S. Supreme Court has recognized that determining excessiveness is inherently imprecise and amenable to State policy judgments.*

To determine whether any punitive aspect of a civil forfeiture is excessive in violation of the Eighth Amendment, the starting point should be the U.S. Supreme Court's pronouncement that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." Bajakajian, 524 U.S. at 336 (citing Solem v. Helm, 463 U.S. 277, 290 (1983), and Gore v. United States, 357 U.S. 386, 393 (1958)). That is, States have wide latitude to determine what they consider to be appropriate penalties, and "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." Id.

Moreover, "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." Bajakajian, 524 U.S. at 336; *see also* Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) ("[O]ur decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of

years"); Rummel v. Estelle, 445 U.S. 263, 275 (1980); *see Solem*, 463 U.S. at 294 ("It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not." (footnote omitted)).

These reasons are why the U.S. Supreme Court adopted a gross—as opposed to a strict—proportionality standard for identifying violations of the Eighth Amendment. *See* Bajakajian, 524 U.S. at 336. The gross proportionality standard has also been referred to as a "narrow proportionality principle." Harmelin, 501 U.S. at 996-97 (Kennedy, J., concurring). The U.S. Supreme Court has repeatedly emphasized that "*successful* challenges to the proportionality of particular sentences [are] exceedingly rare." Id. at 1001 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 289–90). Indeed, courts will only "'rarely'" find it necessary to "'engage in extended analysis'" before rejecting a claim that a sentence is "grossly disproportionate." Id. at 1004.

These concepts, applied above in the context of prison sentences, apply even more so in the context of civil forfeiture. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the share of that value that is properly attributed to the remedial (non-punitive) purposes served by a particular civil forfeiture—which fall outside the Eighth Amendment's scope altogether. Ursery, 518 U.S. at 285. That means that in the *in rem* forfeiture context,

there is imprecision (*i.e.*, what amount should be considered punishment in the first place) heaped on top of the imprecision already recognized by the U.S. Supreme Court in the Cruel and Unusual Punishments Clause context (*i.e.*, determining the line between excessive or non-excessive punishment). Accordingly, deference to State policy determinations is warranted, and it should be a rare case indeed where a court strikes down a civil forfeiture as excessive.

B. *Bajakajian correctly adopted for the Excessive Fines Clause the gross proportionality test of the Cruel and Unusual Punishments Clause.*

In its previous opinion in this case, this Court concluded that "gross disproportionality" means different things for the Cruel and Unusual Punishment Clause and for the Excessive Punishment's clause. *See* Timbs, 134 N.E.3d at 38 ("[E]xcessiveness under the Excessive Fines Clause does not turn on what is prohibited by the Cruel and Unusual Punishments Clause."). This conclusion finds no support in Supreme Court precedent, and in fact, the U.S. Supreme Court in Bajakajian said the opposite. *See* 524 U.S. at 336 ("[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents.").

Further, the text of the Eighth Amendment itself does not support the application of different standards of "gross proportionality" depending upon which clause of the Eighth Amendment is at issue. It states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

punishments inflicted." U.S. Const. amend. VIII. The U.S. Supreme Court has interpreted the Eighth Amendment to subject "[b]ail, fines, and punishment" to "parallel limitations." Browning-Ferris Indus. of Vt, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263 (1989) (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)). By using the word "parallel," the U.S. Supreme Court acknowledged that bails, fines, and punishments were all limited by the same amendment—three actions traditionally "associated with the criminal process." Id.

To the extent that the word "punishments" is modified by "cruel and unusual," while "fines" is modified by "excessive," the Supreme Court has explained that the "cruel and unusual" designation had "usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which are attended with acute pain and suffering." O'Neil v. State of Vermont, 144 U.S. 323, 339 (1892) (explaining that "[s]uch punishments were at one time inflicted in England"). But the Court there concluded that such punishments were no longer employed and that the Eighth Amendment's "inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their *excessive* length or severity are greatly disproportioned to the offenses charged." Id. at 339-40 (emphasis added). "The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted." Id. at 340. In sum, then, the U.S. Supreme Court considers excessiveness across all three categories of

punishments contemplated in the Eighth Amendment, and the "gross proportionality" test it developed to identify such excessive punishments is therefore of equal applicability throughout all Clauses of the Eighth Amendment.

This Court acknowledged that the U.S. Supreme Court in Bajakajian drew upon "the gross-disproportionality standard articulated in Cruel and Unusual Punishments Clause precedents." Timbs, 134 N.E.3d at 39. But the U.S. Supreme Court did more than that—it explicitly "adopt[ed] the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents." Bajakajian, 524 U.S. at 336. This Court is bound by that holding in Bajakajian, and any Excessive Fines analysis conducted for punitive elements of the instant forfeiture should be analyzed under the same rubric as a claim under the Cruel and Unusual Punishments Clause.

The importance of applying the same rubric, fundamentally, is to ensure that this Court's test is not interpreted to reach the anomalous result that monetary fines (or punitive portions of *in rem* forfeitures) will more readily be found constitutionally excessive than sentences of years in prison.

C. *Harshness, gravity, and culpability must be evaluated pursuant to the Supreme Court's existing framework.*

To the extent a proportionality standard applies at all, this Court correctly identified harshness, gravity, and culpability as three considerations that go into application of the 'gross proportionality' standard.

Timbs, 134 N.E.3d at 27. Those factors are all considered in the U.S. Supreme Court's existing precedent in the Cruel and Unusual Punishment Clause context. The Court should take the last step and conclude that these considerations should also be evaluated in the same *manner* for both clauses.

First, the trial court found the seizure here "excessively punitive and unduly harsh" based on a harshness analysis alone, before considering gravity of the offense. Trial Court Judgment, Timbs, ¶ 45. This was improper because gravity and harshness must be considered together, as the subjective determination of whether a punishment is "harsh[]" is necessarily dependent on how "grav[e]" the offense was. *See* Solem, 463 U.S. at 290-91 (excessiveness inquiry must consider the "gravity of the offense and the harshness of the penalty"). For example, forfeiture of a house (to the extent the forfeiture is punitive) might be unduly harsh for a simple drug use crime, but appropriate for crimes involving extensive drug trafficking. Thus, a harsh penalty is not "excessive" if the gravity of the offense is great. The trial court should not have reached the conclusion that the forfeiture here was "unduly" harsh in isolation from the gravity of the offense committed. Trial Court Judgment, Timbs, ¶ 45.

Second, culpability must also be considered in conjunction with those other considerations, rather than as a separate prong to be disposed of as a threshold matter as the trial court did here. *See* id., at ¶ 42. Indeed, the U.S. Supreme Court has considered culpability for an offense to be part of the broader understanding of an offense's gravity. *See* Solem, 463 U.S. at 292

("Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale" and in so doing, "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender.").

Third, as already discussed *supra*, Section I.B, any understanding of "harshness" in the Eighth Amendment context must include only the punitive and not the remedial portions of a civil forfeiture. This Court's test correctly stated that "the more remedial a forfeiture is, the less punishment it imposes," and that the "property's role in the underlying offenses" must be considered. Timbs, 134 N.E.3d at 36. In application, however, the trial court did not recognize or give any weight to the State's real remedial interests at issue here, focusing instead on the cost to reimburse the State for investigations into Timbs. Trial Court Judgment, Timbs, ¶¶ 19, 44(b)-(c).

Statutory civil forfeiture schemes often encompass a wide range of property and circumstances. Indiana's statute, for example, includes not only vehicles used to deal drugs but also proceeds from drug transactions—the forfeiture of which, courts agree, is not subject to the Eighth Amendment. *See* Ind. Code § 34-24-1-1; State v. Cole, 906 P.2d 925, 933 (Wash. 1995) (en banc) (collecting cases). Even if Indiana's statute embodies a punitive element—a finding the court below *did not make*—not every forfeiture action under this statute will be subject to the Eighth Amendment. Determining whether an action is remedial requires analyzing that property's relationship to the offense. *See* Ursery, 518 U.S. at 290-91; Austin, 509 U.S. at 622 n.14.

Finally, this Court correctly recognized that to understand the severity of an offense under the Excessive Fines Clause analysis, courts should consider not only the comparative value of the item forfeited and the maximum fine, but also the potential prison sentences the Legislature has established for the crime. Timbs, 134 N.E.3d at 39; *see also* Bajakajian, 524 U.S. at 339 n.14. But later in the same opinion, this Court concluded that because Bajakajian "did not supply a conversion rate for dollars to years of imprisonment," the gross proportionality jurisprudence of the Cruel and Unusual Punishments Clause is subject to a separate and distinct test. Timbs, 134 N.E.3d at 39. Those two statements appear to be in conflict but are easily reconciled by concluding that the gross proportionality test is the same throughout the Eighth Amendment, while applying to different yet related objects.

Indeed, it is impossible to place monetary penalties and prison sentences into entirely separate boxes and still discern the proportionality of a punishment to a given crime. In isolation, most maximum fines do not adequately depict the gravity of an offense and thus cannot serve as a workable measuring stick in a proportionality analysis. This is especially true in states like Indiana, where the same maximum fine applies to all felonies. Ind. Code §§ 35-50-2-3, -4, -5, -6, -7. By considering the maximum fine for felonies as a comparison for proportionality *without also considering* the potential prison sentence for the criminal conduct, courts substitute their own judgment for the reasoned judgment made by the Legislature about the offense's gravity. Indeed, if other non-monetary penalties that the accused

may face are comparatively much more severe than the maximum potential fine, then the fine, viewed in isolation, would be particularly inadequate to indicate how grave the Legislature viewed the offense and, therefore, inadequate to serve as an accurate "gravity" proxy against which to compare the forfeiture in the proportionality balance.

D. *The Court should grant judgment to Indiana.*

As Indiana's brief demonstrates, the above principles confirm that the trial court's judgment is unsound. Timbs used the forfeited car to transport narcotics, so the car was an instrumentality of and directly related to the accused criminal activity and its forfeiture serves the important remedial purposes that have long been recognized for civil forfeitures. The car's value—reduced by the extent to which the forfeiture is remedial—is not grossly out of proportion with the full picture of fines and potential criminal sentences in Indiana for the offense for which Timbs was convicted. Accordingly, Indiana's judgment that the civil forfeiture in this case was appropriate does not violate the Eighth Amendment and should be allowed to stand.

CONCLUSION

For the reasons set forth above, the Court should reverse the trial court's judgment and enter judgment in favor of the State of Indiana.

Respectfully submitted.

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WORD COUNT CERTIFICATE

The undersigned verifies that this brief contains no more than 7,000 words.

/s/ Kevin S. Smith
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CERTIFICATE OF SERVICE

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