No. ____

IN THE

Supreme Court of the United States

BRENDA JEFFREY,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal and state courts are in conflict regarding the federal due process rights that property owners possess to challenge forfeiture of their possessions, related both to crimes charged in criminal proceedings and in the civil-forfeiture setting.

In this case, the Supreme Court of Appeals of West Virginia effectively held that these property owners are owed no process at all.

Petitioner Brenda Jeffrey was charged under a West Virginia criminal statute, W. Va. Code. § 19-20-20, with harboring a "vicious" animal, her beloved family pet and then-puppy, Jasper. Thereafter, in the course of criminal proceedings against her, Ms. Jeffrey was continually denied meaningful participation in her own case to challenge the State's attempts to seize and euthanize Jasper, even though the only mechanism for the state to do so under state law was unquestionably Ms. Jeffrey's own criminal proceedings, and even though the State agreed that Ms. Jeffrey was the proper party to raise any such challenges.

At present, with all state review exhausted, Jasper remains in confinement and his life depends on the outcome of this matter in this Court.

The question presented is:

> whether, under the Fourteenth Amendment's Due Process Clause, a state can seize and later permanently deprive a defendant of her property, an animal in this case, through proceedings from which the defendant is excluded from any meaningful participation.

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the petition. Petitioner Brenda Jeffrey was the appellant below. The State of West Virginia was the appellee.

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Petitioner Brenda Jeffrey respectfully submits this petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The decision of the Supreme Court of Appeals of West Virginia (App. 1a) is not published in the South Eastern Reporter but is available at 2018 WL 3005948. The decision of the Circuit Court of Raleigh County, West Virginia (App. 8a) is unreported.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on June 18, 2018, and denied Ms. Jeffrey's petition for rehearing on October 9, 2018. App. 18a. This Court's jurisdiction in invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "nor shall any state deprive any person of life, liberty, or property, without due process of law."

West Virginia Code § 19-20-19 states:

> A person who violates any of the provisions of this article for which no specific penalty is prescribed is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days, or both fined and imprisoned. Magistrates shall have concurrent jurisdiction with the circuit

> courts to enforce the penalties prescribed by this article.

West Virginia Code § 19-20-20 states:

> Except as provided in section twenty-one of this article, no person shall own, keep or harbor any dog known by him to be vicious, dangerous, or in the habit of biting or attacking other persons, whether or not such dog wears a tag or muzzle. Upon satisfactory proof before a circuit court or magistrate that such dog is vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals, the judge may authorize the humane officer to cause such dog to be killed.

INTRODUCTION

Federal and State courts conflict over whether and under what circumstances individuals may be deprived of their property without due process of law in civil and criminal forfeiture proceedings. This case presents these issues in the context of the seizure and proposed termination of petitioner's beloved pet dog. Here, petitioner was continually deprived of any meaningful opportunity to challenge the State's proposed actions.

As in other contexts, the courts are deeply divided over the due process rights of animal owners to challenge the Government's proposed termination of their animals. And, as in other contexts, whether the proceedings are criminal or civil in nature is often beside the point in the provision of due process or the lack thereof.

The important and recurring question of whether such animal owners must be afforded due process is particularly significant in the context of animals, which are living creatures rather than inanimate objects both because their lives should not easily be ordered extinguished and because the government does have legitimate interests in protecting the public from truly dangerous animals. Granting review in this case would both provide much needed clarification of the due process rights of animal owners challenging the termination of their animals and be an important first step in clarifying the more general due process of rights of individuals in civil and criminal forfeiture proceedings.

STATEMENT OF THE CASE

A. Legal Background

A West Virginia statute, W. Va. Code § 19-20-20, creates criminal liability for any person who "own[s], keep[s] or harbor[s] any dog known by him to be vicious, dangerous, or in the habit of biting or attacking other persons." Offenders are "guilty of a misdemeanor," § 19-20-19, and the penalties are generally minor: a fine of "not more than one hundred dollars," imprisonment "in the county jail [for] not more than thirty days," or both, *id.*

But a far more serious penalty is available under the law: seizure and euthanasia of the offender's dog by the State. That penalty appears in Section 19-20-20's second sentence, which provides that, "[u]pon satisfactory proof before a circuit court or magistrate that such dog is vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals,

the judge may authorize the humane officer to cause such dog to be killed."

West Virginia's highest court, the Supreme Court of Appeals, made clear in 2012 that § 19-20-20 is "*entirely* criminal in nature." *Durham v. Jenkins*, 735 S.E.2d 266, 268 (W. Va. 2012) (emphasis added). Accordingly, private parties cannot ask the court, in a separate civil proceeding, to authorize the seizure and killing of an offender's dog. § 19-20-20. Only the State can make that request, within the confines of the owner's criminal proceeding.

That criminal proceeding must occur in two stages under West Virginia law. *First*, the State must prove beyond a reasonable doubt that a "crime described in the first sentence of § 19-20-20 has been committed." *Durham*, 735 S.E.2d at 270. The State thus must first show that the defendant "own[s], keep[s] or harbor[s]" a dog "*known by him* to be vicious, dangerous, or in the habit of biting or attacking other persons." § 19-20-20 (emphasis added); *see Durham*, 735 S.E.2d at 270 (Section 19-20-20's first sentence "declares that it is a crime to own a dog that is a danger to people.").

Second, if the State wishes to euthanize the dog as part of the defendant's sentence, the State must also prove beyond a reasonable doubt that the "dog is vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals." § 19-20-20; *see Durham*, 735 S.E.2d at 270 ("Section 19-20-20, which is entirely criminal in nature, only provides for the killing of a dog when it is first found that the dog's owner committed a crime described in the first sentence of the section. During that criminal proceeding, upon finding that the dog is dangerous, which is an

element of the crime to be proved, the judge may then order the dog killed.").

B. Factual and Procedural Background

1. In this criminal case, the State has seized and now wishes to kill petitioner Brenda Jeffrey's dog, Jasper, a small brown-and-white terrier mix:

Jasper is currently in the care of the Humane Society of Raleigh County, West Virginia, awaiting the disposition of this petition.

In 2014, the State alleged that Jasper, then just 10-months old, bit two children in Ms. Jeffrey's neighborhood, once in May 2014 and twice in August 2014, causing serious harm. App. 1–7a. Ms. Jeffrey was therefore charged in August 2014 with knowingly harboring a "vicious" dog, in violation of § 19-20-20's first

sentence. JA000014.[1] Around this time, Ms. Jeffrey hastily signed a document that purportedly transferred ownership of Jasper to the Humane Society. JA000396. Her criminal trial was to take place before a magistrate.

That did not happen, however. Instead, in January 2015, the State filed a petition in the Circuit Court of Raleigh County for permission to kill Jasper under § 19-20-20's second sentence. JA000017. The State did so before attempting to establish Ms. Jeffrey's guilt under § 19-20-20's first sentence.

The circuit court scheduled a hearing, at which Ms. Jeffrey appeared with appointed counsel. The State, however, objected to her presence both at the hearing and as a party in her own criminal case, on the alleged ground that she had relinquished "standing" by signing possession of Jasper over to the Humane Society. JA000077–78. The circuit court agreed and held that "Ms. Jeffrey does not have standing and cannot appear as a party in this proceeding." JA000078. Only the Humane Society therefore was permitted to advocate for Jasper's life in Ms. Jeffrey's criminal hearing.

Those efforts failed. The court deemed Jasper "vicious" and authorized the State to cause him to be killed. JA000082–83.

In March 2015, however, the circuit court vacated its order, acknowledging error under state law in *Durham* v. *Jenkins*, which held that § 19-20-20 "only provides for the killing of a dog when it is *first* found

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[1] Citations to "JA__" are to the Joint Appendix filed in the Supreme Court of Appeals of West Virginia, *State of West Virginia v. Jeffrey*, No. 17-0365.

that the dog's owner committed a crime described in the first sentence of the section." 735 S.E.2d at 270 (emphasis added). Because the State had yet to prove Ms. Jeffrey's guilt, the court nullified its prior euthanization order for lack of jurisdiction and required the State to prosecute Ms. Jeffrey, if at all, before the magistrate. App. 8a.

2. In the interim, Ms. Jeffrey lost her job because of the charges. JA000195. Facing up to 30 days' imprisonment and with two young children to care for, she pleaded guilty in March 2015 to the misdemeanor described in § 19-20-20's first sentence. App. 2a. She was fined and ordered to pay court costs.

But the State wished to impose a harsher penalty. Guilty plea in hand, the State asked the magistrate for authority to terminate Jasper, under § 19-20-20's second sentence. JA000123–124.

Ms. Jeffrey received notice that a criminal magistrate hearing would be held on the State's request in March 2015. Given the circuit court's January 2015 statements that she lacked standing to contest Jasper's fate, however, she did not appear at the hearing as a party, represented by counsel, even though the hearing took place in her own criminal case. The magistrate gave these issues no mention and allowed the hearing to proceed.

In Ms. Jeffrey's stead, the Humane Society again appeared and attempted to advocate for her dog's life. The Humane Society put on, among other witnesses and evidence, employees and an expert who testified that Jasper had never been violent while in their care. JA000207, 213-14, 220-22. However, Ms. Jeffrey was

never able to supplement, amplify or argue based on that evidence.

The Human Society also subpoenaed Ms. Jeffrey as a nonparty witness to testify in her own criminal case, without her counsel present. JA000126. In that limited role, Ms. Jeffrey testified that some of Jasper's alleged biting episodes in fact involved scratching when he was attempting to play and that, in another episode, Jasper was provoked. She also briefly attempted to explain that she had only signed the August 2014 form purportedly transferring ownership of Jasper because, "from [her] understanding, it was papers to hold him in quarantine" for 10 days, JA000194, as West Virginia law requires. *See* W. Va. Code § 19-20-9a ("Any person who owns" a dog that "bites any person, shall forthwith confine and quarantine the animal for a period of ten days for rabies observation.").

The Human Society's efforts to advocate for Jasper were again unsuccessful. The magistrate sided with the State, finding Jasper vicious under § 19-20-20's second sentence and authorizing his termination as part of Ms. Jeffrey's criminal sentence. JA000236. Ms. Jeffrey was never afforded the opportunity put on evidence, to call witnesses of her own, or to argue herself or through counsel to contest the permanent deprivation of her property interest in Jasper.

3. The Human Society appealed the magistrate's decision to the circuit court, and another criminal hearing was set for September 2015. All parties, however, again assumed that Ms. Jeffrey lacked standing to appear as a party. Consequently, neither Ms. Jeffrey nor her counsel appealed, received notice of the hearing, or participated in the hearing in any way. The

circuit court allowed the hearing to proceed without her there, even after announcing the case as "State of West Virginia, Petitioner versus Brenda Jeffery." JA000255.

In Ms. Jeffrey's absence, the State opportunistically reversed its position on Jasper's ownership. The State now claimed that it was the Humane Society, not Ms. Jeffrey, that lacked standing. That was because, the State now claimed, "[t]here was no transfer of legal ownership" from Ms. Jeffrey to the Humane Society "whatsoever during the course of these proceedings," JA000319–320, and the August 2014 form that Ms. Jeffrey had signed "did not transfer ownership of the dog," JA000324. The State thus argued that the circuit court was powerless to hear the Humane Society's petition, as only the dog's owner, Ms. Jeffrey, could appeal the magistrate's termination order. This was directly contrary to the State's prior position that Ms. Jeffrey *did not* own Jasper and thus could not appear as a party in her own criminal case to contest Jasper's fate.

The circuit court agreed with the State. Despite the court's January 2015 statement that "Ms. Jeffrey does not have standing and cannot appear as a party in this proceeding," JA000078, the court now held that it was instead the "Humane Society" that lacked standing, as it was "not the legal owner of the dog," JA000336. Ms. Jeffrey owned Jasper, the court said, and she was not present at the hearing and did not appeal the magistrate's ruling that Jasper was vicious and deserved to be killed as part of her sentence. As a result, the court was "constrained" to "confirm the [magistrate's] determination" that Jasper should be euthanized. JA000327.

The Humane Society appealed the circuit court's decision to the supreme court of appeals, arguing that it owned Jasper and therefore had standing to contest the magistrate's ruling. The supreme court, however, affirmed on technical grounds, finding the Humane Society's brief inadequate. *State* v. *Humane Soc'y of Raleigh Cty., Inc.*, No. 16-0414, 2017 WL 65476, at *2 (W. Va. Jan. 6, 2017).

The case was thus remanded to the circuit court for a status hearing, set for January 2017, concerning the "mechanics" of Jasper's termination. App. 1–7a. Ms. Jeffrey attended this hearing—again held in her own criminal case—as an observer, unrepresented by counsel, and only after learning about it through social media.

Despite her alleged "nonparty" status, Ms. Jeffrey interjected and briefly addressed the court as the conference closed. Without the aid of counsel, she pleaded for Jasper's life and said her "child still carries [Jasper']s picture every day in his backpack hoping someday he'll get him back." JA000355. She said she did not appeal the magistrate's ruling because, when she "sat right here" before the very same circuit judge in January 2015, she was told she "had no say-so" and no rights in this case "because [she] had surrendered the dog" to the Humane Society. JA000356. Now, the State and the court were telling her the exact opposite: that she *did* have standing and yet had somehow slept on her rights. She asked for leave to appeal, but the court refused, stating that her request was untimely. Jasper's termination would proceed as ordered.

4. In her final attempt to stop the State from terminating Jasper, Ms. Jeffrey petitioned the circuit court

for an injunction. She argued that she "never had an opportunity to be heard" regarding whether Jasper should be killed because she was repeatedly told that she lacked standing and was a nonparty in her own criminal case. JA000365–66. The court, however, denied relief on March 17, 2017. App. 8a.

Ms. Jeffrey appealed to the supreme court of appeals. She argued that, "by refusing to order a new hearing," the circuit court denied her "right to due process under the United States Constitution." App. 5-6a n.4.

On June 15, 2018, however, the supreme court affirmed in an unpublished decision and "upon grounds not set forth by [the parties] on appeal." App. 6a. The court stated that, "because [Ms. Jeffrey] has not owned or been the caretaker for Jasper in over three years, she lacks standing to pursue this appeal." App. 7a.

This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for the following reasons:

First, the decision of the Supreme Court of Appeals of West Virginia adds to a growing split of authority concerning the procedural due-process safeguards that the government must provide to an owner before forcing her to forfeit her property rights in an animal. Some courts emphasize the State's police powers to the exclusion of due process rights in forfeiture proceedings concerning animals. Other courts weigh heavily police powers but also consider the rights of animal owners. And a slim majority of courts require due process before an animal can be seized or terminated.

This Court's intervention is necessary to resolve this conflict.

Second, the process due in forfeiture proceedings in general and in the context of animal seizure and termination in particular is an important and recurring question. Civil and criminal forfeiture proceedings are legion and their number continues to increase. Because it involves animal forfeiture, an area where State police power is particularly strong, this case provides an ideal vehicle for this court to clarify the baseline due process rights of property owners in forfeiture proceedings.

Third, the supreme court of appeal's decision is incorrect on the merits and should be reversed. Under fundamental principles of due process, a property owner should have sufficient notice and be able to meaningfully participate in a forfeiture proceeding. Here, petitioner did not receive sufficient notice and was not permitted to meaningfully challenge the State's seizure and proposed termination of Jasper. This lack of process was not justified by the particular nature of the police powers exercised by the State, and the decision below should be reversed.

I. THE DECISION BELOW CONTRIBUTES TO A GROWING SPLIT OF AUTHORITY REGARDING THE PROCESS THAT AN OWNER IS DUE BEFORE SHE IS COMPELLED TO FORFEIT HER PROPERTY RIGHTS IN HER ANIMAL.

Courts applying criminal- and civil-forfeiture laws to similar facts in a variety of contexts produce different outcomes. Heather J. Garretson, *Federal Criminal Forfeiture: A Royal Pain in the Assets*, 18 S. Cal. Rev.

L. & Soc. Just. 45, 66 & n.211 (2008). For example, this outcome disparity exists when the government attempts to seize a tenant's by the entirety property in civil and criminal forfeiture proceedings. Compare, *e.g.*, *United States v. Certain Real Prop. Located at 2525 Leroy Lane, W. Bloomfield, Mich.*, 910 F.2d 343, 351 (6th Cir. 1990) (consolidated criminal and civil forfeiture appeal) (husband forfeited property interest to the government regardless of wife's interest because of federal drug conviction), *with United States v. Lee*, 232 F.3d 556, 561–62 (7th Cir. 2000) (criminal forfeiture appeal) (husband could not forfeit interest in property as a result of criminal conviction without wife's consent).

More specifically, the decision below adds to a well-developed and growing split of authority regarding the procedural due-process protections that a state must provide to an owner before depriving her of her property rights in an animal. This Court has addressed the issue indirectly just twice, once in 1897, *see Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698 (1897) , and again in 1920, *see Nicchia v. New York*, 254 U.S. 228 (1920). In the 99 years since *Nicchia* was decided, federal and state courts have applied varying and inconsistent standards to procedural due process claims involving property interests in animals. And they have often done so without regard to whether the deprivations occur in criminal versus civil forfeiture proceedings. This Court's intervention is necessary to provide guidance in this important area of federal constitutional law.

1. *Sentell* involved the constitutionality of a Louisiana statute that barred dog owners from recovering damages for a dog's harm unless the dog's value was

formally registered with the local tax assessor. 166 U.S. at 700. The statute was designed to "prevent the indiscriminate owning and breeding of worthless dogs." *Id.* When the plaintiff's dog—a "valuable [pregnant] Newfoundland"—was killed on the defendant's property, the plaintiff sued for damages. *Id.* The defendant argued that the plaintiff's claims failed because the dog's value was never formally registered under the statute. *Id.* The plaintiff rejoined that, if applied, the statute would deprive him of his property interest in the dog without due process of law. *Id.*

This Court disagreed and upheld the law. The Court first described the nature of "property in dogs" in 1897 as of "an imperfect or qualified nature." *Id.* at 701. "They are not considered as being upon the same plane with horses, cattle, sheep, and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds, and similar animals, kept for pleasure, curiosity or caprice." *Id.*

But even "if it were assumed that dogs are property in the fullest sense of the word," the Court added, "they would still be subject to the police power of the State, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens." *Id.* at 704. To this end, the Court explained, there exists a balance between due process and the State's police powers. "So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but, so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction." *Id.* at 705.

2. In *Nicchia*, a woman convicted under a New York statute of possessing dogs without a license argued that the law violated her due process rights of ownership. 254 U.S. at 228–30. This Court rejected her challenge and reaffirmed that, because "[p]roperty in dogs is of an imperfect or qualified nature," dogs "may be subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right." *Id.* at 230–31 (relying on *Sentell*).

3. Courts have split into three categories after *Sentell* and *Nicchia*. In the category least protective of property owner's rights, at least three courts of last resort effectively rely on the principles of *Sentell* and *Nicchia* to justify the deprivation of animal-based property rights using broad conceptions of state police power, and with reduced emphasis on due process.

In a more protective category, at least two other state high courts apply *Sentell*'s and *Nicchia*'s general police-power principles while also requiring government officials to adhere to stricter procedural requirements in the seizure of animals.

Finally, in the most protective and searching category, at least four federal courts of appeals and three state high courts look past *Sentell* and *Nicchia* to apply contemporary due process principles enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

A. Some Courts Apply The Principles Of *Sentell* And *Nicchia* To Justify Deprivations Of Animal-Property Under Broad Conceptions Of State Police Power, With Reduced Emphasis On Due Process.

In the category least protective of property owner's rights, at least three state high courts effectively rely

on the principles of *Sentell* and *Nicchia* to justify the deprivation of animal-based property rights using expansive conceptions of state police power, and with little focus on due process protections.

1. **South Carolina.** In *Peoples Program for Endangered Species v. Sexton*, for example, conservationists and owners of two wolves challenged a local ordinance barring the possession of "vicious or dangerous domesticated animals" within their neighborhood. 476 S.E.2d 477, 479 (S.C. 1996). The ordinance was passed after they had already purchased their home, so they argued that the government was attempting to take their animals without due process. *Id.*

The Supreme Court of South Carolina rejected their argument. In so doing, it affirmed the trial court's ruling that the "ordinance does not violate [the plaintiffs'] due process rights because it pertains to the regulation of animals," and an "ordinance regulating the keeping of animals within municipal limits is a valid exercise of the police power." *Id.*

Quoting *Sentell*, the supreme court added that "so far as [an owner's animal] is dangerous to the safety or health of the community, due process of law may authorize its summary destruction." *Id.* "[A] state in a bona fide exercise of its police power," the court broadly concluded, "may interfere with private property, and even order its destruction for the welfare and comfort of its citizens." *Id.*

This was especially true for dogs, said the court, given *Nicchia*'s holding that "[p]roperty in dogs is of an imperfect or qualified nature and dogs may be subjected to peculiar and drastic police regulation by the

state without depriving their owners of any federal right." *Id.*

2. **Virginia.** Similarly, in *King v. Arlington County*, the defendant was convicted of keeping a vicious dog, in violation of a county ordinance requiring "such dog [to] be turned over" to the state "to be destroyed" automatically "[u]pon conviction." 81 S.E.2d 587, 589 (Va. 1954). The defendant challenged the ordinance on the ground that it deprived him of property without due process of law.

Virginia's then-highest court, the Supreme Court of Appeals of Virginia, rejected the defendant's challenge and upheld the law. "It is well settled," the court said, "that the regulation of dogs is within the police power of the State" and the "keeping of dogs in thickly settled municipalities is subject to rigid police regulations, without much regard to rights of the owners in such animals as property." *Id.* at 1087.

3. **West Virginia.** In the decision below, Ms. Jeffrey was convicted of harboring a "vicious" dog, in violation of a West Virginia criminal statute. Through a series of criminal proceedings from which Ms. Jeffrey was either excluded altogether or relegated to non-party status and thus denied any meaningful participation, the State successfully moved the trial court for an order requiring the killing of her dog, Jasper. Throughout the proceedings, the court emphasized the need to "protect another child or another person from being attacked by this animal." JA000101. Yet the court never gave weight to Ms. Jeffrey's assertions of a continuing property interest in Jasper, protected under the Fourteenth Amendment's Due Process Clause

nor to the evidence that was provided that Jasper was neither violent nor dangerous.

Ms. Jeffrey later moved to enjoin Jasper's termination, arguing that she was never given the opportunity to contest the permanent deprivation of her property as a party to her own criminal proceeding. The trial court, however, denied relief. The Supreme Court of Appeals affirmed in a decision that ignored Ms. Jeffrey's still-untested contentions of a continuing property right in Jasper.

B. In A Category More Protective Of Property Rights, At Least Two State High Courts Require Strict Compliance With Procedural Safeguards, While Also Applying Police-Power Principles Derived From *Sentell* and *Nicchia*.

In a more protective category, at least two other state high courts have relied on *Sentell*'s and *Nicchia*'s general police-power principles while also requiring stricter adherence to procedural protections when animals are seized.

1. **Minnesota.** In *Sawh v. City of Lino Lakes*, for example, local government seized and intended to kill the plaintiff's dog after it was involved in three biting episodes. 823 N.W.2d 627, 630 (Minn. 2012). A Minnesota statute provided that violent dogs would be deemed "potentially dangerous" after an initial incident, "dangerous" after a second incident, and subject to euthanasia after a third. *Id.* When plaintiff's dog was designated "dangerous" and when the dog's termination was ordered, the plaintiff called for, and participated as a party in, two full evidentiary hearings con-

cerning his property interest. *Id.* at 630–31. He nevertheless claimed that he was deprived of his animal without due process because the statute did not allow for a hearing when the dog was first deemed "potentially dangerous." *Id.* at 632.

The court rejected this challenge. Citing *Nicchia*, the court emphasized the qualified nature of an owner's property interest in an animal: "[The plaintiff's] protected property interest at stake in this case is not nearly as substantial as the property interests that we have recognized in other contexts." *Id.* at 633–34.

Nonetheless, the court held that the "procedures afforded by the government must provide an individual with notice and an 'opportunity to be heard at a meaningful time and in a meaningful manner.'" *Id.* at 632 (citation omitted)). In this instance, the court concluded, the government satisfied this test: "At both hearings," the plaintiff was permitted "to present witnesses, to explain his version of the incidents, and to argue that the City's decisions were inconsistent with the evidence." *Id.* at 634.

2. **South Dakota.** Similarly, in *City of Pierre v. Blackwell*, the defendant was charged with harboring a "dangerous" dog, in violation of a South Dakota criminal law. 635 N.W.2d 581, 583–84 (S.D. 2001). The only issue for trial was whether the dog was, in fact, "dangerous." *Id.* The court, however, refused to consider the defendant's evidence at trial and instead relied solely on a report created by an animal control officer, an agent of the government. *Id.*

This conduct, the Supreme Court of South Dakota held, violated the defendant's procedural due process

rights, notwithstanding the government's broad police powers over animals. *Id.* at 585. The court recognized *Sentell*'s statements that the "property interest in a dog is of an imperfect or qualified nature." *Id.* But the court still concluded that the "dog is property nonetheless," meaning that, "absent exigent circumstances, the [government] was required to provide [the defendant] with notice, an opportunity to be heard and a proper criminal adjudication by a judicial officer." *Id.*

The final requirement, a "hearing by a disinterested judicial officer, "was not satisfied" in this case, because the trial court's wholesale reliance on the government's report deprived the defendant of an "independent determination of dangerousness by a neutral judicial officer as part of the criminal proceeding." *Id.* at 585–86.

C. In The Category Most Protective Of Property Rights, At Least Four Federal Courts Of Appeals And Three State High Courts Look Past *Sentell* And *Nicchia* To Apply *Matthews*' Balancing Test.

Finally, at least four federal courts of appeals and three state high courts fall into the category most protective of property rights. Courts in this category look past *Sentell* and *Nicchia* to apply *Matthews*' searching, fact-based inquiry to decide what process is due when the government seeks to seize a property owner's animal. While these courts have occasionally found the government's interests in seizure stronger than the property owner's interests in retaining their possessions, they have done so only after ensuring that adequate procedural safeguards are in place and have been adhered to under *Matthews*' framework.

Matthews requires consideration of the (1) "private interest that will be affected by the official action"; the (2) "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the "Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

1. **Seventh Circuit.** In *Porter v. DiBlasio*, for example, county officials seized nine of the plaintiffs' horses for alleged neglect and, without giving the plaintiff notice or a hearing of any kind, terminated his ownership and transferred it to the local humane society. 93 F.3d 301, 303 (7th Cir. 1996). Alleging procedural due process violations through Section 1983, the plaintiff sued the county and county officials.

The Seventh Circuit agreed with the plaintiff, finding plausible violations of procedural due process. *Id.* The court first made clear, without reference to *Sentell* or *Nicchia*, that the "parties do not dispute, and we certainly agree, that [the plaintiff's] ownership interest in the nine horses is a protected property interest under the Fourteenth Amendment." *Id.* at 305.

> [A]n animal owner has a substantial interest in maintaining his rights in a seized animal. Such is especially the case with potential income-generating animals such as horses, cattle, swine, and the like. Other types of animals more commonly kept as pets have a different, but not necessarily lesser, value to their

> owners, generally in the form of companionship. That is not to say, of course, that horses may not also be the objects of their owners' affection.

Id. at 306-07.

Next, the court applied *Matthews*' balancing test to hold that the state "must provide an owner notice and an opportunity for a hearing prior to permanently terminating an individual's interest in seized animals." *Id.* at 307. That was because "[n]otice and a hearing provide the owner with the opportunity to challenge the legality of the original seizure of his animal, as well as the validity of any costs the state is attempting to assess for the seizure and care of the animal." *Id.* *See also Siebert v. Severino*, 256 F.3d 648, 660 (7th Cir. 2001) (the plaintiff "presented sufficient facts to support a due process claim based on [her] horses' removal without a pre-deprivation hearing").

2. **Tenth Circuit.** In *DiCesare v. Stuart*, government officials seized and either euthanized or sold 13 malnourished horses that plaintiff owned. 12 F.3d 973, 975–77 (10th Cir. 1993). The plaintiff, who was at that point incarcerated, received notice of the horses' impending sale, but the notice did not inform him of any opportunity to challenge the government's actions. *Id.* After learning that his animals had been killed or sold, plaintiff alleged violations of procedural due process under Section 1983.

The Tenth Circuit found his claims plausible. The court first explained, without citing *Sentell*, *Nicchia*, or *Matthews*, that the government "may not finally destroy a property interest without first giving the puta-

tive owner an opportunity to present his claim of entitlement." *Id.* at 978 (citation omitted). Here the government violated this principle by making "no provision for a hearing at any time." *Id.*

"Further," the court held, "due process requires that a notice advising an individual that his property right will be terminated must also advise him of the availability of a procedure for protesting the proposed action." *Id.* Yet again, however, the government violated this requirement by sending the plaintiff a notice that "merely informed him of the impending sale [of the horses], without informing him of the availability of an opportunity to present his objections." *Id.*

3. **Sixth Circuit.** In *United Pet Supply, Inc. v. City of Chattanooga*, for example, agents of a private company under contract with the local government raided a mall pet store and seized numerous animals found living in unsanitary conditions. 768 F.3d 464, 472–75 (6th Cir. 2014). The animals' owners alleged, among other things, due process violations under 42 U.S.C. § 1983 on grounds that they did not receive a predeprivation hearing before their animals were seized. *Id.* at 485.

The Sixth Circuit found no such violation, however. Without relying on *Sentell* or *Nicchia*, the court applied the balancing test of *Mathews* to hold that no predeprivation hearing was necessary. The court focused mainly on *Matthews*' third requirement—but only after giving due weight to the owners' property strong interests in their animals. Given the abhorrent conditions of the pet store, however, the court held that the government had a stronger interest in "eliminat[ing]

immediately a situation that posed a danger to the animals" owned by the plaintiffs. *Id.* at 487.

4. **Ninth Circuit.** In *Recchia v. City of L.A. Department of Animal Services*, local government seized and later euthanized numerous birds that (the parties agreed) the plaintiff owned, without a predeprivation hearing. 889 F.3d 553, 555–58 (9th Cir. 2018). The plaintiff alleged violations of procedural due process against government officials, through Section 1983.

The Ninth Circuit, however, affirmed dismissal of the plaintiff's due process claims, applying *Matthews*' three-part balancing test. *Id.* at 561–62. The court first recognized that the "interest at stake" was an "animal or pet owner's property interest in their animals" and that, "[g]iven the emotional attachment between an owner and his or her pet, a pet owner's possessory interest in a pet is stronger than a person's interest in an inanimate object." *Id.* at 562.

Nevertheless, in the circumstances present that included the danger of infectious pathogens, the court found that the government's strong interest in immediate seizure, in these circumstances, outweighed the plaintiff's property rights under *Matthews*':

> [T]here is a strong general governmental interest in being able to seize animals that may be in imminent danger of harm due to their living conditions, may carry pathogens harmful to humans or other animals, or may otherwise threaten public safety without first needing to have a hearing on the subject.

Id.

5. **Alabama.** In *Humane Society v. Adams*, the government seized cattle, allegedly "in poor condition," that the plaintiffs owned. 439 So. 2d 150, 151 (Ala. 1983). The cattle were seized under Alabama's "animal neglect" statute, which gave the government unchecked discretionary powers to seize animals, with "no opportunity" for owners "to contest the seizure" or "sale." *Id.* at 153. The Supreme Court of Alabama struck down the law as violating procedural due process, citing *Matthews*.

6. **Florida.** Similarly, in *County of Pasco v. Riehl*, a Florida statute allowed the state to kill an owner's dog if, after the dog was classified as "dangerous," the dog was involved in another violent incident. 635 So. 2d 17, 17–18 (Fla. 1994). In addition, the Florida law "allowed substantial restrictions and penalties to be placed upon the owner's use and enjoyment of his property without affording an opportunity to a prior hearing on the matter." *Id.* at 18.

Without citing *Sentell* or *Nicchia*, the Florida Supreme Court deemed the statute unconstitutional. The court held:

> [Plaintiff's] private property was subject to, among other things, physical confinement, tattooing or electric implantation, and muzzling. In the aggregate, these restrictions are a deprivation of property and before such restrictions are imposed the property owner must be afforded an opportunity to be heard. Accordingly, we find that [plaintiffs] suffered a depriva-

> tion of property without benefit of a hearing, and such deprivation was a violation of their procedural due process rights.

Id. at 19.

7. **Maine.** Finally, in *State v. Malpher*, a defendant convicted of animal cruelty was ordered to forfeit numerous dogs to the state as part of her sentence. 947 A.2d 484, 485–86 (Me. 2008). She appealed, arguing that she was deprived of her property without due process.

Maine's highest court, the Supreme Judicial Court of Maine, rejected her claims. With no citation to *Sentell* or *Nicchia*, the court held that the defendant was "afforded due process"—but only "when she was given a full opportunity over two days of trial to present her case, explain the condition of the animals, and argue that they should be returned to her." *Id.* at 488.

* * * * * * *

In sum, when dealing with seizure and termination of animals, regardless of whether the deprivations are in criminal or civil proceedings, some courts hold that police powers over animals trump due process rights, other courts presume that police powers are paramount, but nonetheless balance due process rights to some extent, and a slim majority of court require due process. This Court's intervention is necessary to resolve this conflict that stems, at least in part, from differing interpretations of this Court's decisions in *Sentell* and *Nicchia*.

II. THIS ISSUE IS IMPORTANT AND RECURRING IN FEDERAL AND STATE COURTS THROUGHOUT THE NATION AND THIS CASE PRESENTS AN OUTSTANDING VEHICLE FOR RESOLVING IT

As suggested by the numerous courts that have considered the question presented, what process is due a property owner in civil and criminal forfeiture proceedings both in general and when the property is an animal is an important and recurring issue.

1. Asset forfeiture today has become big business for governments. As Justice Thomas has recently pointed out in the context of civil forfeiture, these laws have evolved beyond "historical forfeiture laws * * * limited to a few specific subject matters, such as customs and piracy" into seizing property ranging from drug contraband to puppies without ensuring owner due process. *Leonard* v. *Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., statement on the denial of certiorari) (citing *United States* v. *Parcel of Rumson, N. J., Land*, 507 U.S. 111, 119 (1993)); Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 Harv. L. Rev. 2387, 2390 (2018) (citing Dick M. Carpenter II et al., Inst. for Justice, Policing for Profit: The Abuse of Civil Asset Forfeiture 5 (2015)).

The year 2014 alone witnessed a collection of over $4.5 billion from federal asset forfeiture—including both civil and criminal proceedings. *See* Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, Wash. Post. Nov. 23, 2015. Between 2000 and 2013, equitable sharing programs, whereby the federal government uses its

own civil forfeiture proceedings to circumvent state criminal and civil forfeiture proceedings and then shares up to 80% of the proceeds with the state, generated billions of dollars in revenue. The Justice Department's equitable sharing program alone generated $4.7 billion during that time, while the Treasury Department's program generated another $1.1 billion. *See* Dick M. Carpenter II et al., Inst. for Justice, Policing for Profit: The Abuse of Civil Asset Forfeiture 25 (2015) [hereinafter Policing for Profit], http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf. During this period, annual payments more than tripled. *Id.* Additionally, of the just 14 states that provide enough long-term data, total annual forfeiture revenue across those states more than doubled from 2002 to 2013. *See id.* at 5. Some states, like West Virginia, have forfeiture laws that provide the government with a low bar to seize an asset while they fail to account for forfeiture funds between civil and criminal cases.*See id.* at 142.

Criminal forfeiture statutes have become commonplace in the federal regulation and enforcement of numerous criminal industries. *See, e.g.*, Child Protection Act of 1984, 18 U.S.C. § 2253 (2018); Child Protection and Obscenity Enforcement Act of 1988, 18 U.S.C. § 1467 (2018); Comprehensive Drug Abuse Prevention and Control Act of 1984, 21 U.S.C. § 853 (2018); Copyright Act of 1976, 17 U.S.C. § 506 (2018); Money Laundering Control Act of 1986, 18 U.S.C. § 982 (2018); Racketeering Influenced and Corruption Organizations Act, 18 U.S.C. § 1963 (2018). Forfeiture provisions can be found incorporated into many other areas of law, including animal fighting and radio com-

munication devices. *See* Amy A. Breyer, *Asset Forfeiture and Animal Cruelty: Making One of the Most Powerful Tools in the Law Work for the Most Powerless Members of Society*, 6 Animal L. 203, 214 (2000) (citing 47 U.S.C. § 510 (2018) (permitting forfeiture of unlicensed radio communication devices); 7 U.S.C. § 2156(f) (2018) (permitting forfeiture of animals engaged in animal fighting). *See also* W. Va. Code Ann. § 19-20-20 (West 2018) (permitting destruction of vicious dogs). Additionally, nearly all states have passed criminal forfeiture legislation. *See*, *e.g.*, Center for the Advancement of Public Integrity, Selected Asset Forfeiture by State, https://www.law.columbia.edu/sites/default/files/microsites/public-integrity/files/appendix_1_-_selected_asset_forfeiture_statutes_by_state.pdf.

Rapid proliferation and increased use of these statutes has created confusion, especially as between what process is due in civil versus criminal forfeiture proceedings. For example, several states, such as Arizona, Florida, and South Dakota do not clearly distinguish between civil and criminal forfeitures. *See*, *e.g.*, Ariz. Rev. Stat. §§ 13-4305, 13-4312; Fla. Stat. §§ 932.701-932.706 (2018); S.D. Codified Laws § 23A-49 (2018). Arizona makes criminal forfeiture subject to the rules of civil procedure, *see* Ariz. Rev. Stat. § 13-4305, and such forfeiture may occur in either an in personam civil or criminal action, *see id.* § 13-4312. Moreover, under Arizona law, "[a] civil in rem action may be brought by the state in addition to or in lieu of the civil and criminal in personam forfeiture procedures." *See id.* § 13-4311. Although the Florida Contraband Forfeiture Act is a part of title XLVII of the 2018 Florida Statutes, titled Criminal Procedure and Corrections,

forfeitures under that Act are subject to civil forfeiture rules. *See* Fla. Stat. §§ 932.701–932.706. And, contrary to the basic principles of criminal forfeiture, South Dakota does not require a conviction for criminal forfeiture; rather, all forfeitures, whether they arise from criminal convictions or not, are treated identically under law. *See generally* S.D. Codified Laws § 23A-49. These forfeitures require only that the government prove by a preponderance of the evidence that the property was involved with the crime. *Id.* § 23A-49-13. Such blurring of civil and criminal procedures has led the state's highest court to resolve whether an individual had a Sixth Amendment right to be appointed counsel during a "civil" forfeiture hearing. *State v. $1010.00 in American Currency*, 722 N.W.2d 92 (S.D. 2006). The Supreme Court of South Dakota answered in the affirmative and further blurred the constitutional protections that differ between civil and criminal proceedings. *Id.* at 99.

2. At issue here is the forfeiture and euthanization order regarding an animal in the context of an asset forfeiture proceeding treated as a criminal proceeding. Cases involving animals are numerous but are not treated consistently. As one fifty-state comprehensive survey of state dangerous dog laws reports, "[e]ighteen (18) states have mandatory euthanization provisions, 6 states have none, and 27 states give the determining body the discretion to order the animal euthanized." Mich. St. Univ. Coll. of Law, State Dangerous Dog Laws, https://www.animallaw.info/topic/state-dangerous-dog-laws. Nor is there any consensus as to the type of process that is due. *See generally id.* Some states, such as West Virginia, treat dog forfeiture proceedings

resulting in the dog's euthanization or some other punishment as a criminal proceeding. *See* W. Va. Code, § 19-20-20. Some states treat them as civil proceedings. *See, e.g.*, Ala. Code § 3-1-3 (1975). And still others have conflated the proceedings. *See, e.g.*, Wash. Rev. Code § 16.08.100.

3. This case is an excellent vehicle to decide the question presented. First, the facts pertinent to the question presented are simple, straightforward, and not in dispute. Second, the case presents the outer edge of the States' traditional police powers, typically "defined as the authority to provide for the public health, safety, and morals." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *see R.R. Co. v. Husen*, 95 U.S. 465, 470–71 (1877) (articulating one of the earliest formulations of State police power as the power to make "regulations promotive of domestic order, morals, health, and safety"). This is so because this Court has recognized the power to regulate animals as a crucial aspect of the States' police power. *See Nicchia*, 254 U.S. at 230–31; *Sentell*, 166 U.S. at 703–04. Relatedly, the State's police power is at its greatest when dealing with the forfeiture of a dangerous or potentially dangerous animal, as opposed to the forfeiture of a house used in the commission of a crime, which by itself does not typically pose a harm to the public. By determining the process due animal owners in forfeiture proceedings, an area where the State's police power is at its greatest, this Court can provide an appropriate baseline for due process in most forfeiture proceedings.

III. THE DECISION BELOW IS INCORRECT ON THE MERITS AND SHOULD BE REVERSED

Finally, this Court should grant the petition because the decision of the Supreme Court of Appeals of West Virginia is incorrect under bedrock principles of procedural due process.

1. "Procedural due process imposes constraints on governmental decisions" that "deprive individuals" of "'property' interests within the meaning of the Due Process Clause" of the Fourteenth Amendment. *Mathews*, 424 U.S. at 332. "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 333.

That is because the "right to be heard before being condemned to suffer grievous loss of any kind" is a "principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *see Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions."). At bottom, the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Ms. Jeffrey has been denied that fundamental requirement since late-2014, when the State first seized her 10-month old dog, Jasper, and notified her that it would also seek to have Jasper killed as part of Ms. Jeffrey's criminal punishment. At no point during her own criminal proceedings was Ms. Jeffrey permitted

to appear before a judge as a party and represented by appointed counsel, to adduce her own evidence that the State could not prove beyond a reasonable doubt that Jasper was "vicious" and should be killed as a result. *See Durham*, 735 S.E.2d at 269 (the "standard of proof" under W. Va. Code § 19-20-20 is "beyond a reasonable doubt"). This alone violated due process. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process" and "among the minimum essentials of a fair trial.").

Ms. Jeffrey was instead repeatedly relegated to the status of a nonparty in her own criminal proceedings. As a nonparty, neither her nor her attorney received notice of scheduled court hearings. This, too, violated the basic requirement of due process that the government provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

In addition, as an unrepresented nonparty, Ms. Jeffrey was barred from putting on evidence that she still owns Jasper and from cross-examining the State's witnesses against her and in favor of depriving her of her property rights. Both errors violated the Fourteenth Amendment's promise of due process of law. *E.g.*, *Chambers*, 410 U.S. at 294; *Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("[T]o deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.").

2. These errors arose from the West Virginia courts' undue reverence for the State's purported interest in policing disorderly animals. Throughout the proceedings, the alleged imperative to "protect another child or another person from being attacked by this animal" was repeatedly emphasized. JA000101. Yet Ms. Jeffrey's consistent assertions of a continuing property interest in Jasper were ignored.

This approach is consistent with the reasoning of other courts, which have misconstrued *Sentell*' and *Nicchia* to sanction deprivations of animals alleged to be dangerous without due process. While those cases do recognize a balance between the government's police powers and an animal owner's due process rights, properly construed they do not permit deprivations without due process. *See, e.g.*, *Sentell*, 166 U.S. at 705 (emphasizing what "due process of law may authorize *Nicchia*, 254 U.S. at 230–31 (explaining that in certain circumstances use of "police regulations by the State" may not "depriv[e]" animal owners "of any federal right.").

This Court should make clear that *Matthews*' balancing test applies to all property rights, including an owner's property rights in her animal. Were *Matthews*' test applied in Ms. Jeffrey's case, the State would still be entitled to argue, and the court would still be required to weigh, the "Government's interest" in policing unruly animals. *Matthews*, 424 U.S. at 335. But Ms. Jeffrey would also be permitted to put on evidence about the "private interest" that would be "affected by the official action," *i.e.*, her private property interest in Jasper. That is all Ms. Jeffrey asks for in this case: the "opportunity to be heard 'at a meaningful time and in

a meaningful manner.'" *Id.* at 333 (quoting *Armstrong*, 380 U.S. at 552).

"No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *McGrath*, 341 U.S. at 171–72 (Frankfurter, J., concurring). "Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." *Id.*

Justice should be done in this case. "[A]n animal owner," like Ms. Jeffery, has a "substantial interest" in maintaining her property rights. *Porter*, 93 F.3d at 306. Those rights are protected under the Fourteenth Amendment's Due Process Clause. *Id.* Accordingly, this Court should grant review and hold that the State of West Virginia "must provide" Ms. Jeffrey "notice and an opportunity for a hearing" before it can permanently deprive her of her beloved family dog, Jasper. *Id.* at 307.

CONCLUSION

The petition for a writ of certiorari should be granted.

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