No. _____

In The

Supreme Court of the United States

STEPHEN NICHOLS,

Petitioner,

v.

WAYNE COUNTY, MICHIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 22, 2021

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QUESTIONS PRESENTED

1. Whether due process requires municipalities, after seizing a vehicle in the name of civil forfeiture, to provide the vehicle owner a prompt hearing before a neutral judge to decide whether the municipality may, while litigating the forfeiture, deny the owner continued possession and use of the vehicle.

2. Whether a claim alleging municipal failure to afford a constitutional right requires a plaintiff to plead not only the existence of a policy denying the right but also the existence of policies denying all the means by which the right may be afforded.

PARTIES TO THE PROCEEDING

The caption of this petition identifies all the parties to this proceeding, except as follows.

Besides Wayne County (Michigan), the Respondents here include:

- Wayne County (Mich.) Prosecutor's Office;
- Kym Worthy, in her Official Capacity as Wayne County (Mich.) Prosecutor; and
- City of Lincoln Park, Michigan.

DIRECTLY RELATED PROCEEDINGS

- ***Nichols v. Wayne County, Michigan, et al.***— United States District Court for the Eastern District of Michigan; Docket No. 2:18-cv-12026; Final Judgment Entered August 16, 2019.
- ***Nichols v. Wayne County, Michigan, et al.***— United States Court of Appeals for the Sixth Circuit; Docket No. 19-1056; Final Judgment Entered August 18, 2020; Final Order Denying Rehearing En Banc and Panel Rehearing Entered November 23, 2020.

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Stephen Nichols respectfully petitions the Court to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION & ORDERS BELOW

The Sixth Circuit's August 13, 2020 panel opinion is reproduced at 822 F. App'x 445 and App. 1–50. The Sixth Circuit's November 23, 2020 denial of rehearing is reproduced at App. 60–61.

The district court's December 11, 2018 opinion and order is reproduced at App. 51–59.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) given: (1) the Sixth Circuit's August 18, 2020 entry of final judgment (App. 1–50); and (2) the Sixth Circuit's November 23, 2020 denial of Nichols's timely rehearing petition (App. 60–61).

On March 19, 2020, the Court issued an order extending the time to file a petition for a writ of certiorari for any petition due on or after that date to 150 days from (as relevant here) the date of an order denying a timely rehearing petition. This order extended Nichols's time to file a certiorari petition to and including April 22, 2021.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

In 1953, Justice Robert H. Jackson delivered a speech to the American Bar Association entitled: "The Task of Maintaining Our Liberties."[1] Justice Jackson asked his audience to consider "how far so-called rights of property can be swept away without encroaching upon rights of the person as well."[2] He offered a simple example: "My equal right to drive an automobile may be only a claim to use of property, but it concerns my personal freedom as well."[3]

Wayne County[4] and the City of Lincoln Park (the municipalities) swept away Stephen Nichols's right to possess and drive his automobile. Following a traffic

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[1] Justice Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. J. 961 (1953).

[2] *Id.* at 963.

[3] *Id.*

[4] In referring to Wayne County, Nichols also refers the County's sister Respondents, the Wayne County Prosecutor's Office and Kym Worthy, in her official capacity as Wayne County Prosecutor. *See Petty v. Cnty. of Franklin, Ohio*, 478 F.3d 341, 349 (6th Cir. 2007) ("To the extent . . . [a] suit is against [a county official] in his official capacity, it is nothing more than a suit against . . . [the] [c]ounty itself.").

stop, police seized Nichols's car without a warrant based on improper grounds for civil forfeiture. The municipalities then provided no judicial hearing at which Nichols could challenge the ongoing detention of his car while the municipalities decided whether to prosecute the forfeiture.

For the next **three years**, Nichols had to pay for rides and public transit to get to work and perform the daily necessities of life. He also lost the ability to perform necessary maintenance on his car while still having to pay for insurance. Only after Nichols also suffered the cost of filing a federal civil-rights suit for damages and injunctive relief did the municipalities relent. Three months after Nichols sued, Wayne County announced it would not to seek forfeiture of Nichols's car and returned the car to him. The courts below then held either due process does not require continued-detention hearings or that Nichols did not sufficiently plead a due-process claim.[5]

The Court has seen this situation before. In *Alvarez v. Smith*, 558 U.S. 87 (2009), several civil-rights plaintiffs challenged months-long municipal detention of their cars in the name of civil forfeiture. *See id.* at 579. The Court granted review to decide whether the government afforded the plaintiffs "a sufficiently

[5] Nichols specifically uses the phrase "continued-detention hearing" throughout his cert. petition rather than "post-seizure hearing" or "post-deprivation hearing" to emphasize what the hearing is about (i.e., continued vehicle detention) versus when the hearing takes place (i.e., after a vehicle is seized).

speedy opportunity . . . to contest the lawfulness of the seizure." *Id.* at 578. But the Court's ability to decide this question was mooted when the Court learned that the government had returned the cars and the plaintiffs (unlike Nichols) had sought only declaratory and injunctive relief—"not damages." *Id.* at 578, 580.

In the following decade, courts have strongly divided on the question that *Alvarez* left open. The result is a due-process patchwork contrary to "the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 139 (2005). A person driving through New York, Connecticut, and Vermont may assert that she has a right to a prompt continued-detention hearing for a seized vehicle. *See Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) (Sotomayor, J.). But should the same driver find herself in Illinois, no such luck—at least as far as the Illinois Supreme Court is concerned. *See People v. One 1998 GMC,* 960 N.E.2d 1071 (Ill. 2011).

The Sixth Circuit's decision in Nichols's case complicates this patchwork even more. Federal courts have recognized that a driver who alleges municipal liability based on a policy of failing to provide continued-detention hearings has sufficiently alleged a due-process claim (even if this claim is not ultimately prevailing). *See Krimstock*, 306 F.3d at 51–53. But the Sixth Circuit here holds that a driver must plead more than this because civil-rights plaintiffs have "no right to elect the *means* by which . . . municipalities satisfy the Constitution." App. 12 (italics in original).

Meanwhile, drivers must suffer the loss of their cars for months or even years pending a forfeiture trial, especially "[d]rivers in low-income communities." *City of Chicago v. Fulton*, 141 S. Ct. 585, 593 (2021) (Sotomayor, J., concurring). "Many Americans depend on [their] cars for food, school, work, medical treatment, church, relationships, arts, sports, [and] recreation . . . ." *Washington v. Marion Cnty. Prosecutor*, 916 F.3d 676, 679 (7th Cir. 2019). There is also the prospect of "virtual imprisonment" if a "person released on bond . . . cannot regain his vehicle in time to drive to work." *Id.*; *cf. Fulton*, 141 S. Ct. at 594–95 (Sotomayor, J., concurring) ("One hundred days is a long time to wait for a creditor to return your car . . . .").

The Court should thus grant review in Nichols's case. By doing so, the Court may finally resolve the entrenched division that now pervades whether drivers have a due-process right to continued-detention hearings for seized vehicles. So long as this disorder persists, the Constitution's guarantee of due process is an empty promise for millions of car owners. And that does not comport with the irreducible meaning of due process: "that the people's rights are never any less secure against governmental invasion than they were at [English] common law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

A. Legal Background

1. Common-law protection of vehicle owners dates back over 800 years to Magna Carta and its ancient guarantees of English liberty. Chapter 30 of Magna Carta decreed: "[n]o sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman."[6] Then, in Chapter 39, Magna Carta enshrined due process: "[n]o freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed . . . except by . . . law of the land."[7]

2. In the centuries that followed, "English law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). The same law, however, recognized due-process protections for seized property as well as general limits on statutory forfeitures.

Under English law, the Court of Exchequer adjudicated the "forfeiture of articles seized on land for the violation of law." *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 137 (1943); *see also Calero-Toledo,* 416 U.S. at 682 ("Statutory forfeitures were most often enforced . . . in the . . . Exchequer."). The Exchequer's history reveals

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[6] Magna Carta (1215), *as reproduced online by* THE AVALON PROJECT, YALE LAW SCHOOL, https://bit.ly/3stFqtb.

[7] *Id.*; *see Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta.").

that Crown seizures had to be supported by an early showing of probable cause—a rule that property owners could enforce in court.

The common law provided that "[i]f there be a seizure made, the Officer must in the next Term, or sooner, at the Discretion of the Court, return the Cause of Seizure and take out a Writ of Appraisement."[8] If the Crown did not timely return a cause-of-seizure or take out a writ-of-appraisement,[9] the owner of the seized property was then "entitled to move for a Writ of Delivery" that would require the Crown to return the seized property back to its owner.[10]

The common law observed a similar due-process limit even after filing of a cause-of-seizure and writ-of-appraisement. At this point, the Crown had to file "an [i]nformation . . . to condemn"[11] the seized

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[8] SIR GEOFFREY GILBERT, A TREATISE ON THE COURT OF EXCHEQUER 182 (London, H. Lintot 1758).

[9] A "writ of appraisement" was "a writ issued out of court for the valuation of goods seized as forfeited to the crown." 38 ABRAHAM REES, THE CYCLOPAEDIA (London, Rivington et al. 1819) (no apparent internal pagination).

[10] GILBERT, *supra* note 8, at 182; *see also* JAMES MANNING, THE PRACTICE OF THE COURT OF EXCHEQUER 143–44 (London, A. Strahan 1827) ("Before proceedings or seizures were placed under the control of the commissioners of the respective boards of customs and excises, the seizing officer was bound in the next term, or sooner, at the discretion of the Court, to return the cause of seizure and take out a writ of appraisement, otherwise the proprietor was entitled to move for a writ of delivery . . . ." (some spelling alterations for readability purposes)).

[11] An "information in the Exchequer" was "a statement . . . to the Court" asserting the King's right "to an adjudication in his

property.[12] But if the "information [was] not filed in a month" after a property owner asserted his claim to the seized property, the owner could again "move for a writ of delivery, which he might . . . have as a matter of course, upon giving security."[13]

Writs of delivery for seized property were then one of those "customary procedures to which freemen were entitled by the old law of England." *Sessions*, 138 S. Ct. at 1224 (Gorsuch, J., partial concurrence). And while Parliament later imposed certain statutory limits on issuance of these writs, these limits nevertheless preserved "the discretion of the Court to grant or refuse the writ, under the particular circumstances of each case."[14]

English law thus recognized a due-process right to challenge the government's continued detention of seized property while the Crown sought forfeiture of the property. American courts then assimilated this common-law tradition. As Chief Justice Marshall noted: "If [a] seizing officer should refuse to institute proceedings to ascertain [a federal] forfeiture, the district court may, **upon the application of the aggrieved party**, compel the officer to proceed to

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favor" with respect to seized property. MANNING, *supra* note 10, at 142; *see* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 262 (1765) (providing the same definition).

[12] B. Y., MODERN PRACTICE OF THE COURT OF EXCHEQUER 141 (London, E. & R. Nutt & R. Gosling 1730).

[13] MANNING, *supra* note 10, at 162–63.

[14] *Id.* at 163.

adjudication, or to abandon the seizure." *Slocum v. Mayberry*, 15 U.S. 1, 10 (1817) (bold added).

English law also observed certain key limits on forfeitures. For example, forfeiture "typically covered only the instrumentalities of the crime . . . not the derivative proceeds." *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari). And when seized property was something as vital as a vehicle, the common law required due process on par with criminal proceedings. *See, e.g., United States v. Brig Burdett*, 34 U.S. 682, 690 (1835) (observing that "forfeiture of [a] vessel . . . for a violation of a revenue law" was "highly penal" and thus had to be "established beyond reasonable doubt").

3. Modern American civil forfeiture bears little resemblance to the preceding English tradition. Resting on the "legal fiction" that property may be "held guilty and condemned as though it were conscious," modern civil forfeiture allows the police to enrich themselves from property allegedly tainted by criminal activity. *Various Items of Personal Prop. v. United States*, 282 U.S. 577, 581 (1931). As a result, for the police, "civil forfeiture has in recent decades become widespread and highly profitable." *Leonard,* 137 S. Ct. at 848 (Thomas, J., respecting the denial of certiorari).

With these profits have come "egregious and well-chronicled abuses." *Id.* (collecting examples). "[F]orfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture

proceedings." *Id.* These same groups "are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car." *Id.*

Car forfeitures raise special opportunities for abuse. Respondent Wayne County exemplifies this. Every year, the County seizes about 1,300 cars, with less than a third of these seizures leading to actual forfeiture proceedings.[15] The reason so many of these car seizures are never reviewed by a judge (or jury) is out-of-court settlements. The County offers drivers the chance to get their cars back by "paying a $900 'settlement fee,' plus any towing and storage fees."[16] For many drivers, this is an offer they cannot refuse. The alternative is hoping to prevail in court after waiting months—if not years—to see if the County ultimately decides to file a forfeiture action.

The County may then extract settlements from drivers whose cars should not have been seized in the first place. The antidote to injustices like this (and others) is a prompt judicial hearing at which a driver may

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[15] *See* Tyler Arnold, *Michigan County Seizes More Than $1.2 Million in Personal Property over Two Years*, THE CENTER SQUARE (MICH.) (Mar. 29, 2019), https://bit.ly/3mTNgea (across two years, Wayne County "seized more than 2,600 vehicles"); Tyler Arnold, *Wayne County Took Cars from 380 People Never Charged with a Crime*, MICH. CAPITOL CONFIDENTIAL (Oct. 27, 2018), https://bit.ly/3cAJvFx (in 2017, Wayne County filed only 380 forfeiture actions against cars—i.e., less than a third of the estimated 1,300 cars that the County seized in 2017).

[16] Arnold, *Michigan County*, *supra* note 15.

contest government detention of her recently seized car while forfeiture proceedings are pending. At this hearing, the driver may show that seizure of her car was unlawful or that "less drastic measures" besides "deprivation *pendent lite*" are both "available and appropriate." *Krimstock*, 306 F.3d at 44.

4. The Fifth and Fourteenth Amendments to the Constitution provide the government may not take life, liberty, or property "without due process of law." At a minimum, this text guarantees persons "the benefit of . . . those 'customary procedures to which freemen were entitled by the old law of England.'" *Sessions*, 138 S. Ct. at 1224 (Gorsuch, J., partial concurrence); *see also, e.g., Murray's Lessee*, 59 U.S. at 276 (defining due process as encompassing the "settled usages and modes of proceeding existing in the common and statute law of England").

Due process is also "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Additional "dictates of due process" may then arise from balanced consideration of: (1) a private interest; (2) the risk of erroneous deprivation absent a given safeguard; and (3) the government interest. *Mathews v. Eldridge,* 424 U.S. 319, 334–35 (1976). Together, these factors mandate greater procedural safeguards when these safeguards would effectively protect an important liberty or property interest at little or no cost to the government. *See Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786, 800 (6th Cir. 2018).

The Court has indicated this *Mathews* test controls when it comes to determining whether certain kinds of property merit greater procedural safeguards against civil forfeiture. In *United States v. James Daniel Good Real Property*, the Court held that before the government may seize homes in the name of civil forfeiture, the government must afford a pre-seizure hearing—a post-seizure forfeiture trial is not enough. *See* 510 U.S. 43, 61 (1993). The Court arrived at this conclusion through application of "[t]he three-part inquiry set forth in *Mathews*"—and the overarching principle that "[i]ndividual freedom finds tangible expression in property rights." *Id.* at 53, 61.

At the same time, the Court has established that a different "four-factor balancing test" governs the due-process speedy-trial question of when a "delay in filing a forfeiture action [is] reasonable." *United States v. $8,850*, 461 U.S. 555, 556, 564 (1983). And in *United States v. Von Neumann*, the Court establishes there is no due-process right to "speedy disposition" of a remission petition. 474 U.S. 242, 249 (1986). This is because a remission petition is "not *necessary* to a forfeiture determination," but rather a plea for executive mercy to forgive an allowable forfeiture. *Id.* at 250.

The Court caps this point with a line of dicta: "[a] forfeiture proceeding, without more, provides the post-seizure hearing required by due process." *Id.* at 249. Put another way, property owners are "entitled to an adversary hearing before a final judgment of forfeiture." *James Daniel Good*, 510 U.S. at 61. The Court has yet to decide, however, whether drivers are also

entitled to a continued-detention hearing at which they may regain their cars while forfeiture proceedings are contemplated or pending.[17]

5. Against this due-process landscape, the nation's courts have divided on whether (or when) due-process affords a right to continued-detention hearings for seized cars. On one side are a broad array of federal courts that have found the right to exist, led by the Second Circuit's seminal decision in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002). Written by then-Judge Sotomayor, *Krimstock* lays bare the essential constitutional difference between "the propriety of continued government custody, on the one hand, and . . . final judgment, on the other." *Id.* at 68.

And so, applying the three-part *Mathews* due-process test, *Krimstock* found due process required the government to afford drivers whose cars had been seized under New York City's DWI laws "a prompt post-seizure, pre-judgment hearing before a neutral judicial or administrative officer." *Id.* at 67. Such hearings were necessary "to determine whether the City is likely to succeed on the merits of the forfeiture action and whether means short of retention . . . can satisfy

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[17] A simple way to understand this point is by analogy to bail hearings in criminal proceedings. Viewed through this lens, the Court's *Von Neumann* dicta simply relates that a forfeiture trial affords due process (without more) just as a criminal trial does—i.e., there is no right to a plea bargain (or remission). Nothing about this statement negates the separate existence of a due-process right to a bail/continued-detention hearing.

the City's need to preserve [a car] from destruction or sale during the pendency of proceedings." *Id.*

Along the way, *Krimstock* recognized the Court's four-part test for the timeliness of forfeiture trials had no application in this context: "plaintiffs' claim does not concern the speed with which civil forfeiture proceedings themselves are instituted or conducted." *Id.* at 68. *Krimstock* also recognized *Von Neumann* had no application, as that case was limited to the very "different issue of what process was due in proceedings for remissions." *Id.* at 52 n.12.

Various federal and state courts have rejected this line of reasoning. Chief among them is the Illinois Supreme Court in *People v. One 1998 GMC,* 960 N.E.2d 1071 (Ill. 2011). *One 1998 GMC* holds that "the due process right to a meaningful postseizure hearing at a meaningful time requires only the forfeiture proceeding, it does not also require a probable cause hearing." *Id.* at 1082. *One 1998 GMC* draws this from *Von Neumann*, rejecting the *Mathews* due-process test and *Krimstock* with it. *Id.* at 1082–85, 1091.

The Court tried to settle this divide in *Alvarez v. Smith*, but mootness prevented this. 558 U.S. at 578, 580. Federal and state courts have thus continued to struggle with the important due-process question of continued-detention hearings for seized cars, reaching many conflicting answers. This conflict includes the lower courts in Nichols's case. For example, in the district court's view, "*Krimstock* was wrongly decided."

App. 57 (quoting *One 1998 GMC*); *see also* App. 17–28 (panel concurrence).

B. Facts & Procedural History

1. In July 2015, Stephen Nichols was driving his 1998 Toyota Avalon through the City of Lincoln Park when the police stopped him. *See* App. 67; Dist Ct. Dkt. 6-3.[18] The police asked to see Nichols's car insurance. Dist. Ct. Dkt. 6-3 at 4.[19] The police then called an insurance agent who reported that Nichols was not a client and the "listed policy number never existed." *Id.* The police issued Nichols a ticket for driving-without-insurance,[20] seized Nichols's car, and served Nichols with a notice of intent to forfeit the car under the Michigan Identity Theft Protection Act (MITPA), Mich. Comp. Laws (MCL) §§ 445.61 *et seq.* App. 67; Dist. Ct. Dkts. 6-3 at 4 & 6-4 at 2.

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[18] As part of its motion-to-dismiss before the district court, Wayne County attached the police report for the Nichols stop. Dist. Ct. Dkt. 6-3. Nichols did not reference the report anywhere in his complaint. "Generally, when ruling on a Rule 12(b)(6) motion to dismiss, courts may not consider information outside the complaint." *Berera v. Mesa Med. Grp., PLLC*, 779 F.3d 352, 358 n.7 (6th Cir. 2015). The Court therefore may not credit the police report above Nichols's well-pleaded facts. But the Court may note the ways in which the report supports Nichols's case, and Nichols cites the report for this limited purpose.

[19] All docket pin-cites refer to the ECF-generated pagination at the top of the docket entry (e.g., "Page 4 of 7.").

[20] Nichols pleaded responsible to driving-without-insurance. *See* App. 67; Dist. Ct. Dkt. 6-6 at 2–4. The police never arrested Nichols or charged him with any MITPA offense.

2. MITPA prohibits wrongful "use or attempt to use the personal identifying information **of another person**"—i.e., not mere use of random numbers that identify no person. MCL § 445.65(1)(a), (b). One way MITPA enforces these prohibitions is through civil forfeiture, directing seizure of any "personal or real property . . . used, possessed, or acquired in a felony violation of [MITPA]." *Id.* § 445.79(1)(a).

MITPA gives municipalities a direct pecuniary interest in MITPA-based forfeitures. Municipalities may keep or sell property forfeited under MITPA. *See id.* § 445.79c(1)(a), (b). The law also directs that "money received by a seizing agency"—after litigation expenses—must be used "to enhance law enforcement efforts." *Id.* § 445.79c(1)(b)(i), (ii).

MITPA generally requires the police to seize property by obtaining "process issued by [a] circuit court." *Id.* § 445.79a. MITPA also allows seizures "without process," but only in limited situations. *Id.* § 445.79a. These limited situations include executing a "search warrant"; having "probable cause to believe . . . [seized] property was used or is intended to be used in violation of [MITPA]"; and having "probable cause to believe . . . [seized] property is the proceeds" of a MITPA violation. *Id.* § 445.79a(a), (d), (e).

When the police seize property "with process," MITPA requires municipalities to promptly institute forfeiture proceedings. *Id.* § 445.79b(1). For seizures "without process," when the property seized is worth less than $50,000, the police must notify the owner. *Id.*

§ 445.79b(1)(a). The owner then has 20 days to: (1) file with the municipality a signed property claim; and (2) "give a bond . . . of 10% of the value of the claimed property." *Id.* § 445.79b(1)(c).

Upon timely filing of claim and bond, MITPA requires prompt institution of forfeiture proceedings after "the 20-day [notice] period" ends. *Id.* Several MITPA provisions then enable municipalities to afford a continued-detention hearing in addition to a ultimate forfeiture trial. For example, municipalities may afford a continued-detention hearing in terms of "[r]emov[ing] [seized] property to a place designated by the court." *Id.* § 445.79b(2)(b). Municipalities may also afford a continued-detention hearing by electing to obtain court "process" to justify ongoing custody of property (a separate seizure). *Id.* § 445.79a.

Property owners, by contrast, cannot secure a continued-detention hearing on their own. MITPA expressly provides that "[p]roperty taken or detained under [MITPA] is not subject to an action to recover personal property."[21] *Id.* § 445.79b(2). Drivers are then entirely at the mercy of municipalities in terms of being afforded an interim hearing before a neutral judge to regain custody of a seized car. *Id.*

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[21] This prohibition distinguishes Nichols's case from federal customs seizures. Property owners may obtain the equivalent of a continued-detention hearing for a customs seizure by filing "a motion under Federal Rule of Criminal Procedure 41(g) for the return of seized property." *Serrano*, 975 F.3d at 499.

3. The forfeiture notice that police served on Nichols announced that if Nichols wanted to contest the forfeiture, Nichols had to do the following by July 22, 2015: (1) file a claim of interest with the Lincoln Park Police Department; and (2) post a $250 bond. App. 67; Dist. Ct. Dkt. 6-4 at 2. The notice then said that if Nichols met these requirements, the forfeiture case against his car would be referred to the Wayne County Prosecutor. Dist. Ct. Dkt. 6-4 at 2.

Nichols complied, timely filing a written claim and $250 bond. App. 67; Dist. Ct. Dkt. 6-5. Then, for **the next three years**, his car remained in municipal custody. App. 67–68; MCL § 445.79b(2). At no time did the municipalities afford a continued-detention hearing; nor did they ever institute the forfeiture proceedings expressly required by MITPA. App. 67–68.

4. Nichols filed a federal class-action lawsuit.[22] App. 63–65. Asserting municipal liability under 42 U.S.C. § 1983, Nichols sought damages, injunctive relief (return of his car), and a certified class of all similarly-situated drivers. App. 70–77. Nichols based these civil-rights claims on procedural due process and the municipalities' policy, practice, or custom of not providing prompt continued-detention hearings to the owners of seized cars. App. 65, 75.

This left Nichols and his fellow class-members no way to regain their cars while the municipalities decided whether to bring a forfeiture action in the first

[22] Two co-plaintiffs joined Nichols, but they later chose to voluntarily dismiss their actions. *See* Dist. Ct. Dkt. 3.

place. *Id.* The result for Nichols was three years of being unable to use or maintain his car. App. 68. Three years of having to pay for insurance for a car he could not use. *Id.* Three years of having to pay for rides, taxis, and public transit to get to work and perform the other daily necessities of life. *Id.*

A few months after Nichols sued, the Wayne County Prosecutor's Office emailed Nichols's counsel. Dist. Ct. Dkt. 6-8 at 2. The Office announced that the County prosecutor assigned to handle the forfeiture of Nichols's car had "decided to decline the case" and return Nichols's car but had "overlooked" informing the Lincoln Park police to release the car. *Id.* The Office had since readied Nichols's car for pick up and waived all towing and storage fees. *Id.*

After returning Nichols's car, Wayne County filed a motion for dismissal or summary judgment while Lincoln Park opted to file an answer. *See* Dist. Ct. Dkts. 6, 8. The County raised four arguments: (1) Nichols failed to state a due-process claim; (2) Nichols could not sue Wayne County Prosecutor Kim Worthy in her individual capacity; (3) the return of Nichols's car mooted Nichols's injunctive claim; and (4) *Pullman* abstention. *See* Dist. Ct. Dkt. 6 at 12–20.

Together with its motion, the County filed an affidavit on the County's handling of Nichols's vehicle from 2015 to 2018. Dist. Ct. Dkt. 6-2. The affidavit revealed the prosecutor assigned to forfeit Nichols's car decided not to seek forfeiture all the way back in September/October 2015 (i.e., two months after police seized the

car). Dist. Ct. Dkt. 6-2 at 4. But instead of promptly returning the car, the prosecutor tried to set up meetings with Nichols's counsel in September 2015 and January 2017—apparent efforts to extract settlement fees from Nichols, consistent with County practice. *Id.* at 3–4; *supra* note 15 and accompanying text.

Nichols filed a timely opposition to the County's motion-to-dismiss. Dist. Ct. Dkt. 9. Nichols disposed of the County's mootness and individual-capacity arguments by voluntarily dismissing the claims at issue. *Id.* at 27. Nichols then argued that he had stated a due-process claim based on the *Mathews* due-process test, *James Daniel Good*, and car-seizure cases like *Krimstock*. *Id.* at 17–25 & n.3. Nichols finally argued *Pullman* abstention was improper since there was no unclear state law involved. *Id.* at 25–27.

5. The district court granted Wayne County's motion to dismiss and terminated Nichols's suit as to all defendants.[23] App. 52, 59. The court noted it was "undisputed" that the defendants did "not routinely provide" continued-detention hearings after seizing property. App. 56. The court then found dismissal proper as this "'policy' of not providing an additional hearing does not violate due process." App. 58.

The district court stressed that the "Supreme Court of the United States has not [yet] found the Due Process Clause to require" continued-detention

[23] At this point, the only remaining defendants were Wayne County; the Wayne County Prosecutor's Office; Kym Worthy, in her official capacity, and Lincoln Park. App. 52.

hearings for seized property. *Id.* The court deemed *Krimstock* "wrongly decided" and the due-process concerns expressed in *Krimstock* absent in Nichols's case.[24] App. 56–58. Finally, the court dismissed Nichols's claims against the City of Lincoln Park—even though the City did not seek this—because the court found "no relevant factual or legal distinction" between Nichols's claims against the City and the County. App. 58.

6. A divided panel of the Sixth Circuit affirmed. App. 17. The majority held Nichols's due-process claim failed because Nichols did not allege that the municipalities *both* "fail[ed] to provide a stand-alone continued-detention hearing" *and* also "fail[ed] to initiate constitutionally-timely [statutory] forfeiture proceedings." App. 16. The majority found Nichols had to make this dual allegation because: (1) a civil-rights plaintiff "has no right to elect the *means* by which . . . municipalities satisfy the Constitution"; and (2) at oral argument on appeal, Nichols's counsel noted that "regularly initiated forfeiture proceedings" after a seizure (e.g., within a week) may "obviate the need" for a continued-detention hearing. App. 11–12, 35 (Moore dissent); *see* 6th Cir. Oral Arg. at 43:40 to 44:48.

Judge McKeague concurred. App. 17–28. In his view, Nichols's due-process claim separately failed because "the Due Process Clause guarantees only a

[24] Nichols's Sixth Circuit opening brief details the district court's many errors on this point. 6th Cir. Dkt. 24 at 41–46 (ECF pagination) (establishing that when compared to the facts of *Krimstock*, the seizure of Nichols's car presented the same or even more compelling due-process concerns).

timely forfeiture hearing." App. 28. Judge McKeague found *Von Neumann* dictated this result and he rejected *Krimstock* as wrongly decided. App. 20–27. This led him to conclude that since Nichols was "not constitutionally entitled to an additional continued-detention hearing—between the [car] seizure and the forfeiture hearing—there was no due process right for the municipalities to violate." App. 28.

Judge Moore dissented. App. 28–50. Rebutting the majority and concurrence point-for-point, Judge Moore noted the "many things" about Nichols's case that the majority did not (and could not) deny. App. 28. These points included: (1) Nichols "was wrongfully deprived of the use of his car for three years"; (2) the municipalities "failed to afford any opportunity" by which Nichols could seek "temporary repossession" of his car; and (3) the municipalities had "discretion" under state law (MITPA) to provide continued-detention hearings for seized cars. App. 29.

Given these facts, Judge Moore found it was no "flaw" in Nichols's case that "multiple ways" existed by which the municipalities could have afforded due process (but did not). *Id.* This only "confirmed" the case's "modest" nature. *Id.* Judge Moore accordingly believed the panel should have followed *Krimstock*. App. 44. And by not doing so, Michiganders now had to live "without [any] chance" of regaining use of seized cars pending commencement and/or completion of vehicle-forfeiture proceedings. App. 50.

7. Nichols timely sought rehearing. The Sixth Circuit denied Nichols's petition. App. 60–61.

8. This certiorari petition follows.

REASONS TO GRANT THE PETITION

I. Federal and state courts are divided.

The district court and Sixth Circuit opinions in Nichols's case join a long-standing legal divide over whether (or when) due process guarantees a right to a continued-detention hearing for a seized car. The Sixth Circuit majority opinion in Nichols's case also reflects a growing divide over the pleading standards that properly govern this civil-rights claim.

1. The divide over whether due process requires continued-detention hearings centers on then-Judge Sotomayor's *Krimstock* decision. *Krimstock* holds due process may require continued-detention hearings for seized cars—a claim that is to be tested by applying the *Mathews* due-process test to the vehicle-forfeiture provisions at hand. 306 F.3d at 51–70. *Krimstock* thereby rejects: (1) application of speedy-trial tests in this context; and (2) the idea that *Von Neumann* categorically rejects a due-process right to continued-detention hearings. *See id.* at 52 n.12, 68.

2. Numerous courts have embraced *Krimstock*. Among these authorities[25] are the Fifth Circuit,[26] the Eighth Circuit,[27] three federal district judges,[28] and the Minnesota Supreme Court.[29]

3. On the opposite side are the authorities that reject *Krimstock* as wrongly decided. For these authorities, *Von Neumann* is the first and last word on continued-detention hearings for seized cars, affirmatively eliminating any such due-process right. Among these authorities are the Illinois Supreme Court, the district judge here, and Judge McKeague's concurrence here. *See One 1998 GMC,* 960 N.E.2d at 1071; App. 56–58 (district judge opinion); App. 28 (McKeague concurring opinion).

4. This battle over *Krimstock* then gives rise to another division in terms of sufficient pleading.

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[25] The Seventh Circuit embraces *Krimstock* in *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008)—a decision this Court later vacated as moot. *See Alvarez*, 558 U.S. at 583.

[26] *See Serrano*, 975 F.3d at 496–502 (citing *Krimstock* favorably; noting "Von Neumann is not dispositive"; applying *Mathews* to car seizures under federal customs laws).

[27] *See Booker v. City of St. Paul*, 762 F.3d 730, 734–37 (8th Cir. 2014) (citing *Krimstock* favorably and applying *Mathews* to car seizures under state driving-while-impaired laws).

[28] *See Washington v. Marion Cnty. Prosecutor*, 264 F. Supp. 3d 957, 975–79 (S.D. Ind. 2017) (agreeing with *Krimstock* and applying *Mathews* to municipal car seizures); *Brown v. D.C.*, 115 F. Supp. 3d 56, 64–67 (D.D.C. 2015) (same); *Simms v. D.C.*, 872 F. Supp. 2d 90, 95–107 (D.D.C. 2012) (same).

[29] *Olson v. One 1999 Lexus*, 924 N.W.2d 594, 604–05 & n.7 (Minn. 2019) (agreeing with *Krimstock* that Mathews affords "the appropriate framework" in this context).

Krimstock recognizes plaintiffs may allege a municipal due-process failure to provide continued-detention hearings without more. Indeed, *Krimstock* examined several alternatives to continued-detention hearings, like "an Article 78 proceeding." 306 F.3d at 59. *Krimstock* did not then rule that the plaintiffs' civil-rights claims were insufficient because the plaintiffs did not allege municipal denial of the alternatives.

The panel majority in Nichols's case, by contrast, does exactly this based on the unsourced theory that a civil-rights plaintiff has "no right to elect the means by which . . . municipalities satisfy the Constitution." App. 16. This pleading rule then enables the majority to avoid conducting any due-process analysis at all. But as Judge Moore's dissent shows, such thinking "misunderstands the nature of [municipal] liability" under this Court's decisions. App. 34.

5. Finally, it is fair to say the Sixth Circuit's decision in Nichols's case itself embodies the disarray that surrounds the questions presented. The panel opinion comprises of: (1) a lengthy majority opinion pronouncing that Nichols did not sufficiently plead a due-process claim; (2) a lengthy concurrence declaring that Nichols's due-process claim is barred by *Von Neumann* and *Krimstock* is wrong; and (3) a lengthy dissent declaring that Nichols did sufficiently plead a due-process claim, that *Von Neumman* does not apply, and that *Krimstock* is right.

Vehicle owners cannot afford this chaos.

II. The questions presented are essential.

The importance of the questions presented is readily apparent from the Court having already tried once before to resolve them. *See Alvarez,* 558 U.S. at 580 (the Court "granted certiorari to review the Seventh Circuit's 'due-process' determination" that car owners were entitled to continued-detention hearings under Illinois's drug-forfeiture laws). And in the decade that has passed since then, the questions presented have become only more important in terms of the following private and public interests:

1. For tens of millions of Americans, "[a] car or truck is often central" to their "livelihood or daily activities." *Krimstock*, 306 F.3d at 44. Loss of a car then means having to "make other arrangements" to meet core "transportation needs," such as "transit to a job or school, visits to health care professionals, and caretaking for [young] children or other family members." *Washington*, 264 F. Supp. at 976.

Against this backdrop, "[d]ays, even hours" of government vehicle detention "may impose onerous burdens upon a person deprived of his vehicle." *Stypmann v. City & Cnty. of S.F.*, 557 F.2d 1338, 1344 (9th Cir. 1977). Continued-detention hearings, in turn, afford drivers an "[early] opportunity to test the factual basis" of the government's forfeiture case, ultimately protecting all drivers "against erroneous deprivation of the use of their vehicles." *Id.*

This makes whether (and when) drivers have a due-process right to continued-detention hearings an

essential question. Neither an officer's "unreviewed probable cause determination" nor "a court's ruling in the distant future on the merits" of a forfeiture action can protect drivers as their cars "stand[] idle in a police lot." *Krimstock*, 306 F.3d at 62.

2. "[A]mbitious modern statutes and prosecutorial practices have all but detached themselves from . . . ancient notion[s] of civil forfeiture." *James Daniel Good*, 510 U.S. at 85 (Thomas, J., concurring-in-part and dissenting-in-part). The resulting, predictable "egregious . . . abuses" have then fallen disproportionately on those "least able to defend their interests." *Leonard,* 137 S. Ct. at 848 (Thomas, J., respecting the denial of certiorari).

The linchpin to these abuses is municipalities being able to "seize property **with limited judicial oversight**." *Id.* (bold added). And in the context of vehicle seizures, this linchpin assumes even greater importance, with police and prosecutors being able to use continued detention of a vehicle as leverage to extract payment of settlement, storage, and/or towing fees before the case ever sees the inside of a court. *See supra* Statement, Part A (Legal Background) at ¶3.

Resolving whether (and when) drivers have a due-process right to a continued-detention hearing is then essential to preventing such injustices. Nichols's case exemplifies this. Lacking any judicial oversight, Wayne County detained Nichols's car long after the County prosecutor decided not to seek forfeiture. *See* Dist. Ct. Dkt. 6-2 at 4. A continued-detention hearing at any

time during this three-year period would have put an end to this, as well as any underlying effort by the County to extract settlement fees despite having already decided not to forfeit Nichols's car

3. Finally, the pleading rules governing claims of municipal liability for constitutional violations are of essential importance given the way such rules may "increase the cost of legal services and decrease access to justice in unwarranted ways."[30] After all, "the rule of law depends on access to justice."[31]

In Nichols's case, the Sixth Circuit enforces an unprecedented rule for pleading municipal-liability (*Monell*) claims. *See Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978). Under this rule, a *Monell* plaintiff who alleges municipal failure to afford a constitutional right must also plead the existence of municipal policies denying every way the municipality may afford this right. App. 12.

According to the panel majority, this rule meant that Nichols had to plead the municipalities here had "*both* . . . [a] policy of failing to provide a stand-alone continued-detention hearing *and* . . . [a] policy of failing to initiate constitutionally-timely MITPA forfeiture proceedings." App. 16 (italics in original). But as Justice Cardozo noted long ago, courts must always be

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[30] HON. NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 254 (2019).

[31] *Id.* at 238.

prepared for "the tendency of a principle to expand itself to the limit of its logic."[32]

The following hypothetical puts this in concrete terms. Suppose a city has a policy of not serving kosher lunches in schools. A Jewish student sues for *Monell* damages, asserting this policy forced her to give up school lunch for years in violation of her religious-free-exercise rights under the First Amendment. The city moves to dismiss, prompting the following court exchange with the student's attorney:

> **Court**: The city admits having a policy of not serving kosher lunches in schools. Your client now asserts this policy violated her First Amendment rights.
>
> **Att'y:** Yes.
>
> **Court:** What if the city had given cash to your client allowing her to obtain a free lunch from a kosher deli. Would that have rectified the violation?
>
> **Att'y:** Yes.
>
> **Court:** What if the city had given your client permission to visit a synagogue every day for a free lunch. Would that have rectified the violation?
>
> **Att'y:** Yes.

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[32] B. CARDOZO, NATURE OF THE JUDICIAL PROCESS 51 (1921).

Court: But your client's complaint does not specifically plead facts showing the city has a policy of not affording deli cash or synagogue lunch visits.

Att'y: No.

This exchange now renders the student's *Monell* claim insufficient—at least according to the panel majority here—as the student "has no right to elect the *means* by which . . . municipalities satisfy the Constitution." App. 12. Put another way, the panel majority's decision establishes that *Monell* plaintiffs must be prepared to allege facts showing that a municipality has adopted policies denying every "means" that a municipality has (or that a judge can imagine) to remedy an alleged constitutional violation.

This pleading rule then stands to raise the cost of *Monell* litigation in ways bound to discourage meritorious claims and increase the legal expenses borne by *Monell* plaintiffs. Resolving the propriety of this rule is then essential, for the uncertainty created by this rule can only make justice harder to access. *See Bounds v. Smith*, 430 U.S 817, 825 (1977) ("[A] lawyer must know what the law is . . . to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.").

III. This case is the right vehicle.

For five reasons, Nichols's case is precisely the vehicle that the Court has been awaiting to resolve

whether (and when) due process requires continued-detention hearings for seized cars:

1. Nichols squarely asserts a claim for damages in his complaint, enabling him to recover both actual and nominal damages. App. 76; *see Uzuegbunam v. Preczewski*, No. 19-968, slip op. at 12 (U.S. Mar. 8, 2021). Nichols's case therefore avoids the mootness issues that materialized in *Alvarez,* forcing dismissal of that case. *See Alvarez*, 558 U.S. at 89, 93.

2. Nichols has asserted § 1983 claims against municipalities with an "undisputed" policy of not providing continued-detention hearings. App. 56. These claims eliminate any possibility of problems with qualified immunity. *See Brandon v. Holt*, 469 U.S. 464, 473 (1985) ("[A] municipality is not entitled to . . . qualified immunity from liability under § 1983 . . . ."); *Zucker v. City of Farmington Hills*, 643 F. App'x 555, 570 (6th Cir. 2016) ("[M]unicipalities do not enjoy qualified immunity . . . ."). These claims also avoid problems that often arise in asserting federal liability. *See Ziglar v. Abbasi,* 137 S. Ct. 1843 (2017).

3. Nichols's case was dismissed at the pleading stage under Rule 12(b)(6). App. 58–59. This presents the Court with a straightforward record—i.e., the facts alleged in Nichols's complaint—to decide the questions presented. App. 28–29 (dissent) (listing the many undisputed aspects of Nichols's case).

4. Nichols's case fully ventilates the questions presented. Between the panel majority, concurrence, and dissent (as well as the district court opinion), one

may find the full panoply of views that federal courts have taken on whether due process affords a right to a continued-detention hearing (for a seized car) and what pleading rules apply in this regard.

5. Nichols's case presents key facts establishing that Nichols would have prevailed at a continued-detention hearing had the defendant-municipalities provided him one. As Judge Moore notes, Nichols's complaint may be fairly read to establish that "a retention hearing, focusing on hardship, would [have] come out in [Nichols's] favor." App. 33.

Moreover, the municipalities' own police report establishes the police had no lawful basis to seize Nichols's car under MITPA. According to the report, the police seized Nichols's car under MITPA because Nichols (allegedly) identified *himself* by using an insurance policy number that "never existed" (i.e., a policy number belonging to *no one*). Dist. Ct. Dkt. 6-3 at 4. By definition, none of that alleged conduct involves use of "the personal identifying information **of another person**." MCL § 445.65(1)(a), (b).

IV. The decisions below are wrong.

The Sixth Circuit and the district court each erred in concluding that Nichols's assertion of a due-process right to a continued-detention hearing failed. Contrary to the district court and panel concurrence, this Court's due-process jurisprudence fully supports a due-process right to a continued-detention hearing for a seized car. And contrary to the panel majority, Nichols more than

sufficiently pleaded his claim that the municipalities here violated this due-process right.

1. The district court and panel concurrence each conclude that *Von Neumann* categorically bars any recognition of a due-process right to a continued-detention hearing for a seized car. Such wooden reasoning, however, neglects this Court's two main teachings when it comes to due process: (1) this right incorporates the customary protections of common law, *Sessions*, 138 S. Ct. at 1224 (Gorsuch, J., partial concurrence); and (2) this right is flexible, demanding such procedural protections "as the particular situation demands." *Morrissey*, 408 U.S. at 481.

The customary protections of common law included "writs of delivery"—i.e., a due-process right to challenge the government's continued detention of seized property while the government sought forfeiture of the property. *See supra* Statement, Part A at ¶2. The courts below were then bound to respect Nichols's assertion of a right to a continued-detention hearing, as due process means "the people's rights are never any less secure against governmental invasion than they were at common law." *Sessions*, 138 S. Ct. at 1224 (2018) (Gorsuch, J., partial concurrence).

Nichols's "particular situation" also called for a right to a continued-detention hearing. *Morrissey*, 408 U.S. at 481. Unlike the customs seizure at issue in *Von Neumann*, MITPA left Nichols no avenue to obtain interim judicial review on his own. The law instead expressly provided that "[p]roperty taken or detained

under [MITPA] is not subject to an action to recover personal property."[33] MCL § 445.79b(2). Nichols's only hope for judicial review at an early stage was if the municipalities themselves provided a hearing—something MITPA permitted. *See, e.g., id.* § 445.79b(2)(b).

2. The panel majority concludes that Nichols insufficiently pleaded his municipal-liability claim because he did not plead the municipalities denied both continued-detention hearings and ultra-prompt forfeiture trials. App. 12. But this analysis defies *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). *Leatherman* establishes that federal courts "may not" apply "heightened pleading standard[s]" to *Monell* claims. *Id.* at 164.

Nichols pleaded every element of a *Monell* claim. He alleged a constitutional violation: "fail[ure] to provide . . . a prompt post-seizure, pre-forfeiture hearing" in front of a neutral decision-maker. App. 68. And he alleged a municipal policy that directly caused this violation—something the district court confirmed. App. 56 ("It is undisputed . . . [the municipalities] do not routinely provide post-deprivation, pre-forfeiture hearings."). By demanding that Nichols plead more than

[33] This prohibition distinguishes Nichols's case from federal customs seizures. Property owners may obtain the equivalent of a continued-detention hearing for a customs seizure by filing "a motion under Federal Rule of Criminal Procedure 41(g) for the return of seized property." *Serrano*, 975 F.3d at 499.

this, the panel majority enacts a forbidden heightened pleading standard that fails under *Leatherman*.

The panel majority also abridges *Zinermon v. Burch*, 494 U.S. 113 (1990). In *Zinermon,* Darrell Burch, a mental patient, sued state hospital officials under § 1983 for confining him in a mental hospital without due process. *See id.* at 114–15. Burch alleged the officials "should have afforded him" a "procedural safeguard[] required by the Constitution": an involuntary-placement hearing. *Id.* at 115, 134. At the same time, Burch "concede[d]" that the sued officials could have avoided violating his due-process rights in the first place if they had just "strictly complied with" Florida statutory procedures for involuntary commitment. *Id.* at 117 n.3.

This Court found that Burch "state[d] a claim under § 1983 for violation of his procedural due process rights." *Id.* at 139. Florida had "delegated to" hospital officials the "power" to confine Burch and the "duty to see that no deprivation occurs without adequate procedural protections." *Id.* at 135. Burch then fairly alleged a denial of due process based on his being confined "without . . . an involuntary placement hearing" by entities with "power to deprive mental patients of their liberty and the duty to implement procedural safeguards." *Id.* at 139.

In this regard, the Court emphasized: "[i]t is immaterial whether the due process violation Burch alleges is best described as arising from . . . [a] failure to comply with state procedures for admitting

involuntary patients, or from the absence of a specific requirement" for a hearing on "whether a patient is competent to consent to voluntary admission." *Id.* at 135–36. All that mattered was that Burch sought to hold government officials "accountable" for "abus[ing] . . . broadly delegated, uncircumscribed power to effect the deprivation at issue." *Id.* at 136.

Zinermon maps exactly onto Nichols's case. Nichols sued the municipalities here under § 1983 for depriving him of property (his car) without due process. Nichols alleged that the municipalities should have afforded him a procedural safeguard required by the Constitution: a continued-detention hearing. At the same time, the municipalities would not have deprived Nichols of property without due process had they strictly complied with Michigan statutory procedures by "initiat[ing] forfeiture proceedings within, for example, one week of the expiration of the [statutory] twenty-day [claim] period." App. 35 (Moore dissent).

The panel majority should have then found that Nichols stated a § 1983 claim for violation of his procedural due process rights. Michigan delegated to the sued municipalities the power to seize Nichols's car and the duty to see that no deprivation occurred without adequate procedural protections. *See* App. 29 (Moore dissent) (noting the municipalities' undisputed "discretion"). Nichols then sufficiently alleged a denial of due process based on his car being taken without a continued-detention hearing by entities with power to seize cars and the concomitant duty to implement procedural safeguards.

The panel majority, however, deemed it pivotal that the due-process violation alleged by Nichols could be described as arising from either a municipal policy of "failing to initiate constitutionally-timely . . . forfeiture proceedings" or from a policy of "failing to provide a stand-alone continued-detention hearing." App 16. And based on this "immaterial" distinction, the majority denied Nichols any right to hold the municipalities "accountable" for "abus[ing] . . . [their] broadly delegated, uncircumscribed power to effect the deprivation at issue." *Zinermon*, 494 U.S. at 136.

That is error, especially when one considers this Court's rejection in *Zinermon* of a "categorical [due-process] distinction between a deprivation of liberty and one of property." *Id.* at 132. Or as the Court put it just three years later: "[i]ndividual freedom finds tangible expression in property rights." *James Daniel Good*, 510 U.S. at 61. The panel majority fails to honor this critical principle based on an erroneous view of pleading sufficiency that *Zinermon* negates and, in the end, disserves millions of American drivers.

CONCLUSION

The Court should grant Nichols's petition.

Respectfully submitted,

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