No. 20-768

IN THE
Supreme Court of the United States

GERARDO SERRANO,

Petitioner,

v.

U.S. CUSTOMS & BORDER PROTECTION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF DAVID B. SMITH, LEAP, AND THE R STREET INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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Question Presented

When the government seizes a vehicle for civil forfeiture, does due process require a prompt post-seizure hearing to test the legality of the seizure and continued detention of the vehicle pending the final forfeiture trial?

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Interest of *Amici Curiae*

Amici submit this brief to highlight the particular importance of providing prompt post-seizure hearings before a neutral magistrate in the context of civil forfeitures by the agency responsible for border security, U.S. Customs & Border Protection ("CBP"), and to explain why providing such hearings will not impose an undue burden on the government.[1]

David B. Smith is one of the nation's foremost experts on civil-forfeiture law, and is the author of the leading treatise on the subject, *Prosecution and Defense of Forfeiture Cases*. Smith has regularly counseled the Senate and House Judiciary Committees on civil-forfeiture issues, and was heavily involved in drafting the Civil Asset Forfeiture Reform Act of 2000, receiving thanks on the floor of the Senate for his "invaluable" work. 146 Cong. Rec. 3,656 (2000).

The R Street Institute is a non-profit, non-partisan, public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets and limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty. The Director of Criminal Justice Policy at the R Street Institute is Arthur Rizer.

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[1] All parties received timely notice of and have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution specifically for the preparation or submission of this brief.

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization composed of police, prosecutors, judges, corrections officials, and other law enforcement officials. Through speaking engagements, media appearances, testimony, and other efforts, LEAP advocates for criminal justice and policy reforms to make our communities safer and more just.

Summary of Argument

In the context of civil forfeiture, the failure to provide a prompt post-seizure hearing after the government seizes private property presents a serious constitutional problem whenever it occurs. But the problem is particularly severe and glaring when CBP seizes vehicles at or near the border. Unlike almost everywhere else in America, the border exception to the ordinary requirements of the Fourth Amendment allows CBP officials to stop and search vehicles without a warrant, probable cause, or even reasonable suspicion. As a practical matter, there is virtually no check on the unilateral exercise of discretion by CBP agents to seize a person's car and initiate the forfeiture process.

The lack of any pre-seizure protections at the border make the due process protection of a prompt post-seizure hearing before a neutral judge all the more important. Absent that procedural protection, CBP can hold a person's car for months—or, as here, years—without any opportunity for the owner even to challenge an officer's on-the-spot conclusion that there was probable cause for the seizure. When this Court previously granted certiorari on the question presented in *Alvarez v. Smith*, 558 U.S. 87 (2009), several Justices questioned the permissibility of that approach.

The problem is made worse by CBP's statutory exemption from most of the reforms in the Civil Asset Forfeiture Reform Act ("CAFRA"), which provides at least some statutory safeguards for forfeiture at other federal law-enforcement agencies. Unlike most agencies, CBP need not comply with CAFRA's modest limitations on the amount of time that the federal government may hold an owner's property without going before a neutral judge. Nor is CBP subject to CAFRA's statutory hardship provision, which provides a safety valve to prevent the severe hardship that results from the prolonged detention of a person's vehicle while forfeiture proceedings run their course.

Unsurprisingly, given the absence of any of these protections, civil-forfeiture abuse at CBP is widespread. The Department of Homeland Security's own internal audit uncovered serious problems, including that CBP frequently strong-arms property owners into settlements even after it learns that there is no basis to forfeit their property. And outside groups have documented shocking examples of improper seizures at the border and elsewhere, most of which go unchallenged because of CBP's controversial practice of forcing owners to sign hold-harmless agreements in exchange for the return of their property, even when CBP has no right to retain their property.

Contrary to the Fifth Circuit's decision below, allowing property owners in this situation the basic due process protection of a prompt hearing before a neutral magistrate need not impose an undue burden on the government. Under then-Judge Sotomayor's landmark decision for the Second Circuit in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), New York City has provided vehicle owners the right to a prompt post-seizure hearing for years. New York's experience with

Krimstock hearings demonstrates that the government can provide owners the opportunity to challenge the prolonged detention of their vehicles without imposing an unmanageable burden on the government or courts. And many states similarly provide property owners statutory rights to reasonably prompt post-seizure process.

In short, this case provides the Court with an important opportunity to rein in civil-forfeiture abuse. There is no good reason why vehicle owners should be denied the basic constitutional protection of a prompt hearing before a neutral magistrate after the government seizes their property. The Court should grant certiorari.

Argument

I. Prompt post-seizure hearings are particularly important for civil-forfeiture proceedings at Customs & Border Protection.

A. The border exception allows CBP agents to search and seize vehicles without a warrant or probable cause.

In the context of seizures by CBP, the lack of any pre-seizure protections at the border makes post-seizure process even more important. This Court has long recognized that CBP agents are not subject to the ordinary demands of the Fourth Amendment. *See, e.g.*, *United States v. Ramsey*, 431 U.S. 606, 619 (1977). "Routine searches of the persons and effects of entrants" at the border "are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). These lax rules apply even on highways dozens of miles into the United States, where "[a]utomotive travelers may be stopped at fixed

checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity." *Id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 562–63 (1976)).

As a consequence, individual CBP agents have broad authority to stop and seize vehicles without any check on their discretion. And although they cannot keep a person's vehicle without probable cause to believe the vehicle is subject to forfeiture, as a practical matter there is no meaningful check on that on-the-spot decision either. This means that civil forfeiture at CBP is uniquely susceptible to abuse by rogue agents, since there is neither a pre-seizure check on their decision to take property nor an opportunity for prompt post-seizure review of the lawfulness of that decision.

The absence of any check on an individual officer's determination of probable cause is a critical factor in the due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976), since it increases the risk of unlawful and erroneous deprivations. "No warrant need be issued, there is no review by a neutral factfinder regarding the propriety of the initial seizure, and there is no judicial determination of probable cause for the seizure." *Washington v. Marion County Prosecutor*, 264 F. Supp. 3d 957, 977 (S.D. Ind. 2017), *remanded on other grounds*, 916 F.3d 676 (7th Cir. 2019). Without additional process, warrantless seizures create "an inherent risk of error" because the seizure's "validity rests solely on the arresting officer's unreviewed probable cause determination." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 101–02 (D.D.C. 2012).

B. In *Alvarez*, several Justices were troubled by the absence of a prompt hearing to review warrantless seizures.

All of this makes a prompt post-seizure hearing particularly important when CBP seizes vehicles at the border. Without a prompt hearing, car and truck owners can be stuck in the agency's bureaucratic labyrinth for months or years without any independent check on the whim of the individual agent who took their car.

Even for forfeiture regimes that require a neutral magistrate's review of probable cause *before* a seizure—unlike the CBP process, which lacks that protection—the owner's inability to be heard "creates an unacceptable risk of error." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993). That is because "[n]o 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." *Id.* (quotation marks omitted). Here, the risk is significantly greater than that posed by the ex parte procedures found insufficient in *James Daniel Good*—civil forfeitures at CBP do not even allow for ex parte review by a neutral magistrate.

In *Alvarez*, several Justices asked questions concerning the consequences of this complete absence of prompt review. For example, Justice Alito asked about "the typical case where the police officer arrests someone in a vehicle … without a warrant," noting that in the context of "the arrest of an individual" the government would be required to go before a magistrate and show probable cause "within some reasonably brief period of time." Argument Tr. at 19, *Alvarez v. Smith*, No. 08-351 (Oct. 14, 2009).

Similarly, Justice Sotomayor asked whether there is "any other area of law where we permit a prejudgment attachment and/or seizure of property without a neutral magistrate reviewing the reason for that seizure." *Id.* at 3–4. And Justice Breyer asked for a "constitutional justification for making a person wait for 6 months before he gets a neutral judicial official to say whether there was even [probable] cause to take his car." *Id.* at 28; *see also id.* at 20–21, 26–27.

The Court was unable to resolve these important issues in *Alvarez* because the case became moot. 558 U.S. at 93–94. As petitioner explains, Pet. 35–38, this case does not present those mootness concerns, and therefore provides an excellent opportunity for the Court finally to answer the question whether due process entitles owners to a reasonably prompt opportunity to challenge an officer's initial decision to seize their property.

C. Customs forfeitures are generally immune from the safeguards in the Civil Asset Forfeiture Reform Act.

This Court's explication of the due process constraints on seizures of personal property for forfeiture purposes is particularly important in the CBP context, because customs forfeitures are largely exempt from the protections in CAFRA. *See* 18 U.S.C. § 983(i)(2)(A). Like the absence of an independent check on probable cause, the absence of these protections makes CBP seizures particularly likely to be erroneous or otherwise unlawful.

Congress did not make a deliberate policy choice to exempt CBP seizures from the protections of CAFRA. Rather, that exemption was the result of CAFRA's unique legislative history and committee

rules in the House of Representatives. Smith, *Prosecution and Defense of Forfeiture Cases*, 1-26.4 n. 9.11.1 (2020); *see also United States v. Davis*, 648 F.3d 84, 94 (2d Cir. 2011). "[T]o avoid having his reform bill bottled up in the unsympathetic House Ways and Means Committee, which has jurisdiction over bills affecting Customs and IRS," House Judiciary Chairman Henry H. Hyde left CBP out of the bill. Smith, *supra*, at 1-26.4 n.9.11.1. The unfortunate consequence is that, unlike most other federal law-enforcement agencies, CBP need not comply with some of CAFRA's most important statutory reforms, including reforms that lower the risk of prolonged unlawful detention of a property owner's vehicle.

For example, CBP is not subject even to CAFRA's modest limits on the amount of time that the government may keep a person's property without going to court. *See* 18 U.S.C. § 983(a)(1)(A)(i) (government must serve property owners notice within 60 days); *id.* § 983(a)(3)(A) (government must file a complaint within 90 days after a property owner files a claim). Nor is it subject to the requirement that if the government fails to comply with those time limits it must "return the property pending the filing of a complaint." *Id.*; *see also id.* § 983(a)(3)(B). Instead, CBP can (and does) keep seized property indefinitely, even after the property owner files her claim, while it decides whether to bring a judicial forfeiture action. Although 19 U.S.C. § 1603 requires customs officers to report seizures to a United States attorney "promptly" and the U.S. attorney to in turn bring a civil-forfeiture action "without delay," *id.* § 1604, neither of these requirements is judicially enforceable. *James Daniel*

Good, 510 U.S. at 63–65. Thus, the only real time constraint is a five-year statute of limitations. 19 U.S.C. § 1621.

CBP is also immune from CAFRA's hardship provision, which provides at least some safety valve for prolonged forfeiture proceedings at other agencies. Specifically, CAFRA entitles property owners to the "immediate release of seized property" if "the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant," so long as the hardship to the owner "outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred." 18 U.S.C. § 983(f)(1). If the government does not return the property within 15 days of the owner's request, then the owner may file a petition in a federal district court seeking the property's release. *Id.* § 983(f)(3). The district court "shall render a decision" within 30 days, subject to limited exceptions. *Id.* § 983(f)(5). There are no similar procedures at CBP for owners who will suffer hardship from the loss of their vehicles for extended periods. At best, the owner can offer to pay CBP the full value of her car in exchange for its return. *See* 19 U.S.C. § 1614; 19 C.F.R. § 162.44. And even if she can afford to buy her car back from CPB at full value, CPB can say no. *See id.*

D. Civil-forfeiture abuse at CBP is rampant.

These concerns are not hypothetical: civil-forfeiture abuse at CBP is widespread, and has been for decades. *See* Smith, *supra*, at 5-48.34 to 5-48.39 (collecting examples of civil-forfeiture abuse and corruption at CBP dating back to 1986). The Department of Homeland Security's own Office of Inspector General

and outside groups have documented a growing pattern of serious problems at CBP.

A recent Inspector General's audit found that CBP was responsible for more than 90 percent of $4.6 billion in civil-forfeiture proceeds at the Department of Homeland Security between 2014 and 2018. Office of Inspector General, Dep't of Homeland Security, *DHS Inconsistently Implemented Administrative Forfeiture Authorities Under CAFRA*, at 1 (Aug. 27, 2020), https://tinyurl.com/y6dswhxo. Yet forfeitures at CBP lacked proper oversight and sufficient protections for property owners, and the audit found repeated violations of CBP's own internal policies. *Id.* at 5–7. For example, CBP had frequently forced innocent property owners into cash settlements even after it had been "determined that the funds seized did not appear to come from illegal activity." *Id.* at 5. To make matters worse, in "7 of 11 sampled cases in which a claim was filed, CBP settled with a property owner without sending the claim to a [U.S. Attorney's office] for a decision, as required by policy." *Id.* And even when it had to return property to innocent owners, CBP first required them to sign "Hold Harmless Agreement[s]" requiring the property owner to "waive the right to file suit against the government and absolve the government of any wrongdoing." *Id.* at 6.

A 2016 letter from an independent observer documented concrete examples of forfeiture abuse by CBP agents that are consistent with the audit's findings. *See* Letter from James Lyall, Staff Attorney, ACLU of Arizona, to Assistant Commissioner Matthew Klein, Department of Homeland Security (June 28, 2016), https://tinyurl.com/y2b77g58 ("Lyall Letter"). Local residents had to pay thousands of dollars to recover

their vehicle after it was wrongfully seized by the Border Patrol even though they "were never charged with any crime or immigration offense." *Id.* at 2.

In one of those cases, CBP arrested a woman nearly 40 miles north of the US-Mexico border and held her overnight in a detention center without any explanation. Lyall Letter at 3–4. Although CBP released her the next day, it initiated civil-forfeiture proceedings against her car and held it for nearly two months. *Id.* CBP returned the car only after the woman signed a hold-harmless agreement absolving CBP of liability for her unlawful detention. *Id.* at 4. Another man was detained for two days and nights and released without being charged with any crime. *Id.* at 5–6. Nevertheless, CBP seized his wife's car and refused to return it for four months until he signed a hold-harmless agreement and paid $3,500. *Id.* at 6.

There are also serious problems with CBP forfeitures at airports. A recent report by the Institute for Justice documented billions of dollars in cash seizures by agencies within the Department of Homeland Security, most of them by CBP agents. Jennifer McDonald, *Jetway Robbery?*, Institute for Justice (July 2020), https://ij.org/report/jetway-robbery/. In one example, CBP seized more than $40,000 in cash from a U.S. citizen traveling to Nigeria to build a free medical clinic. *Id.* at 12. She was never charged with a crime and the U.S. Attorney's office declined to pursue formal civil-forfeiture proceedings. *Id.* Yet CBP *still* refused to return her money unless she signed a hold-harmless agreement. *Id.*

CBP has also been plagued with corruption in its ranks, which increases the risk of improper seizures and outright theft. *See* Gabrielle Levy, *Former Customs Chief Accuses Agency of Cover-Ups*, UPI (Aug.

15, 2014), https://tinyurl.com/y2zu8ohl. A 2019 report concluded that the Department of Homeland Security (of which CBP is a part) "does not have sufficient policies and procedures to address misconduct." Office of Inspector General, Dep't of Homeland Security, *DHS Needs to Improve Its Oversight of Misconduct and Discipline*, at 1 (June 17, 2019), https://tinyurl.com/y55nzhf6. And a 2015 report from the Homeland Security Advisory Council stated that "arrests for corruption of CBP personnel far exceed, on a per capita basis, such arrests at other federal law enforcement agencies." Homeland Security Advisory Council, *Interim Report of the CBP Integrity Advisory Panel*, at 6 (June 29, 2015), https://tinyurl.com/z9fh6br; *see also* Smith, *supra*, at 5-48.36 to 5-48.38 (describing corruption at CBP).

* * *

Examples like these show that the extreme facts of this case—where CBP held petitioner's truck for two years without any hearing, without charging him with any crime, and despite his repeated inquiries, Pet. 11–12—are not an aberration. Under the decision below, these abuses will continue unchecked, and vehicle owners at the border and elsewhere will continue to lose access to their vehicles for months and years without any opportunity for timely review by the Judiciary. Because civil-forfeiture abuse at CBP is a real and growing problem, this Court should grant certiorari to ensure that property owners are at least guaranteed the opportunity for a neutral judge to review CBP's seizure decisions with reasonable promptitude.

II. Prompt post-seizure hearings would not impose an undue burden on the government.

In the decision below, the Fifth Circuit asserted that prompt post-seizure hearings would impose "a significant administrative burden" on the government. *Serrano v. Customs & Border Patrol*, 975 F.3d 488, 500 (5th Cir. 2020). But while it is of course "often more efficient to dispense with the opportunity for" a hearing before a neutral judge, these "rather ordinary costs cannot outweigh" the constitutional rights of property owners. *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972). "Procedural due process is not intended to promote efficiency . . . it is intended to protect the particular interests of the person whose possessions are about to be taken." *Id.*

And, in any event, the burden that prompt post-seizure hearings would impose on CBP is minimal when compared to the serious deprivation of property rights that results when the federal government takes away someone's vehicle for months or years without any meaningful process.

A. New York's experience after *Krimstock* demonstrates that post-seizure hearings would not be unduly burdensome.

The largest city in the Nation has already conclusively demonstrated the feasibility of administering a prompt post-seizure hearing procedure for seized vehicles. In a widely cited 2002 opinion by then-Judge Sotomayor, the Second Circuit required New York City to provide "prompt post-seizure retention hearing[s], with adequate notice, for motor vehicles seized as instrumentalities of crime." *Krimstock*, 306 F.3d at 68–69 & n.33 (footnote omitted). The scope of these

hearings is narrow, limited to the question "whether the vehicle should be returned to its owner during the pendency of proceedings" based on "an initial testing of the merits of the City's case." *Id.* at 69–70.

Under *Krimstock*, New York generally provides vehicle owners an opportunity for a hearing within 10 business days of a claimant's demand. *Krimstock v. Kelly*, No. 1:99-cv-12041, 2007 U.S. Dist. LEXIS 82612, at *2 (S.D.N.Y. Sept. 27, 2007) (Third Amended Order & Judgment). New York's Office of Administrative Trials and Hearings ("OATH") conducts the hearings. *Id.* at *1–2. To retain a vehicle while a forfeiture action is pending, the New York Police Department must prove by a preponderance of the evidence that: (1) "probable cause existed for the arrest of the vehicle operator"; (2) the City will likely prevail in a forfeiture action; and (3) either "retention is necessary to preserve the vehicle from loss, sale or destruction" or releasing the vehicle to the owner would "threaten public safety." *Id.* at *2; *Police Dep't v. Santana*, OATH Index No. 1117/18, slip op. at 4 (OATH Dec. 8, 2017); *see also* Gregory L. Acquaviva & Kevin M. McDonough, *How to Win a* Krimstock *Hearing*, 18 Widener L.J. 23, 63 (2008); Office of Administrative Trials and Hearings, *Did the Police Take Your Car? A Guide to Your Trial at the OATH Trials Division*, at 8, https://tinyurl.com/y5hg2t5e.

Practitioners have described the relative simplicity with which the *Krimstock* hearings are conducted and resolved. Acquaviva & McDonough, *supra*, at 23 nn.a1, aa1. The typical hearing consists of opening statements, witness testimony, and closing arguments. *Id.* at 81. The NYPD generally introduces doc-

umentary evidence such as the arrest report and criminal complaint, and usually calls only the car owner as a witness. *Id.* at 81–83.

Moreover, in the ordinary case, the vehicle owner either does not request a hearing or settles prior to the hearing. In 2014, for example, the NYPD seized approximately 2,400 vehicles; yet owners requested fewer than 600 *Krimstock* hearings; nearly 300 settled prior to the hearing; only 15 were actually held. Kat Aaron, *Stop and Seize: When the NYPD Takes Your Car*, WNYC News (Nov. 10, 2015), https://tinyurl.com/yyzbtjes. Similarly, the NYPD reported retaining or liquidating 5,836 vehicles in 2018 and 7,610 in 2019. New York Police Department, *Local Law 131 Report for Calendar Year 2018*, at 1 (2018), https://tinyurl.com/y6b4e8jq; New York Police Department, *Administrative Code 14-169 Report for Calendar Year 2019*, at 1 (2019), https://tinyurl.com/y3sy9b5v. By comparison, between July 13, 2017 and September 10, 2020, OATH held only 53 hearings concerning vehicle forfeiture, 14 of which resulted in the vehicle being returned. NYC Open Data, OATH Trials Division Case Status, https://tinyurl.com/y3y9sh7n (last visited Jan. 4, 2021). That amounts to a 26 percent return rate on vehicle forfeitures challenged in a hearing. Combined with the substantial number of seizures that end with the return of claimants' cars through settlements, this data shows that *Krimstock* hearings have had a measurable impact in protecting the rights of New Yorkers. And the mere right to a hearing serves an important role in deterring abuses—if officers know a vehicle owner has a right to a prompt hearing before a judge, they have far less incentive to seize vehicles without adequate justification in the first place. Thus, the

availability of *Krimstock* hearings provides an important check on an officer's initial decision whether to seize a vehicle without imposing an undue burden on the government or courts. The same would be true for CBP's seizures.

B. Many states already provide prompt post-seizure process.

New York is hardly alone in providing prompt hearings to owners who have had their property seized. Alaska requires a court order to maintain the seizure of moveable property for longer than 48 hours. Alaska Stat. § 17.30.114(a)(3). In Arizona, a property owner has fifteen days after notice of a seizure made without prior judicial determination to request a judicial hearing, which can occur as soon as five days after a show-cause order issues. Ariz. Rev. Stat. § 13-4310(B). Florida requires that the government must make an application to a court for a determination of probable cause within 10 business days of a seizure, and a potential claimant has 15 days from notice of the seizure to request an "adversarial preliminary hearing" that generally must be held within 10 days of the request. Fla. Stat. § 932.703(2)(a), (3)(a); *see also Dep't of Law Enforcement v. Real Property*, 588 So. 2d 957, 965–66 (Fla. 1991).

Other states also require the government to initiate judicial forfeiture proceedings promptly after seizing property. In Missouri, for example, the seizing officer must report a seizure to a prosecuting attorney or the attorney general within four days, and the prosecuting attorney has only ten additional days to file a petition of forfeiture. Mo. Rev. Stat. § 513.607(6)(2). And Texas requires that forfeiture proceedings be

commenced within 30 days of the seizure. Tex. Code Crim. Proc. Art. 59.04(a).[2]

And, of course, courts and government lawyers around the country already have considerable experience with conducting prompt probable-cause hearings in the context of warrantless arrests of individuals. *See, e.g.*, *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (requiring probable-cause hearings within 48 hours after warrantless arrests absent extraordinary circumstances); *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). There is no reason to believe they cannot do the same thing in the context of the warrantless seizure of a car.

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[2] *See also, e.g.*, Cal. Health & Safety Code § 11488.5(c) (forfeiture hearing shall be set for within thirty days of verified claim by property owner); Ga. Code Ann. § 9-16-14(4) (court can order probable-cause hearing that must be scheduled within 30 days); Haw. Rev. Stat. Ann. § 712A-12(6) (forfeiture hearing must be held within 60 days after filing of petition); Idaho Code Ann. § 37-2744(c)(3), (d)(3)(D) (proceedings must be initiated within 30 days of seizure, and hearing must be scheduled within 30 days from answer); Iowa Code Ann. § 809.4 (hearing must be set for no more than 30 days from filing of an application); Kan. Stat. Ann. § 60-4112(c) (court can order probable-cause hearing that must be scheduled within 30 days); La. Rev. Stat. Ann. § 40:2611(C) (court can order probable-cause hearing that must be scheduled within 30 days); Me. Rev. Stat. Ann. tit. 15, § 5823.2 (proceedings for seized vehicles must be initiated within 42 days of seizure, and hearings must be held within 14 days after required notices); Miss. Code Ann. §§ 41-29-177(1), 41-29-179(1) (proceedings must be initiated within 30 days of seizure, and hearing must be held within 30 days of answer); Wis. Stat. Ann. § 961.555(2) (proceedings must be initiated within 30 days of seizure, and hearing must be held within 60 days of answer).

C. Civil forfeiture brings the government substantial revenue that offsets the burden of due process and increases the risk of erroneous seizures.

Finally, any administrative burden of providing prompt post-seizure process to property owners does not occur in a vacuum. Civil forfeiture brings the government substantial income. The revenues for the federal Treasury Forfeiture Fund for fiscal year 2018, of which CBP is a "[p]rincipal revenue-producing bureau[]," were over $1.2 billion. Dep't of Treasury, Executive Office of Asset Forfeiture, *Congressional Budget Justification and Annual Performance Report and Plan*, at 3, 6 (FY 2020), https://bit.ly/2UrY2Lz. One scholar determined that in 2015 "law enforcement took more property from Americans than criminals did." *Washington*, 916 F.3d at 679 (citing study).

Against that backdrop, the government should not be heard to complain about the relatively minor cost of providing basic due process—including a timely right to be heard by a neutral decisionmaker—before it holds an individual's property for a prolonged period.

Moreover, the government's profit incentive increases the risk of erroneous and unlawful seizures. The protection of an adversary hearing before a neutral magistrate "is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." *James Daniel Good*, 510 U.S. at 55–56. Thus, not only does the government's civil-forfeiture revenue more than offset the relatively minor administrative burden of a prompt post-seizure hearing, it makes the owner's right to the hearing all the more critical "to ensure the requisite

neutrality that must inform all government decisionmaking." *Id.* at 55.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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