No. 22-585

In the Supreme Court of the United States

HALIMA TARIFFA CULLEY, on Behalf of Herself and Those Similarly Situated, *Petitioner,*

v.

ATTORNEY GENERAL OF ALABAMA, et al., *Respondents.*

LENA SUTTON, on Behalf of Herself and Those Similarly Situated as Described Below, *Petitioner,*

v.

TOWN OF LEESBURG, ALABAMA, et al., *Respondents.*

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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Question Presented

In determining whether the Due Process Clause requires a state or local government to provide a post seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), as held by the Eleventh Circuit or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as held by at least the Second, Fifth, Seventh, and Ninth Circuits.

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Interest of Amicus Curiae

Pacific Legal Foundation (PLF) is a nonprofit corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom.[1] PLF has extensive experience litigating to protect private property rights under multiple provisions of the U.S. Constitution. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) (taking); *Knick v. Township of Scott, Pa.*, 139 S.Ct. 2162 (2019) (procedural barrier to litigating taking claims); *Barnette v. HBI, L.L.C.*, 141 S.Ct. 1370 (2021) (due process notice requirements before foreclosure); *Financial Oversight & Management Bd. of Puerto Rico v. Cooperativa de Ahorro y Credito Abraham Rosa*, No. 22-367 (constitutional imperative of just compensation remedy) (pending); *Lent v. California Coastal Comm'n*, 142 S.Ct. 1109 (2022) (property owner's claim involving procedural due process under *Mathews v. Eldridge*, 424 U.S. 319 (1976), and excessive fines); *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, 141 S.Ct. 1380 (2021) (procedural due process).

PLF is alarmed by the growing trend of governments using fines, fees, and forfeitures to fund agency budgets, raising serious due process concerns. This trend moves public agencies from acting in the

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[1] Pursuant to Rule 37.2, PLF provided timely notice to all parties. Pursuant to Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to find the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

public interest as neutral arbiters to interested parties with a stake in the outcome. The Due Process Clauses of the Fifth and Fourteenth Amendments ensure fair procedures in the administration of the law and PLF believes this case presents an excellent opportunity for this Court to address the known problem of law enforcement agencies confiscating automobiles of innocent owners without a prompt hearing, with often financially ruinous consequences.

Introduction and Summary of Reasons for Granting the Petition

Halima Culley and Lena Sutton made the mistake of lending their cars to friends and family. The borrowers were busted for drugs while driving the cars and the police seized the cars as "instrumentalities of crime." App.3a; Ala. Code § 20-2-93 (Civil Asset Forfeiture Statute). The statute that allows the seizure contains an exception for innocent vehicle owners. Ala. Code § 20-2-93(h). But there is no post-seizure hearing at which Culley and Sutton could argue for the return of their vehicles during the pendency of the underlying criminal litigation. The cities held both cars for over a year before returning them when Culley and Sutton proved at merits hearings that they were innocent owners. App.3a. Culley and Sutton subsequently filed class action lawsuits under 42 U.S.C. § 1983, claiming that the defendants' failure to provide a prompt post-deprivation hearing violated their rights under the Eighth and Fourteenth Amendments and seeking money damages.[2] App.2a. Both district courts dismissed the complaints and the Eleventh Circuit

[2] Ms. Culley also sought injunctive relief that was mooted when she recovered her vehicle. App.2a.

affirmed, on the basis of prior Circuit cases, holding that vehicle owners have no right to post-seizure hearings. App.7a–8a. The panel acknowledged that "at least one circuit has taken [Culley and Sutton's] view," citing *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002). App.7a.[3]

The Due Process clauses of the Fifth and Fourteenth Amendments guarantee that "no person shall be … deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. Temporary, nonfinal deprivation of property is a "deprivation" entitled to the due process protections of the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67, 84–85 (1972). "[T]he Fourteenth Amendment draws no bright lines around the three day, 10-day, or 50-day deprivation of property. Any significant taking of property by the State is within the Purview of the Due Process Clause." *Id.* at 86. In *Mathews*, 424 U.S. at 335, this Court established the standard framework for determining whether the state has provided constitutionally adequate due process. Courts must consider three factors: (1) the private interest that will be affected by the official action; (2) the 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 governmental interest, including the function

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[3] This understates the extent of the conflict. Multiple Circuits share Culley and Sutton's view that *Mathews* provides the correct analytical framework, in conflict with the Eleventh Circuit. *See, e.g.*, *Serrano v. CBP*, 975 F.3d 488, 496 et seq. (5th Cir. 2020); *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008), *vacated on mootness grounds, Alvarez v. Smith*, 558 U.S. 87 (2009); *Booker v. City of St. Paul*, 762 F.3d 730, 734 (8th Cir. 2014); *see also infra* at 5–7.

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* However, the court below used the multifactor test of *Barker v. Wingo*, 407 U.S. 514 (1972), established to determine when pretrial delay violates the Sixth Amendment's guarantee of a speedy trial. App.8a.

The *Mathews* analytical framework results in many courts holding, in conflict with the decision below, that post-deprivation hearings must be offered to people whose vehicles are confiscated, ostensibly as instrumentalities of crime. Compelling policy reasons support this view. First, civil forfeiture deserves particular judicial attention because the financial incentives to confiscate property heightens the risk of abuse and corruption and most frequently harms those with the least power to resist. Second, civil forfeiture wrongly provides lesser protection to deprivations of property, notwithstanding that property rights are the foundation of a free society. With a clear and pervasive conflict on an issue this Court previously considered worthy of review, *see Alvarez*, 558 U.S. 87, this case presents the perfect opportunity for the Court to address whether vehicle owners have a right to a post-seizure hearing in civil forfeiture proceedings against the vehicle.

Reasons for Granting the Petition

I. The Eleventh Circuit Conflicts with Decisions of Other Circuit Courts and this Court

The decision below was based entirely on "binding Eleventh Circuit precedent" such as *Gonzales v. Rivkind*, 858 F.2d 657 (11th Cir. 1988), which held

that whether due process requires "a probable cause hearing to determine whether they can retain their property during the pendency of litigation" in the civil asset forfeiture context is determined by the "speedy trial" test announced in *Barker v. Wingo*. App.4a, 7a. The court's continued reliance on *Gonzales* places the Eleventh Circuit in conflict with the majority of Circuit courts that apply *Mathews* and hold that due process demands a prompt post-seizure hearing following seizure of a person's vehicle. *See Krimstock*, 306 F.3d at 50; *Serrano*, 975 F.3d at 500 n.17 ("*Mathews* is more applicable here because the harm alleged is the lack of an interim hearing rather than delay preceding an ultimate hearing on the merits."); *Smith*, 524 F.3d at 838 (applying *Mathews* and noting, "[i]t is hard to see any reason why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal."); *Booker*, 762 F.3d at 736 ("After looking at the three *Mathews* factors, we are persuaded that the City's current process—allowing those affected by vehicle forfeiture to request a judicial determination if they believe the forfeiture was erroneous—is sufficient to satisfy due process."); *Stypmann v. City and Cnty. of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977) (applying *Mathews* and holding that prompt post-deprivation hearing "provide[s] vehicle owners the opportunity to test the factual basis of the tow and thus protect them against erroneous deprivation of the use of their vehicles" and the state's interest in "avoidance of the administrative burden and expense is not enough in these circumstances to warrant denying such a hearing."); *De Franks v. Mayor and City Council of Ocean City*, 777 F.2d 185, 187–88 (4th Cir. 1985) (under *Mathews*, previous towing ordinance

that failed to provide a post-seizure hearing was "manifestly defective;" new ordinance that provided for prompt notice and a hearing upon request resolved the constitutional deficiency).

Lower federal courts outside of the Eleventh Circuit and state courts also follow the majority rule that *Mathews* applies. *See, e.g.*, *Washington v. Marion Cnty. Prosecutor*, 264 F.Supp.3d 957, 975 (S.D. Ind. 2017) ("The Court agrees with the circuit courts' reasoning in both *Smith* and *Krimstock*. This is a process case, not a timing case. The Court concludes, as did the Supreme Court in [*United States v. James Daniel*] *Good Real Property*[, 510 U.S. 43 (1993)], that the *Mathews* test provides the proper framework[.]"), *remanded to consider amendments to statute*, 916 F.3d 676 (7th Cir. 2019); *Brown v. District of Columbia*, 115 F.Supp.3d 56, 60 (D.D.C. 2015) (holding "that the government must provide a prompt opportunity for owners of seized automobiles to challenge the reasonableness of the seizure and propose means to protect the government's interest short of retaining their cars until the conclusion of forfeiture proceedings."); *Cnty. of Nassau v. Canavan*, 1 N.Y.3d 134, 142–43 (2003) ("A balancing of [the *Mathews*] factors mandates that post-seizure hearings be routinely provided" for vehicles seized during lawful arrests.); *State ex rel. Schrunk v. Metz*, 125 Or.App. 405, 417–18 (1993) ("[T]he due process balance manifestly tilts in favor of a prompt post-seizure hearing. We therefore hold that, to the extent that [the law] authorizes the seizure of property pursuant to an *ex parte* court order without any post-deprivation probable cause hearing other than the forfeiture trial, it violates due process …"); *Olson v. One 1999 Lexus*, 924 N.W.2d 594, 602 (Minn. 2019) ("The *Mathews*

framework is well suited to answering this question" of whether due process requires "prompt post-seizure judicial review of the substantive legal basis for the State's seizure of [a] vehicle.").

The Eleventh Circuit denied en banc review in this case, cementing its position that *Barker*, rather than *Mathews*, provides the proper analytical framework. It conflicts with all other courts and this Court, and leaves the combined 35 million residents of Alabama, Georgia, and Florida[4] vulnerable to civil asset forfeiture without any prompt recourse to recover their property. Only this Court can resolve this untenable situation.

II. Whether Summary Asset Forfeiture Without a Prompt Post-Deprivation Hearing Violates Due Process Is an Important National Question Requiring Resolution by this Court

A. Civil Asset Forfeiture Has Corrupting Effects that Especially Harm the Innocent and Impoverished

In *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980), this Court observed that due process is in jeopardy where there is "a realistic possibility that … judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement." *See also James Daniel Good*, 510 U.S. at 56 (due process protections are of most importance where the government "has a direct pecuniary interest" in the outcome); *Harmelin*

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[4] Ellen Kershner, *The 50 US States Ranked by Population*, WorldAtlas (June 12, 2020), https://www.worldatlas.com/articles/us-states-by-population.html.

v. Michigan, 501 U.S. 957, 978 n.9 (1991) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."). The proceeds of forfeitures often paid for the budgets of the very law enforcement and administrative agencies that levy them and influences the motivations of law enforcement officials.

As has been well documented,[5] law enforcement agencies that come to depend on civil forfeiture to supplement their budgets are prone to abusing their power. *See El-Ali v. Stat*e, 428 S.W.3d 824, 828 (2014) (Willett, J., with Lehrmann and Devine, JJ., dissenting to denial of petition for review) ("When agency budgets grow dependent on asset forfeiture, not as an occasional windfall or supplement but as indispensable revenue to fund basic operations, constitutional liberties are unavoidably imperiled.") While law enforcement agencies enjoy the financial windfall obtained from seizing assets associated with criminal activity, "excessive dependence on forfeited funds can lead to questionable seizures of property unrelated to the crime committed or devoid of procedural protections." Nicholas A. Loyal, Note, *Bills to Pay and Mouths to Feed: Forfeiture and Due Process Concerns after* Alvarez v. Smith, 55 St. Louis U. L.J. 1143, 1148 (2011). *See also United States v. Funds Held ex rel. Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) (observing the "potential for abuse" and "corrupting

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[5] *See, e.g.*, *Policing and Profit*, 128 Harv. L. Rev. 1723, 1731 (2015) (citing multiple studies and articles); Christine A. Budasoff, Note, *Modern Civil Forfeiture is Unconstitutional*, 23 Tex. Rev. L. & Pol. 467, 486–87 (2019) ("A combination of perverse incentives, a low burden-of-proof requirement, and the lack of a hearing has led to inequitable results at best and abuse of innocent people at the worst.") (citations omitted).

incentives" when Department of Justice "conceives the jurisdiction and ground for seizures, and executes them, [and] also absorbs their proceeds."). This conflict takes on added resonance when law enforcement agencies are "defunded" and thus impelled to seek alternative sources of revenue. Jasmin Chigbrow, Note, *Police or Pirates? Reforming Washington's Civil Asset Forfeiture System*, 96 Wash. Law Rev. 1147, 1168 (2021) (citations omitted).

The evils of the inherently corruptive influence of civil asset forfeiture on one side are compounded by the vulnerability of the mostly low-income victims. Wealthy drivers who lose their cars suffer inconvenience and expense, but have a way to recover their vehicles that does not exist for drivers of reduced means. Specifically, Alabama's law permits wealthy vehicle owners to recover their property during the pendency of the forfeiture action by executing a bond in an amount double the value of the confiscated property. Ala. Code § 28-4-287. This is the "exclusive method" to regain one's property, *State v. Two White Hook Wreckers*, 337 So.3d 735, 738 (Ala. 2020), and offers no solace to the vast majority of car owners who lack thousands of dollars on hand to pay the "double bond."

Civil forfeiture originated as "a device, a legal fiction, authorizing legal action against inanimate objects for participation in alleged criminal activity, regardless of whether the property owner is proven guilty of a crime—or even charged with a crime." *Horner v. Curry*, 125 N.E.3d 584, 597 (Ind. 2019) (citation omitted). It is a fiction with often devastating consequences. This Court has largely abandoned the legal fiction, noting that "forfeiture serves, at least in

part, to punish *the owner*," *Austin v. United States*, 509 U.S. 602, 618 (1993) (emphasis added); *United States v. Usery*, 518 U.S. 267, 295 (1996) (Kennedy, J., concurring) ("It is the owner who feels the pain and receives the stigma of the forfeiture, not the property."). Yet the core problem remains: the pain and stigma center primarily on poorer and politically weaker Americans, especially those who are innocently caught in a trap not of their own making. As Justice Thomas warned, "forfeiture could become like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused." *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring). *See also Parcel Real Prop. v. City of Jackson*, 664 So.2d 194, 198 (Miss. 1995) (lamenting forfeiture from "innocent owners who did all they reasonably could to prevent the misuse of the property."). The post-deprivation hearing sought in this case is a necessary and constitutionally mandated corrective.

B. Due Process Must Accompany Deprivation of Property to the Same Extent as Life or Liberty

The right to own and hold property is necessary to promote the exercise and preservation of freedom. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2071 (2021); *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017) ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Protection*, 560 U.S. 702, 734 (2010) (Kennedy, J., concurring). For this reason, the Framers "saw the

protection of property as vital to civil society." Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 Marq. L. Rev. 1, 27 (2016). *See also Richardson v. $20,771.00, U.S. Currency*, No. 2020-000092, __ S.E.2d __, 2022 WL 4231029, at *15 (S.C. 2022) (Beatty, C.J., concurring in part and dissenting in part) ("An individual's ownership of property is a fundamental right recognized prior to our nation's formation and adopted by our nation's founders." (citing John Adams, *A Dissertation on the Canon and the Feudal Law* (1765) ("Property is surely a right of mankind as real as liberty."), and John Locke, *Two Treatises of Government*, Book II, ch. 7, § 87 (1690) (stating an individual is born with inalienable and natural rights, among them the right to property, defined as life, liberty, and estate)). In short, "[c]ars manifest liberty." *Washington*, 916 F.3d at 679.

This Court has long understood that liberty and property are inextricably intertwined. *See Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829) ("The fundamental maxims of a free government seem to require, that the rights of personal liberty *and* private property should be held sacred.") (emphasis added). The due process clause is expressly written to encompass both. In fact, the "whole purpose" of constitutional due process is "to prevent arbitrary deprivations of *liberty or property*." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 434 (1994) (emphasis added). Yet "[c]ivil asset forfeiture treats property as an inferior right because it enables the government to take a person's property much more easily than it can take one's life or liberty. Defendants in criminal cases receive greater procedural safeguards than do civil asset forfeiture claimants who have never been

charged with a crime." Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 Wake Forest J.L. & Pol'y 315, 343 (2017).

Ultimately, due process must ensure fairness. As Justice Frankfurter opined in *Joint Anti–Fascist Refugee Comm. v. McGrath*,

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... 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. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

341 U.S. 123, 170–172 (1951) (Frankfurter, J., concurring) (footnotes omitted).

Indefinite, lengthy delays are profoundly unfair to innocent owners. *See Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 332 (1999) (characterizing pretrial restraint of assets as a "nuclear weapon"). Few can afford to go without their property for months or years even if they are innocent and would ultimately prevail in a forfeiture case. *See, e.g.*, *Serrano*, 975 F.3d at 492, 494 (vehicle owner waited more than two years for a hearing before the government returned his vehicle to him). Delay is a "sharp weapon" when the state can "afford to wait" and the people whose property has been confiscated "can ill-afford to do so." *Cotton v. Louisville & N.R. Co.*, 14 Ill.2d 144, 170 (1958), *overruled on other*

grounds Wieser v. Missouri Pac. R. Co., 98 Ill.2d 359 (1983). During long periods of waiting, especially when a person cannot work during the interim, deprived vehicle owners and their families are rendered "dependent on the benevolences and mercy" of others. *Id.* This creates an often unbearable pressure to settle quickly on unfavorable and inadequate terms. *Id. See also Jones v. Am. State Bank*, 857 F.2d 494, 499 (8th Cir. 1988); *Thompson v. Ortiz*, 619 F.App'x 542, 544 (7th Cir. 2015) ("The purpose of declaratory judgment is to deprive the defendant of delay as a weapon.") (citation omitted). As the California Supreme Court noted in the analogous situation where a recorded *lis pendens* renders a person's property unmarketable and unusable as security for a loan, "[t]he financial pressure exerted on the property owner may be considerable, forcing him to settle not due to the merits of the suit but to rid himself of the cloud upon his title. The potential for abuse is obvious." *Kirkeby v. Superior Court of Orange Cnty.*, 33 Cal.4th 642, 651 (2004) (citations omitted).

Delay has other adverse effects as well. A vehicle is a depreciating asset that loses value over time. Thus, when a seized vehicle is finally returned, it is almost assuredly worth less than when it was seized. *Krimstock*, 306 F.3d at 64. Because the rate of depreciation in vehicles is far greater than the depreciation rate for money and real property,[6] the "promptness" of the process that is due for the

[6] *See* Michael O'Connor, *What is Car Depreciation and How to Calculate It?*, AutoList (Sept. 25, 2021) ("cars have one of the highest 5-year depreciation rates of any purchase"), https://www.autolist.com/guides/car-depreciation.

confiscation of vehicles pending forfeiture should be recognized as strongly compelling. The loss of inherent value is compounded when innocent owners remain responsible for making car payments even while they are completely deprived of use of the vehicle. Andrew W. Laing, Note, *Asset Forfeiture & Instrumentalities: The Constitutional Outer Limits*, 8 N.Y.U. J. L. & Liberty 1201, 1232 (2014).

Yet, as demonstrated by the decision below, under *Barker*, only the most extreme delays between seizure and final disposition are deemed to violate due process. Essentially, so long as the government eventually provides a forfeiture proceeding that enables the plaintiff to eventually challenge the propriety of a seizure, the speedy trial standard will be satisfied. *United States v. Von Neumann*, 474 U.S. 242, 250 (1986); *see also United States v. $8,850*, 461 U.S. 555, 569–70 (1983) (eighteen-month delay between seizure and forfeiture proceedings did not violate *Barker*). Culley and Sutton, innocent owners of their vehicles, were nonetheless deprived of their property for more than a year. A prompt post-deprivation hearing would have restored their property to them, a result that combines the constitutional mandate with a fair and just outcome.[7]

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[7] A post-deprivation hearing is not a get-out-of-impound-free card. Since *Krimstock*, New York requires a post-deprivation hearing within ten business days of the police department's receipt of the owner's hearing demand form. Gregory L. Acquaviva and Kevin M. McDonough, *How to Win a* Krimstock *Hearing: Litigating Vehicle Retention Proceedings Before New York's Office of Administrative Trials and Hearings*, 18 Widener L.J. 23, 80 (2008) (citation omitted). Those claiming an innocent ownership defense must show, for example, that their

Conclusion

The petition should be granted.

DATED: January 2023.

Respectfully submitted,

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"possessory interest outweighs the City's need to impound the vehicle to (i) deter future criminal conduct, and to (ii) safeguard its right to future auction proceeds by preventing theft, sale, destruction or loss." *Prop. Clerk v. Harris*, 9 N.Y.3d 237, 244 (2007).