No. 22-585

In the Supreme Court of the United States

HALIMA TARIFFA CULLEY, ET AL., PETITIONERS

v.

STEVEN T. MARSHALL, ATTORNEY GENERAL OF ALABAMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTE

INTRODUCTION

The courts of appeals and state high courts are still split—now 5–2—over the question the Court granted cert to review but failed to resolve in *Alvarez v. Smith*, 558 U.S. 87 (2009): whether courts should apply *Mathews v. Eldridge*, 424 U.S. 319 (1976), or *Barker v. Wingo*, 407 U.S. 514 (1972), to decide whether (and when) due process requires a post-seizure, prejudgment hearing to challenge the government's retention of property ("retention hearing") during civil forfeiture proceedings. The Second, Fifth, Seventh, and Eighth Circuits and the Minnesota Supreme Court apply *Mathews*' three-factor inquiry, but the Eleventh Circuit and Illinois Supreme Court apply *Barker*'s four-factor speedy trial test. The split won't resolve itself. The decision below expressly rejected then-Judge Sotomayor's decision in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002). App. 20a-21a. And a recent Sixth Circuit decision shows that the divide is deepening. Only this Court can resolve the conflict, which determined the outcome here.

Although *Smith* made clear that the question presented is certworthy, the Court could not resolve the question because the case was moot: the property disputes had ended, and the plaintiffs did not seek damages. 558 U.S. at 92. This case, by contrast, presents a live controversy: Petitioners Halima Culley and Lena Sutton seek damages. Alabama (to be precise, the state and local Respondents) doesn't disagree. This case is thus the perfect vehicle to finally resolve the deep divide over an important due process question.

Alabama does not dispute that courts are split. Instead, it unsuccessfully tries to downplay the conflict.

First, methodology matters. Under *Mathews*, due process will sometimes require a prompt retention hearing, especially when claimants are innocent owners—like Petitioners. But under *Barker*, due process will *never* require such a hearing, because "a merits hearing on forfeiture, 'if timely,'" is sufficient. Pet. App. 7a (citation omitted). The caselaw confirms that applying *Mathews* over *Barker* can change the outcome, as it did here.

Second, Alabama argues that vehicle owners can post a bond for double the value of their vehicles. But that backbreaking burden only *underscores* the importance of the split. The idea that the government can cure a property deprivation by demanding *twice* the value in *other property* is nonsensical. Indeed, Alabama ignores *Olson v. One 1999 Lexus*, 924 N.W.2d 594, 600, 615 (Minn. 2019), which held that, under *Mathews*, the innocent owner was entitled to a prompt retention hearing even though she didn't post a bond for the value of her vehicle, as state law allowed. If a bond procedure doesn't fix a due process violation, then requiring a *double* bond certainly doesn't, either. At any rate, because the decision below refused to apply *Mathews*, whether the double-value bond is a less restrictive measure than continued deprivation when analyzed under *Mathews*, *see Krimstock*, 306 F.3d at 44, is a remand question. The only question here is whether to apply *Mathews* or *Barker*.

The answer is *Mathews*, because it addresses the availability and timing of retention hearings. *Barker*, by contrast, addresses delays with final judgments—an entirely different question. Indeed, Alabama does not seriously defend the decision below. It instead renews arguments the decision below did not address and the district courts rejected. Lastly, the change in

Alabama law doesn't undermine the certworthiness of this case. Petitioners seek damages for *past* harms. And individuals outside Alabama are still subject to forfeiture schemes that offer *neither* prompt retention hearings *nor* bond procedures. The question presented is as important now as it was when the Court granted cert in *Smith*, and this case is the perfect vehicle to finally resolve it. The Court should grant review.

ARGUMENT

I. Courts are still split over the question *Smith* did not resolve.

Smith did not resolve whether courts should apply *Mathews* or *Barker* when deciding whether (and when) due process requires a retention hearing in civil forfeiture proceedings. The lower courts remain split, currently 5–2, and a recent Sixth Circuit decision shows that the conflict isn't going away. Rather than deny the split, Alabama tries to downplay it. But the split matters. Indeed, it determined the outcome here.

A. 1. The Second, Fifth, Seventh, and Eighth Circuits and the Minnesota Supreme Court apply *Mathews*. *See Krimstock*, 306 F.3d at 51-53, 68; *Smith v. City of Chicago*, 524 F.3d 834, 836-38 (7th Cir. 2008), *vacated as moot sub nom. Alvarez v. Smith*, 558 U.S. 87 (2009); *Olson*, 924 N.W.2d at 603-04; *Serrano v. United States Customs & Border Protection*, 975 F.3d 488, 496 (5th Cir. 2020); *Booker v. City of St. Paul*, 762 F.3d 730, 734 (8th Cir. 2014); Pet. 9-19.

Mathews requires courts to balance three factors: "(1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the value of other safeguards; and (3) the government's interest." *Krimstock*, 306 F.3d at 60. When the government seizes property of an "innocent owner,"

i.e., someone who did not participate in or permit the alleged illegal use of the property, *id.* at 48 n.9, the *Mathews* factors typically weigh in favor of requiring a prompt retention hearing, because "there is a heightened potential for erroneous retention where an arrestee … is not the owner of the seized vehicle," *id.* at 58; *see also Smith*, 524 F.3d at 838-39; *Olson*, 924 N.W.2d at 612-16.

Courts applying *Mathews* reject *Barker*'s speedy trial test, which "requires consideration of the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant." *Smith*, 524 F.3d at 836. "The Constitution," then-Judge Sotomayor explained, "distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other." *Krimstock*, 306 F.3d at 68. While the speedy trial test addresses "the speed with which civil forfeiture proceedings themselves are instituted or conducted," it does not address the availability of "a prompt post-seizure opportunity to challenge the legitimacy of the [government's] retention of the [property] while those proceedings are conducted." *Id.*; *see Smith*, 524 F.3d at 837; *Serrano*, 975 F.3d at 500-01 n.17; *Olson*, 924 N.W.2d at 601-03.

2. The Eleventh Circuit and the Illinois Supreme Court apply *Barker*. What's more, they expressly split from then-Judge Sotomayor's decision in *Krimstock*. *See* Pet. App. 7a-8a; *People v. One 1998 GMC*, 960 N.E.2d 1071, 1080-85 (Ill. 2011). There is thus a clean 5–2 split over the *Mathews*-or-*Barker* question, and it is outcome-determinative.

The decision below noted that the Second Circuit applies *Mathews*. Pet. App. 7a. But because the Eleventh Circuit applies "*Barker* rather than *Mathews*," and because, under *Barker*, "a timely merits hearing affords a claimant all the process to which he is due," the court held that Petitioners—innocent owners—had no right to a prompt retention hearing. Pet. App. 7a-8a. That choice of test dictated the outcome. Petitioners would have won under *Mathews* given the "substantial" "risk of erroneous deprivation that is posed to innocent owners." *Krimstock*, 306 F.3d at 63.

The Illinois Supreme Court has likewise rejected *Krimstock* and applied *Barker*, holding that a prompt retention hearing "is not necessary" because due process "requires only the forfeiture proceeding." *One 1998 GMC*, 960 N.E.2d at 1082, 1087. The court saw the problem with applying *Barker*: it addresses "the time limits within which the forfeiture action itself must be initiated, and not the timing of an interim postseizure hearing." *Id.* at 1081. It applied *Barker* anyway.

3. *Nichols v. Wayne County*, 822 F. App'x 445 (6th Cir. 2020), shows that the split is bound to deepen. Judge McKeague would have held that, under *Barker*, the government need not "provide a continued-detention hearing because that hearing is not necessary to a timely forfeiture proceeding." *Id.* at 453 (McKeague, J., concurring) (disagreeing with *Krimstock*). Judge Moore, by contrast, would have held that, under *Mathews*, "the failure to provide some sort of retention hearing for purported owners of seized property violates the Constitution." *Id.* at 465 (Moore, J., dissenting in part) (agreeing with *Krimstock*). The panel did not pick sides because the complaint had a

pleading defect. *Id.* at 451. But this recent squabble shows that the Sixth Circuit, and possibly others, will likely deepen the conflict soon.

B. 1. Alabama admits (Opp. 13-14) that courts are split over whether to apply *Mathews* or *Barker*. And for all its attempts to distract, Alabama recognizes that the question presents a discrete issue. The question is not whether "the initial seizure" was lawful, Opp. 14, whether "due process required a predetention hearing," *One 1998 GMC*, 960 N.E.2d at 1080, or whether the final merits hearing comported with due process, Opp. 14. Instead, as Alabama recognizes (Opp. 14-15), the petition presents a discrete methodological question: whether to apply *Mathews* or *Barker* when deciding whether (and when) due process requires a retention hearing in civil forfeiture actions.

2. Alabama calls the *Mathews*-or-*Barker* question a "labeling" choice and "an empty formality." Opp. 15. But the decisions show that the choice of test matters. Take *Smith*, which applied *Mathews* and ordered the district court to provide a prompt hearing. 524 F.3d at 838. Had the court applied *Barker*, it would have affirmed the dismissal of plaintiffs' complaint. *Id.* at 835. Or consider *Olson*. The majority applied *Mathews*, holding that the innocent owner was entitled to a prompt retention hearing, *Olson*, 924 N.W.2d at 612-16, while the dissent applied *Barker*, arguing that the innocent owner was not entitled to such a hearing, *id.* at 616-19 (Gildea, C.J., concurring in part, dissenting in part). Similarly, Judges McKeague and Moore wrote separately in *Nichols* to explain that their disagreement about the "threshold" *Mathews*-or-*Barker* question, *Nichols*, 822 F. App'x at 462 (Moore,

J., dissenting in part), would have led them to different outcomes. While Judge Moore found "a significant constitutional violation," *id.* at 467, Judge McKeague would have found "no due process right" in the first place, *id.* at 458 (McKeague, J., concurring).

Methodology matters. *Mathews* sometimes requires a prompt retention hearing, especially when the claimant is an innocent owner. *See, e.g.*, *Olson*, 924 N.W.2d at 612-16. But *Barker never* requires such a hearing, because *Barker* requires only "a merits hearing on forfeiture, 'if timely.'" Pet. App. 7a (citation omitted); *see One 1998 GMC*, 960 N.E.2d at 1082; *Nichols*, 822 F. App'x at 453 (McKeague, J., concurring).

3. Alabama argues (Opp. 16-17) that the split is abstract because no court has addressed the *Mathews*-or-*Barker* question in the context of a forfeiture scheme that includes a bond procedure. That argument is both irrelevant and incorrect.

As noted, the petition presents only a methodological question: whether courts should apply *Mathews* or *Barker* to decide whether (and when) due process requires a retention hearing in civil forfeiture actions. The answer is *Mathews*, *infra* pp. 8-9. The court of appeals can decide "in the first instance," *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022), what *Mathews* requires in this context.

That said, the due process violation under *Mathews* is clear, as another bond case—contrary to Alabama's argument—shows. In *Olson*, the Minnesota Supreme Court held that, under *Mathews*, the innocent owner was entitled to a prompt retention hearing even though she did not post a bond for the full value of her vehicle, as state law allowed. 924

N.W.2d at 600, 615. *Olson* thus confirms that the split is outcome-determinative.

The due process violations here are twice as bad. While Minnesotans must post "bond for the full retail value of the vehicle—a potentially heavy financial burden that diminishes the value of the bond option as hardship relief," *Id.* at 615, Alabamans must "post a bond for *double* the value of the property," Opp. 1 (emphasis added). And posting a double-value bond is the "*exclusive* means for obtaining" seized vehicles during forfeiture proceedings. *Alabama v. Two White Hook Wreckers*, 337 So.3d 735, 738-39 (Ala. 2020) (emphasis added). The double-value bond isn't "less drastic than continued deprivation," *Krimstock*, 306 F.3d at 49—it's "illusory hardship relief," *Olson*, 924 N.W.2d at 615.

II. The decision below is wrong.

Mathews governs whether (and when) due process requires a retention hearing in civil forfeiture actions. "[T]he *Barker* test is inapposite." Pet. 11.

Mathews applies when "the government seeks to maintain possession of property before a final judgment is rendered." *Krimstock*, 306 F.3d at 60. *Barker*, by contrast, applies when there are "delays in rendering final judgment." *Id.* at 68. "The issues of a speedy trial and a prompt retention hearing are not parallel." *Id.* at 53. Indeed, "the speedy trial test presumes prior resolution of any issues involving … the government's custody of the property [during the proceedings]"—the issue here—"leaving only the issue of delay in the proceedings." *Id.* at 68.

Alabama doesn't seriously disagree. It claims "*Barker* provides more precise guidance," but it fails to explain why. Opp. 15. And Alabama is mistaken if

it thinks that *Barker* is the "better test," *id.*, because "a timely merits hearing affords a claimant all the process to which he is due," Pet. App. 8a. "[T]o say that the forfeiture proceeding, which often occurs more than a year after a vehicle's seizure, represents a meaningful opportunity to be heard at a meaningful time on the issue of continued impoundment is to stretch the sense of that venerable phrase to the breaking point." *Krimstock*, 306 F.3d at 53.

III. This case is an ideal vehicle to resolve this important due process question.

A. 1. This case is an excellent vehicle to finish what *Smith* started. Pet. 20-21. Alabama does not dispute that, unlike *Smith*, 558 U.S. at 92, this case presents a live controversy because Petitioners seek damages, Pet. App. 6a.

Prior petitions confirm that this case is an ideal vehicle. Opp. 16. While this case tees up an outcome-determinative *Mathews*-or-*Barker* question, those petitions did not. *See supra* pp. 3-8. *Nichols* turned on a pleading defect and didn't reach the question. 822 F. App'x at 451. The petition in *Serrano* challenged the Fifth Circuit's application of *Mathews* to the facts, not its choice of *Mathews* over *Barker*. *See* 975 F.3d at 500-01 n.17; Pet., *Serrano v. United States Customs & Border Protection*, 141 S. Ct. 2511 (2021) (No. 20-768). The petition in *Russell* challenged the delay in rendering final judgment, not the failure to provide a retention hearing. *See* Pet. 17-21, *Russell v. Alabama*, 571 U.S. 823 (2013) (No. 12-1389). Lastly, the petition in *One 1998 GMC* misrepresented the split, citing several cases that did not address the retention-hearing issue. *See* Pet. 23-24, *One 1998 GMC v. Illinois*, 566 U.S. 1034 (2012) (No. 11-1192).

2. The question presented is important. Pet. 19-22. "The deprivation of real or personal property involves substantial due process interests," and the "particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the means to earn a livelihood." *Krimstock*, 306 F.3d at 61. Alabama doesn't argue otherwise, or dispute the serious risks associated with civil-asset forfeiture. Pacific Legal Foundation Amicus Br. 7-10; Rutherford Institute Amicus Br. 4-8.

B. Alabama's vehicle arguments fail.

1. Alabama contends that this case is a poor vehicle because Petitioners received due process under *Mathews*. That argument lacks merit, and it presents only a remand question anyway.

Alabama doesn't dispute (Opp. 22) that the first *Mathews* factor—the private interest affected—favors Petitioners.

The second factor—the risk of erroneous deprivation through the procedures used and the value of other safeguards—also favors Petitioners. "[T]he risk of erroneous deprivation that is posed to innocent owners is a substantial one." *Krimstock*, 306 F.3d at 63. That's because there is *no* prompt opportunity for the owner to show her innocence to "a neutral factfinder." *Id.* at 51. Indeed, that was the "decisive" factor in *Olson*, 924 N.W.2d at 613. Alabama may think that "the process worked," Opp. 22, because Petitioners eventually got their vehicles back over a year later, but it forgets that posting a double-value bond is the *only* way Petitioners could have gotten their vehicles back sooner. *Supra* p. 8. That lone, illusory safeguard falls short—requiring a *double-value* bond just deprives the innocent owner of *more* property. What's

more, Alabama law enforcement has "a direct pecuniary interest in the outcome of the proceeding," increasing the risk of mistaken seizures. *Krimstock*, 306 F.3d at 63 (citation omitted); *see* Ala. Code § 20-2-93(s)(2) (previously § 20-2-93(e)(2)).

The last factor—the government's interest—likewise favors Petitioners. Alabama fails to show that "less drastic measures than continued impoundment" "would not suffice to protect [its] interests." *Krimstock*, 306 F.3d at 67, 70 (citation omitted). Alabama's steadfast reliance on the double-value bond is absurd. Opp. 23-24. Giving individuals the choice between posting *double* the value of their vehicle or walking is no choice at all.

2. Alabama argues that Petitioners' claims are barred by claim preclusion (Opp. 25-28) and that Petitioners have failed to prove every element of conspiracy (Opp. 29-32). These premature arguments don't go to the question presented, and so the decision below did not address them. Pet. App. 2a n.1, 8a-9a, The district courts likewise did not analyze the conspiracy claims beyond finding that they failed because there was no due process violation under *Barker*. Pet. App. 58a. But the district courts did reject Alabama's claim-preclusion argument, explaining at length why it lacked merit under Alabama law. Pet. App. 28a-32a; *see also* Doc. 39 at 23-26, *Sutton v. Leesburg*, No. 4:20-cv-91 (N.D. Ala.).

3. The change in Alabama law doesn't prevent the Court from resolving the split, Opp. 29, because Petitioners seek damages for *past* harms. Moreover, the Court must intervene because this issue persists. In Michigan, for instance, individuals can *neither* obtain a prompt retention hearing *nor* post a bond in

exchange for having their vehicles returned; the bond in Michigan simply pays for the proceedings. *See Nichols*, 822 F. App'x at 446-48. The Sixth Circuit has shown that it can't agree on the *Mathews*-or-*Barker* question, thus confirming the need for review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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