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.,

*Respondents.*

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

## BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

*Counsel for Amicus Curiae*

* Counsel of Record

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

Cases

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**



Constitutional Provisions and Legislative Materials



Other Authorities

**TABLE OF AUTHORITIES – cont'd**

**Page(s)**

## INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution is interpreted in a manner consistent with its text and history and accordingly has an interest in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Law enforcement officers seized the vehicles of Petitioners Halima Culley and Lena Sutton because other people allegedly possessed drugs while driving those vehicles. Petitioners were not present at the time of the alleged offenses. The state nonetheless refused to return the vehicles because it wanted to take ownership of them through civil forfeiture proceedings—which could last well over a year.

The question here is whether Petitioners are entitled to a hearing to challenge the retention of their vehicles in the meantime. The way to answer that question is through the due process framework outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), not the speedy trial framework of *Barker v. Wingo*, 407 U.S. 514 (1972). The issue is not whether the government must hasten the initiation of its forfeiture action, but

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

whether more process is due in the interim to avoid the erroneous deprivation of a type of property that is often essential for modern life and livelihoods. Because the *Mathews* framework is far more suited to resolving that due process question than the *Barker* framework, the decision below should be reversed.

*Mathews*, like this case, addressed whether more process was needed to deprive an individual of their property pending a final determination of their right to that property. Answering such questions, this Court explained, generally requires considering three factors: "the private interest that will be affected," "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 "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

Significantly, these factors did not originate with *Mathews*. Drawn from "prior decisions," *id.* at 334, they reflect the development over two centuries of standards that give meaning to the broad terms of the Due Process Clauses—terms that are arguably "cryptic and abstract," *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950), but which have always been understood to embody certain "fundamental requirements of fairness," *Morgan v. United States*, 304 U.S. 1, 19 (1938), shielding individuals from "arbitrary deprivation" of life, liberty, or property, *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 707 (1884).

When the Bill of Rights was ratified, the term "due process of law" had "existed in the English customary constitution for at least four hundred years." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1721-22

(2012). Closely associated with Magna Carta's guarantee that liberty could be infringed only "by the law of the land," *see* 2 Edward Coke, *Institutes of the Laws of England* 46, 50 (1681 ed.), due process is credited with playing "an essential role in the development of Anglo-American liberty," Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 Am. J. Legal Hist. 265, 266 (1975). Historically, the concept represented "a guarantee of minimal fairness" and "a proscription against arbitrary action by the king," who "had sometimes seized the property of his subjects . . . without the benefit of any legal process." Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 949-50; *see* Jurow, *supra*, at 266-71 (describing the landmark English statutes to which the concept of due process traces).

At the same time, this important safeguard was not reducible to a simple formula. To many Americans, due process meant "protection against arbitrary government in general." Rodney L. Mott, *Due Process of Law: A Historical and Analytical Treatise* 123 (1973 ed.). As colonists, they had "couched their grievances . . . in the terms of the English right of due process," arguing that Parliament could not "unilaterally alter their charter rights without the application of law in the course of a fair hearing." Chapman & McConnell, *supra*, at 1702-03. But lacking a "wholly fixed and precise content," due process "meant many things," which "varied with context and circumstance." Riggs, *supra*, at 991-92. Moreover, none of the early state constitutions contained "due process" language, opting instead for "law of the land" formulations, Mott, *supra*, at 14-16, with "considerable diversity in phrasing, context and meaning," Riggs, *supra*, at 974.

Against this backdrop, James Madison proposed adding to the Constitution the language that is now

the Fifth Amendment's Due Process Clause. That text was ratified in the form proposed by Madison without "any substantive comments about its meaning." Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 Okla. L. Rev. 1, 29 (2007). English precedent offered only a limited guide, because it reached only executive abuses, whereas due process in America was "understood to apply to legislative as well as executive and judicial acts." Chapman & McConnell, *supra*, at 1722; *see Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276 (1855). Unlike the Sixth Amendment, the Due Process Clause did not list specific required procedures, and unlike the Seventh Amendment, it did not expressly incorporate "the rules of the common law." U.S. Const. amend. VII. The Clause also "linked the obligation of due process to a deprivation of 'life, liberty, or property,'" a formulation that had not been used in England or America. Rosenthal, *supra*, at 34.

It was predicted, however, that if the Bill of Rights and its Due Process Clause were added to the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." 1 Annals of Cong. 457 (1789) (Joseph Gales ed., 1834) (James Madison); *cf. Moore v. Harper*, No. 21-1271, slip. op. at 11-14 (U.S. June 27, 2023) (describing the Founders' understanding of judicial review). Introducing his proposed amendments to Congress, Madison explained that the courts would "be an impenetrable bulwark against every assumption of power in the legislative or executive" and "resist every encroachment" on the liberties protected by the amendments. 1 Annals of Cong. 457 (1789). In resolving cases and controversies, federal courts would

inevitably have to decide what standards and formulas the Due Process Clause called for.

By the time Americans ratified the Fourteenth Amendment and extended due process restrictions to state governments, precedent had established that due process generally demanded "reasonable notice to those whose rights were implicated . . . , followed by a meaningful opportunity to be heard in defense of one's rights, and provision of a fair and neutral proceeding." Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339, 362 (1987). Traditional common law rules served as a baseline, but translating those rules to new contexts could require "analogy and considerations of policy." Matthew J. Steilen, *Due Process as Choice of Law: A Study in the History of a Judicial Doctrine*, 24 Wm. & Mary Bill Rts. J. 1047, 1071 (2016). Acknowledging the diversity of common law procedures for different situations, this Court recognized that the variation stemmed partly from differences in "the interest at stake." Eberle, *supra*, at 344; *see Murray's Lessee*, 59 U.S. at 282 (justifying a reduced level of process based on "imperative necessity").

After the Fourteenth Amendment's ratification, as American society grew and transformed, this Court was called upon to evaluate state procedural innovations under its Due Process Clause. In doing so, this Court noted the challenge of providing a definition of due process "broad enough to cover every case," *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 519 (1885), and gave increasing attention to the central goal of securing "a fair opportunity to be heard," *Hooker v. City of Los Angeles*, 188 U.S. 314, 318 (1903); *see Hurtado v. California*, 110 U.S. 516, 535 (1884) (a valid law "hears before it condemns," avoiding "arbitrary exertions of power" (quotation marks omitted)). This Court

also recognized that the type of process due can vary based on the nature of the interests affected, and that "[w]hat is fair in one set of circumstances may be an act of tyranny in others." *Snyder v. Massachusetts*, 291 U.S. 97, 117 (1934).

By the middle of the last century, the elements that would become the *Mathews* factors were readily apparent in this Court's decisions. *E.g.*, *Mullane*, 339 U.S. at 313-14 (explaining that "we must balance the individual interest" against "the vital interest of the State" and analyzing the likely value of additional procedures). Due process, this Court wrote, must account for "differences in the particular interests affected, circumstances involved, and procedures prescribed by [law] for dealing with them." *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 277 (1949); *see Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J.) ("The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, [and] the available alternatives . . . must enter into the judicial judgment."). Well before *Mathews* distilled these considerations into a three-part framework, therefore, it was established that due process "depends upon a complexity of factors," including "[t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

*Mathews* organized these factors into a focused, coherent framework that has become the "general approach" for evaluating due process claims. *Parham v. J.R.*, 442 U.S. 584, 599 (1979); *see Nelson v. Colorado*, 581 U.S. 128, 134 (2017). Its standards "normally determine" whether due process is satisfied, *City of Los Angeles v. David*, 538 U.S. 715, 716 (2003), and they can be applied to a wide range of issues.

In contrast, *Barker*'s speedy trial test is poorly suited to resolving due process questions—except, at most, challenges to "undue delay" in "the initiation" of legal proceedings. *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 564 (1983). Designed to address a Sixth Amendment right that is "generically different from any of the other rights enshrined in the Constitution," the *Barker* test requires that every dispute be resolved "on an ad hoc basis," with reference to "the peculiar circumstances of the case," using four factors that do not relate to each other through any clear formula, plus "such other circumstances as may be relevant" to the unique facts of that case. *Barker*, 407 U.S. at 519, 522, 530-31. None of *Barker*'s four factors squarely accounts for the risk of arbitrary decision-making without additional process, or the varying interests at stake in different types of government actions. And the test's ad hoc approach, which "necessarily depends on the facts of the particular case," *United States v. $8,850*, 461 U.S. at 565, hinders the development of clear rules governing particular categories of property deprivations.

At bottom, the *Barker* test addresses whether an unjustified delay in initiating a proceeding has prejudiced a defendant who sufficiently asserted his rights. When the question is instead whether more process is needed to deprive someone of their property (and if so, what kind of process), the *Mathews* factors are clearly the better choice. "By weighing these concerns, courts can determine whether a State has met the 'fundamental requirement of due process'—'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *David*, 538 U.S. at 715-16 (quoting *Mathews*, 424 U.S. at 333).

## ARGUMENT

### I. The *Mathews* Framework Reflects the Judiciary's Effort to Secure the Fairness and Reliability that Due Process Demands.

**A.** This Court's early comments on the meaning of due process emphasized its value in preventing arbitrary infringement of individual rights. The words of Magna Carta, incorporated by Americans into due process and "law of the land" guarantees, "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights." *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819). Those "great principles" protect individuals from having their property "taken away without trial, without notice, and without offence." *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829). They restrain legislatures as well as the executive. *Id.*; *see Bloomer v. McQuewan*, 55 U.S. 539, 553 (1852).

The essence of due process, this Court explained, was a requirement of basic procedural fairness, an opportunity to ensure accuracy in decisionmaking through participation by those whose interests were in jeopardy: "no man shall be condemned in his person or property without notice and an opportunity to make his defence." *Baldwin v. Hale*, 68 U.S. 223, 233 (1863).

This Court's most substantial discussion of due process before the Civil War confirmed that due process normally requires certain core protections that promote fair and reliable decisionmaking: it "generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." *Murray's Lessee*, 59 U.S. at 280. But these specific protections were not "universally" required, *id.*, and the Court acknowledged the challenges of fleshing out the Fifth

Amendment's guarantee, noting that the Amendment "contains no description of those processes which it was intended to allow or forbid," *id.* at 276.

To fill that gap, *Murray's Lessee* invoked the "settled usages and modes of proceeding" under English and American common law. *Id.* at 277. Even at the outset, however, the limitations of this approach were apparent. The summary procedure that *Murray's Lessee* upheld was not identical to any common law practice, but rather bore only "a very close resemblance" to one. *Id.* at 278. The new procedure was acceptable, this Court decided, because it did not "differ in principle" from established methods. *Id.* at 281-82. Thus, *Murray's Lessee* recognized the need for courts to identify the essence of traditional safeguards and translate them into novel contexts. Statutes departing from the common law had to "employ alternative procedures that the courts would regard as equivalently fair and appropriate." Chapman & McConnell, *supra*, at 1774.

This Court recognized, too, that variations in acceptable procedures were driven in part by the interests at stake. The government's recovery of debts from its own revenue collectors (at issue in *Murray's Lessee*) was subject to looser rules than cases involving ordinary debtors because "imperative necessity" had "forced a distinction between such claims and all others." 59 U.S. at 282. In other words, sometimes "the interest at stake merits less protection than the full procedural safeguards" normally required. Eberle, *supra*, at 344.

Historical analogues, therefore, needed to be "adapted to the present question by analogy and considerations of policy," Steilen, *supra*, at 1071, and "departures from the traditional common law procedures . . . scrutinized for fairness," Chapman & McConnell, *supra*, at 1775.

**B.** By the time the Fourteenth Amendment's Due Process Clause was adopted, "a considerable body of case law" on the meaning of due process under state constitutions had developed as well. Mott, *supra*, at 184. These cases often posed "a choice between summary and common-law procedural regimes." Steilen, *supra*, at 1056. Ultimately, "due process came to mean reasonable notice to those whose rights were implicated by state actions, followed by a meaningful opportunity to be heard in defense of one's rights, and provision of a fair and neutral proceeding to determine ultimately the status of the rights at issue." Eberle, *supra*, at 362. Those broad standards afforded considerable discretion, however, "to decide what constitutes fair notice, opportunity to be heard, and fair adjudicative procedures." Rosenthal, *supra*, at 27 n.110.

Summarizing the understanding of due process in 1868, Cooley's influential treatise explained that it embodied "ancient principles which shield private rights against arbitrary interference." Thomas M. Cooley, *A Treatise on Constitutional Limitations* 355 (1868). "Administrative and remedial process may be changed from time to time, but only with due regard to the old landmarks established for the protection of the citizen." *Id.* at 356. To interfere with title to one's property "or with his independent enjoyment of it," government actions must comport with "those principles of civil liberty and constitutional defence which have become established in our system of law." *Id.* At a minimum, that required "a hearing before condemnation, and judgment before dispossession." *Id.*

**C.** By including a Due Process Clause in the Fourteenth Amendment, its Framers sought to impose on state governments the same restraints that already bound the federal government. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. app. at 256 (1866) (Rep. Baker).

Because "it was generally understood that the courts had already articulated the parameters of due process," the Framers "made no attempt to create their own definition." Rosenthal, *supra*, at 36, 42. When questioned about the meaning of due process, leading advocate Representative John Bingham simply replied that "the courts have settled that long ago, and the gentleman can go and read their decisions." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866). There was no substantial debate in Congress or the ratifying states about the meaning of due process. Mott, *supra*, at 164. But scholars suggest that, as "a technical matter of legal interpretation," the Framers "preferred to leave it to the decisions of the courts." *Id.* at 165; *see* Rosenthal, *supra*, at 42-43 (in light of the case law, "surely the Framers could not have doubted that due process jurisprudence would continue to evolve by common-law methods").

In the late nineteenth century, this Court addressed how to apply the Fourteenth Amendment's procedural safeguards to state legislation. The Court reiterated the difficulty of defining due process "in terms which would cover every exercise of power thus forbidden to the State." *Davidson v. City of New Orleans*, 96 U.S. 97, 104 (1877). In light of that challenge, this Court concluded that "ascertaining . . . the intent and application of such an important phrase in the Federal Constitution" should be achieved "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require." *Id.* Despite this flexibility, however, property deprivations needed to be accompanied by a core set of procedures securing fairness and reliability, tailored to the interests at stake—including notice, "reasonable time to object," and "a full and fair hearing." *Id.* at 105.

The leading case from this era, *Hurtado v. California*, 110 U.S. 516 (1884), grappled with the challenges of retaining essential due process safeguards amid societal transformation and procedural innovation. While *Hurtado* held that novel procedures lacking the sanction of settled usage could satisfy due process, *id.* at 528, it made clear that such innovations could not permit "arbitrary exertions of power" or transgress "'certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized,'" *id.* at 535-36 (quoting *Brown v. Bd. of Levee Comm'rs*, 50 Miss. 468, 479 (1874)). Due process implied "a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." *Id.* at 535 (quoting *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 581 (1819) (argument of Daniel Webster)).

Although the Court disclaimed any "pure historical approach," therefore, "the types of procedures traditionally required shed light on the general values that the clause protects." Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 468-69 (1986). Newly devised procedures could satisfy due process only if they adequately protected the individual interest in fair, reliable proceedings. The innovation upheld in *Hurtado*, for instance, was approved because "it carefully considers and guards the substantial interest of the prisoner." *Hurtado*, 110 U.S. at 538.

**D.** A pair of important early twentieth-century decisions reflects this Court's increasing focus on the nature of the interests at stake and the risk of error without additional procedures. In *Londoner v. City & County of Denver*, 210 U.S. 373 (1908), the Court invalidated an assessment levied on specific landowners for the costs of paving a street. The assessment

violated due process because the landowners, although allowed to file written objections, "were not afforded an opportunity to be heard upon them." *Id.* at 385. The "essence" of an adequate hearing, in this context, included "the right to support [one's] allegations by argument, however brief: and, if need be, by proof, however informal." *Id.* at 386.

In contrast, *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), illustrated how the calculus could change when the balance of interests shifted. Colorado tax authorities, concluding that properties in Denver were systematically undervalued, increased the value of *all* taxable property there by 40 percent. While acknowledging a risk of error like that in *Londoner* ("injustice may be suffered if some property in the county already has been valued at its full worth," *id.* at 444), this Court found that the government's heightened needs merited a different outcome. When a rule applied so broadly, it was "impracticable" that "everyone should have a direct voice in its adoption." *Id.* at 445. "There must be a limit to individual argument in such matters if government is to go on." *Id.*

**E.** Although twentieth-century decisions sometimes took an "intuitive" and "ad hoc, open-ended approach" to due process, implicit in many decisions were the components of the more "detailed" and "somewhat mechanical" framework later spelled out in *Mathews*. Redish & Marshall, *supra*, at 470-71. By midcentury, those components were increasingly explicit.

For instance, in *FCC v. WJR, The Goodwill Station*, 337 U.S. 265 (1949), which addressed whether agencies must always permit oral argument by affected parties on questions of law, the Court acknowledged "the value of oral argument" in promoting sound decisionmaking, but explained that its necessity must

depend on "the substantive nature of the asserted right or interest involved," because different procedures were appropriate for resolving "interests widely varying in kind." *Id.* at 275-77. Rather than offer "broadside generalizations" about when oral argument is essential, this Court opted for a case-by-case approach, "through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them." *Id.* at 277.

This context-specific assessment of the interests affected and the adequacy of the prescribed procedures was also evident in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which concerned the measures a trustee must take to notify beneficiaries when settling the accounts of a common trust fund. The Court emphasized "the vital interest of the State" in facilitating settlement of such funds, and that a due process rule "which would place impossible or impractical obstacles in the way could not be justified," but it explained that "[a]gainst this interest of the State we must balance the individual interest" of out-of-state beneficiaries in their property rights. *Id.* at 313-14. Those rival imperatives called for notice "reasonably calculated," but not certain, to apprise beneficiaries of the settlement. *Id.* at 314. Thus, the private interests affected, the government's interest, and the likely value of additional process were all considered. Where potential beneficiaries could not be identified, notice by publication alone was sufficient because further efforts would provide little value. *Id.* at 317. But where the value of additional process was likely higher—with respect to known beneficiaries—more was required. *Id.* at 318.

Another set of cases illustrated this Court's recognition that the adequacy of process hinged in part on

the private interests at stake. In *Morgan v. United States*, 304 U.S. 1 (1938), this Court insisted on prior notice to affected parties of an order setting maximum market rates, emphasizing that "the owners depended for their livelihood" on "the rates for their services." *Id.* at 20. Likewise, where the Attorney General's designation of organizations as Communist would inevitably "cripple the functioning and damage the reputation of those organizations," *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (Burton, J.), making those designations without an opportunity to contest them was "so devoid of fundamental fairness as to offend the Due Process Clause," *id.* at 161 (Frankfurter, J.). In resolving due process questions, "[t]he precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, [and] the available alternatives . . . must enter into the judicial judgment." *Id.* at 163.

By contrast, in a purely investigative administrative hearing, where the risk of public opprobrium or other harm to subpoenaed witnesses was only "conjectural," and "the investigative process could be completely disrupted" by trial-like proceedings, making "a shambles of the investigation and stifl[ing] the agency in its gathering of facts," judicial-type procedures were not required. *Hannah v. Larche*, 363 U.S. 420, 443-44 (1960). As this Court summarized, whether due process requires particular procedures "depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." *Id.* at 442.

**F.** By the time of *Mathews*, therefore, a due process framework had become well established which sought to accommodate the relevant interests while assessing the potential value of additional procedures.

Using that framework, this Court held, for example, that a debtor's wages could not be garnished without prior notice and an opportunity to be heard. Although there would eventually be a chance to contest the alleged debt in the creditor's suit, "in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have." *Sniadach v. Fam. Fin. Corp. of Bay View*, 395 U.S. 337, 339 (1969). Employee wages represented "a specialized type of property presenting distinct problems," and their garnishment "may impose tremendous hardship on wage earners." *Id.* at 340. Conversely, there was no evident need for any "special protection to a state or creditor interest." *Id.* at 339. Because affording a prior hearing could prevent erroneous wage garnishments, it was required by due process. *Id.* at 342.

The question in *Sniadach*, as here, was whether more process was needed to deprive someone of their property pending a final determination. This Court answered that question by evaluating the interests at stake and the potential value of additional process. So too whenever similar questions arose. *See Goldberg v. Kelly*, 397 U.S. 254, 262-67 (1970) (considering welfare recipients' interest in continued benefits, the value of a hearing in preventing "erroneous termination," and the countervailing "governmental interest in summary adjudication"); *Morrissey v. Brewer*, 408 U.S. 471, 481-84 (1972) (considering "the interest of [a] parolee in his continued liberty," the value of a hearing in ensuring "that [a] finding of a parole violation will be based on verified facts," and the state's interest in swiftly returning violators to prison); *see also* Pet. Br. 21-24 (describing other cases applying the same framework).

Thus, when this Court decided *Mathews*, which likewise concerned whether more process was needed

to deprive someone of their property "pending review," 424 U.S. at 333, the Court did not write on a blank slate. Rather, it relied on its "prior decisions" indicating that "identification of the specific dictates of due process generally requires consideration of three distinct factors." *Id.* at 334-35. And importantly, *Mathews* explained, "more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants." *Id.* at 348. The "ultimate" question is what procedures are needed "to assure fairness." *Id.*

## II. The *Mathews* Due Process Framework, Not the *Barker* Speedy Trial Framework, Should Be Used to Resolve Cases Like This One.

The *Mathews* framework has proven durable and versatile. Its three factors "normally determine" whether due process is satisfied, *David*, 538 U.S. at 716, and have been used to resolve a wide range of questions in diverse contexts. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431 (2011) (right to counsel in civil contempt proceedings in child support cases); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (opportunity for citizens held as enemy combatants to contest the basis for their detention); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993) (right to notice and hearing before seizure of real property pursuant to civil forfeiture); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (legitimacy of statutory limit on fees for attorneys representing individuals seeking veterans benefits); *Santosky v. Kramer*, 455 U.S. 745 (1982) (standard of proof required to terminate parental rights); *Mackey v. Montrym*, 443 U.S. 1 (1979) (opportunity for hearing before suspension of driver's license based on refusal to take breath-analysis test); *Parham*, 442 U.S. 584 (procedures required before

committing minors to mental hospital); *see also* Pet. Br. 19-21.

In short, the *Mathews* framework was developed to implement the "elusive" but essential guarantees of due process, *Hannah*, 363 U.S. at 442, and is firmly established as the "general approach for testing challenged state procedures under a due process claim," *Parham*, 442 U.S. at 599. While that general approach may not be appropriate for every due process question, *cf. Medina v. California*, 505 U.S. 437, 445 (1992), consistency and transparency are enhanced by hewing to a single framework whenever feasible.

In contrast, the speedy trial test fashioned in *Barker v. Wingo*, 407 U.S. 514 (1972), is unsuited to resolving due process questions. At most, the *Barker* test is appropriate in challenges to "undue delay" in "the initiation" of legal proceedings, given the parallel between such challenges and speedy trial claims. *United States v. $8,850*, 461 U.S. at 564. Beyond that narrow exception, however, a test developed to enforce an entirely different constitutional provision is inadequate when the right to due process is at stake.

Significantly, the Sixth Amendment right to a speedy trial "is generically different from any of the other rights enshrined in the Constitution." *Barker*, 407 U.S. at 519. Those differences shaped the *Barker* test. As this Court explained, in some circumstances deprivation of a speedy trial "may work to the accused's advantage." *Id.* at 521. Moreover, "the only possible remedy" for a deprivation is "the unsatisfactorily severe remedy of dismissal of the indictment." *Id.* at 522. And although the Speedy Trial Clause seems to point toward a single issue—speed—this Court decided that it "cannot definitely say how long is too long," and that is "impossible to determine with precision when the right has been denied." *Id.* at 521.

Thus, "because the speedy trial right is so slippery," the *Barker* test requires courts to resolve every dispute "on an ad hoc basis," with reference to "the peculiar circumstances of the case." *Id.* at 522, 530-31. Courts must examine those unique circumstances by considering at least four case-specific factors, none of which is either "necessary or sufficient" to find a violation, and all of which "must be considered together with such other circumstances as may be relevant" in that particular case. *Id.* at 533.

Unlike the *Mathews* framework, which operates at a higher level of generality by addressing "categor[ies] of claimants," 424 U.S. at 348, the *Barker* test is ill-equipped to establish clear standards for particular types of property deprivations. Every challenge must be resolved by appraising the equities of the individual dispute, considering a mix of defined and undefined factors without any clear formula for how they interact with each other. In each challenge, "the determination necessarily depends on the facts of the particular case." *United States v. $8,850*, 461 U.S. at 565. While such an approach may be inevitable under the Speedy Trial Clause, extending it unnecessarily to the Due Process Clause wastes resources and frustrates the development of well-defined guidelines. *See Walters*, 473 U.S. at 321 (due process "does not turn on the result obtained in any individual case," but rather on the fairness of procedures "'as applied to the generality of cases'" (quoting *Mathews*, 424 U.S. at 344)).

Worse, the *Barker* test does not squarely address the nature of the interests at stake, or the risk of error, in due process disputes. At best, its "[l]ength of delay" and "reason for the delay" factors, *Barker*, 407 U.S. at 530, can be conscripted to serve as rough proxies for the individual and government interests in particular cases. *See, e.g.*, *United States v. $8,850*, 461 U.S. at

565 ("Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden."); *id.* at 569 ("the Government's diligent pursuit of pending administrative and criminal proceedings indicate strongly that the reasons for its delay in filing a civil forfeiture proceeding were substantial"). *Barker*'s other two factors—"the defendant's assertion of his right" and "prejudice to the defendant," 407 U.S. at 530—are simply incongruous in most due process cases. Meanwhile, the *Barker* test cannot account for what may be the most critical consideration in any due process challenge: "the risk of an erroneous deprivation" and the likely value of "additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335.

Finally, because the *Barker* test was fashioned against a backdrop with only one possible remedy—dismissal—it cannot accommodate both the individual and government interests in light of the potential value of additional procedures. *Compare Goldberg*, 397 U.S. 254 (requiring pre-termination evidentiary hearing but finding informal procedures sufficient), *with Mathews*, 424 U.S. 319 (requiring only pre-termination written submissions, followed by a post-termination evidentiary hearing). Nor can the *Barker* test account for the varying interests at stake in different types of government action. *Compare Fuentes v. Shevin*, 407 U.S. 67 (1972) (prohibiting seizure of goods without prior hearing under replevin process initiated by private creditors), *with Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (permitting hearing to occur after seizure, based on special government need for prompt action), *and James Daniel Good*, 510 U.S. 43 (declining to extend *Calero-Toledo* to seizures of homes, based on heightened private interest and reduced government need for swift action).

Thus, while both *Mathews* and *Barker* involve "balancing," the *Mathews* framework is a more focused inquiry that accounts for the nature of the interests at stake, addresses the fairness and reliability required by due process, and avoids the need for ad hoc, fact-specific resolution of every dispute. It is the better choice by far in cases like this one.

## CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

*Counsel for Amicus Curiae*

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* Counsel of Record