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 AMICUS CURIAE OF GOLDWATER INSTITUTE, PACIFIC LEGAL FOUNDATION AND MANHATTAN INSTITUTE 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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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Goldwater Institute (GI) was established in 1988 as a nonpartisan public policy foundation devoted to principles of limited government, individual freedom, and constitutional protections. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates cases and files amicus briefs when its or its clients' objectives are implicated.

Among GI's priorities is the protection of individual rights against the unjustified, imprudent, and unfair use of asset forfeiture. To that end, GI has represented parties in forfeiture cases in federal and state cases across the country, *see*, *e.g.*, *Sanders v. Town of Mooresville*, No. 22-2290 (4th Cir. filed Dec. 20, 2022) (pending), including many that did not come to court because as soon as GI announced its representation of the victims, prosecutors dropped their efforts to seize the property—which demonstrates how prosecutors use forfeiture against unsophisticated parties in hopes of enriching themselves rather than actually prosecuting crimes. *See*, *e.g.*, *The Government Stole Kevin's Jeep. Goldwater Got It Back*, In Defense of Liberty Blog (Aug. 27, 2020)[2]; *Massachusetts Grandmother Finally Gets Her Car Back from the Government*, In Defense of

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[1] No counsel for any party authored this amicus brief in whole or in part, and no person or entity, other than amici, their members, or counsel, made any monetary contribution to the preparation or submission of this brief.

[2] https://www.goldwaterinstitute.org/the-government-stole-kevins-jeep-goldwater-got-it-back/.

Liberty Blog, (Sept. 9, 2021)[3]; *The Government Stole Their Money. Goldwater Got It Back*, In Defense of Liberty Blog (Oct. 28, 2022).[4] GI has also published important scholarship on forfeiture, *see* Sandefur, *How Asset Forfeiture Undermines Government's Legitimacy*, Goldwater Institute Blog (Mar. 23, 2021)[5]; Sandefur & Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* 126–31, 157–58 (2d ed. 2016). GI's staff and clients have testified before Congress and state legislatures in support of federal forfeiture reform,[6] and GI co-authored and helped enact Arizona's vital new protections against asset forfeiture, SB 2810 (2019).

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. PLF has extensive experience litigating to protect private property rights under multiple provisions of the U.S. Constitution. *See*, *e.g.*, *Tyler v. Hennepin County*, No. 22-166 (U.S. May 25, 2023) (taking and excessive fines); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021)

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[3] https://www.goldwaterinstitute.org/massachusetts-grandmother-malinda-harris-finally-gets-her-car-back/.

[4] https://www.goldwaterinstitute.org/the-government-stole-their-money-goldwater-got-it-back/.

[5] https://www.goldwaterinstitute.org/how-policing-for-profit-undermines-governments-legitimacy/.

[6] *See*, *e.g.*, *Forfeiting Our Rights: The Urgent Need for Civil Asset Forfeiture Reform*, Subcomm. On Civ. Rts. & Civ. Liberties, Dec. 8, 2021, Serial No. 117-57, https://www.congress.gov/event/117th-congress/house-event/LC67788/text?s=1&r=14.

(taking); *Knick v. Twp. 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). PLF is alarmed by the 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 public interest as neutral arbiters to interested parties with a stake in the outcome.

The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has sponsored scholarship and filed briefs supporting economic freedom and property rights. *See*, *e.g.*, *Tyler, supra*; *Sheetz v. County of El Dorado*, No. 22-1074 (U.S. May 4, 2023).

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below puts the square peg of the Speedy Trial Clause into the round hole of a pretrial probable cause matter, which is properly a Due Process of Law question. That's problematic both as a matter of Originalism and as a matter of constitutional theory. The Constitution's authors were familiar with forfeiture; they considered it unconscionable, and it was actually one cause of the Revolution. Certainly they never anticipated that the Speedy Trial Clause would

be adapted to determine whether a property owner has a right to challenge the government taking her property and keeping it indefinitely, pending the ultimate determination of the government's authority to take it.

Instead, the pretrial detention of property, like the pretrial detention of persons, falls within the Due Process of Law Clause—which, after all, is explicitly addressed to "depriv[ations]" of "property," and which imposes an across-the-board prohibition against government acting arbitrarily in any respect, including in pretrial detentions. Therefore, the test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), is more appropriate here.

Providing owners an opportunity to contest government's confiscation of their property before the ultimate forfeiture determination also leads to better outcomes for the public and for law enforcement itself. Letting government take and keep property with minimal accountability undermines democratic legitimacy and ruins the public's trust in the police. Recent statutory reforms show that giving forfeiture a pretrial retention hearing will not handicap, but will actually improve, law enforcement.

ARGUMENT

I. The Due Process of Law principle, not the Speedy Trial standard, should apply to *pendente lite* retention of seized property.

A. Applying Speedy Trial doctrine in pretrial property detention matters unnecessarily distorts constitutional protections.

1. Pretrial detention and adjudication of guilt are two different things.

Using the "speedy trial" standard in the context of a property owner's right to a pretrial determination regarding government's authority to hold seized property *pendente lite* leads to several logical and doctrinal conundrums.

First, the questions addressed by the Speedy Trial and Due Process of Law Clauses are different. The latter merely regulates the timing of an ultimate determination of guilt—the legal proceeding as a whole, so to speak—whereas the former applies to *every* stage of a legal proceeding, including *pendente lite* matters.

The reason the Constitution imposes these two different standards is that there's a difference between holding persons or property during litigation, and a court's ultimate determination of guilt, liability, etc. For example, in the pretrial detention of the accused, the Fourth Amendment requires a probable cause hearing; probable cause is "a practical, nontechnical conception affording the best compromise that has

been found . . . [between] unduly hamper[ing] law enforcement [and] . . . leav[ing] law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Likewise, the law distinguishes between the ultimate adjudication of claims and the burdens the state can impose on the parties before those claims are resolved: for example, in bail proceedings, *see United States v. Salerno*, 481 U.S. 739, 746 (1987), proceedings in which an owner can retain property *pendente lite* by posting a bond, 16 U.S.C. § 2409(c), or, in the realm of eminent domain, the "quick take" procedure that lets government seize property immediately and adjudicate the constitutionality of the taking later. *See generally Mayor & City Council of Baltimore City v. Valsamaki*, 916 A.2d 324 (Md. 2007).

The reason is obvious: for government to take and keep property *pendente lite* imposes a different injury on the owner than does final adjudication. If government seizes a business's assets and keeps them until a court renders judgment months or years later, the business could be ruined even if it eventually wins the case and the court orders the assets returned. *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 901 (2d Cir. 1992) ("Although the tangible property of the claimant can be returned post-trial, should the district court's assessment of the government's case prove to be incorrect, the business itself would at that point be drained of any good will by the summary closing, because the old customers would by then have resorted to new places.").

Property deteriorates and depreciates. A forfeiture determination can take a long time. During that time, property owners are deprived of their possessions—perhaps wrongfully. To let government seize and keep property during that period, and give the owner no pretrial mechanism for determining whether that *pendente lite* detention is proper, on the theory that the owner can get a "speedy" determination of the government's ultimate right to take, fails to factor in the *distinct* costs imposed on the owner by the long period of pretrial deprivation.

Consider the case of Arizona handyman Kevin McBride. In 2020, Tucson police officers confiscated his Jeep—as well as his tools, which were inside—because his girlfriend borrowed it and drove to a convenience store, where she sold undercover officers $25 worth of marijuana. McBride was never charged with any crime, but when he wrote the police to ask for his Jeep back, they told him they would return the Jeep if he paid them $1,900. As a carpenter, McBride could not make a living without his tools and his Jeep. Fortunately, once he obtained legal counsel who sent a second demand to the police department, officers immediately returned the Jeep without charge—never explaining why they dropped their demand for $1,900. *See The Government Stole Kevin's Jeep. Goldwater Got It Back*, *supra.*

Kevin obviously suffered an injury from the interim confiscation of his property, separate and apart from the question of whether the government could ultimately keep it. One can easily imagine how much

worse the situation is when the property is someone's home. *See*, *e.g.*, *In re Joseph Parham*, No. CV2020-016788 (Maricopa Cnty. Super. Ct. filed Dec. 18, 2020) (state seeking seizure of a widow's home despite her being innocent of any crime). To hold that constitutional concerns are adequately addressed by the owner's right to an ultimate trial on the government's right to take requires blinding oneself to the distinct harms that *pendente lite* detention of property causes.

True, there are circumstances that can warrant the government holding property *pendente lite*—for example, to prevent it being destroyed or hidden. *See Ferrari v. Cnty. of Suffolk*, 845 F.3d 46, 57–58 (2d Cir. 2016). But these are the same kinds of reasons that justify keeping accused *people* in jail pending trial—and in those cases, the person is entitled to a prompt pretrial determination of *that* question. *Gerstein v. Pugh*, 420 U.S. 103, 111–16 (1975). The fact that the defendant is entitled to a "speedy trial" is not considered sufficient in those cases, because being kept in jail pending trial is a separate harm aside from the ultimate determination of guilt.

2. Using the Speedy Trial instead of Due Process of Law Clause renders the two clauses redundant.

Another reason the Speedy Trial analysis is inapposite is that it effectively renders the two rights redundant, when people are entitled to both. The Due Process of Law Clause, as explained below, is a broadly

applicable ban on all arbitrary government action, which means that unreasonable delay by the government could indeed violate both Clauses, but that doesn't make the two interchangeable. The Eleventh Circuit's approach would imply that in criminal prosecutions, too, people have no right to initial probable cause hearings as long as they have a chance at the trial itself to challenge their arrest, *cf. Krimstock v. Kelly*, 306 F.3d 40, 68 (2d Cir. 2002), or that no probable cause hearing is required before issuing a search warrant, as long as the defendant eventually gets to challenge the evidence when offered at trial. That cannot be the rule.

Further, the idea that the timing of an owner's right to challenge the seizure of property is governed by Speedy Trial principles instead of Due Process of Law principles inverts the so-called "more-specific-provision rule." That rule says that "'[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (citation omitted). But the Eleventh Circuit's approach does the opposite: it says that as long as an amendment (the Eighth) which admittedly does *not* "explicitly" apply can be viewed as *analogous*, its underlying *principles* can *substitute* for the requirements of the Amendments (the Fifth/Fourteenth) which *do* explicitly apply to "depriv[ations] of . . . property."

To "analogize" the Speedy Trial Clause to the Due Process of Law Clause, as *United States v. $8,850 in U.S. Currency*, did, 461 U.S. 555, 564 (1983), conflicts with the theory behind modern forfeiture law. "Trial" in the Speedy Trial Clause refers to the determination of the rights and liability of a human individual charged with a crime. But modern forfeiture is purportedly a *civil* proceeding against *property*, relying on the "personification fiction." Even assuming that fiction made sense—it doesn't, *see* Part III below—the conclusion would be that the inanimate object, not the owner, has the right to the speedy trial. Obviously inanimate objects cannot form a *mens rea* or commit crimes, so they cannot be "accused" or "tried."[7] That means the Speedy Trial right cannot apply to them.[8]

And while modern forfeiture purports to be a civil proceeding, the Speedy Trial Clause does not apply to civil proceedings—even those that can result in confinement. *See Argiz v. U.S. Immigr.*, 704 F.2d 384, 387 (7th Cir. 1983); *United States v. Commey*, 452 F. App'x

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[7] In fact, even under the superstitious theory of deodand, courts never purported to put inanimate objects on trial; they only had juries examine the circumstances and determine the value of the objects. *See* Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. Penn. L. Rev. 696, 729 (1915).

[8] Also, because the Speedy Trial right is a personal right, the defendant can decide whether (and how) to assert or waive it. *Chinn v. United States*, 228 F.2d 151, 153 (4th Cir. 1955); *Danziger v. United States*, 161 F.2d 299, 301 (9th Cir. 1947). It's not only nonsensical to ascribe personal rights to inanimate objects; it's unclear who would have standing to assert or waive that right on an object's behalf.

21, 23 (2d Cir. 2011). Yet even so, applying the "personification fiction" here would lead to the conclusion that the property should have—so to speak—a right to a prompt pretrial detention hearing—which is the question presented.

Of course, the *$8,850* case did not literally apply the Speedy Trial Clause—it just borrowed from that Clause.[9] But it did so as part of a Due Process of Law determination. And in doing so, it said that because the latter Clause's requirements are flexible, "the context of the particular situation" may justify holding the government to a *stricter* standard in a particular case. 461 U.S. at 565 n.14. Nonetheless, subsequent decisions have erroneously relied on that case to hold that Speedy Trial is a blanket—non-flexible—rule, and that the availability of a timely forfeiture determination "affords a claimant all the process to which he is due." App. 8a. That's an error this Court should correct.

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[9] It was also anomalous for the *$8,850* Court to look to the Sixth Amendment for an analogy instead of to the Fourth Amendment, given that the latter is specifically addressed to the "seizure[ ]" of "things." U.S. Const. amend. IV. The Fourth Amendment, however, requires a determination of "probable cause"—and, of course, some means for determining *before trial* what evidence is admissible.

B. The text and theory of the Constitution support using Due Process of Law as the guide in cases involving property deprivations.

It makes more sense to follow *Mathews*, both for textual reasons and for reasons of constitutional theory.

As a textual matter, the Due Process of Law Clause explicitly applies to cases involving the "depriv[ation]" of "property." U.S. Const. amend. V. Again, under the "more specific provision rule," it should take precedence. Also, while the Speedy Trial Clause applies only to "criminal" "trial[s]," *id.* amend. VI, the Due Process of Law Clause applies to *all* legal proceedings, including pretrial proceedings.

The latter Clause's principles are more applicable as a matter of constitutional theory, also. It forbids *all* arbitrary—i.e., unjustified—takings of life, liberty, or property. *See generally* Sandefur, *The Conscience of the Constitution* 71–120 (2014). The critical part of the Clause is the phrase "of law." It means that not just any "process" will satisfy—it must be a process *of law*, meaning that when government takes life, liberty, or property, it must not do so in an arbitrary manner (because arbitrariness is the opposite of "law"). A coin-toss, for example, would not be "due process *of law,*" even if it was equally used in every case. For a process to qualify as "law," it must meet certain *substantive* standards—e.g., it must be rational, non-contradictory, and must serve the public welfare. *See generally* Fuller,

The Morality of Law 33–94 (rev. ed. 1969); *cf. Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874) (arbitrary government action "is not legislation" but "a decree under legislative forms"). As *Hurtado v. California*, 110 U.S. 516, 536 (1884), recognized, "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law."

True, the particular meaning of "due process of law" is "flexib[le] and [has a] capacity for growth and adaptation" depending on circumstances, *id.* at 530, and that flexibility is built into the *Mathews* test. 424 U.S. at 334–35. That test employs multiple factors, including the burden on the individual and the possible need for alternative procedures. Its flexibility has rendered it neither toothless nor a straitjacket for law enforcement. It has been considered adequate in cases involving pretrial detention of persons, *see*, *e.g.*, *Schall v. Martin*, 467 U.S. 253, 263–64 (1984), where the accused is entitled to a pretrial determination of probable cause. There's no reason it cannot also apply to the pretrial detention of property.

The Speedy Trial test, as adapted to the forfeiture context, requires a court to weigh four factors: the length of the delay in bringing the trial, the reason for that delay, the circumstances of the owner's assertion of her rights, and the prejudice to the owner. App. 70a. But the first factor—length of the delay—really controls, because only if the court thinks the delay is excessive does it even apply this test. *Id.* The Eleventh Circuit typically draws the line at a year. *United States*

v. Oliva, 909 F.3d 1292, 1298 (11th Cir. 2018).[10] In other words, the government can seize someone's house, car, or tools and keep them for a year without even triggering a speedy trial analysis, and thus without any meaningful accountability.

The Due Process of Law test, by contrast, requires weighing the burden on the individual, the risk of an erroneous determination of the government's authority, the need, if any, for different procedural protections, and the government's interest. *Brown v. District of Columbia*, 115 F. Supp.3d 56, 64 (D.D.C. 2015). This test does not start with a *de facto* one-year presumption in favor of the government. It also more thoroughly considers the impact on the property owner than does the Speedy Trial test. While the latter includes consideration of prejudice, it places the burden on the defendant to show how a delay has been prejudicial. *Jumaev*, 20 F.4th at 541. Also, it defines prejudice in terms of preventing oppressive incarceration, minimizing anxiety to the defendant, and ensuring against impairment of the defense—considerations far better suited to a criminal prosecution than a deprivation of property. *Id.*

Mathews' "burden" prong, in contrast, considers the impact on the individual's circumstances more broadly—which is as it should be, since it's a test for

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[10] The Tenth Circuit recently held that a six-year delay did not violate a defendant's speedy trial rights. *United States v. Jumaev*, 20 F.4th 518, 541 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 245 (2022).

detecting any government arbitrariness, rather than focusing specifically on trial timing.

Brown illustrates the difference. That case, like this one, involved police seizing cars from innocent owners, under laws that gave owners no right to a pretrial retention determination. 115 F. Supp.3d at 59, 61–62. The court applied the *Mathews* test. First, the burden on private interests, which "point[ed] squarely towards the need for a hearing," because "[e]ven in a city with public transportation options, a car may be a person's only means to earn a livelihood, attend school, see family, [etc.]. . . . For an innocent owner who loses a car for months without a means to contest the seizure, the loss is even more significant." *Id.* at 66. Next, the risk of error—which, the court said, was serious "because the validity of traffic stops 'rests solely on the arresting officer's unreviewed probable cause determination,'" and because the police "retain the value of what they seize." *Id.* at 67 (citation omitted).

As for possible alternatives, a prompt retention hearing would redress these problems and "reduce the costs to owners of an erroneous seizure—such as vehicle insurance and finance charges—that *cannot be mitigated after the fact*." *Id.* (emphasis added). Finally, the government's interest: in preventing targeted property from being hidden or destroyed was obviously valid, but "some means short of retention, such as a bond or restraining order," would usually suffice. *Id.*

The Speedy Trial test would have come out differently. The pivotal burden in that test is "prejudice,"

which specifically means the burden on the accused's capacity to defend herself from the criminal charge, not the impact on such interests as the ability to earn a livelihood, see family, etc. But even interpreting "prejudice" in an "analogous" way, the other factors would not weigh the costs and benefits of alternative procedures, as the *Mathews* test does. And, of course, the Speedy Trial test is far more tolerant of delay. The *Brown* court recognized the considerable burden of "los[ing] a car for months," *id.* at 66, but a months-long delay just doesn't trigger the Speedy Trial analysis *at all* in the Eleventh Circuit.

Allowing police to hold seized property *pendente lite* without giving owners a meaningful opportunity to be heard creates an incentive for officers to manipulate citizens and pressure them into waiving their criminal procedure rights. As Assistant U.S. Attorney Gary Brown observes, government's power to keep property during litigation enables prosecutors to effectively force the owner to abandon their Fifth Amendment right against self-incrimination—because in order to get back their property right away, they accede to discovery requests, meaning their answers can be used against them in parallel criminal proceedings. Brown, *Reforming Civil Forfeiture Law: The Case for an Automatic Stay Provision*, 67 St. John's L. Rev. 705, 714 (1993). Prosecutors know well enough that "[i]f the Government brings the civil forfeiture first without also filing criminal charges, it puts property owners in a Fifth Amendment vise"—and they take full

advantage of it. Guerra, *Between A Rock and A Hard Place*, 15 Ga. St. U. L. Rev. 555, 598–99 (1999).

II. Fixing the asset-forfeiture regime will benefit everybody.

A. The current asset-forfeiture regime is unsustainable.

It is worth emphasizing that **80 percent of forfeitures are not accompanied by any criminal prosecution**. Blumenson & Nilsen, *Policing for Profit*, 65 U. Chi. L. Rev. 35, 77 (1998). Government typically takes property—usually small amounts, Knepper, et al., *Policing for Profit* 6 (3d ed. 2020)[11]—from people who cannot afford representation, and puts the burden on them to seek its return. If they try, they must waive their constitutional right against self-incrimination. An unknown number of victims—probably most—don't bother trying. The agency that seized the property then keeps it for its own use, never giving the owner a trial.

This deprives innocent people of their possessions and enriches government agencies outside of taxation—which means, outside the political accountability that goes with taxation. This encourages law enforcement to bend or break the rules and undermines government's legitimacy in the eyes of the populace.

The iniquities of the current forfeiture regime are well documented. *See generally id*. What's sometimes

[11] https://ij.org/report/policing-for-profit-3/.

overlooked is that in addition to wrongfully depriving people of property, forfeiture also enables law enforcement to fund itself "off-budget"—that is, to pay costs based on seized assets instead of through the allocation of tax dollars, and without meaningful review by elected representatives.[12] Thus, "civil forfeiture has in recent decades become widespread and highly profitable," *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting denial of certiorari), that many law enforcement agencies now consider themselves dependent upon it. Reversing cause and effect, they often enforce the law to gain revenues, rather than using revenues to enforce the law. Worrall, *Addicted to the Drug War*, 29 J. Crim. Just. 171, 179 (2001).

And whereas the burden of taxation is spread across the whole populace, forfeiture's burden isn't. It works like an arbitrary, largely invisible tax on whichever individuals officers target. That encourages a public perception that officers are raiders profiting off the people, rather than peacekeepers promoting the public interest.

What's more, the lack of oversight as to how forfeiture proceedings are spent results in improper expenditures and sometimes even corruption. A 2014 *Washington Post* study found that police spent most

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[12] In early America, law enforcement was not always funded by private revenue. This was replaced by the current system because private funding proved "fatally inconsistent with republican and liberal principles," and because "mass interest-group rivalry . . . made it untenable to have officers cater to a particular 'customer class.' " Parrillo, *Against the Profit Motive* 359 (2013).

seized funds on computers and building improvements—items that should be funded by taxation. It also revealed questionable expenditures, such as a $637 coffee maker and $225 for a clown for a party. Cuadra, et al., *Spending Seized Assets*, Wash. Post (Oct. 11, 2014)[13]; Lind, *How Police Can Take Your Stuff, Sell It, And Pay for Armored Cars with The Money*, Vox.com (Mar. 28, 2016).[14]

One Georgia sheriff's office spent seized money on a sports car, a boat, and gas for his employees' personal vehicles. All Things Considered, *Sheriff Under Scrutiny over Drug Money Spending*, NPR, at 12:49 (June 18, 2008).[15] A Florida department spent tens of thousands of dollars on trips to Chicago, Las Vegas, and Los Angeles, where they rented luxury cars, attended banquets, and held beach parties. Clarke, *Policing for Profit*, Prison Legal News (July 28, 2017).[16] But more commonly, forfeiture funds salaries and equipment without the democratic oversight that accompanies taxation and appropriations. Before Arizona's recent reforms were adopted, 34 percent of forfeiture proceeds went to paying law enforcement salaries. *Policing for Profit, supra*, at 65.

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[13] https://www.washingtonpost.com/wp-srv/special/investigative/asset-seizures/.

[14] https://www.vox.com/2014/10/14/6969335/civil-asset-forfeiture-what-is-how-work-equitable-sharing-police-seizure.

[15] https://www.npr.org/templates/story/story.php?storyId=91638378&ps=rs.

[16] https://www.prisonlegalnews.org/news/2017/jul/28/policing-profit-law-enforcement-agencies-abuse-civil-asset-forfeiture/.

Such practices inevitably undermine public respect for police. And when police are viewed as illegitimate, that encourages a broader belief that the government itself is illegitimate.

More than 25 years ago, a report in *Justice Quarterly* described this breakdown of legitimacy by reporting first-hand how forfeiture works. After spending a year pretending to be an informant in order to interact with officers engaged in forfeiture, the author detailed how "the operational goal was profit rather than the incapacitation of drug dealers." Miller & Selva, *Drug Enforcement's Double-Edge Sword*, 11 Just. Q. 313, 325 (1994). Officers sometimes delayed arresting dealers until after they sold drugs, because it was more lucrative to seize the proceeds than to prevent the sales. *Id.* at 328. On one occasion, the author observed officers persuading a suspect to use his own car as collateral to get a loan from a bank to buy marijuana—so officers could seize the car. Such behavior, the author concluded, "not only victimizes ordinary people but also affects the conduct of police and their function in society." *Id.* at 327.

Conscientious detectives sometimes found their supervisors uninterested in investigating crimes that seemed unlikely to result in revenues—which "promoted cynicism among officers." *Id.* at 326. It also promotes cynicism among the public, because a legal process "whereby law enforcement agencies share the wealth of drug trafficking under the guise of 'service' to society" inevitably substitutes "the image and the reality of the private soldier over those of the public

servant." *Id.* at 332–33. In short, "a focus on revenue requires police to compromise law enforcement in a manner that may harm rather than protect society." *Id.* at 328.

Many scholars have discussed the ways in which arbitrary and harsh police tactics can worsen society's racial divisions—leading minorities to feel resentful and excluded from the community. *See*, *e.g.*, Fagan & Meares, *Punishment, Deterrence and Social Control*, 6 Ohio St. J. Crim. L. 173, 215–22 (2008); Meares, *The Legitimacy of Police Among Young African-American Men*, 92 Marquette L. Rev. 651, 651–66 (2009). When that ethos takes hold, citizens develop what scholars call "Legal Cynicism"—the belief that government is antagonistic to their interests.

Legal Cynicism has economic and social consequences "analogous to the costs of fear of crime." Harmon, *Federal Programs and the Real Costs of Policing*, 90 NYU L. Rev. 870, 923 (2015). For instance, it forces people to devote resources to protecting themselves from crime when that should be law enforcement's job. It also encourages people to look to other sources to provide social order—including vigilantes. Sampson & Bartusch, *Legal Cynicism and (Subcultural?) Toleration of Deviance*, 32 L. & Soc. Rev. 777 (1998); Kane, *Compromised Police Legitimacy as a Predictor of Violent Crime in Structurally Disadvantaged Communities*, 43 Criminology 469, 473–74 (2005). "The code of the street," writes sociologist Elijah Anderson, "is actually a cultural adaptation to a profound lack of

faith in the police and the judicial system." *Code of the Street* 34 (1999).

Recent years have seen a disturbing trend of public distrust toward police departments, which is likely attributable at least partly to policing-for-profit. A 2019 poll of more than 800 residents of American cities found that many respondents considered themselves "'up for the taking' and regularly 'fleeced.'" Prowse, et al., *The State from Below*, 56 Urb. Aff. Rev. 1423, 1429 (2019). Police, one participant opined, "are a legalized gang on their own." *Id.* at 1448.

In recent years, other issues have moved to the forefront in controversies over police legitimacy—specifically race relations and "defund the police" initiatives—but even these are connected with forfeiture, given that the same lower-income minority neighborhoods are most victimized both by the increased crime resulting from "defunded" law enforcement and by policing-for-profit. After all, "defunding" sends police departments on a search for external sources of revenue. *See* Chigbrow, *Comment: Police or Pirates? Reforming Washington's Civil Asset Forfeiture System*, 96 Wash. L. Rev. 1147, 1168 (2021).

When government fails to serve the community's needs but profits off of citizens instead, it harms its credibility and contributes to systemwide breakdown. *See* Anderson, *Streetwise: Race, Class, and Change in an Urban Community* 205 (1990) ("[C]ynicism about the effectiveness of the police mixed with community suspicion of their behavior" prevents citizens "from

embracing the notion that they must rely heavily on the formal means of social control to maintain even the minimum freedom of movement they enjoy on the streets.").

B. Arizona's recent statutory reform demonstrates that applying Due Process of Law protections here will improve outcomes for citizens and law enforcement.

"Legal Cynicism" may be hard to cure, but fixing forfeiture is not. Some 15 states have adopted laws in recent years that restrict the use of forfeiture absent a criminal conviction. *See* Snead, *An Overview of Recent State-Level Forfeiture Reforms*, Heritage Found. (Aug. 23, 2016)[17]; *Civil Forfeiture Reforms on the State Level*, Institute for Justice.[18] These reforms have not reduced police effectiveness or harmed the public welfare.

Arizona adopted HB 2810 in 2021,[19] which reformed the state's forfeiture laws by, among other things, requiring law enforcement to notify the owner when property is seized—which had not previously been the law—and establishing a right to a pre-trial probable cause hearing. Most significantly, it requires a criminal conviction before forfeiture. There is no evidence that this has hindered law enforcement in

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[17] https://www.heritage.org/crime-and-justice/report/overview-recent-state-level-forfeiture-reforms.

[18] https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/.

[19] Codified at A.R.S. §§ 13-4307–4309.

Arizona. On the contrary, the state's official crime statistics website showed a decrease in overall crime in the year that followed. *See* Arizona Crime Statistics, *Crime Overview 2022*, Ariz. Dep't of Pub. Safety (2022).[20] Yet arrests for drug crimes increased between those two years.

As for funding, while it's too early for definitive results, one revealing hint of the reform's consequences came last November, when Yavapai County law enforcement officers requested additional funding from the county's Community Health Services department for its Partners Against Narcotic's [*sic*] Trafficking program. *See* Letter from Taylor, et al., Partners Against Narcotics Trafficking, to Horton, Director, Yavapai Cnty. Cmty. Health Servs. (Nov. 1, 2022).[21] The officers said that the program—which is the cross-jurisdictional task force designed to prevent drug trafficking in that county—had previously been funded through forfeiture, but that HB 2810 "resulted in a significant decline in asset forfeitures and a co-occurring [*sic*] decline in funding" for the project. *Id.* at 1. **The officers therefore were required to ask the people's elected representatives** for money.

That can only be good for democratic accountability. As this Court has often remarked, "public burdens . . . should be borne by the public as a whole," not

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[20] https://azcrimestatistics.azdps.gov/tops/report/crime-overview/arizona/2022.

[21] https://destinyhosted.com/yavapdocs/2023/BOS/20230419_1868/17015_Request_for_Opioid_Litigation_Funds_for_PANT_Operations.pdf.

only as a matter of "fairness and justice," but because allowing government to fund its operations by "forcing some people alone" to bear those burdens undermines democracy. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *cf.* Levinson, *Making Government Pay*, 67 U. Chi. L. Rev. 345, 360 (2000) ("[O]fficials who enjoy the political benefits of regulation without suffering the political costs will tend to over-regulate. If, on the other hand, the . . . government must pay for the implementation of its programs using . . . tax revenue . . . officials will be forced to bear the political costs, along with the political benefits, of regulation.").

Asset forfeiture can be an immense distraction for law enforcement, focusing their attention on property acquisition rather than crime-fighting. That creates a kind of externality: police can fund themselves at the expense of forfeiture victims, who have little opportunity to reclaim their property. By forcing officials to internalize those costs (or more accurately, to ask the people's elected representatives for them), forfeiture reform—including the requirement for a prompt retention hearing when property is taken—can ensure greater efficiency by re-focusing law enforcement on its official responsibilities and its accountability to the voting public.

III. Today's asset-forfeiture regime bears little resemblance to anything the Constitution's authors would have tolerated.

The Constitution's authors knew about asset forfeiture because the British government used a similar

procedure in the years before the Revolution. Forfeiture was a common practice in *admiralty* law since Roman days, rationalized on the basis of convenience: because a seized ship might sail away before legal process could begin, it was thought legitimate to confiscate the vessel. As ships were already treated in some respects like legal persons, governments began using the "personification fiction" to consider the vessel itself the wrongdoer. Levy, *A License to Steal: The Forfeiture of Property* 51 (1996). And because forfeiture was considered civil rather than criminal, admiralty courts did not provide the same legal protections accorded criminal defendants, such as the presumption of innocence or the right to a jury.

For just those reasons, America's founders regarded forfeiture with skepticism, as a thin excuse for dispensing with the legal protections every individual is entitled to. *See* Crepelle, *Probable Cause to Plunder*, 7 Wake Forest J.L. & Pol'y 315, 318–19 (2017). Thus they protested when, in the 1760s, Parliament adopted the Stamp Act, the Sugar Act, and the Townshend Acts, which not only imposed illegal taxes on the colonists, but also expanded the power of Britain's Vice Admiralty Courts so that they could implement these seizure theories—developed for the high seas—in land-based cases that should have been dealt with by ordinary criminal law. *Id.*

That meant British officials could confiscate colonists' goods on suspicion that they were imported in violation of the tax laws, and then force owners to travel to the Vice Admiralty Court in Nova Scotia to

reclaim them. *Id.* at 319 & n.31. The process of reclaiming them was not governed by a presumption of innocence or trial by jury, *id.* at 318–19, and Vice Admiralty judges were even paid a commission of the property they deemed forfeited, *see*, *e.g.*, Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 Mich. L. Rev. 1, 10 (2008).

American patriots considered this a violation of Magna Carta's Law of the Land Clause—precursor to our Due Process of Law Clauses—and denounced the entire scheme as "foreign to our constitution" and a means of "depriving us, in many cases, of the benefits of trial by jury." Declaration of Independence, 1 Stat. 1, 2 (1776).[22] John Adams called the Vice Admiralty courts arrangement "the most grievous innovation of all" that the crown imposed before the Revolution. Instructions of the Town of Braintree to Their Representative, *in John Adams: Revolutionary Writings 1755-1775* at 126 (Wood ed., 2011); *see also* Boudreaux & Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 Mo. L. Rev. 593, 608 (1996).

Forfeiture was not exclusive to admiralty law; at common law, it could result from attainder and could also be a punishment for certain crimes, including suicide and treason. Here, too, the founders regarded forfeiture as unjust. Legal reformer Cesare Beccaria argued against forfeiture in 1764 because it penalized whole families for the crimes of individuals. "[W]hat

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[22] The reference to "foreign" alluded to the origins of asset forfeiture in Roman civil law, rather than English common law.

more afflicting sight could there be," he asked, "than that of a family which is brought into disgrace and destitution by the crimes of its head, when their legally decreed submission to him prevented them from averting his crimes, even if there had been a way of doing so[?]" *Beccaria: "On Crimes and Punishments" and Other Writings* 58–59 (Bellamy, ed., Cambridge University Press, 1995). America's founders agreed. Thomas Jefferson quoted Beccaria while proposing to eliminate forfeiture as a punishment for suicide, noting that many juries were already using a legal fiction to skirt that punishment (they would just say someone who killed himself did so in a state of insanity, "because they have no other way of [avoiding] the forfeiture"). *A Bill for Proportioning Crimes and Punishments*, *in Jefferson: Writings* 354 (Peterson ed., 1984). James Wilson, too, cited Beccaria when arguing that forfeiture was riddled with injustice and corruption.

First, he said, it actually worsened things by creating an incentive for government to *encourage* lawbreaking—thereby enabling officials to profit. "When crimes were the sources of princely wealth," wrote Wilson, "it is no wonder if they [are] objects of princely indulgence." *Of the Nature of Crimes* (1791)*, in* 2 *Collected Works of James Wilson* 1111 (Hall & Hall eds., 2007). He also argued that forfeiture encouraged the public to sympathize with criminals, because people could not help but have their hearts wrung by inordinately severe penalties. This led bystanders to cheer criminals on, or help them hide from authorities. *See id.* at 1112.

These reflections came in the wake of a disastrous experiment with attainder in the early United States. During and after the Revolution, some states indulged in this practice; Pennsylvania, for example, banished nearly 500 people from the state and seized their land—as much as 40,000 acres—for opposing the war with Britain. *See* Gallo, *Property Rights, Citizenship, Corruption, and Inequality*, 86 Penn. Hist. 474, 474 (2019). Maryland confiscated 200,000 acres. *Id.* at 475. New York's 1779 Forfeiture Act took a million acres from "enemies of the state." These actions, wrote John Jay, "disgraced" New York "by injustice too palpable to admit even of palliation." 1 William Jay, *The Life of John Jay* 112 (1833).

Alexander Hamilton agreed. He thought the Act made America "the scorn of [other] nations" and endangered its long-term stability by making people fear and resent the government instead of respecting it. *Letter from Phocion* (1784), *in Hamilton: Writings* 129 (Freeman ed., 2001). When the war ended, he argued that it was in everyone's interest for the now-independent country to respect property rights and trial by jury, even for former loyalists, because that would encourage them to become "friends to the new government." *Id.* at 137.

This obviously led to the Constitution's prohibitions on bills of attainder—but it's vital to recognize that those prohibitions tie the *due process of law* concerns to the general principles regarding *forfeiture of property*. The founders did not separate these into different boxes. They regarded forfeiture—through

proceedings that deprived people of such protections as the presumption of innocence—as a dangerous, morally corrupt practice to be guarded against by multiple constitutional guarantees.

There was a third source of forfeiture at common law: the theory of "deodands," which employed the "personification fiction" and viewed inanimate objects as guilty of wrongdoing in certain cases and thus subject to forfeiture. *See* Levy, *supra* at 7–20. Deodand was originally devised both to enrich the crown and as a rudimentary form of the "wrongful death" cause of action. Although relatively common in the early eighteenth century, it fell into disuse in America by the time of the Revolution, partly because colonies permitted wrongful death cases, which were not available in English courts. *See* Morris, *Studies in the History of American Law* 230 (1958).

Colonial courts seem to have rarely used deodand theory, which even Blackstone called a "superstit[ion]," 1 W. Blackstone, *Commentaries* *301. America's founding generation distanced itself from the theory. *See Parker-Harris Co. v. Tate*, 188 S.W. 54, 55 (Tenn. 1916) ("To the credit of American jurisprudence, from the outset the doctrine was deemed to be so repugnant to our ideas of justice as not to be included as a part of the common law of this country."). Pennsylvania abolished it in its 1790 constitution (art. IX § 9), and Virginia legal scholar William Waller Hening—who called deodand an "infamous" and "rediculous superstition [*sic*]"—wrote that it had been "virtually abolished" by

that state's 1776 Cruel and Unusual Punishment Clause. *The New Virginia Justice* 156–57 (1795).

Early America did continue to practice forfeiture in admiralty cases, and in cases involving tax evasion, although the latter is disanalogous to modern forfeiture practice because it did not involve the "personification fiction" or the confiscation of property for general lawbreaking. In any event, as Professor Arlyck points out, even in the tax evasion context, "widespread Founding Era agreement that it was fundamentally unjust to seize private property in response to unintentional violations of the law" led to a practice of promptly returning wrongfully taken property—a practice the founders appear to have considered constitutionally mandatory. *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449, 1506 (2019). The procedure called for the return of seized property "when presented with any credible explanation for why the violation was not motivated by fraudulent intent," *id.* at 1454, which, along with other factors, reveals that the owner's innocence was "a paramount concern in the early forfeiture regime." *Id.* at 1501.

This all shows that today's forfeiture system—wherein property allegedly involved in a crime is regarded as a defendant and can be taken without the protections of the presumption of innocence or trial by jury (because it's supposedly a "civil" proceeding)—was simply not contemplated by our Constitution. Except in admiralty, or if leavened by a rigorous process for returning innocent owners' property, it was not considered a legitimate law enforcement tool by the framers.

In fact, as Adams indicated when he called the Vice Admiralty Courts an "innovation," they thought it a violation of principles "deeply rooted" in *their own* "history and tradition"—namely, Magna Carta and common law. *Adams: Revolutionary Writings, supra* at 126.

Forfeiture as we know it today traces its ancestry not to the founding, but to the confiscation of Confederate property during the Civil War. When this Court upheld the 1862 Confiscation Act in *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870), it did so on the theory that the military can seize enemy property during wartime, and this isn't punishment. But as Justice Field correctly observed, this rationale was flawed, because the Confiscation Act *did* impose punishment. *Id.* at 318 (Field, J., dissenting). The property was being taken as a consequence of the owner's wrongdoing, without obeying criminal procedure rules. If that were permitted, Field warned, it would "work[ ] a complete revolution in our criminal jurisprudence," because the government could likewise "confiscate the property of the burglar, the highwayman, or the murderer . . . without [a] conviction . . . upon the assumption of their guilt." *Id.* at 323 (Field, J., dissenting).

Field was right. Within half a century, government resorted to forfeiture to punish bootlegging during Prohibition. Boudreaux & Pritchard, *supra* at 627–31. Prohibition-era decisions "allowed *in rem* forfeiture to evolve from its origins in admiralty and customs enforcement to become a general tool for government to suppress criminal activity through civil procedures . . . [even] against people who had committed no crime." *Id.*

at 629. A half century after that, the War on Drugs encouraged prosecutors to ramp up their use of *in rem* proceedings to take property connected with drug transactions.

Even that, however, was still subject to relatively meaningful legal safeguards for property owners, because it was done under *criminal* forfeiture laws. Only in the 1980s did federal and state prosecutors overwhelmingly resort to *civil* forfeiture instead, in order to evade those safeguards and make forfeiture more profitable to the government. This was due largely to "equitable sharing," created in 1984, which allowed state officials to evade state-based limits on forfeiture by contracting with federal officials. *See Note: How Crime Pays*, 131 Harv. L. Rev. 2387, 2403–08 (2018). It was then that the modern forfeiture regime truly began.

That regime bears no resemblance to any thing the Constitution's authors anticipated, and is not rooted in constitutional history and tradition. The founders would have regarded a legal proceeding wherein property that is not itself contraband—such as a car—can be snatched by the state, even though the owner *could be* arrested and tried, and that this is done through a proceeding which gives the owner no automatic actual-innocence defense, or a presumption of innocence, or a trial by jury, and in which the confiscating authorities can keep the proceeds of that taking, as the same type of abuse the Vice Admiralty Courts imposed. They would have regarded it as "foreign to our constitution." Declaration, 1 Stat. at 2.

What Wilson said of bills of attainder is true of forfeiture today: it penalizes innocent people and their families, stimulates criminals to try harder at their crimes, encourages law enforcement to prioritize profit-making over crime-fighting, and weakens government's legitimacy by giving citizens reason to view police and prosecutors as mercenaries. Modern forfeiture encourages Legal Cynicism because it makes government less a protector of rights, and more a threat to rights,[23] and causes people to view police with resentment and distrust. Reforms—including a procedure for citizens to challenge wrongful takings promptly—would improve matters for both the public and law enforcement.

CONCLUSION

The judgment should be *reversed*.

Respectfully submitted,

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[23] *Cf.* Hardy & King, *Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids*, 11 Crim. L. & Phil. 733 (2017) (addressing a similar argument based on the use of civil proceedings in criminal matters in the U.K.).

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