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 U.S. Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONERS

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June 29, 2023

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. is a non-partisan nonprofit dedicated to robust enforcement of the Fourth Amendment and related due-process rights. Restore the Fourth oversees a series of local chapters whose membership includes lawyers, academics, advocates, and ordinary citizens. Restore the Fourth also files *amicus curiae* briefs in major cases about Fourth Amendment or due process rights. *See, e.g.*, Brief of *Amici Curiae* Restore the Fourth, Inc., *et al.* in Support of Petitioners, *Lombardo v. City of St. Louis*, 141 S. Ct. 2239 (2021); Brief of *Amicus Curiae* Restore the Fourth, Inc., in Support of Petitioner, *Torres v. Madrid*, 141 S. Ct. 989 (2021).

Restore the Fourth is interested in *Culley* because this case affords an important opportunity to vindicate the irreducible constitutional minimum of due process: "that the people's rights are never any less secure against governmental invasion than they were at common law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring-in-part). When the Crown seized private property in the name of civil forfeiture (including vehicles), owners had the right to seek and retain custody of their property while the Crown litigated the forfeiture. Restore the Fourth submits that vehicle owners retain this right today when the government seizes vehicles.

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[1] This amicus brief is filed with timely notice to all parties. S. Ct. R. 37.2(a). No counsel for a party wrote this amicus brief in whole or in part; nor has any person or any entity, other than Restore the Fourth and its counsel, contributed money intended to fund the preparation or submission of this amicus brief.

SUMMARY OF THE ARGUMENT

Due process entitles vehicle owners to retention hearings when the government seizes vehicles in the name of civil forfeiture. Retention hearings protect a vehicle owner's essential interest in continued possession of her vehicle while forfeiture litigation is pending—litigation that may take months or years to resolve. Retention hearings further allow for early detection (and termination) of erroneous seizures and for prevention of unjust hardships to vehicle owners. In short, these hearings make vehicle forfeitures less arbitrary at minor cost to the government.

Beyond this pragmatic analysis—required by the Court's modern due-process jurisprudence—due process entitles vehicle owners to retention hearings for a more basic reason: generations of common law afforded property owners the same right in the form of a "writ of delivery." This procedural device allowed owners to request—and the Court of Exchequer to grant—custody of seized property for the duration of a civil forfeiture case. Through the writ, owners could obtain early redress for erroneous seizures and for Crown delays in litigating forfeiture cases.

This case thus presents the Court with a rare opportunity to vindicate the original meaning of due process. By taking this approach, the Court stands to make clear that due process consists of more than a case-by-case balancing of private and governmental interests. Due process also includes those customary procedures to which freemen were entitled under the common law—an irreducible constitutional floor vital to a fully protective due-process jurisprudence.

ARGUMENT

I. Procedural due process is not limited to the *Mathews* test—it also includes those customary protections afforded at common law (the old law of England).

The Fifth and Fourteenth Amendments each dictate that government may not deprive any person of "life, liberty, or property" without "due process of law." Here, the government seized Petitioners' cars in the name of civil forfeiture—"the process by which governments seize property without compensating its owner, based on [the property's] connection with . . . [a] crime." *State v. Edwards*, 787 So. 2d 981, 990–91 (La. 2001). The government then retained custody of Petitioners' cars for between 14 and 20 months while the government pursued civil forfeiture cases in state court against the cars. *See* Pet'r Br. 8. Finally, state courts ruled that Petitioners were innocent owners entitled to the return of their vehicles. *Id.*

Petitioners maintain the government's vehicle seizures violated their due-process rights because the government did not afford Petitioners a "retention hearing"—an opportunity to be heard by a judge (or other neutral decisionmaker) on whether Petitioners could retain their vehicles while the government litigated forfeiture cases against the vehicles. *See* Pet'r Br. 45–50. Petitioners argue the validity of this procedural due-process claim should be determined based on the Court's modern *Mathews* test, which generally applies when a party asserts a due-process right to additional procedural safeguards in the face of a particular deprivation. *See* Pet'r Br. 17–28.

Named after *Mathews v. Eldridge,* 424 U.S. 319 (1976), the *Mathews* test requires courts to assess a claim for additional process based on three factors: (1) the "private interest" at stake (e.g., continuous possession of a vehicle); (2) the "risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards"; and (3) the government's interest. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). "Where the liberty or property interest is significant and the cost to the government of providing additional, valuable process is low, then greater procedures must be implemented." *Hicks v. Comm'r,* 909 F.3d 786, 800–01 (6th Cir. 2018).

By definition, "[t]he *Mathews* framework is well suited to answering th[e] question" of whether due process requires the government to provide retention hearings to vehicle owners—i.e., additional process beyond a civil forfeiture trial. *See Olson v. One 1999 Lexus*, 924 N.W.2d 594, 603 (Minn. 2019). The Court has noted time and again that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The *Mathews* test, through its balancing of multiple, open-ended factors, ensures government deprivations never outpace due process, no matter how stealthy or complex the government deprivation in question may happen to be.

But there is more to procedural due process than *Mathews*. Over 150 years ago, the Court asked itself by "what principles . . . are we . . . to ascertain" what "is due process?" *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276–77 (1856). The

Court replied: presuming that no other constitutional provision spoke to the point (e.g., by prescribing a sufficient procedure), the Court "must look to those settled usages and modes of proceeding existing in the common and statu[t]e law of England, before the emigration of our ancestors." *Id.*

This makes sense. In mandating due process, the Constitution carries forward Magna Carta's ancient guarantee that: "[n]o freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[2] "[T]he words 'due process of law' are equivalent . . . to the words 'law of the land,' contained in . . . Magna Carta." *Twining v. New Jersey,* 211 U.S. 78, 100 (1908); *see also, e.g., Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 28–29 (1991) (Scalia, J., concurring in the judgment).

Put another way, the Constitution includes the requirement of due process to "ensure that the people's rights are never any less secure against governmental invasion than they were at common law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring-in-part). Due process thus requires government to afford a given procedure (like a retention hearing) not only when the *Mathews* test supports this, but also when the procedure is one of those "customary procedures to which freemen were entitled by the old law of England." *Id.*

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[2] MAGNA CARTA (1215) (ch. 39) (as reproduced by Yale Law School's Avalon Project), https://bit.ly/3stFqtb.

The Court now has the opportunity to cement this irreducible constitutional minimum. In doing so, the Court stands to restore the protective function of original meaning in due-process cases just as the Court has restored the protective function of original meaning in search-and-seizure cases. The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." From the founding, this right guarded against "government trespass" on "persons, houses, papers, and effects"— a "property-based approach" to ensuring privacy from prying government eyes. *United States v. Jones*, 565 U.S. 400, 405–06 (2012) (plurality op.).

Beginning in the 1960s, the Court developed a new approach to Fourth Amendment rights, holding these rights apply when the government violates an "expectation of privacy" that "society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This "*Katz* test" tends to yield "often unpredictable—and sometimes unbelievable—jurisprudence." *Carpenter v. United States*, 132 S. Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting). One remarkable example is the Court's determination that "a police helicopter hovering 400 feet above a person's property invades no reasonable expectation of privacy." *Id.* (citing *Florida v. Riley*, 488 U.S. 445, 450 (1989)).

Thankfully, in the past few decades, the Court has clarified that the *Katz* test does not "snuf[f] out . . . previously recognized protection for property under the Fourth Amendment." *Soldal v. Cook Cnty.*, 506 U.S. 56, 64 (1992). The *Katz* test in fact comes

second, "supplement[ing], rather than displac[ing], the traditional property-based understanding." *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (cleaned up). By expressly acknowledging this reality and enforcing it in appropriate situations, the Court has ensured that the Fourth Amendment continues to uphold "that degree of privacy against government that existed when the . . . Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

Due process merits the same treatment. While the *Mathews* test is of paramount importance in ensuring due process remains a flexible concept able to meet any government deprivation, *Mathews* does not snuff out previously-recognized protection of "'those settled usages and modes of proceeding' found in the common law." *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring-in-the-judgment). One such usage is that "the law must afford ordinary people fair notice of its demands." *Id.* Another is the rule that a judge may not possess a "pecuniary interest . . . in the result of his judgment." *Tumey v. Ohio*, 273 U.S. 510, 533 (1927) (detailing common-law tradition that proved this rule).

Petitioners' case raises a third settled usage: that when the government seizes property in the name of civil forfeiture, the owner may seek and retain custody of the property for the duration of the forfeiture case. The common law protected this right through a device known as a "writ of delivery." To appreciate the full significance of this legal practice, one must begin at the beginning—with the common law's seminal concern for the protection of private property rights against government depredation.

II. The common law held private property (including vehicles) in high regard.

The common law regarded "private property" so highly that the law would "not authorize the least violation of it." 1 W. BLACKSTONE, COMMENTARIES *135 (1765). Many British statutes prohibited the King from "dispos[ing]" of a subject's "lands or goods" in any "arbitrary way." *Id.* at *138. Key English precedents like Lord Camden's decision in *Entick v. Carrington* reinforced this point, emphasizing: "[t]he great end for which men entered into society was to secure their property. . . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass." *Boyd v. United States*, 116 U.S. 616, 626–27 (1886) (quoting *Entick*).

Vehicles were no exception to these principles. Under Chapter 30, Magna Carta itself forbade the arbitrary disposition of private vehicles: "[n]o sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman."[3] The target of this prohibition was "purveyance": "a right enjoyed by the [C]rown" to "forcibly impress[] the carriages and horses of the subject" to do "the king's business on the public roads." 1 BLACKSTONE, COMMENTARIES *277; *see also* Louis Sears, *Purveyance in England Under Elizabeth,* 24 J. OF POL. ECON. 755 (1916).

What was true yesterday remains true today. Like Lord Camden over two centuries ago, the Court has affirmed the key importance of property rights,

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[3] MAGNA CARTA (1215) (ch. 30), *supra* note 2.

explaining that "[i]ndividual freedom finds tangible expression in property rights." *James Daniel Good*, 510 U.S. at 61. The Court has further elaborated: "[p]roperty rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin*, 582 U.S. 383, 393 (2017).

American courts have likewise recognized that vehicles are no exception to this principle. Because a "car or truck is often central to a person's livelihood or daily activities," government seizure of a vehicle impairs a person's freedom as much as his or her property rights. *Krimstock v. Kelly*, 306 F.3d 40, 44 (2d Cir. 2002). Simply put, "[c]ars manifest liberty." *Washington v. Marion Cnty. Prosecutor*, 916 F.3d 676, 679 (7th Cir. 2019). It is no exaggeration, then, that "[d]ays, even hours" of vehicle detention "may impose onerous burdens upon a person deprived of his [or her] vehicle." *Stypmann v. City & Cnty. of S.F.*, 557 F.2d 1338, 1344 (9th Cir. 1977).

The common law's strong regard for property rights, including vehicle ownership, ultimately calls for close attention to common law limitations on civil forfeiture. After all, the constitutional legitimacy of modern civil forfeiture hinges on the extent to which modern forfeiture resembles the "historical practice that existed at the time of the founding." *Leonard v. Texas*, 580 U.S. 1178, 1180–81 (2017) (Thomas, J., respecting the denial of cert.). This historical practice establishes in turn that when the government seizes property in the name of civil forfeiture, due process requires more than a timely forfeiture trial.

III. Through "writs of delivery," the common law afforded persons the right to seek and retain custody of seized property during the pendency of a civil forfeiture case.

"English law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682–83 (1974). A typical example is a 1768 statute that Parliament enacted to "more effectually" prevent clandestine importation of foreign spirits. *See* 9 Geo. III ch. 6 (1768). English statutes already authorized "officer[s] of the excise to seize all brandy, arrack, rum, spirits, and strong waters" shipped in violation of English excise laws. *Id.* at §1 (p.152). The 1768 statute imposed an even broader mandate: "officers of excise are required to seize . . . every horse, and other cattle and carriage whatsoever, used in removing, carrying, or conveying away, any of the [aforesaid] liquors." *Id.*

The Court of Exchequer—or Exchequer, for short—had the job of adjudicating Crown forfeiture cases against goods, land-based conveyances, and vessels. One of three royal courts at common law,[4] the Exchequer was "well established as a court of law in the thirteenth century."[5] In 1649, the Exchequer became "a high court of general jurisdiction in both common law and equity."[6] Eminent jurists (also

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[4] W. Bryson, *The Court of Exchequer Comes of Age*, *in* TUDOR RULE & REVOLUTION 149, 149 (1982).

[5] *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) ("three royal courts" at common law: "Exchequer, Common Pleas, and King's Bench").

[6] Bryson, *supra* note 4, at 149.

known as barons) presided, including "Hale, Gilbert, Parke, Alderson, and Pollock."[7] The Exchequer's core function—the "foundation" of its jurisdiction—was to "[settle] disputes between the Crown and a subject" over money "due to the Crown."[8] As a result, "before 1791," the Exchequer handled most forfeiture cases, conducting them "as a proceeding at common law, with trial by jury." *United States v. One Mercedes Benz 280S*, 618 F.2d 453, 462 (7th Cir. 1980).

The Exchequer's common law spelled out how a forfeiture case was to proceed. Following a seizure, "**the regular steps**" were for the Crown—or a *qui tam* informer standing in the Crown's shoes[9]—to "**file an information**, and then take out **a writ of appraisement**."[10] An information was "a statement" asserting the King's right "to an adjudication in his favor."[11] A "writ of appraisement" was a court order directing "valuation" of the seized property.[12] Upon

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7 Bryson, *supra* note 4, at 151.

8 *Id.* at 152.

9 "Under the provisions of many [English] statutes, the suit might be brought by an informer *qui tam*, who was permitted to share in the proceeds of the forfeited article . . . ." *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137–38 (1943).

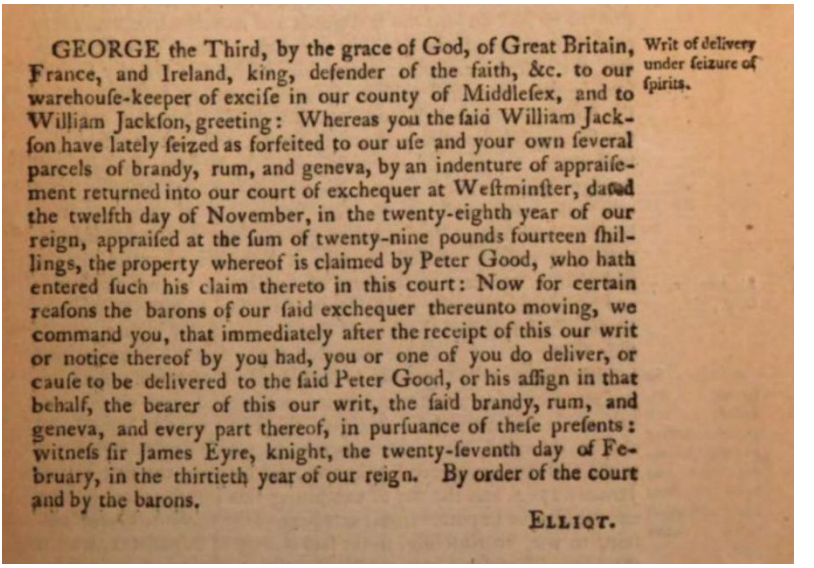
10 *Johnson qui tam v. Sowers* (COE 1718), *reported in*: WM. BUNBURY, REPORTS OF CASES IN THE COURT OF EXCHEQUER 30 (1756) (bold added) (capitalization omitted); *see also, e.g.,* B.Y., MODERN PRACTICE OF THE COURT OF EXCHEQUER 139–50 (London, E. & R. Nutt & R. Gosling 1730) (providing a detailed account of the procedural steps that statutory forfeiture cases went through when litigated in the Exchequer).

11 JAMES MANNING, PRACTICE OF THE COURT OF EXCHEQUER 142 (London, A. Strahan 1827); *see also* 3 W. BLACKSTONE, COMMENTARIES *262 (1765) (same definition).

12 38 ABRAHAM REES, THE CYCLOPAEDIA (London, Rivington et al. 1819) (no apparent internal pagination).

"return" of the writ of appraisement, the owner of the seized property had "**to enter his claim**."[13]

After filing his claim with the court, the owner could then "move for **his writ of delivery**."[14] The writ was a settled procedural device that enabled the Exchequer to "direct[] the delivery of goods out of the King's possessions."[15] Through the writ—and often concomitant payment of security—owners could seek and retain custody of their property during pending forfeiture proceedings. A sample writ of delivery is displayed below. The writ directs King George III to deliver seized spirits to owner Peter Good:



Writ of delivery under ſeizure of ſpirits.

GEORGE the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. to our warehouſe-keeper of exciſe in our county of Middleſex, and to William Jackſon, greeting: Whereas you the ſaid William Jackſon have lately ſeized as forfeited to our uſe and your own ſeveral parcels of brandy, rum, and geneva, by an indenture of appraiſement returned into our court of exchequer at Weſtminſter, dated the twelfth day of November, in the twenty-eighth year of our reign, appraiſed at the ſum of twenty-nine pounds fourteen ſhillings, the property whereof is claimed by Peter Good, who hath entered ſuch his claim thereto in this court: Now for certain reaſons the barons of our ſaid exchequer thereunto moving, we command you, that immediately after the receipt of this our writ or notice thereof by you had, you or one of you do deliver, or cauſe to be delivered to the ſaid Peter Good, or his aſſign in that behalf, the bearer of this our writ, the ſaid brandy, rum, and geneva, and every part thereof, in purſuance of theſe preſents: witneſs ſir James Eyre, knight, the twenty-ſeventh day of February, in the thirtieth year of our reign. By order of the court and by the barons.

ELLIOT.

Sample Writ of Delivery[16]

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13 *Johnson qui tam*, *supra* note 10, at BUNBURY 30.

14 *Id.*

15 38 REES, *supra* note 12.

16 *Reproduced at*: 4 JOHN WENTWORTH, A COMPLETE SYSTEM OF PLEADING 491 (London: G.G. & J. Robinson 1797).

The ability of property owners to seek writs of delivery after filing claims to seized property—and the Exchequer's ability to grant these writs—served many valuable functions. One of these functions was **early error correction**. "Some risk of erroneous seizure exists in all cases." *Krimstock*, 306 F.3d at 50–51. "[I]n the absence of prompt [judicial] review," detection of errors may "wait months or . . . years" until trial on the merits. *Id.* By contrast, an "early hearing" provides "the opportunity to test the factual basis" of a seizure and end erroneous seizures before they force owners to suffer the harms that often come with waiting. *Stypmann*, 557 F.2d at 1344.

The Exchequer used writs of delivery just this way. In *Rex v. Hollingsby* (COE 1723), the Crown made "a seizure of brandy, and the waggon which it was put into."[17] The Exchequer noted the applicable forfeiture statute granted the court jurisdiction over the brandy, but a substantial jurisdictional question existed as to the wagon.[18] The statute conditioned forfeiture of the wagon on its use in the "running [of] goods from the water-side."[19] Because the record indicated the wagon was not used this way, the court ordered the Crown to "show cause why there should not be a Writ of Delivery for the Waggon."[20]

In *Warwick qui tam v. White* (COE 1722), the Exchequer granted a writ of delivery (on security) to the owners of goods seized by excise commissioners

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17 *Reported in*: WM. BUNBURY, REPORTS OF CASES IN THE COURT OF EXCHEQUER 130 (1756) (capitalization omitted).

18 *Id.*

19 *See id.*

20 *Id.*

without proper jurisdiction.[21] The court observed the basis for the seizure, as stated "in the information," was that "the goods were removed from one port to another without a permit."[22] Because this conduct was "an unlawful importation" the conduct was "not within" the commissioners' "jurisdiction."[23]

On the flip side, when jurisdiction and probable cause existed for a property seizure, the Exchequer might deny a writ of delivery. In *Parker qui tam v. Afton* (COE 1717), the owners of "a ship loaded with salt" moved for a writ of delivery "ten days" after the ship was seized.[24] Conceding the salt's perishable nature, the court nevertheless denied the motion.[25] The court rested this judgment on both the writ's "discretionary" nature and the existence of evidence supporting the seizure ("there is reason to suspect this ship was going to Gottenburgh").[26]

Another critical function that writs of delivery served at common law was **hardship prevention**. In *Gatehouse qui tam v. Reith* (COE 1721), the Exchequer issued a writ of delivery (on security) "for a parcel of gold watches."[27] The "springs and steel work" made the watches "perishable goods . . . liable

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[21] *Reported in*: WM. BUNBURY, REPORTS OF CASES IN THE COURT OF EXCHEQUER 106 (1756) (capitalization omitted).

[22] *Id.*

[23] *Id.*

[24] *Reported in*: WM. BUNBURY, REPORTS OF CASES IN THE COURT OF EXCHEQUER 21 (1756) (capitalization omitted).

[25] *Id.*

[26] *Id.*

[27] *Reported in*: WM. BUNBURY, REPORTS OF CASES IN THE COURT OF EXCHEQUER 74 (1756) (capitalization omitted).

to receive damage by lying in a damp warehouse."[28] *Cf. Krimstock*, 306 F.3d at 62 (a "ruling in the distant future on the merits" in a vehicle forfeiture case cannot "fully protect" against "erroneous deprivation" as one's vehicle "stands idle in a police lot").

The most important function of writs of delivery in the Exchequer was **to prevent and redress Crown delays** in its litigation of forfeiture cases. The Exchequer established that property owners could seek a writ of delivery not only after they filed their claims, but also "[i]f the prosecutor delays filing an information, or [the prosecutor] does not sue out a writ of appraisement."[29] This meant (for example) that if the Crown did not file an information "in a month" after an owner filed his claim, the owner could seek a writ of delivery, which he might have "as a matter of course, upon giving security."[30]

Parliament ultimately affirmed the importance of this principle when it attempted in 1662 to curtail writs of delivery in forfeiture cases. Focusing on the

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[28] *Gatehouse qui tam*, *supra* note 27, at BUNBURY 74.

[29] *Johnson qui tam*, *supra* note 10, at BUNBURY 30; *see also B.Y.*, *supra* note 10, at 145 ("When a defendant enters a claim, if there is no writ of appraisement returned . . . within the next term . . . [the defendant] may move the court for a writ of appraisement and delivery, which is seldom denied by the court . . . . [T]he said goods, when they are thus appraised, and security given . . . are to be delivered to the claimer.").

[30] MANNING, *supra* note 11, at 162–63; *see* SIR GEOFFREY GILBERT, TREATISE ON THE COURT OF EXCHEQUER 182 (London, H. Lintot 1758) ("If there be a seizure made, the officer must in the next term, or sooner, at the discretion of the Court, return the cause of seizure [i.e., information], and take out a writ of appraisement, otherwise the proprietor [i.e., property owner] is entitled to move for a writ of delivery . . . .").

statutory forfeitures of goods (versus conveyances or vessels), Parliament dictated that "no writ of delivery shall be granted out of the court of exchequer for goods seized, but upon good security, and that for goods perishable only." 13 & 14 Car. II, ch. 11, §30 (1662). In the same breath, Parliament reaffirmed the writs' availability "in cases where the informer shall defer or delay his coming to as speedy a trial as the course of that court will permit." *Id.*

In 1731, the Exchequer considered the meaning of delay. A ship-owner moved for a writ of delivery after the Crown prosecutor failed to return a writ of appraisement in the same term.[31] The ship-owner asserted that this fact proved the Crown was "guilty of a manifest delay" in litigating the forfeiture.[32] One of the Exchequer's barons concluded the ship-owner's motion was "too early," deeming "the rule to be that this writ could not be granted till the party was delayed of a trial."[33] But "the rest of the Court" disagreed, concluding that "any apparent delay on the part of the Crown was sufficient reason to grant" a writ of delivery.[34] The barons thereby confirmed that in forfeiture cases, owners were entitled to more process than just a timely forfeiture trial.

American courts assimilated these traditions. While "[s]eparate courts exercising the jurisdiction of the . . . Exchequer were never established in the

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[31] *Anonymous* (COE 1731), *reported in*: 1 THOMAS BARNARDISTON, REPORTS OF CASES DETERMINED IN THE COURT OF THE KING'S BENCH TOGETHER WITH SOME OTHER CASES 464 (1744).

[32] *Id.*

[33] *Id.*

[34] *Id.*

American Colonies," the "common law courts" of the era "absorbed" this jurisdiction. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1943). When these courts then "entertained suits for the forfeiture of property under English or local statutes," they issued writs of delivery just as the Exchequer did. *Id.* For instance, in 1772, when colonial authorities seized "[t]he sloop *Ruby* and her cargo" and "prosecution had begun in the district court," the judge assigned to the case "issued a writ of delivery, allowing the owners of the sloop custody of their vessel upon payment of proper security, until the cause was decided."[35]

American courts also appreciated there always had to be some form of judicial procedure enabling owners to seek and retain custody of seized property during forfeiture litigation—be it a writ of delivery or something else. Consider *Slocum v. Mayberry*, 15 U.S. 1 (1817). Reviewing the propriety of a state court's grant of replevin to redress a federal revenue officer's improper seizure of cargo, Chief Justice Marshall took care to emphasize: if a "seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, **upon the application of the aggrieved party**, compel the officer to proceed to adjudication, or to abandon the seizure." *Id.* at 10 (bold added); *see also Gilliam v. Parker*, 19 F.2d 358, 361–62 (E.D.S.C. 1927) (reaffirming this).

Over a century later, Judge Learned Hand put the point in even simpler terms: "I can insist either that the collector proceed with the forfeiture or [that

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[35] CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS & THE AMERICAN REVOLUTION 183 n.6 (1960).

he] release the goods, and that I will do." *Standard Carpet Co. v. Bowers*, 284 F. 284, 285 (S.D.N.Y. 1922); *see Church v. Goodnough*, 14 F.2d 432, 434 (D.R.I. 1926) ("well recognized" right in admiralty to proceed-or-abandon orders in vessel-forfeiture cases). These declarations, combined with the history of the writ of delivery, leave no doubt that the retention-hearing right that Petitioners assert here is one of the "customary procedures to which freemen were entitled by the old law of England." *Sessions*, 138 S. Ct. at 1224 (Gorsuch, J., concurring-in-part).

CONCLUSION

Fulfilling the Constitution's vital promise of due process requires the Court to "take the long view," from Magna Carta forward. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). The long view here reveals an enduring concern for—and protection of—an owner's ability to seek (and retain) custody of seized property for the duration of forfeiture proceedings. The Court should not hesitate to enforce this view.

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Dated: June 29, 2023