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 FOR RESPONDENTS

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QUESTION PRESENTED

Did the procedures available to Petitioners regarding the seizure and forfeiture of their cars satisfy the Due Process Clause of the Fourteenth Amendment?

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INTRODUCTION

In one case, law enforcement stopped a car transporting a large quantity of methamphetamine. In the other, the car was transporting marijuana and a loaded handgun. When officers saw the drugs, they plainly had probable cause to arrest the drivers and impound the cars.

What happened next is critical. To hear Petitioners tell it, nothing happened—the State kept their cars "for over a year without *any* judicial oversight." Br.5; *see also id.* at 1, 7, 16, 45, 47. In reality, judicial oversight commenced right away with cases filed in state trial courts. Petitioners simply declined to participate. Far from clamoring for a prompt hearing, one Petitioner defaulted, and the other waited six months to answer the complaint. Now they decry the State process, but the true story is that Petitioners slept on their rights.

First, from the moment their cars were seized, Petitioners had the right to move for return of property, creating an independent proceeding where the court would have heard evidence and ordered their cars returned if the motions were successful. ALA. R. CRIM. P. 3.13(a). But Petitioners did not invoke Rule 3.13.

Second, Petitioners had the right to execute a bond after seizure in exchange for the immediate release of their cars. ALA. CODE §28-4-287. But Petitioners never posted bonds to get their cars back.

Third, as required by law, the State initiated forfeiture actions promptly—within *two weeks* of seizure. Once in court, each Petitioner had a case and

a judge; they could have moved to dismiss, moved for summary judgment, moved to expedite, or pursued any other avenue under the civil rules. But Petitioners did none of those things for over a year.

Instead, Petitioners sat on their hands until the state courts forced them to act. How can they demand more when they refused all the process available? Only by omitting their own delay and neglect can Petitioners even begin to sketch a due-process violation.

This procedural history exemplifies why the Court decided that the speedy-trial test of *Barker v. Wingo*, 407 U.S. 514 (1972), is the right one for civil forfeiture. Petitioners do not dispute the validity of the seizures or the outcomes of their cases. Rather, they complain that the State held their cars for over a year while the proceedings were pending. But only *Barker* explains whether a year is too long. And only *Barker* directly accounts for the crucial fact here—that Petitioners waited a year to get their cars because *they waited a year* to assert their rights.

For decades, *Barker*'s application has ensured timeliness while leaving matters of day-to-day case management to the trial courts. Petitioners' newfangled right to a "retention hearing" would wrest control from the States, spawn a morass of new procedural questions, and invite the federal bench to micromanage state forfeiture rules under the guise of constitutional law. This Court thus has never suggested that the Constitution requires the sort of mini-trial that Petitioners would inject between seizure and a forfeiture proceeding. To the contrary, the Court has held that "a forfeiture proceeding

meeting the *Barker* test satisfies any due process right." *United States v. Von Neumann*, 474 U.S. 242, 251 (1986). There is no reason to depart from the wisdom of *Von Neumann* and its forebear, *United States v. $8,850*, 461 U.S. 555 (1983), and accordingly, no constitutional right to a "retention hearing."

STATEMENT

A. Historical Background

Centuries of history and tradition undergird the practice of civil asset forfeiture. From English common law through the Framing to today, the power to confiscate 'guilty property' has persisted. *See, e.g.*, Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2454-67 (2016). Drawing on this wealth of history, the Court has often repelled demands to remake forfeiture doctrine or carve new exceptions to settled law. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442, 446-51 (1996); *Austin v. United States*, 509 U.S. 602, 611-18 (1993)*; Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-86 (1974); *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137-53 (1943); *J. W. Goldsmith, Jr., Grant Co. v. United States*, 254 U.S. 505, 510-13 (1921); *but see United States v. James Daniel Good Real Property*, 510 U.S. 43, 59 (1993) (declining to "revisit[]" "cases decided over a century ago" beyond their "apparent rationale"). As a result, modern forfeiture laws greatly resemble "those settled usages and modes of proceeding" in bygone eras. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855).

Pre-Founding English common law had at least three distinct modes of forfeiture: "deodand, forfeiture

upon conviction for a felony or treason, and statutory forfeiture." *Austin*, 509 U.S. at 611. Most relevant today, the third form "provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Calero-Toledo*, 416 U.S. at 682; *see also* 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *262 (1768). The Crown could confiscate not only smuggled goods but also the ships, boats, horses, and carriages used to transport them. *See* Nelson, *supra*, 2457-61 (citing An Act for the Encourageing and Increasing of Shipping and Navigation 1660, 12 Car.2 c.18 (Eng.); An Act … for Enforcing Laws Against the Clandestine Importation of Soap, Candles, and Starch, into this Kingdom 1750, 23 Geo.2 c.21, §31 (Eng.)).

In England, these actions were normally heard in the Court of Exchequer or the admiralty courts, *C.J. Hendry*, 318 U.S. at 138-39; in the American colonies, common-law courts "regularly exercised jurisdiction to enforce English and local statutes authorizing the seizure of ships and goods." *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 118 (1993).

The First Congress of the United States followed the colonial practice by "authorizing the seizure and forfeiture of ships and cargos involved in customs offenses" or "piracy." *92 Buena Vista Ave.*, 507 U.S. at 119 & nn.11-12 (citing *The Palmyra*, 12 Wheat. 1, 8 (1827)). Later statutes licensed the forfeiture of "distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages." *Id.* at 120; *see also Goldsmith*, 254 U.S. 505; *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878). Today's laws cover a wider variety of controlled substances and contraband—and the

conveyances used to transport them—but the basic mechanics are the same. Federal and State narcotics laws include statutory forfeiture provisions to "foster[] the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo*, 416 U.S. at 687.

An important feature of the historical practice, which continues today, is that civil forfeiture proceeds *in rem*: "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing...." *The Palmyra*, 12 Wheat. at 9. A civil forfeiture action "is not a proceeding against the owner; it is a proceeding against the [property], for an offence committed by the [property]." *The Little Charles*, 26 F. Cas. 979, 982 (Marshall, Circuit Justice, C.C. Va. 1818). The acts warranting forfeiture may be "committed without the authority, and against the will of the owner," *id.*, yet they still "bind the interest of the owner … whether he be innocent or guilty," *Harmony v. United States*, 43 U.S. 210, 234 (1844). "[C]ertain uses of property" are "so undesirable[] that the owner surrenders his control at his peril." *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926). "It has long been settled," therefore, that due process does not relieve even innocent owners of the "unpleasant consequences" attending the illegal use of their property. *Id.* at 467-68; *accord Bennis*, 516 U.S. 442.

Nonetheless, property owners were not bereft of procedural protections against unlawful forfeitures. In one early case, the Court considered the remedies available to an aggrieved owner of seized property. *See*

Slocum v. Mayberry, 15 U.S. 1 (1817). Such an owner was *entitled* to have the government "institute proceedings." *Id.* at 10. Upon motion, a court could "compel the officer to proceed to adjudication, or to abandon the seizure." *Id.* Because the judicial forfeiture proceeding *was* the process due, a claimant could not "because he considers it tortious, replevy the property out of the [government's] custody" in a separate action. *Id.* at 9. Only "if the seizure be *finally adjudged* wrongful, and without reasonable cause" could a claimant then seek "damages for the illegal act." *Id.* at 10 (emphasis added); *accord Day v. Gallup*, 69 U.S. 97, 101 (1864) ("[T]he proper way … was first to have litigated the naked right of property in the Federal court. If successful in that, he then could have brought his action either of trespass or replevin."); *Gelston v. Hoyt,* 16 U.S. (3 Wheat.) 246, 312-13, 318 (1818).

In sum, due process historically protected a person's property interests in two ways. First, the government cannot seize and retain property indefinitely; it must bring its case to court, which permits a claimant to be heard and have his or her rights adjudicated. Second, a wrongful or illegal seizure may entitle a claimant to damages after the forfeiture is fully and finally adjudicated.

B. Statutory Background

1. Alabama empowers law enforcement to seize and forfeit "controlled substances," as well as the money used to buy them, the proceeds from their sale, and the "conveyances" used "to facilitate the transportation, sale, receipt, possession, or

concealment" of them. ALA. CODE §20-2-93(b)(1)-(9).[1] "Seizure without process may be made … incident to an arrest" or if there is "probable cause to believe that the property was used" to violate the law. *Id.* §20-2-93(d). After a seizure without process, forfeiture proceedings "shall be instituted promptly." *Id.* §20-2-93(e)(1).

2. Anyone "aggrieved by an unlawful search and seizure" may immediately move for the return of his or her property. ALA. R. CRIM. P. 3.13(a). Such a motion results in an independent action at which "[t]he judge shall receive evidence on any issue of fact." *Id.* "If the motion is granted, the property shall be restored." *Id.* This procedure thus tracks federal law, which has long permitted "equitable action[s] seeking an order compelling the filing of the forfeiture action or return of the seized property." *$8,850*, 461 U.S. at 569 (citing *Slocum*, 15 U.S. at 10; FED. R. CRIM. P. 41(g)).

3. Following a seizure, any claimant has the right to recover property (pending its disposition) by posting a double-value bond. *See* ALA. CODE §20-2-93(w), *inc'g by ref.* §28-4-287. "Upon the execution of such bond, the sheriff shall deliver said property to the defendant or claimant executing the same." *Id.* §28-4-287.

4. Because forfeiture actions are judicial proceedings generally subject to the Alabama Rules of Civil Procedure, claimants may also seek relief by motion—including dismissal, summary judgment, or

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[1] Alabama's forfeiture statute was amended while these suits were pending, so the code citations used here may not match those used earlier in these proceedings. The preexisting language relevant to this case remains substantially the same.

expedited consideration. As defenses to forfeiture, claimants may raise constitutional challenges, *see, e.g.*, *Ex parte Kelley*, 766 So. 2d 837, 840 (Ala. 1999), or the statutory "innocent-owner" affirmative defense, ALA. CODE §20-2-93(w); *see also Wallace v. State*, 229 So. 3d 1108, 1110-11 (Ala. Civ. App. 2017).

5. Owners of personal property also have meaningful post-deprivation remedies for the wrongful retention of their property. In Alabama, the tort of conversion is the "unlawful deprivation of or interference with [an owner's] possession" of personal property. ALA. CODE §6-5-260. Official retention of property may qualify as conversion, for example, when the government fails to institute forfeiture proceedings promptly. *See, e.g.*, *Lightfoot v. Floyd*, 667 So. 2d 56, 66-67 (Ala. 1995); *accord Lindsey v. Storey*, 936 F.2d 554, 561 (11th Cir. 1991).

C. Procedural History

1. The Sutton Cases

In early 2019, Petitioner Lena Sutton was living with her friend Roger Maze. Sutton let Maze drive her 2012 Chevrolet Sonic. Pet.App.62a. On February 20, 2019, Leesburg officers stopped Maze for speeding, found a large amount of methamphetamine in the car, and arrested and charged him with trafficking a controlled substance. *Id.*

Within two weeks of the stop, on March 6, 2019, the State initiated civil judicial forfeiture proceedings against Sutton's car in Cherokee County Circuit Court. J.A.7-22 (*Sutton I*). Sutton did not appear, and the court entered a default judgment forfeiting the car. J.A.23-24.

On the same day Sutton defaulted in state circuit court, she filed a lawsuit in federal district court. J.A.27-46 (*Sutton II*). Sutton's class-action complaint claimed, *inter alia*, a due-process right to a retention hearing. J.A.39-41. The *Sutton II* court dismissed on abstention grounds, reasoning that "the forfeiture proceedings completely encompass the issue of whether the state has a right to hold Ms. Sutton's car, either permanently or temporarily." *Sutton v. Marshall*, 423 F.Supp.3d 1294, 1299 (N.D. Ala. 2019). Sutton did not appeal.

Meanwhile, Sutton appeared in *Sutton I*, moved to set aside the default judgment, and alleged her innocence. J.A.25-26. The court granted the motion and afforded 21 days for Sutton to answer the complaint. The full 21 days later, Sutton filed a two-page answer, again alleging her innocence and raising constitutional claims. In July 2019, Sutton served discovery requests, Pet.App.63a, but for six months thereafter did nothing to get her car back.

Back in federal court, Sutton again filed suit in January 2020—this time against the Town of Leesburg—for money damages. J.A.73-91 (*Sutton III*). On behalf of herself and a putative class, she again claimed the State's failure to offer a prompt post-seizure hearing violated due process.

In February 2020, the *Sutton I* court *sua sponte* set the state forfeiture case for trial. Pet.App.63a. Several days before the April trial—and nearly nine months after filing her answer—Sutton moved for summary judgment based on her innocent-owner defense. *Id.* The court held a hearing on May 28, 2020, and entered an order granting Sutton's motion the same day. The

court ruled in favor of Sutton's innocent-owner defense, notwithstanding its finding that the State made a *prima facie* case for forfeiture. Pet.App.63a-64a.

Sutton never posted bond, moved for expedited review, or took any other action in state court to recover her car before moving for summary judgment 14 months after seizure.

Several months later, Sutton moved for summary judgment in *Sutton III* and first notified the State of her constitutional challenge to State law. The State intervened and moved to dismiss. The district court dismissed almost all of Sutton's claims, including her Fourteenth Amendment claim that no process existed to reclaim property *pendente lite* "because the statute plainly provides for the execution of a bond." J.A.121; *contra* J.A.81, 86. Sutton's challenge to the lack of a prompt post-seizure hearing was later resolved on cross-motions for summary judgment, when the district court applied *Barker* and determined that Sutton had no claim that she was denied a speedy trial. *See* Pet.App.70a-71a. The district court entered judgment, *id.* at 71a, and she appealed.

2. The Culley Cases

Petitioner Halima Tariffa Culley owned a 2015 Nissan Altima that her son Tayjon drove. Pet.App.15a-16a. On February 17, 2019, officers with the City of Satsuma stopped Tayjon and found marijuana, drug paraphernalia, and a loaded Sig Sauer 9-millimeter pistol in the car. Pet.App.16a. Officers seized those items and the car. *Id.*

Ten days after seizure, the State brought a civil judicial forfeiture action against the car and the gun

in Mobile County Circuit Court. J.A.1-5 (*Culley I*). The complaint was served on Culley on March 8, 2019, but she did not respond to it until September 16, 2019, when she appeared and filed an answer. Pet.App.16a.

One week after answering the six-month-old complaint in *Culley I*, Culley filed suit in federal district court against Attorney General Marshall, the District Attorney, and the City of Satsuma on behalf of herself and a putative class. J.A.52-72 (*Culley II*). Culley claimed the State's failure to offer a prompt post-seizure hearing violated due process. Pet.App.16a-17a.

Meanwhile, Culley "did nothing to press forward on the underlying forfeiture case" for twelve months. Pet.App.46a. Other than some minor discovery filings, the case remained dormant until September 1, 2020, when the court *sua sponte* scheduled a status conference. *Id.* at 46a-47a. It was only then that Culley moved for summary judgment. *Id.* at 47a. The court heard Culley's motion on October 30, 2020, granted it the same day, and ordered her car returned but the handgun forfeited. J.A.116-17.

Culley never posted bond, moved for expedited review, or took any other action in state court to recover her car before moving for summary judgment 19 months after seizure.

On Rule 12 motions from the defendants, the district court entered judgment against Culley on the merits of all claims. Pet.App.58a. As the court explained, Culley's assertion that the State offered no way for her to regain possession of the car was "factually and legally incorrect" given her option to post bond. Pet.App.39a-40a, 42a-43a. The bond

mechanism in conjunction with Culley's self-imposed delays meant her claim "clear[ly]" failed under *Barker* "as a matter of law." *Id.* at 46a. Alternatively, the court held that even under *Mathews*, Culley would lose because of the "multiple points of checks and balances" throughout the process. Pet.App.46a-52a. Culley appealed.

3. Petitioners' Appeal

The court of appeals consolidated the two appeals and rejected Petitioners' due-process claims. Pet.App.6a-8a. Under circuit precedent, *$8,850* and *Von Neumann* "were controlling and required [the court] to apply *Barker* rather than *Mathews*." *Id.* at 7a (citing *Gonzales v. Rivkind*, 858 F.2d 657 (11th Cir. 1988)). Because "a timely merits hearing" satisfying *Barker* "affords a claimant all the process to which he is due," no extra hearing is required. *Id.* at 8a.

Petitioners then sought a writ of certiorari, asking this Court to decide the test for whether due process requires a "probable cause hearing" "and, if so, when such a hearing must take place." Pet.i. After the Court granted certiorari, they transformed the issue. Petitioners now seek a "retention hearing" "to challenge the government's retention of property," Br.i, which would permit claimants to lodge affirmative defenses regardless of any probable-cause finding.

SUMMARY OF ARGUMENT

I.A. When a government seizes personal property for civil forfeiture, a timely judicial forfeiture proceeding provides all the process that is due. Assent to that proposition decides this case: Because a claimant's interests are fully protected by the

forfeiture proceeding itself, there is no need for an interim "retention hearing," Br.i, and no "methodological question" worth answering, Br.42-43.

Forty years ago, the Court foreclosed any notion that more process is required: "[T]he forfeiture proceeding, without more, provides the postseizure hearing required by due process." *United States v. Von Neumann*, 474 U.S. 242, 249 (1986) (describing *United States v. $8,850*, 461 U.S. 555 (1983)). At the same time, the Court recognized that forfeiture claimants do endure a temporary deprivation of their property. *Id.* at 250-51. That temporary deprivation is abated not by adding interim steps, but by ensuring that proceedings progress toward judgment in a timely fashion. And the appropriate test for timeliness is *Barker v. Wingo*, 407 U.S. 514 (1972).

I.B. To decide this forfeiture case, the Court should apply its forfeiture precedent, including *$8,850* and *Von Neumann*. Those decisions are still good law, and they still make good sense. The government has the power to retain property throughout proceedings for the same reasons it can seize property in the first place. Those reasons include, *inter alia*, the need to protect forfeitable property from removal, destruction, or concealment. Moreover, a full-blown adversarial hearing would not only jeopardize the government's property interests but could also compromise ongoing criminal investigations. *See Kaley v. United States*, 571 U.S. 320, 335-36 (2014).

Due process protects forfeiture claimants by forcing the government to initiate and progress proceedings without delay. At bottom, the case at hand is about timeliness: Petitioners stress that they

lacked their cars for "over a year." Br. 1, 5, 10, 16, 43, 45-47. Whether that duration was unconstitutional is a question for *Barker*, not *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Barker* is more flexible than *Mathews* because it analyzes *ad hoc* the unique procedural history of each case. And *Barker* accounts for the dispositive fact here—that Petitioners are responsible for the time it took to recover their cars.

A "retention hearing" would require the State to show more to retain property in civil proceedings than to detain people in criminal proceedings. Because the government may detain people facing incarceration "without an adversary hearing," *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975), it may retain cars without a "retention hearing." *See United States v. Monsanto*, 491 U.S. 600, 615-16 (1989).

I.C. Beyond the forfeiture proceeding itself, claimants have multiple avenues to obtain relief. First, like many States, Alabama allows claimants to post bond in exchange for their property. The bond process achieves the same result as a "retention hearing"—claimants can possess their property *pendente lite*—while securing the government's interests too. In their certiorari petition, Petitioners repeatedly admitted that bond provisions like Alabama's satisfy due process, *see* Pet.15-16, 23-25, and their own authorities admit the same, *see, e.g.*, *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002). Second, claimants have adequate post-deprivation remedies for the unlawful retention of their property. If the forfeiture proceeding somehow fails to provide due process, there is no constitutional violation where a tort claim for conversion would fully compensate the

claimant. *See Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981).

II. Petitioners received due process under any test. Under *Barker*, it is dispositive that Petitioners failed to assert their rights by waiting over a year to participate in the judicial process. Under *Mathews*, the State's strong interests in recovering forfeitable property outweigh a claimant's desire to avoid posting bond. Moreover, the risk of error is already low in a judicial forfeiture proceeding. Law enforcement must have probable cause, the State must investigate and decide to bring a complaint, and the case must withstand dispositive motions. All the while, the prospect of tort liability deters unlawful retention.

The State did not violate due process when it did not hold a "retention hearing." Nothing in this Court's due-process jurisprudence or the history of civil forfeiture suggests otherwise.

ARGUMENT

I. A Timely Forfeiture Proceeding, Without More, Satisfies Due Process.

This case is about what due process requires while the government retains property during a civil forfeiture proceeding. The question is not new. When exigent circumstances demand action, the Constitution permits "outright seizure without opportunity for a prior hearing." *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972) (footnote omitted). Seizure without warning is warranted, for example, when the property could be "removed," "destroyed, or concealed." *Calero-Toledo*, 416 U.S. at 679. In such cases, the government necessarily retains property, but its judicial disposition is not foregone—only delayed. The "mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 596-97 (1931).

Where it is permissible to delay process until after seizure, the courts still must ask what due process requires in the interim. That question is also not new. Forty years ago, the Court answered that what due process requires is timeliness, so *Barker*'s speedy-trial test is the "appropriate framework." *$8,850*, 461 U.S. at 564. That makes sense: When forfeiture proceedings cannot occur pre-seizure, the next best thing is to institute them promptly post-seizure and make timely progress toward judgment—*i.e.*, a speedy trial. To test for speed, *Barker* weighs: "[1] length of

delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] prejudice to the defendant." *Id.* These elements "balanc[e] the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." *Id.* at 565.

Petitioners charge that *$8,850* said "nothing about whether the Constitution may require *more* process," Br.37 (emphasis added), but the Court has answered that question too: "[T]he forfeiture proceeding, *without more*, provides the postseizure hearing required by due process." *Von Neumann*, 474 U.S. at 249 (emphasis added). To the extent the Court's full view was only "[i]mplicit … in *$8,850*," *Von Neumann* made explicit that "a forfeiture proceeding meeting the *Barker* test satisfies *any* due process right with respect to the [property]." *Id.* at 249, 251 (emphasis added).

By deeming *Barker* the exclusive test for post-seizure due process in forfeiture cases, *$8,850* and *Von Neumann* squarely decided the issue here. Those decisions, which comport with both history and contemporary doctrine, should not be overruled. The Court should neither craft an exception—a novel "retention hearing" unknown to forfeiture jurisprudence—nor apply a due-process test that would require one.

A. *$8,850* and *Von Neumann* squarely decided that a timely forfeiture proceeding, without more, satisfies due process.

1. In *$8,850*, the Supreme Court adopted the *Barker* test to analyze a due-process challenge to a post-seizure forfeiture proceeding. 461 U.S. at 561-64. In that case, the U.S. Customs Service seized currency that the claimant, Mary Vasquez, had failed to declare upon entering the country. *Id.* at 558-59. Asserting that her error was accidental, Vasquez promptly filed a petition for remission or mitigation. *Id.* The post-seizure administrative process permits a petitioner to request remission or mitigation by denying "willful negligence" or "intention … to violate the law" or by identifying "mitigating circumstances." 19 U.S.C. §1618. In Vasquez's case, the government did not act on her petition for eighteen months. 461 U.S. at 560-61 & n.7. Like Petitioners, she complained that the government violated her due-process right to prompt post-seizure process.

Applying the *Barker* factors, the Court concluded there was no due-process violation. Although the delay was "quite significant" and the deprivation a "significant burden," the government had good reasons: the need for investigation, which "inherently is time-consuming"; the "time to decide whether to institute forfeiture proceedings"; "a pending petition for mitigation or remission"; and "a pending criminal proceeding." *Id.* at 565-68. The government "acted with all due speed," yet Vasquez "fail[ed] to use the[] remedies" available "to trigger rapid filing of a forfeiture action" and suffered no prejudice. *Id.* at 568-69.

$8,850 decided the issue here when it endorsed *Barker* as the "apt" and "appropriate" test for post-seizure procedural due process. *Id.* at 564. Petitioners insist that *$8,850* adopted *Barker* only to analyze undue delay, so it offers "no guidance" here. Br.37-38. Both the premise and the conclusion are mistaken.

Vasquez had demanded more and better process. Petitioners misapprehend the role of remission in the case. Vasquez had alleged that "remission petition[s] are subject to due process requirements." Tr. of Oral Arg. at 54. Aside from the civil action, Vasquez argued she was "entitled" "to a prompt decision on her petition supported by factual findings and conforming to law." Vasquez.Resp.Br.46. The government owed her "a procedure … [to] show that there's been an innocent mistake." Tr. of Oral Arg. at 36. But she was denied that chance because "at no time was [her] petition ever considered as part of the remission procedures." Tr. of Oral Arg. at 36-37.

The Court responded by adopting *Barker* to analyze the whole case, necessarily deciding more than just the propriety of "waiting 18 months to institute a civil forfeiture action." Br.37. The *$8,850* Court decided that Vasquez's separate due-process concerns with the administrative process, *see* Vasquez.Resp.Br.44-46, could be analyzed under the *Barker* framework. Her concerns were relevant but did not trigger a separate due-process challenge under *Mathews*. Rather, "delay in processing the administrative petition" was one "factor in the flexible balancing inquiry" of *Barker*. *$8,850*, 461 U.S. at 566-67.

Alabama's reading of *$8,850—i.e.*, that *Barker* governs post-seizure procedural due process—is supported by *Von Neumann*, 474 U.S. at 249-51, by the Justice who authored *$8,850*, *see Good*, 510 U.S. at 74 (O'Connor, J., concurring in part and dissenting in part), and by multiple circuits, *see, e.g.*, *Serrano v. Customs & Border Patrol, U.S. Customs & Border Prot.*, 975 F.3d 488, 498 (5th Cir. 2020) ("[T]he forfeiture proceeding itself would provide the post-seizure hearing required by due process if it were held promptly."); *Gonzales*, 858 F.2d 657.

Petitioners' reading of *$8,850*, on the other hand, is supported only by a Second Circuit case that was mistaken for the same reasons. *See* Br.38-39 (citing *Krimstock v. Kelly*, 306 F.3d 40 (2002)). *Krimstock* asserted that "application of the speedy trial test presumes prior resolution of any issues involving probable cause" and "custody," "leaving only the issue of delay in the proceedings." 306 F.3d at 68. But Vasquez had lodged separate challenges to the remission procedure, which did not concern "delays in rendering final judgment," *Krimstock*, 306 F.3d at 68, yet were analyzed under *Barker*.

Petitioners' other attempts to diminish *$8,850* fail. For instance, they latch on to *$8,850*'s use of the word "narrow." Br.15, 37-38, 44. But the Court used that word because Vasquez—just like Petitioners—had not contested the validity of the seizure or the ultimate forfeiture hearing. 461 U.S. at 562. Rather, she complained that she was not "heard at a meaningful time," *id.* at 564, in the period between seizure and the forfeiture trial.

Petitioners also emphasize the Court's use of the word "analogy" when adopting the *Barker* test. Br.4, 14, 29, 31-32, 37-40. That language is unsurprising since *Barker* concerned the Sixth Amendment speedy-trial right, as the Court acknowledged. 461 U.S. at 564. Further, the adoption of an established test for a new context is not an indictment of the Court's reasoning; to the contrary, it grounds *$8,850* in precedent. And whether the Court reached its result by "analogy" has no effect on its reasoned holding that *Barker* applies. *See id.* (rejecting the government's proposed alternative); *see also Betterman v. Montana*, 578 U.S. 437, 451 (2016) (Sotomayor, J., concurring) ("[B]ecause the *Barker* test is flexible, it will allow courts to take account of any differences between trial and sentencing delays.").

2. Whatever *$8,850* left "[i]mplicit," *Von Neumann* cleared up. 474 U.S. at 249. *Von Neumann* was another customs case in which the claimant alleged he made an innocent mistake in failing to declare certain property (a car). *Id.* at 245-46. Von Neumann's petition for remission or mitigation had resulted in a reduced penalty, *id.* at 246, but he still challenged the interim deprivation. First, he argued that under *$8,850*, his property interest against deprivation during administrative review was "protected by the Due Process Clause" "independently of the statute" providing for remission. Von.Neumann.Resp.Br.8-9. Second, he argued that because due process attaches, a petition for remission (as "the first consideration of the merits") must be resolved "with reasonable promptness." *Id.* at 11-12.

The Ninth Circuit had initially applied a *Mathews*-style balancing test to Von Neumann's challenge. *Von*

Neumann v. United States, 660 F.2d 1319, 1324-25 (9th Cir. 1981), *cert. granted, judgment vacated*, 462 U.S. 1101 (1983). After the Court remanded for further consideration in light of *$8,850*, the Ninth Circuit distinguished *$8,850* as "present[ing] a somewhat different issue" and again held "that due process rights attach to the processing of the petition for remission." *Von Neumann v. United States*, 729 F.2d 657, 659-60 (9th Cir. 1984).

Applying *$8,850*, this Court reversed. 474 U.S. at 249. Nothing about the handling of Von Neumann's petition could violate his constitutional rights because "the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car." *Id.* Rejecting Von Neumann's argument that remission is protected as "one step in the entire process," Von.Neumann.Resp.Br.11, the Court explained that "remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required," 474 U.S. at 250. As to whether the remission statute created "a property right" to the process, the Court reiterated that Von Neumann's "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money." *Id.* at 251.

Von Neumann resolves this case. Like Petitioners, Von Neumann had complained that being even temporarily deprived of his car violated his due-process rights. Like Petitioners, Von Neumann had asked for more process: He urged the Court to affirm that due process gave him a right to prompt administrative review. At oral argument, Von

Neumann even raised the prospect of an immediate post-seizure hearing:

> The question … before the Court, are the procedural safeguards that are involved when there is a seizure of property with no hearing. Not only is there no pre-seizure hearing, there is no immediate probable cause post-seizure hearing.

Tr. of Oral Arg. at 28. In response, one of the Justices observed that "there eventually is a hearing," which must "be provided within a reasonable time to meet due process concerns. Now, why isn't that all that someone in [Von Neumann's] position is entitled to?" *Id.* Von Neumann had no persuasive answer, and the Court embraced the view underlying that question: "[T]he forfeiture proceeding, without more" protects due process post-seizure. 474 U.S. at 249.

Petitioners cannot make sense of *Von Neumann*. First, they incorrectly suggest there is an open "methodological question," Br.42, because *Von Neumann* applied *Barker* only "*as to the ultimate ownership determination*," not as to deprivation "*during*" proceedings, Br.44. Wrong. For starters, there never was an "ultimate ownership determination" prior to Von Neumann's due-process suit because the case was resolved administratively. But more importantly, Von Neumann challenged the interim deprivation as well, arguing he "had a cognizable property interest in the vehicle protected by the Due Process Clause until there was an adjudication of the forfeitability of the vehicle." Von.Neumann.Resp.Br.9. And the Court directly considered the temporary deprivation: "True, he was

without his car for 14 days, and then, for another 22 days, without the money he had put up to secure a bond, and Von Neumann urges the importance of automobiles…." 474 U.S. at 250-51. "But we have already noted that his right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money." *Id.* at 251. In other words, "when courts apply *Barker*, the answer is *always* 'no,'" there is no more process needed. Br.15.

For that reason, *Von Neumann*'s holding was not limited to remission, Br.42-43, and cannot be wished away as "dicta going far beyond the case." Br.44 (citation omitted). "The question here is whether more process is due in a civil case," Br.29, but the demand for more—whether an administrative process or a "retention hearing"—has been asked and answered.

Even if the Court had decided only that there is no due-process right to prompt administrative review, *Von Neumann* would still foreclose Petitioners' claim. If due process does not require a prompt decision on remission, *a fortiori* there is no right to a more robust adversarial hearing to challenge retention. Having rejected a demand for slightly more process, the Court necessarily rejected the demand for much more.

Petitioners resist the comparison by asserting that *Von Neumann* rested on the unique fact that "remission is entirely discretionary." Br.41; *see also Olson v. One 1999 Lexus*, 924 N.W.2d 594, 601 n.4 (Minn. 2019). But that fact was just the predicate for the Court's holding that proceedings "not *necessary* to a forfeiture determination … are not constitutionally required." 474 U.S. at 250. Being discretionary was just the way remission happened to be unnecessary.

Likewise, a "retention hearing" is unnecessary for forfeiture. For one, a State may forfeit property without hearing an innocent-owner defense. *Bennis*, 516 U.S. 442. For another, innocence is often never raised, so it cannot be described as "one step" in forfeiture. *Von Neumann*, 474 U.S. at 249. Being unnecessary, the "retention hearing" is not constitutionally required under *Von Neumann*.

Krimstock recognized that it could not require a "retention hearing" without distinguishing New York's forfeiture laws from those of *Von Neumann*. *See* 306 F.3d at 52 n.12. So the Second Circuit emphasized two features of the customs laws that New York did not offer: (1) claimants could challenge the initial seizure of property by motion, and (2) claimants could recover their property by posting a bond. *Id.*

The trouble for Petitioners—and the reason they cannot invoke *Krimstock*'s analysis of *Von Neumann*—is that claimants in Alabama can both challenge the initial seizure and secure the release of property on bond. *See supra* p.7. Thus, even if *Krimstock* were correct to infer that those features explain the holding of *Von Neumann*, Alabama already "provides the postseizure hearing required by due process." 474 U.S. at 249.

3. *$8,850* and *Von Neumann* remain good law and should not be overruled. There has been no intervening precedent that changed the legal landscape. Indeed, the Court referenced *$8,850* and *Von Neumann* as the relevant caselaw for answering this same question presented in 2009. *See Alvarez v. Smith*, 558 U.S. 87, 89 (2009). The Court cited both

cases in *Good* without qualification. 510 U.S. at 48, 53, 57, 65.

"Before overruling precedent, the Court usually requires that a party ask for overruling …, and then the Court carefully evaluates the traditional *stare decisis* factors." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 n.5 (2020) ("*AAPC*"). But Petitioners have not asked the Court to overrule *$8,850* and *Von Neumann*, and the traditional factors counsel against it. First, if those cases were wrong, they were not egregiously wrong. Multiple lower courts have read them just as Respondents do. That four Justices strongly resisted the creation of a new *Mathews*-powered exception for real property in *Good* suggests the enduring force of the Court's traditional forfeiture rules. Second, *$8,850* and *Von Neumann* rested on sound rationales. They reflect the basic intuitions that the government must secure forfeitable property and that timeliness protects the claimant's interim interests. *See infra* §B.1-2. Third, the timeliness inquiry is eminently workable, especially in comparison the "retention hearing" concept, which remains undeveloped and vague. *See Krimstock*, 306 F.3d at 69 ("[W]e decline to dictate a specific form for the prompt retention hearing."). And fourth, dozens of States have relied on the settled principles underlying *$8,850* and *Von Neumann* to craft their forfeiture laws. Effective deterrence and punishment of drug crimes depend on these precedents.

4. As a substitute for this Court's wealth of forfeiture jurisprudence, Petitioners offer the balancing test of *Mathews v. Eldridge*. But *Mathews* is not a license to ignore on-point precedent as if the

Court were writing on a blank page. The question of what due process requires in forfeiture proceedings is not new, and recasting it as whether due process requires a "retention hearing" does not erase the Court's previous answers.

Mathews may be "familiar," Br.1, 18, 22, but it did not "announc[e] an all-embracing test for deciding due process claims." *Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002). Instead, the Court looks first to history and precedent. In *Dusenbery*, the Court explained that *Mathews* "was first conceived in the context of a due process challenge to the adequacy of administrative procedures used to terminate Social Security disability benefits." *Id.* at 167. While *Mathews* may apply "in other contexts," a "well-settled practice" will trump *Mathews*. *Id.* at 167-68. Similarly, in *Medina v. California*, the Court rejected *Mathews*'s "general approach" in favor of "[h]istorical practice" and "settled tradition." 505 U.S. 437, 444, 446 (1992) (citation omitted). And even when its historical inquiry turned up empty, the Court still chose another test over *Mathews*. *Id.* at 445-47.

Petitioners identify one time in the half-century since *Mathews* that the Court has applied it in the forfeiture context. *See Good*, 510 U.S. at 53. But *Good* did not cement *Mathews* as the due-process test for forfeiture proceedings. In fact, all *Good* said about *Mathews* was that it "provides guidance." *Id.* Combining that sentence with a "mountain" of irrelevant *Mathews* caselaw, Br.19-21 (citation omitted), does not override *$8,850*'s reasoned analysis adopting *Barker*, *Von Neumann*'s faithful application

of that precedent, or the rest of the Court's forfeiture jurisprudence at odds with the "retention hearing" concept, *see infra* §I.B. *See AAPC*, 140 S. Ct. at 2347 n.5 (declining to overrule "precedent on precedent").

If every new phrasing of a resolved due-process issue required a fresh *Mathews* analysis, the Due Process Clause would be completely unmoored. *Mathews* affords no weight to constitutional text, history, or tradition. It requires no deference to precedent. Even its defenders admit that *Mathews* can never be the whole story, lest due process blindly "absor[b] … [the] social standards of a progressive society." *Medina*, 505 U.S. at 454 (O'Connor, J., concurring in the judgment) (citation omitted); *see also Good*, 510 U.S. at 66 (Rehnquist, C.J., concurring in part and dissenting in part) (describing how *Mathews* was "conceived to address … modern administrative law" because "[n]o historical practices existed").

B. Even if *$8,850* and *Von Neumann* do not resolve this case, *Barker* is the appropriate due-process framework.

$8,850 and *Von Neumann* decided that a forfeiture proceeding meeting the *Barker* test satisfies due process. The Court should embrace that conclusion, even if precedent does not command it, because *Barker*'s application to forfeiture is consonant with longstanding due-process principles.

Where pre-seizure process is not required, due process provides claimants the right to prompt and timely post-seizure process. It is "commonsense" that

the civil forfeiture action itself is the post-seizure process required. *Good*, 510 U.S. at 74 (O'Connor, J., concurring in part and dissenting in part). To that basic framework Petitioners would add the condition that a judicial proceeding violates due process without a "retention hearing"—apparently a mini-trial of sorts. That novel concept is at odds with (1) the governmental interests that justify seizure without process; (2) the claimant's interests in timeliness; and (3) the process for pre-trial detention of criminal defendants.

1. Because the government's reasons for seizure also justify retention, due process does not require more than a timely forfeiture proceeding.

The government may act before providing an opportunity to be heard "where some valid governmental interest … justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips*, 283 U.S. at 596-97. "Property rights must yield provisionally to governmental need." *Id.* at 595.

Because "there is a strong governmental interest in obtaining full recovery of all forfeitable assets," *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 631 (1989), the Court has repeatedly held that forfeiture justifies seizure without process. The government's recovery is threatened by the risks that property may be "removed to another jurisdiction,

destroyed, or concealed." *Calero-Toledo*, 416 U.S. at 679. Claimants or third parties may try to frustrate forfeiture for their private gain. *See Good*, 510 U.S. at 72 (Rehnquist, C.J., concurring in part and dissenting in part). And once the property is missing or destroyed, the court may lose *in rem* jurisdiction because its judgment would be "useless." *See, e.g.*, *United States v. 3262 SW 141 Ave.*, 33 F.3d 1299, 1303-04 (11th Cir. 1994).

Immediate seizure eliminates such risks, thereby promoting the goals of the forfeiture laws. *Calero-Toledo*, 416 U.S. at 679 (collecting cases); *Good*, 510 U.S. at 57 (citing *Von Neumann*, 474 U.S. at 251); *see also Kaley*, 571 U.S. at 323. For example, in *Adams v. City of Milwaukee*, the immediate seizure of possibly tainted milk did not offend due process because it was necessary to effectuate the milk regulation's protection of public health. 228 U.S. 572, 583-84 (1913).

When the property may be used for illicit purposes, immediate seizure "foster[s] the public interest" in deterring criminal activity. *Calero-Toledo*, 416 U.S. at 679. Seizure restrains the property used to commit illegal acts, preventing further criminal use pending investigation and adjudication. Further, seizure facilitates the general "deterrent purpose" of "imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Bennis*, 516 U.S. at 452 (citation omitted). For these reasons, the Court has "permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." *United States v. Monsanto*, 491 U.S. 600, 615 (1989) (citing *$8,850*, 461 U.S. 555).

The power to retain flows from the power to seize. Public health would have been no less jeopardized in *Adams* had tainted milk re-entered circulation soon after seizure. 228 U.S. at 584. So too it would be pointless for the government to seize contraband only to return it days later. When dealing with any "sort of property that could be removed …, destroyed, or concealed," the "special need" to seize without process also warrants retention "prior to the forfeiture judgment." *Good*, 510 U.S. at 52, 58 (citation and editing marks omitted). If anything, that need is heightened post-seizure. Someone motivated to conceal a boat or car would be motivated all the more once the government has staked its claim. Any ground for immediate seizure rules out immediate release.

Retention also facilitates orderly investigation by law enforcement. Authorities need time to ascertain exactly who owns the property, who might have claims, and who used it unlawfully. There are often parallel criminal investigations too, and witnesses may be uncooperative or unreliable. A complex matter may require the coordination of multiple law-enforcement agencies. *See, e.g.*, *$8,850*, 461 U.S. at 567-68.

But Petitioners demand that the State "rehearse the case's merits, including the Government's theory and supporting evidence," perhaps only days after seizure. *Kaley*, 571 U.S. at 335. Beyond the drain on prosecutorial time and resources, that "sneak preview" could "facilitate witness tampering or jeopardize witness safety," "undermin[ing] the [State's] ability either to obtain a conviction or to preserve forfeitable property." *Id.*

Case in point: Petitioner Sutton loaned her car to a friend whom she knew "had a drug problem." J.A.11. When he was pulled over, officers discovered a "large amount of methamphetamine." J.A.20. At that point, the owner could have been a suspect; the owner or the driver could have been part of a larger conspiracy. In any event, the State would need time to investigate. *See $8,850*, 461 U.S. at 565 ("The Government must be allowed some time…."); *see also id.* at 563-64, 567-68. A mandated merits preview at the earliest stage could divert crucial resources, hamper investigation, and prejudice the State in its forfeiture and criminal proceedings. Instead of rushing a mini-trial, the State's burdens at each stage should remain the province of the rules of civil procedure. *See infra* §I.B.3.

The exception *Good* crafted for real property does not aid Petitioners. Unlike "an automobile," "real property cannot abscond," 510 U.S. at 57 (contrasting *Von Neumann*, 474 U.S. at 251), so "the Government can wait" to seize real property, *id.* at 59. Citing centuries-old admiralty cases, the Court explicitly left intact the permission to seize "vessels and other movable personal property." *Id.* at 57; *see also Krimstock*, 306 F.3d at 65 (citing *Good* for "the need for seizure of movable property"). In the course of reifying that need, the *Good* Court reaffirmed that *Calero-Toledo* and *Von Neumann* remain good law.

Because *Good* plainly held that real property is different, Petitioners resort to the general idea that due process "does not distinguish among different kinds of property." Br.26 (internal quotation marks omitted). If true, that would be a reason *Good* was wrong to create a new exception, not a reason to

expand the aberration. Indeed, Chief Justice Rehnquist criticized the Court for "discard[ing]" "the long history of *ex parte* seizures of real property through civil forfeiture." *Good*, 510 U.S. at 69-70 (Rehnquist, C.J., concurring in part and dissenting in part). "[N]ot until" *Good* had the Court "held that the Constitution demanded notice and a *preseizure* hearing to satisfy due process requirements in civil forfeiture cases." *Id.* at 72. *Good* is "instructive," Br.26, only as an exemplar of modern deviation.

Moreover, the principle that due process treats all kinds of property alike counsels against a new type of remedy for unknown categories of claimants and property. Flexibility turns to nebulosity when Petitioners suggest that "[s]ometimes the *Mathews* framework will require a retention hearing in civil forfeiture actions. Other times it won't." Br.36. On their view, a "retention hearing" would be required at least whenever the owner claims innocence *Id.* at 28. And maybe for all cars, *id.* at 45-46, but probably not "spoiled poultry" or "contraband," *Krimstock*, 306 F.3d at 66. "But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions." *Fuentes*, 407 U.S. at 90; *see also Good*, 510 U.S. at 76 (O'Connor, J., concurring in part and dissenting in part) ("It is entirely spurious to say … that executive urgency depends on the nature of the property sought to be forfeited.").

2. A timely forfeiture proceeding fully protects a claimant's interests.

1. The government can seize personal property without notice, and it can retain that property temporarily because its strong interests in recovery do

not wane during the forfeiture proceeding. Still, due process requires "balancing the interests of the claimant" too. *$8,850*, 461 U.S. at 564-65. What is the claimant's interest? The claimant wants to end the temporary deprivation as soon as possible. That's why Petitioners stress that their proceedings lasted "over a year." If the state court had held a "retention hearing" one year after seizure, Petitioners would have had the same grievance. But if the state court had rendered a final judgment one day after seizure, Petitioners would have no complaint (despite not receiving a "retention hearing"). From these intuitive observations it follows that *$8,850* and *Von Neumann* were right: The issue here is timeliness, not a lack of procedure, and *Barker* is the test for timeliness.

The gravamen of Petitioners' claim is that they were not heard "at a meaningful time and in a meaningful manner." Br.27 (citation omitted). In support, they say their "innocent-owner defense received … *no consideration* for over a year." Br.47 (internal quotation marks omitted). But in their own words, Petitioners "finally had a chance to be heard" after they filed motions for summary judgment. Br.47. That sounds like the proceeding itself "provide[d] the postseizure hearing required." *Von Neumann*, 474 U.S. at 249. In other words, the summary-judgment hearing on each Petitioner's innocent-owner defense, as one component of a fair judicial proceeding, was the "meaningful manner" required. The only question is whether it occurred "at a meaningful time."

While Petitioners clothe their argument in *Mathews* language, underneath is a claim about delay.

As to the first *Mathews* factor, Petitioners say that "14 months" without a car meant Sutton "was unable to find work, fell behind on her bills, and missed medical appointments." Br.46. Those alleged harms plainly stemmed from the length of the deprivation. As to the second factor, Petitioners argue that "error" could have been avoided by an *earlier* hearing on their defenses. Br.47. Finally, Petitioners discount the government interests under *Mathews* by reiterating their private interests in "daily access to their vehicles." Br.49 (citation omitted). But if the harms recur daily, that's a timeliness issue too. Petitioners seek a "retention hearing" not because it would enhance "judicial oversight," Br.1, but because it might end the deprivation sooner. The timeliness thread is woven through their argument at every turn.

2. For these reasons, *Barker* better accounts for the source of the alleged harms—*i.e.*, the time between seizure and hearing. If claimants face "irreparable injury" due to "congested civil dockets," Br.27 (citation omitted), that would be a *Barker* problem. If the State somehow delayed summary-judgment hearings for "over a year," that would be a *Barker* problem. *Mathews*, on the other hand, would implausibly blame a lack of procedure, despite Petitioners' admission that the procedure they eventually received was adequate. And by misdiagnosing the purported problem, *Mathews* risks exacerbating it by requiring time-consuming hurdles to final judgment.

Similarly, *Mathews* cannot supply a complete cure. Supposing Petitioners were entitled to a "retention

hearing," when would it occur—at two weeks, thirty days, or six months? Petitioners do not say, and *Mathews* cannot answer because the competing interests and the risk of error remain roughly constant. Nor can *Mathews* say when the final hearing must occur to satisfy due process. *Barker* is designed to answer those very questions. *See $8,850*, 461 U.S. at 564-65.

Petitioners charge that *Barker* does not adequately balance interests, Br.29, but the Court has said otherwise: The *Barker* factors "are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." *$8,850*, 461 U.S. at 565. And *Barker* better articulates the interests in forfeiture cases, which should not be weighed in a vacuum but instead moderated by the length of delay in each case. *See, e.g.*, *id.* ("Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden."). So too the second and third *Barker* factors take a more nuanced approach to the interests. For example, if a claimant declines to participate in the forfeiture proceedings for over a year, then no matter how valuable his property in the abstract, it was not valuable *to him* in *this case*, and his delay ought not give rise to a due-process violation. *See infra* §II. In contrast to the rigidity of *Mathews*, *Barker* "necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Barker*, 407 U.S. at 530.

Petitioners insist that *Mathews* is flexible because it may or may not warrant more process "in any given forfeiture case." Br.28. But that has not borne out in practice. *See, e.g.*, *Good*, 510 U.S. at 62 (all claimants of real property); *Krimstock*, 306 F.3d at 68-69 (all claimants of motor vehicles). The best example on offer is *Olson*, Br.28, which decided *Mathews* requires additional hearings for all "potentially innocent owners," 924 N.W.2d at 613. Still not very flexible.

Barker achieves its promise of flexibility by being retrospective and particular—asking why a case took so long—whereas *Mathews* tends to be prospective and general—asking hypothetically whether some process would help a set of claimants. But not all owners, not even all innocent owners, are alike. Consider Sutton's case. Perhaps a car carrying methamphetamine warrants more investigation and more caution before releasing the car or disclosing evidence. Plus, holding a "retention hearing" after Sutton defaulted would make little sense. *Barker*'s case-by-case approach is sensitive to such circumstances and the procedural history of each case. *See $8,850*, 461 U.S. at 564-65. *Mathews* is comparatively shallow, which Petitioners' argument—omitting the reasons for delay and the self-imposed nature of their harms—exemplifies.

Even if *Mathews* could operate *ad hoc* to add hearings to a given proceeding, it would only exacerbate delay—the true cause of Petitioners' concerns. Application of *Mathews* could mean affidavits, briefing, and another hearing—just to

determine whether to have a "retention hearing." And it would inevitably spawn procedural battles about the contours of the "retention hearing." *See Krimstock*, 306 F.3d at 69 (admitting that there are "many potential variations" and "no one plan" (citations omitted)). *Mathews* encourages micromanagement of the state-court docket—dissecting each moment of the process in isolation to see if the interests are perfectly balanced. But that "subtle balancing" should be "left to the legislative branch." *Patterson v. New York*, 432 U.S. 197, 210 (1977).

Mathews was well known to the Court when it decided *$8,850* and *Von Neumann*. But procedural due process during a judicial proceeding is ultimately about timeliness, and *Barker* ensures timeliness. Thus, the Court correctly held that a *Barker*-compliant proceeding satisfies due process. Not every due-process question is a more-process question.

3. Requiring a "retention hearing" would mean property receives greater procedural protections than persons.

1. When Petitioners asked the Court to take their case, they presented the question as whether "a probable cause hearing" is required. Pet.i. But having secured a grant of certiorari, they now ask for far more—"a retention hearing," Br.i, that would require the State to show the "probable validity" of its case, Br.25 (citation omitted), and to overcome any affirmative defense to forfeitability in an adversarial hearing. They want, in effect, a rushed mini-trial on the merits of forfeiture just weeks after seizure.

Even criminal defendants do not receive that degree of process. The pretrial detention of a criminal defendant requires only "probable cause for detaining," which may be found through "a nonadversary proceeding," featuring "informal modes of proof" such as "hearsay and written testimony." *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991). Thus, on Petitioners' view, it should be harder to impound *property* than to imprison a *person* before trial. Absurdly, Culley's car would receive more process than Culley's son, who faced a felony charge.

The Court has repeatedly rejected the "incongruity" Petitioners propose. *Kaley*, 571 U.S. at 330 (noting the "absence of any reason to hold property seizures to different rules"); *Monsanto*, 491 U.S. at 615-16 (holding that a restraint of property "to protect its 'appearance' at trial and protect the community's interest in full recovery" is not "constitutional[ly] infirm[]" where a similar restraint on a person would be permitted). Whenever confronted with a parallel to criminal law, this Court has held that civil *in rem* proceedings warrant no greater protections. *Cf. United States v. Ursery*, 518 U.S. 267 (1996) (holding civil forfeitures not protected by the Double Jeopardy Clause); *$8,850*, 461 U.S. at 565 n.14 (noting that *Barker*'s balance of interests "may differ" in a criminal case where the loss of liberty is a "more grievous" deprivation).

2. The *Gerstein* disanalogy also reveals that the "retention hearing" has the burdens of proof all wrong. For pretrial detention following a warrantless arrest, the State must show only probable cause; for conviction, proof beyond a reasonable doubt. The

standard is higher for a permanent deprivation of liberty than for a temporary one. But Petitioners would let claimants challenge retention on the same grounds on which they would challenge forfeitability; ergo, the State would have the same burden to retain property as it does to forfeit property permanently.

By accelerating the showing for permanent forfeiture, the "retention hearing" concept eschews the basic logic of civil procedure, which appropriately scales the burdens throughout a proceeding. The standard for the State's complaint to survive a motion to dismiss is commensurate with the early stage of proceedings, whereas the required showing on summary judgment is properly more onerous. There's no reason to warp these burdens and rush to a miniature merits hearing before discovery or even a full investigation by law enforcement.

More generally, decisions about "the burden of producing evidence and the burden of persuasion" fall "within the power of the State to regulate procedures under which its laws are carried out." *Patterson*, 432 U.S. at 201-02 (citation omitted). That power has special force here because forfeiture presupposes a crime, and "[i]t goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Id.* Where the government has decided "what process is due owners of vehicles seized under the narcotics laws," "[g]reat weight must be given to its judgment." *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 820 (9th Cir. 1981). The Constitution should not be "lightly construe[d]" "so as to intrude upon the

administration of justice by the individual States." *Patterson*, 432 U.S. at 201. A mandatory "retention hearing" would do just that. The Court should reject Petitioners' call to become "a rule-making organ" for state procedure. *Spencer v. Texas*, 385 U.S. 554, 564 (1967).

3. Even if Petitioners had not abandoned their request for a "probable cause" hearing, *Gerstein* would not be an "apt analogy" to civil *in rem* forfeiture actions. Br.39 (citation omitted). For one, the Court already rejected the need for a probable-cause hearing when Von Neumann demanded one in 1985. *See supra* p.23 (quoting oral argument). The civil judicial action *is* the prompt post-seizure hearing required. *Id.* For another, a probable-cause hearing would have no effect on "the risk of erroneous deprivation." Br.46-47. The State plainly had probable cause because officers found drugs in the cars, and Petitioners have never argued otherwise. *See Gerstein*, 420 U.S. at 120 ("The [judicial] standard is the same as that for arrest.").

Because probable cause would be no hurdle in forfeiture cases, Petitioners have always asked for more. They initially demanded the State "show probable cause that her automobile was used in a crime with her knowledge." J.A.60, 81. But that showing would exceed probable cause; the State would need to prove its case for forfeiture *and* disprove innocence. For that, Petitioners cannot invoke *Gerstein* because the State need not overcome affirmative defenses at a pretrial detention hearing.

However described, the hearing Petitioners seek would test more than probable cause and afford more process than defendants receive when their pre-trial

liberty is at stake. To avoid that anomaly, the Court should reaffirm that the hearing required is "the forfeiture proceeding, without more." *Von Neumann*, 474 U.S. at 249.

C. Due process is satisfied by alternative avenues of relief.

Due process does not require more than a timely forfeiture proceeding. But even if it does, claimants have no right to a "retention hearing" where there exist adequate alternative remedies for the deprivation of their property interests.

1. Where claimants can obtain their property on bond, due process is satisfied.

A bond mechanism gives claimants the option to possess their property *pendente lite*. Bond provisions have a long pedigree, *see, e.g.*, Act of Apr. 2, 1844, ch. 8, §1, 5 Stat. 653, 653, and today over a dozen States, the District of Columbia, and the Federal Government secure their interests in forfeiture with a bond.[2] On Petitioners' view, these familiar laws are unconstitutional because claimants have a right to a hearing that would mandate the unconditional

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[2] *See, e.g.*, 19 U.S.C. §§1608, 1614; ALA. CODE §28-4-287 (double bond); ALASKA STAT. §17.30.118(b)(2) (double bond); D.C. CODE §41-306(d)(2)(E), (f)(3)(C)(ii); HAW. REV. STAT. §§712A-10, 712A-11(1); IDAHO CODE §37-2744(d); IND. CODE ANN. §34-24-1-2(i)(1) (West); KAN. STAT. ANN. §§60-4108(b), 60-4112(b); MD. CODE ANN., CRIM. PROC. §12-208 (West); MINN. STAT. §609.531, subd. 5a; MO. REV. STAT. §513.610; N.J. REV. STAT. §2C:64-3(g); R.I. GEN. LAWS §21-28-5.04.2(h)(4), (7); TENN. CODE ANN. §§40-33-107(3), 40-33-108 (West) (double bond); UTAH CODE ANN. §§77-11a-301(2)(a), 77-11a-302 (West); VA. CODE ANN. §19.2-386.6 (West).

release of their property. But in truth, releasing property on bond is a permissible, even praiseworthy, way to protect due process during forfeiture proceedings.

This Court and many courts of appeals have authorized bonds. In *Good*, the Court proposed that for real property, a bond would "suffice to protect the Government's interests." 510 U.S. at 62. In *Smith*, the Seventh Circuit distinguished *Von Neumann* by the fact that the claimant already "had, in effect, relief similar" to a 'retention hearing' because his "vehicle was released in 2 weeks after he posted bond." *Smith v. City of Chicago*, 524 F.3d 834, 837 (7th Cir. 2008), *vacated as moot sub nom. Alvarez v. Smith*, 558 U.S. 87 (2009).

The case that really gives bond procedures pride of place is *Krimstock*. Throughout its analysis, the Second Circuit crucially relied on the absence of a bond provision in New York City's forfeiture scheme. 306 F.3d at 52 n.12, 55, 65 & n.26, 67 & n.29, 70. Describing them as "avenues of interim relief," *id.* at 55, the court repeatedly suggested that bonds satisfy due process during forfeiture proceedings. *See, e.g.*, *id.* at 52 n.12 (distinguishing *Von Neumann* based on the availability of bonds); *id.* at 65 n.26 (distinguishing *Calero-Toledo* on the same ground).

That's not all. Like Respondents here, New York had argued that because personal property is movable, "the City must retain custody." *Id.* at 64. Crediting the need "[t]o *ensure* that the City's interest … is protected," the court held only that "retention *may* be unjustified" where "claimants could post bonds" to secure the City's interests. *Id.* at 65

(emphasis added); *accord* Pet.24-25. That premise explains *Krimstock*'s remedy—a limited hearing to see "whether means short of retention [*e.g.*, a bond] … can satisfy the City's need." 306 F.3d at 67; *accord Smith*, 524 F.3d at 839.

Petitioners praise *Krimstock*'s remedy but ignore its rationale that a "retention hearing" is supposedly justified *because it could result in the release of property on bond*. That reasoning has no application here where the State already provides a bond procedure *as a matter of right*. Alabama does not "refus[e] to exercise some means short of continued retention." 306 F.3d at 68.

Importantly, Petitioners' complaints did not allege any facts about Alabama's bond procedure. Worse, both Petitioners falsely denied that such process existed. *See* J.A.60, 65, 81, 86.[3] As a result, the assertion that it is "downright delusional" to think that releasing property on bond can "cure a property deprivation," Br.48, has been raised for the first time on appeal. Generally, an appellate court does not consider an issue not passed on below. *Singleton v.*

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[3] Petitioners continued to feign ignorance in their certiorari petition, making no mention of their forgone option to post bond. Worse still, they repeatedly praised the idea, wrongly implying that Alabama does not permit claimants to post bonds for seized property. *See* Pet.15-16 ("The innocent owner can be without his car for months or years without a means … even to post a bond to obtain its release. It is hard to see any reason why an automobile … should not be released with a bond…." (quoting *Smith*, 525 F.3d at 838)); Pet.23 ("[T]he retention hearing will allow the court to consider … a bond…." (quoting *Krimstock*, 306 F.3d at 69-70)); Pet.24-25 (similar). Petitioners appeared to concede that a bond provision like Alabama's would satisfy their due process claim.

Wulff, 428 U.S. 106, 120-21 (1976). Petitioners have not argued that any exception to that general rule applies here, *see id.*, so their belated allegations that a bond would be "illusory" should not be considered, Br.48. Petitioners should not be permitted to backfill their barebones complaints before this Court. *See Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (dismissing writ of certiorari where "record [was] not sufficiently clear and specific to permit decision of the important constitutional questions involved").

Because Petitioners failed to address Alabama's bond procedure, they never stated a claim. "[T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990); *see also McKinney v. Pate*, 20 F.3d 1550, 1563-64 & nn.18, 20 (11th Cir. 1994) (en banc) (rejecting due-process claim where plaintiff ignored an "available, adequate remedy in the state system"). Petitioners ignored the bond provision, thus failing to "explain why … [it] is insufficient to remedy the [alleged] process violations." *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 910 (6th Cir. 2014); *accord* J.A.120-21, 143.

Because Petitioners did not even attempt to use the bond procedure, they have no standing. *See, e.g.*, *Ga. Elec. Life Safety & Sys. Ass'n, Inc. v. City of Sandy Springs*, 965 F.3d 1270, 1277-80 (11th Cir. 2020) (finding no standing to raise due-process challenge to municipal appellate process where plaintiff never appealed). Petitioners cannot have concrete injuries caused by a process they inexplicably failed to use.

Now to address Petitioners' overdue argument that the idea of a bond is "delusional." Br.48. Despite never alleging, let alone proving, any relevant facts, Petitioners say "the opportunity to post a bond … is 'illusory hardship relief.'" *Id.* (quoting *Olson*, 924 N.W.2d at 615). But not even *Olson* supports their view, which the very next sentences make clear: "[Minnesota's] bond provision requires a claimant to post a bond … in exchange for receiving the vehicle back in a *disabled* state." 924 N.W.2d at 615. A "bond in exchange for an unusable vehicle[] is not meaningful hardship relief." *Id*. If anything, *Olson* supports Respondents by implying that a bond-for-car exchange otherwise would be meaningful relief; Alabama law does not require cars to be disabled upon release.

Similarly, the criticism that Alabama's double-value bond provision is "excessive," Br.49, implies that some other bond would be enough for due process. The Court can reject the naked assertion that double bonds are excessive but accept the tacit implication that a non-excessive bond would suffice. Petitioners' admission is fatal to their thesis that only a "retention hearing" can protect due process during a forfeiture proceeding.

2. Where claimants have post-deprivation remedies, due process is satisfied.

In the extraordinary scenario where every other procedural protection has failed to provide relief, "a common-law tort remedy for erroneous deprivation[] satisfies due process." *Zinermon*, 494 U.S. at 128. If the State does not file proceedings "promptly," ALA.

CODE §20-2-93(e)(1), and does not progress them timely, *Barker*, 407 U.S. 514, then "the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." *Parratt v. Taylor*, 451 U.S. 527, 543 (1981). In such a case, post-deprivation tort remedies can "fully compensate[]" claimants and thus "satisfy the requirements of due process." *Id.* at 544. Even when "retention … is wrongful, no procedural due process violation has occurred 'if a meaningful postdeprivation remedy for the loss is available.'" *Lindsey*, 936 F.2d at 561 (quoting *Hudson v. Palmer*, 468 U.S. 517, 533 (1984)); *accord Byrd v. Stewart*, 811 F.2d 554, 555 n.1 (11th Cir. 1987) (citing a state tort as "an adequate post deprivation remedy when … the state has retained [] property without due process").

Alabama provides adequate post-deprivation remedies. Claimants who do not receive prompt process can bring a tort claim for conversion, the "unlawful deprivation" of their personal property. ALA. CODE §6-5-260. In one case, law enforcement knew the State would not institute a forfeiture action yet retained seized "money … for 23 ½ months and [a] car for approximately 15-18 months." *Lightfoot*, 667 So. 2d at 66. Once it became impossible for a prompt forfeiture action to provide due process, the official "had no authority to retain custody," and conversion was the proper remedy. *Id.*

Just as they failed to address the bond, Petitioners have not explained why their tort remedies would be inadequate. At most, they gesture at the possibility of "irreparable injury." Br.27. But the temporary loss of one's car is a calculable harm fully compensable by monetary damages. *See, e.g.*, *Rajapakse v. Credit*

Acceptance Corp., No. 17-12970, 2018 WL 3284452, at *8 (E.D. Mich. Apr. 19, 2018). Indeed, that's the very relief Petitioners sought from the municipalities below.

II. The Procedures Available to Petitioners Satisfied Due Process.

Petitioners lacked their cars for over a year because they did nothing to get them back. After the State promptly initiated judicial proceedings, Petitioners let their cases languish until the courts *sua sponte* set them for hearings. Such dilatory conduct does not give rise to a due-process violation.

A. Petitioners received due process under the *Barker* test.

Petitioners concede that they cannot win under the *Barker* test. All four factors favor the State.

1. There was no delay. The State promptly filed each proceeding within two weeks of seizure. Although *Sutton I* lasted 14 months and *Culley I* lasted 21 months, duration is not the same as delay. No act of the State postponed the process. Notably, when Petitioners eventually moved for summary judgment, both received hearings and final judgments within fifty days. Had they filed the same motions from the start (or even simpler motions to expedite), they may well have received exactly the relief they demand. There was no delay between the time Petitioners raised their defenses and the time they were resolved.

2. The reason for the length of these proceedings is that Petitioners did nothing to advance them. After

Sutton's default was set aside, she made no attempt to expedite or resolve her case for over nine months. For her part, Culley did not request a hearing or expedited review, post a bond, or do anything of substance for over a year.

3. Petitioners slept on their rights. They did not challenge seizure under Rule 3.13. They did not post bonds to recover their cars. And they waited over a year to move for summary judgment, although nothing prevented them from submitting those motions on the day the case was filed. Petitioners had the counsel and resources to assert their rights in the forfeiture proceedings—as they did over a year later—but they chose not to do so. Their failures do not create a constitutional violation. *See Barker*, 407 U.S. at 533-36 (no violation despite "extraordinary" five-year delay).

4. Petitioners were not prejudiced in their defense. Being without their cars, even for over a year, did not "hamper[] [Petitioners] in presenting a defense on the merits, through, for example, the loss of witnesses or other important evidence." *$8,850,* 461 U.S. at 569.

B. Petitioners received due process under the *Mathews* test.

Petitioners' claims also fail under *Mathews*, which weighs (1) the private interest; (2) the risk of erroneous deprivation and value of additional safeguards; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens" of additional procedure. 424 U.S. at 335. As the *Culley* district court recognized, Pet.App.47a-52a, Petitioners' case under *Mathews*

falls apart once "tested by an appraisal of the totality of facts," *Betts v. Brady*, 316 U.S. 455, 462 (1942).

1. The private interest is weak. Whatever the value of cars in the abstract, Petitioners exacerbated their alleged deprivation by waiting to act. Their self-imposed harms must be subtracted from the analysis, for *Mathews* balances only "the private interest that will be *affected by the official action*." 424 U.S. at 335 (emphasis added). Moreover, the platitudes about cars, Br.45-46, count for very little because Petitioners could have opted instead to post bonds or incur the negligible cost of filing their short motions for summary judgment a year earlier. *Accord* Br.34 (describing "the temporary deprivation of money" as "far [less] serious" (citation omitted)). Absent any facts about the expense of a bond or a timely motion, Petitioners have no support for the significance of their interests.

2. Alabama's forfeiture procedures have a low risk of erroneous deprivation. Petitioners have not identified a risk of error in law enforcement's ability to assess probable cause, the State's ability to decide whether to bring an action, or the court's ability to determine forfeitability. Supposedly, "[t]hese cases show exactly why" an immediate hearing is needed. Br.47. But take Sutton's case, in which law enforcement came upon a car carrying methamphetamine. The State had more than probable cause to hold onto the car, particularly when no one appeared in court to claim it. J.A.103 (finding "a prima facie case" for forfeiture). So, what was the error? Not anticipating what Sutton might say a year later? Once again, any risk of erroneous deprivation was due to Petitioners' dilatory conduct, not the

process they received. Petitioners meagerly allege that they "called the police to get their cars back," Br.47, but surely it's not error for law enforcement to choose judicial process over telephonic assertions of innocence from the roommate of a methamphetamine trafficker.

Alabama's bond provision also reduces the risk of error. Claimants, innocent and guilty alike, are entitled to the release of their property on bond. True, a bond is the exchange of "*other property*" for the seized property. Br.48. But Petitioners named the use of their cars as the interest at stake, and there is no risk of erroneously depriving claimants of that interest when a bond is available.

Nor are additional procedural safeguards likely to help. Petitioners already had a full judicial proceeding in which to assert their defenses, yet they did so only upon the court's prompting and while leaving important process on the table. It is not credible to suppose that these same claimants (one of whom defaulted and one of whom failed to answer for over six months) would have utilized a different process if offered. Petitioners cannot manufacture due-process violations by refusing to use available process.

An early "retention hearing" might, however, *increase* the likelihood and severity of erroneous deprivations. One reason for retention is to protect the property for and from unknown third parties. *See supra* p.30. Suppose the cars were unregistered or the owners could not be easily ascertained. Suppose multiple claimants, creditors, or lienholders came forward. Or the rightful owner had not yet received

notice. A rushed hearing could force the State to release valuable property into the wrong hands.

3. The governmental interests at stake weigh heavily in the State's favor. "At some point the benefit of an additional safeguard … may be outweighed by the cost." *Mathews*, 424 U.S. at 348. Here, those costs include all the good reasons a State has to forfeit property—deterrence, making sure crime doesn't pay, removing from circulation property used to commit crimes, etc. *See supra* §I.B.1. Retention affords the State time to investigate; an early "retention hearing" could compromise the State's efforts to bring criminals to justice. *Id.*

Petitioners say their innocence weakens those State interests. Br.49. But these are the same people who let their cars be used for drug crimes. The State has no way to know *ex ante* which owners are truly innocent. Or whose property will continue to facilitate crime and whose won't. Or whose property might disappear or be destroyed if released. As long as the property is still potentially forfeitable, the State has a strong interest in its retention.

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On these facts, the test does not matter. Petitioners are not entitled to more process where they declined to use the process already available to them. *Cf. Serrano*, 975 F.3d at 498-500 (applying *Mathews* but concluding that a *Barker*-compliant forfeiture proceeding satisfies due process).

CONCLUSION

The Court should affirm the decision below and hold that due process does not require a "retention hearing" during civil forfeiture proceedings.

Respectfully submitted,

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