No. 22-585

IN THE

Supreme Court of the United States

HALIMA TARIFFA CULLEY, ET AL.,
Petitioners,

v.

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

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

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF RESPONDENTS

GILBERT C. DICKEY
Counsel of Record
FRANK H. CHANG
C'ZAR BERNSTEIN
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd, Suite 700
Arlington, VA 22209
(703) 243-9423
gilbert@consovoymccarthy.com

Counsel for Amici Curiae

August 21, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court as well as state and federal appellate courts.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live.

This case is of significant concern to local governments. Forfeiture has been an essential law-enforcement tool for centuries. It remains one today.

---

[1] Under this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief.

If anything, civil asset forfeiture has become more important to combat drug crime and financially-sophisticated criminal enterprises.

SUMMARY OF ARGUMENT

For centuries, forfeiture proceedings have been an essential tool of law enforcement. Before the founding, both Parliament and colonial legislatures enacted forfeiture statutes. Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2457 (2016). The First Congress enacted a statute that provided for forfeiture of goods and vessels. *See* Collection Act of 1789, ch. 5, §§ 12, 15, 22-24, 34, 40, 1 Stat. 29, 39, 41-43, 46, 48-49. And Congress enacted another forfeiture statute within a decade of the adoption of the Due Process Clause. *See* Collection Act of 1799, ch. 22, § 89, 1 Stat. 627, 695-96.

Claimants under these forfeiture regimes were entitled only to one hearing—a final forfeiture hearing. Congress's early statutes, for example, instructed that notice should be provided and a trial held, but did not provide for any other hearing. *See* Collection Act of 1789, ch. 5, §§ 12, 15, 22-24, 34, 36 40, 1 Stat. 29, 39, 41-43, 46-49; Collection Act of 1799, ch. 22, § 89, 1 Stat. 627, 695-96. The only path to recover the property before an adjudication was to post bond. *See id*.

Forfeiture continues to be an essential law enforcement tool today, but with more procedural protections for claimants. Governments at all levels use this "time-honored method to prevent illegal

activity." *Gen. Motors Acceptance Corp. v. United States*, 286 U.S. 49, 56 (1932). And while the financial sophistication of criminal enterprises makes investigation more difficult, claimants generally receive more protection than called for by history. *See, e.g.*, 18 U.S.C. § 983.

This history confirms that no additional hearing is needed between seizure and a final forfeiture hearing to satisfy due process. Where there is a specific historical tradition, this Court has looked to that tradition, not a general balancing test, to determine the requirements of due process. *See, e.g.*, *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 619 (1990) (plurality op.); *Ownbey v. Morgan*, 256 U.S. 94, 108-12 (1921); *Hurtado v. California*, 110 U.S. 516, 528-29 (1884). Here, that history shows that an opportunity to post bond and a final forfeiture hearing are enough.

When a claimant seeks more prompt relief than provided by the final hearing, this Court's precedents establish that the *Barker* test applies. This Court has twice held that *Barker*—which looks to factors including the length of delay, reason for delay, claimant's assertion of rights, and prejudice to the claimant—provides the "appropriate framework" to assess the "whether the flexible requirements of due process have been met" in this context. *See United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 564-65 (1983); *United States v. Von Neumann*, 474 U.S. 242, 251 (1986) (A claimant's "right to a forfeiture proceeding meeting the *Barker* test satisfies any due

process right with respect to the car and the money.").

That holding is consistent with this Court's general approach to due-process questions. Due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Consistent with this instruction, this Court looked to *Barker*'s speedy trial standard because it provides a "flexible approach" to assess a claim of "undue delay." *$8,850*, 461 U.S. at 564.

This Court's adoption of *Barker* also provides certainty from which governments, claimants, and courts benefit. This Court's due-process precedents call for a nuanced assessment of each particular situation. All interested parties are better able to understand how to make those assessments when they are instructed to look to guidance from analogous situations.

ARGUMENT

I. Forfeiture has been an important law-enforcement tool since before the founding.

A. Both before the founding and immediately after, governments seized assets with no hearing until a final forfeiture hearing.

This Court has long looked to the common law to understand the requirements of "due process." *E.g.*, *Ingraham v. Wright*, 430 U.S. 651, 672-76, 679-80 (1977); *Burnham v. Superior Ct. of Cal.*, 495 U.S.

604, 619 (1990) (plurality op.); *Ownbey v. Morgan*, 256 U.S. 94, 108-12 (1921). A procedure "'must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country.'" *Burnham*, 495 U.S. at 619 (quoting *Hurtado v. California*, 110 U.S. 516, 528-29 (1884)). Thus, a procedure satisfies due process "if it is one of the continuing traditions of our legal system." *Id.*

History confirms a long tradition of law enforcement employing forfeiture. Forfeiture predates the United States. Both Parliament and colonial legislatures encouraged compliance with statutes by using the threat of forfeiture. Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2457 (2016). These forfeitures targeted smuggled goods, but they also reached the means of transporting those goods, including ships, horses, and carriages. *See id.* at 2461.

This tradition continued after independence. The states enacted forfeiture statutes that permitted both *in rem* and *in personam* proceedings. *See id.* at 2464. As in the previous British system, these laws enabled the seizure of both goods and vehicles. *See id*. Courts enforced forfeitures *in rem* even if the property owner was innocent. *See The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (Story, J.) ("[T]he practice has been, and so this Court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*."). No innocent-owner defense was required. *See Bennis v. Michigan*, 516 U.S. 442, 447 (1996) ("'[T]he acts of the master and crew … bind

the interest of the owner of the ship, *whether he be innocent or guilty*; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.'").

Importantly, the First Congress acted swiftly to adopt forfeiture provisions. *See* Collection Act of 1789, ch. 5, §§ 12, 15, 22-24, 34, 40, 1 Stat. 29, 39, 41-43, 46, 48-49. Those provisions provided for the forfeiture of goods and of vessels. *See* Nelson, *supra*, at 2465. And as with the state statutes, they contemplated *in rem* proceedings against the seized property. *Id*.

Congress enacted a similar forfeiture statute after the enactment of the Due Process Clause. *See id*. In 1799, Congress enacted a statute that "included equally extensive forfeiture provisions." *Id*. And this statute was "enforced through the same in rem proceedings." *Id.*

The only hearing provided by these early forfeiture statutes was a final hearing on the merits. The 1789 statute required "notice to be given of such seizure" before "trial," but it did not require any hearing before the court "proceed[ed] to hear and determine the cause according to law." Collection Act of 1789, § 36, 1 Stat. at 47. The 1799 Act did not require a pre-trial hearing, but it did provide that forfeiture "suits" should "be commenced without delay," beginning the process of notice and then, ultimately, trial. Collection Act of 1799, ch. 22, § 89, 1 Stat. 627, 695-96. In general, seized "goods, wares or

merchandise" would "remain in the custody of the collector" until "it shall be adjudged [whether] they are forfeited." *Id.* § 69, 1 Stat. at 678.

The early forfeiture statutes had only one mechanism for a claimant to recover property before a final hearing: the posting of bond. Under the 1789 statute, if a claimant "appear[ed] before … judgment of forfeiture" and asked for relief, the court could "order" that the vessel or goods "be delivered to" him after an appraisement and after he "execute[d] a bond." Collection Act of 1789, § 36, 1 Stat. at 47. The 1799 statute included the same bond procedure. Collection Act of 1799, § 89, 1 Stat. at 695-96.

This early congressional practice "is strong evidence of the original meaning of the Constitution." *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (acts of the First Congress "'provide[] contemporaneous and weighty evidence of the Constitution's meaning' and has long been the 'settled and well understood construction of the Constitution'" (citation omitted)). Consistent with due process, then, original practice involved commencing suit promptly and giving a claimant notice and a trial. Before trial, he could secure the property by executing a bond, but not otherwise.

Views about the requirements of due process in forfeiture proceedings had not changed by the time the Fourteenth Amendment was ratified. In 1864, Congress enacted a statute for the forfeiture of "all

spirits or other articles" if a collector had "reason to believe" that they would be sold "in fraud of the internal revenue laws." Act of Mar. 7, 1864, ch. 20, § 2, 13 Stat. 14, 14. The Act declared that "the proceedings to enforce said forfeiture shall be in the nature of a proceeding *in rem*." *Id.* The seized "spirits and other articles" were to "be delivered to the marshal … and remain in his care and custody, and under his control, *until final judgment in such proceedings shall be rendered*." *Id.* at 15 (emphasis added). If the seized property was "perish[able]," then the owner could "have said property returned to him upon giving bond … in an amount equal to the appraised value." *Id.* If the owner could not "give said bond," the marshal had to sell the perishable property. *Id.*; *see also* Act of Apr. 2, 1844, ch. 8, § 1, 5 Stat. 653, 653 (requiring a claimant to "execute a bond" at least 2.5 times the value of the seized property).

Alabama affords similar procedures and additional ones for innocent owners. *See* Ala. Code § 20-2-93(e) (requiring the prosecuting authority to commence suit "promptly"); *id.* § 20-2-93(o) (trial); *id.* § 20-2-93(l) ("innocent owner may petition court for a hearing … at any time after seizure of property"), *inc'g by ref. id.* § 15-5-63; *id.* § 20-2-93(w), *inc'g by ref.* Ala. Code § 28-4-287 ("claimant of the property shall have the right to execute a bond in double the value of such property")[2]; *compare* Ala. R. Crim. P. 3.13(a)

[2] Petitioners' only response is inconsistent with this tradition. According to petitioners, not even a bond equal the

("[a] person aggrieved by an unlawful search and seizure may move the court for the return of the property seized"), *with* Fed. R. Crim. P. 41(g) (similar). That "continuing tradition[] of our legal system" is sufficient for due process. *Burnham*, 495 U.S. at 619 (plurality op.); *cf. Ownbey*, 256 U.S. at 104-12 (upholding procedure based on early tradition of requiring a defendant to "first give substantial security" before he could "enter an appearance and contest plaintiff's demand"). And "[t]here is no reason to depart from tradition and require" additional

---

value of the property would satisfy due process. *See* Pet. Br. 48. To begin, Petitioners argument might be relevant if they challenged the amount of bond, but they instead argue that there are entitled to a prompt retention hearing. *See* Marshall Br. 44-45. In any event, this kind of bond procedure is precisely what the First Congress provided. *See* Act of 1789 § 36 ("execute a bond … for the payment of a sum equal to the sum at which the ship or vessel … be appraised"); *cf. also* Gilbert, *A Treatise on the Court of Exchequer* 182 (1758) (describing procedure whereby a claimant could "move for a Writ of *Delivery*" to acquire "the goods" after officer delayed commencing forfeiture proceedings only if the claimant gave "Security in double the Sum to answer the Value they are appraised"). The ability of the claimant "to furnish the necessary security" is legally irrelevant if the relevant historical tradition did not take account of that consideration. *See Ownbey*, 256 U.S. at 108-09, 111-12 (holding that "a time-honored method of procedure as a part of a time-honored requirement of security" does not offend the Due Process Clause even if "a defendant [lacks] resources or credit aside from the property attached"). And, in any event, requiring a bond equal in value to a ship can presumably be more burdensome than a bond requiring double the value of a common chattel.

"procedural safeguards" beyond what Alabama already provides. *Ingraham*, 430 U.S. at 679-80.

B. Civil forfeiture continues to serve as an important tool for law enforcement.

Civil forfeiture remains an important tool for law enforcement today. The states and the federal government universally rely on this "time-honored method to prevent illegal activity." *Gen. Motors Acceptance Corp. v. United States*, 286 U.S. 49, 56 (1932). Forfeiture allows law enforcement to stop defendants from using seized items and preserves forfeitable assets in which the government has an interest. *See United States v. Bissell*, 866 F.2d 1343, 1349 (11th Cir. 1989).

Civil forfeiture is an especially important tool for property that can easily be concealed or destroyed outside government custody. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 58 (1993). To prevent a criminal from frustrating the government's interest in seized assets, courts have traditionally employed restraining orders, injunctions, or execution of a performance bond. 21 U.S.C. § 853(e)(1).

If anything, civil forfeiture has become a more important tool. The White House Office of National Drug Control Policy explains, for example, that the criminal organizations that engage in drug trade are "driven by economics" and "will manufacture and traffic" drugs "[a]s long as illicit drugs continue to be economically beneficial." Office of National Drug Control Policy, *National Drug Control Strategy*

Performance Review System Report 39 (Mar. 2023), perma.cc/BRZ3-XL8K. Thus, "seizing currency and assets to reduce the financial incentives for criminals" is a key feature of drug-control policy. Office of National Drug Control Policy, *National Drug Control Assessment* 98 (June 2023), perma.cc/MW97-T89D.

The use of civil forfeiture demands a substantial commitment of government resources. Determining whether property is subject to forfeiture—or even who owns property—is often not a straightforward process. That is especially the case when a government is investigating a sophisticated criminal enterprise. The complex financial mechanisms these organizations use to protect their assets cause law enforcement to "face major barriers in detecting and identifying the real ownership and sources of investment." Booth, Bureau of Justice Assistance, U.S. Dep't of Justice, *Asset Forfeiture: Public Record and Other Information on Hidden Assets* 2 (1988); 18 U.S.C. § 983(a)(1)(A)(v) (permitting an extension of time for providing notice where the police have encountered difficulty in identifying an owner).

Ensuring that the government has time to investigate can benefit the government and the claimant. "Both the Government and the claimant have an interest in a rule that allows the Government some time to investigate" without mandated proceedings. *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 565 (1983). An investigation may lead the government to return

property before moving forward with "unnecessary and burdensome court proceedings." *Id.* at 566; *see also, e.g.*, 28 C.F.R. § 8.7(a)(2) (allowing property to be released if "there is an innocent party with the right to immediate possession of the property" or if "the release would be in the best interest of justice or the Government.").

"Pending criminal proceedings" provide particularly strong reasons to permit the government adequate time to delay before a hearing in a civil-forfeiture action. *$8,850*, 461 U.S. at 567. A claimant in a hearing before the conclusion of criminal proceedings might have to choose to either remain silent or testify and risk self-incrimination. *See United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995); 18 U.S.C. § 981(g)(2)(C). And a hearing might "prejudice the claimant's ability to raise an inconsistent defense in a contemporaneous criminal proceeding." *$8,850*, 461 U.S. at 567. For example, the government might test an innocent-owner theory through cross examination, potentially endangering the claimant's right against compelled self-incrimination in related criminal cases. *See, e.g.*, Smith, *1 Prosecution and Defense of Forfeiture Cases* § 10.01 ("A party may seek to improperly exploit the broad civil discovery procedures to gather information for use in the criminal case."). The government can also be prejudiced by hearings held while criminal proceedings are pending. An early hearing could "provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution." *$8,850*, 461 U.S. at 567; *see also* 18 U.S.C. § 981(g)(1) (allowing the court

to stay civil proceedings to protect related criminal investigations that have yet to result in formal charges); Smith, *1 Prosecution and Defense of Forfeiture Cases* § 10.02[2] (Section 981(g)(1) emphasizes "that the need for confidentiality is at least as great during the investigatory stage of a criminal case.").

Despite the complicated criminal schemes that must be investigated, claimants ordinarily receive all the protection provided at the founding and more. As discussed, Alabama provides one example. *See supra* 8-9. And other governments (federal, state, and local) also provide extensive protections to claimants. *See, e.g.*, 42 U.S.C. § 1983.

C. Governments continue to provide traditional postdeprivation remedies to property owners for unauthorized deprivations.

Postdeprivation remedies have also served as a traditional remedy for the wrongful seizure of property. The 1789 Collection Act, for example, allowed a claimant a postdeprivation remedy against "the person who made the seizure" if there was no "reasonable cause of seizure." § 36, 1 Stat. at 47.

Modern caselaw continues to recognize this traditional remedy for improper seizures. Postdeprivation tort remedies afford due process at least for any deprivations caused by an officer's failure to comply with state procedures. This Court has held that "an unauthorized intentional deprivation of property by a state employee does not

constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Common-law remedies are adequate even if they "may not provide the [claimant] with all the relief which may" be available "under § 1983." *Parratt v. Taylor*, 451 U.S. 527, 544 (1986).

In addition to affording claimants the procedures to which they were traditionally entitled in forfeiture proceedings, Alabama law also provides postdeprivation remedies for unauthorized deprivations. Alabama allows seizure if the "seizing agency has probable cause to believe that the property was used or is intended to be used" to violate the law. Ala. Code § 20-2-93(d). As explained above, it also requires that proceedings be instituted promptly. *Id.* § 20-2-93(e). If an official interferes with a claimant's property interests in violation of those legal requirements and others, the claimant has remedies in tort. *See, e.g.*, *Lightfoot v. Floyd*, 667 So. 2d 56, 64-67 (Ala. 1995) (claimant "stated a cause of action for conversion" because prosecuting authority did not institute forfeiture proceedings promptly and officer nevertheless retained property). These postdeprivation common-law remedies for unlawful seizure comport with the tradition described above. *Cf.* Collection Act of 1789 § 36 (no cause of action available to prevailing claimant if "there was reasonable cause of seizure"); *Lindsey v. Storey*, 936 F.3d 554, 561 (11th Cir. 1991) ("Even assuming the continued retention of plaintiffs' personal property is wrongful no procedural due

process violation has occurred, 'if a meaningful postdeprivation remedy for the loss is available.'").

II. *Barker* provides the appropriate test to assess a challenge seeking an earlier hearing in forfeiture proceedings.

A. This Court rightly held that *Barker* provides the best test to assess challenges seeking an earlier hearing in forfeiture proceedings.

This Court's more recent due process precedents call for a fact-specific assessment to determine whether the demands of due process have been met. The Due Process Clause "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (due process does not have "'a fixed content unrelated to time, place and circumstances'"). It calls for an "intensely practical" assessment of the specific issue presented to a court. *Goss v. Lopez*, 419 U.S. 565, 578 (1975).

This flexible approach is not unbounded. Courts have developed a variety of tests. Some of those tests are cast in broad general terms. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (announcing a broad due process standard in a social security benefits case). But often, the Court looks to more specific considerations for guidance in particular situations. *See, e.g.*, *United States v. Lovasco*, 431 U.S. 783, 795-

97 (1977) (discussing test for delay in bringing indictment).

Under this approach, *Barker* provides the right test to determine whether a claimant received a timely enough hearing after seizure of assets. To start, this Court has already twice held that *Barker* applies in this context. *See $8,850*, 461 U.S. at 563; *United States v. Von Neumann*, 474 U.S. 242, 251 (1986). *$8,850* explained that a challenge to the failure to provide a prompt hearing after the deprivation of property "mirrors the concern of undue delay encompassed in the right to a speedy trial." *$8,850*, 461 U.S. at 564. For this reason, it found that the *Barker* test—which looks to factors including the length of delay, reason for delay, claimant's assertion of rights, and prejudice to the claimant—provided the "appropriate framework" to assess the "whether the flexible requirements of due process have been met." *Id*. at 564-65.

$8,850 applied *Barker* to find that the claimant "was not denied due process of law." *Id*. at 570. The claimant complained that an 18-month delay in bringing civil forfeiture proceedings violated due process. *Id*. at 556. That 18-month delay in that case was "quite significant." *Id*. at 565. But "pending administrative and criminal proceedings" gave the government "substantial" reasons for delay. *Id*. at 568. Moreover, the claimant had failed to pursue other federal remedies, indicating that she "did not desire an early judicial hearing." *Id* at 569. And she had not been prejudiced in her "ability to defend the

propriety of the forfeiture on the merits." *Id.* at 570. Thus, due process had been satisfied.

Von Neumann confirmed this due-process holding. There, the Court addressed a claim that a 36-day delay in responding to a remission petition filed after the seizure of a car violated the claimant's due process right. 474 U.S. at 246-47. The Court first held that "[i]mplicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car." *Id.* at 249. Thus, the claimant's "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money" that he posted as bond. *Id.* at 251. Then—discussing a potential statutory right to a timely response—the Court found that "any due process requirement of timely disposition was more than adequately provided" by looking to *Barker* factors. *Id.* at 250. It was "difficult, indeed impossible to see what prejudice … the 36-day delay" caused. *Id.* So it did not "deprive" him "of due process of law." *Id.* at 251.

$8,850 and *Von Neumann* adopted *Barker* for the civil-forfeiture context for good reason. *$8,850* noted that due process requires a "'flexible'" assessment of what the "'particular situation demands.'" 461 U.S. at 564 (quoting *Morrisey*, 408 U.S. at 471). *Barker* provides a "flexible approach" to assess a claim of "undue delay." *Id.* That is the same central concern when a claimant in a civil forfeiture argues that they should have received a hearing before the final

forfeiture hearing. Thus, *Barker* is the "appropriate framework." *Id.*

Moreover, *Barker* provides needed guidance for governments, claimants, and courts. The flexible inquiry required by due process presents difficult questions. A government, for example, must "balanc[e] the interests of the claimant" with its own interest "to assess whether the basic due process requirement of fairness has been satisfied." *Id.* at 565. While this inquiry turns on the facts of each "particular case," it would transform the inquiry from difficult to impossible if governments are instructed not to look to the most-analogous guidance. *Id.* Fortunately, this Court's precedents have provided "guides" based on the "apt analogy" between *Barker* and the due-process concerns in claims for prompt post-deprivation hearings. *Id.* at 564-65.

B. Petitioners' attempts to evade *Barker* are inconsistent with this Court's context-specific approach in due process cases.

Petitioners argue that courts should not look to *Barker* to decide whether a claimant is entitled to a hearing before a forfeiture hearing. Pet. Br. at 28-44. Instead, they urge this Court to adopt the *Mathews* test. *Id.* at 17-28. That test, which first arose in the context of the termination of Social Security disability benefits, asks courts to balance the private interest, the government's interest, and the risk of an erroneous deprivation. *Mathews*, 424 U.S. at 335.

Petitioners' invitation ignores the approach that this Court has adopted to due-process questions.

While this Court has applied *Mathews* outside its original context, it has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims." *Dusenberry v. United States*, 534 U.S. 161, 168 (2002). Instead, it has often continued to rely on more specific tests. For example, in *Dusenberry*, the Court held that *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), governed the adequacy of notice to a prisoner about his ability to seek the return of property seized during the execution of a search warrant. 539 U.S. at 167-68; *see also Medina v. California*, 505 U.S. 437, 443 (1992) ("[T]he *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which … are part of the criminal process."). These more specific standards provide "a more straightforward test of reasonableness under the circumstances." *Dusenbery*, 539 U.S. at 167. And they are more consistent with historical practice. *See id.* at 167-68; *Medina*, 505 U.S. at 443, 446.

This Court's extension of *Barker* to pre-forfeiture hearings is another example of this approach. The Court looked to a more specific and historically grounded standard to address "the concern of undue delay." *$8,850*, 461 U.S. at 564.

Still, Petitioners try to evade this more specific standard by saying that their claim is not about delay, but instead about additional procedure—a retention hearing. *See* Pet. Br. at 38. But it is difficult to understand how Petitioners' claim is not about timing. They argue that the Due Process

Clause demands a "'*prompt* post-deprivation hearing.'" Pet. Br. at 28. They contend that the *Barker* test cannot produce a just outcome because it concerns timeliness, and "'timely' does not mean 'prompt.'" Pet. Br. at 36. They cite *Commissioner v. Shapiro*, 424 U.S. 614, 628 (1976), three times (at 28, 39, 47) to support their claim that a "prompt post-deprivation hearing" is a requirement of due process. And they repeatedly reference (at 32, 39-40) *Gerstein v. Pugh* to support the proposition that, in the criminal context, the government "must provide a fair and reliable determination of probable cause . . . either before or promptly after arrest." 420 U.S. 103, 125 (1975) (emphasis added).

These arguments show that the concern, at bottom, is one about the timing of the hearing. *Barker* concerns the very same thing: "customary promptness." *See Doggett v. United States*, 505 U.S. 647, 652 (1992). If, for example, the final forfeiture hearing had been held a short time after the seizure (say, a week or a day), it seems unlikely that Petitioners would argue that due process requires a retention hearing before then. But as even they seem to acknowledge, if promptness what is at issue, then *Barker* has a "focus on the 'promptness' of governmental action." Pet. Br. 31.

More importantly, to the extent that they seek a right to a retention hearing independent of any delay objections, that doesn't help their case. Where there is a long history and tradition, this Court has looked to that tradition—not *Mathews* or any other balancing test—to decide what due process requires.

And as explained, history unequivocally confirms that due process does not require any hearing before a forfeiture hearing. *See supra* 4-7. Precedent does too since a "forfeiture proceeding, without more, provides the postseizure hearing required by due process." *Von Neumann*, 474 U.S. at 249.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

GILBERT C. DICKEY
Counsel of Record
FRANK H. CHANG
C'ZAR BERNSTEIN
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd, Suite 700
Arlington, VA 22209
(703) 243-9423
gilbert@consovoymccarthy.com

August 21, 2023 *Counsel for Amici Curiae*