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 THE STATES OF GEORGIA, ALASKA, ARKANSAS, IDAHO, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, AND TENNESSEE AS *AMICI CURIAE* SUPPORTING RESPONDENTS


CHRISTOPHER M. CARR
Attorney General

STEPHEN J. PETRANY
Solicitor General
*Counsel of Record*

JAMES E. BARRETT
Honors Fellow

OFFICE OF THE GEORGIA ATTORNEY GENERAL
40 Capitol Square SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov
*Counsel for Amici Curiae*

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## INTEREST OF THE *AMICI CURIAE*

*Amici* are the States of Georgia, Alaska, Arkansas, Idaho, Mississippi, Montana, Nebraska, New Hampshire, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee. These States vary greatly in their use of, support for, and procedures for civil forfeiture. All States formulate their civil forfeiture schemes to both discourage crime and protect property rights. But States have different priorities and different views as to the best methods to achieve those priorities. The virtue of a federal system is that a State can experiment and adapt as it sees the results of its forfeiture policy—and other States' policies—play out.

As this Court has held, due process requires that a State provide a civil forfeiture hearing, promptly. But Petitioners seek far more: they want the judiciary to mandate at least a *second* hearing to address Alabama's statutorily provided innocent-owner defense, and to support their argument they want to apply the "intrusive" requirements of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to the entire civil forfeiture process. This Court has already rejected their extreme view, and Petitioners' demands would, if accepted, place the judiciary into the role of super-legislature, fiddling with civil forfeiture processes in each State in ways unpredictable and likely unprincipled. There is no reason to bring on such confusion, and the States submit this brief to explain as much.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Properly understood, the Due Process Clause leaves room for States to design their civil forfeiture processes differently. States customize their schemes every step of the way, including the seizure processes, the timing and forms of notice, the ways owners may seek temporary return of property prior to the final hearing, the time until proceedings commence, the number of hearings, considerations of owner culpability, burdens of proof, and the procedures for the final hearing itself. This variety arises because States balance competing interests to best reflect local needs and priorities, as well as their own experiences in what works and what doesn't. Indeed, some States show through their laws a higher degree of skepticism of civil forfeiture, while others do not. But whatever the differing views on the policy questions at issue, they are *policy questions*. This Court has made clear that civil forfeiture requires a prompt hearing, and it has wisely declined to write out a detailed civil procedure code for civil forfeiture actions. If the Court accepts Petitioners' arguments here and begins to do so, the outcome will sow confusion, undermine state authority, and diminish States' ability to innovate and craft procedures that best address their priorities.

**I.** Most States go well beyond the baseline requirements of due process and provide all sorts of complementary procedural protections for litigants in civil forfeiture proceedings. Many States allow owners to avoid civil forfeiture if they can show that—even if

their property facilitated unlawful criminal activity—they did not know of, consent to, or participate in that activity. And, as detailed below, many States open up opportunities for individuals to reacquire use of their property while the proceedings play out, whether by posting bond, proving substantial hardship, surrendering title, requesting remission, and so on. The variations among state procedures can hardly be counted.

Some States even combine the two and allow property owners to ask for an early hearing on their "innocent owner" defense. There is variation here too. Some keep it simple and require only probable cause. Others go all the way to merits. Some opt for early hearings only in narrow situations. Still others have burden-shifting regimes.

**II.** Petitioners' request of this Court—to impose a "retention" hearing at the outset of civil forfeiture litigation at which an owner can assert an innocent-owner affirmative defense—would cast doubt on all of this variation for no good reason. The Due Process Clause is not the Homogenous Policy Clause. The Constitution ensures that States provide baseline required process. It does not empower an individual seeking legal reform to propose procedural changes to state law in federal court on a case-by-case basis. Experimenting with new processes and evaluating whether the reforms work is a job for the legislature, not the courts.

This Court has already held that a single, timely, post-seizure forfeiture hearing fully protects an owner's interest in her property. And this Court has

already held that to determine whether a forfeiture hearing was timely, the correct analysis comes from *Barker v. Wingo*, 407 U.S. 514 (1972), which asks whether the hearing was improperly delayed and whether that delay caused harm. Though Petitioners try to argue otherwise, their demand for more process would simply duplicate a portion of the already required hearing and hold it sooner. Petitioners call their preferred process a "retention" hearing, but whatever label you use, it is a hearing to determine the merits (in this case, the merits of the innocent owner affirmative defense). The final hearing already fulfills that role, and *Barker* already ensures that it is held in a timely manner.

Petitioners would apply the *Mathews* test, but besides being wrong as a matter of law, that would create confusion and needlessly undermine state authority. The *Mathews* test can be highly "intrusive" and "invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443, 446 (1992). As this Court has made clear, "it is normally within the power of the State to regulate procedures under which its laws are carried out." *Id.* at 445 (quotation omitted).

There is good reason for that flexibility, as the practical implications of Petitioners' demand show. An immediate hearing on the merits of an innocent-owner defense would clash with several States' existing regimes, and Petitioners provide no principled reason why statutory innocent-owner protections deserve

greater protection than the constitutionally protected interest the owner has in the property itself. On top of that, the specifics of what such a hearing might entail not only vary greatly but also may create further conflicts with other aspects of States' existing laws, such as discovery procedures and notice requirements. In fact, imposing an immediate hearing may backfire altogether and lead States to eliminate innocent-owner protections—or at least not expand protections where doing so could come with unforeseen consequences.

This Court should not invite any of this: it should affirm that a single, *timely* civil forfeiture hearing is what due process requires and that otherwise States have the authority to customize their procedures to fit their preferred policies.

## ARGUMENT

### I. States have the authority to customize their civil forfeiture systems, and they need that flexibility to create the diverse processes that best fit their priorities and experiences.

States have "autonomy to establish their own governmental processes." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 816 (2015). This Court has emphasized that federal courts "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States," particularly "the power of the State to regulate procedures under which its laws are carried out." *Medina*, 505 U.S. at 445 (quotation omitted). The

Due Process Clause mandates "notice and an opportunity to be heard," *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), but it does not mandate detailed requirements for a judiciary to impose on state lawmakers. Indeed, "[a]sking the judiciary to engineer 'optimal process' through constitutional doctrine is imprudent," at best. Adam M. Samaha, *Undue Process*, 59 Stan. L. Rev. 601, 605 (2006).

The flexibility of the Due Process Clause is a critical aspect of federalism. "[S]tate lawmaking allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Arizona State Legislature*, 576 U.S. at 817 (quotation omitted). Competing values do not cash out the same way in every State, so legislatures design their laws to reflect the balance that best serves their State.

This flexibility is especially relevant in the area of civil forfeiture, where States have very different views on how best to deter crime and protect property rights. Indeed, civil forfeiture, as a matter of policy, is fraught with disagreement. *See*, *e.g.*, Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2450 (2016) ("Over the past few decades, these practices have gone through a cycle of expansion and reform."). It should be no surprise that States choose to balance the various interests differently, including when they design their civil forfeiture procedures.

In general, the "premier purpose of civil forfeiture is deterrence of future crime"—it eliminates the means for committing crime and discourages "future uses of similar property for similar illegal activities." *Ross v. Duggan*, 402 F.3d 575, 582 (6th Cir. 2004) (emphasis omitted). Both are "proper public 'deterrence' purposes." *Id.* On top of that, forfeiture funds can help undo the harmful effects of the criminal activity. The federal government, for example, has used civil forfeiture to return billions of dollars to victims of criminal activity. Rod J. Rosenstein, *Bernie Madoff and the Case for Civil Asset Forfeiture*, Wall St. J. (Nov. 9, 2017, https://www.wsj.com/articles/bernie-madoff-and-the-case-for-civil-asset-forfeiture-1510237360). And starving criminal organizations of their cash flow disrupts operations by imposing significant financial pressure, preventing them from covering costs like payroll, supplies, or bribes. Mark Osler, *Asset Forfeiture in a New Market-Reality Narcotics Policy*, 52 Harv. J. on Legis. 221, 228 (2015).

At the same time, States may decide that, in certain situations, owners innocent of any wrongdoing should be able to reclaim their property, such as when it is seized from the owner's friend, roommate, or licensee caught using the property to engage in criminal activity without the owner's knowledge or permission. *See* Pet'rs' Br. 8–9. Of course, States may temper or carefully limit such exceptions too—because "people engaged in illegal activities often attempt to disguise their interests in property by placing title in someone else's name." *United States v. One 1990 Beechcraft,*

*1900 C Twin Engine Turbo-Prop Aircraft*, 619 F.3d 1275, 1279 (11th Cir. 2010) (quotation omitted). If States make it too easy for supposedly "innocent" third parties to hold title on behalf of a criminal or criminal organization and claw it back from the government after it is seized, the exception will be exploited, just like how criminals banned from purchasing firearms use straw purchasers to skirt the law. *See*, *e.g.*, *United States v. McKenzie*, 33 F.4th 343, 345 (6th Cir. 2022); *United States v. Soto*, 539 F.3d 191, 193 (3d Cir. 2008).

State legislatures take all of these competing interests into account when designing state civil forfeiture laws. Unsurprisingly, many state regimes overlap at their core to fulfill the baseline constitutional procedural requirements guaranteed by the Fourth, Fifth, and Fourteenth Amendments. Beyond that, the procedures vary significantly. "Procedure, after all, is often used as a vehicle to achieve substantive ends," and the procedure provided in the civil forfeiture context is no exception. *Moore v. Harper*, 143 S. Ct. 2065, 2086 (2023). States thus need procedural flexibility to pursue competing substantive interests.

Even questions as seemingly simple as the burden of proof and the length of procedures can involve substantial tradeoffs. Requiring the State to satisfy a high burden of proof often dovetails with a longer process—affording more time for accuracy, more protection for property interests, and more options for litigants—but of course it delays any resolution. A shorter process has the opposite strengths (and weaknesses). So some

States select a more detailed, time-consuming process, while others aim for speed.

Minnesota is an example of the former. To start, the government shoulders a heavy burden of proof. It can seek civil forfeiture only after securing a criminal conviction "related to the action for forfeiture." Minn. Stat. § 609.531(6a)(b). After seizing personal property, the government has 60 days to "notify the owner or possessor of the property of the action, if known or readily ascertainable." *Id.* §§ 609.5313(a), 609.5314(2)(a). Depending on the property, it is automatically forfeited if the owner fails to file a complaint within 60 days of receiving notice. *Id.* § 609.5314(2)(b), (3)(a). If the owner files a complaint, a hearing must be held within 90 days after the criminal case resolves, which may take time. *Id.* § 609.5314(3)(a).[1]

Other States, like Nebraska, prefer shorter processes. For property used in certain crimes, Nebraska requires the government to file a forfeiture petition within a "reasonable period" after the property is seized or the property must "be immediately returned." Neb. Rev. Stat. § 25-21,302(4)(a). The government must serve the petition on the possessor and identifiable owners, lienholders, and interest holders; at

[1] Several other processes may run in the interim before the forfeiture hearing. *See*, *e.g.*, Minn. Stat. § 609.531(5a) (owner may post bond (or for vehicles, surrender title) to temporarily reclaim possession); *id.* § 609.531(7) (owner may file remission petition seeking discretionary return); *id.* § 609.5314(1a)(a)–(d) (innocent owner may request earlier hearing, which must be held within 60 days).

minimum, notice must be published. *Id.* § 25-21,302(4)(b), (10). The owner must answer the petition within 30 days, and a hearing must be held within 30 days of the answer unless postponed for a criminal action against the owner. *Id.* § 25-21,302(12)(a). The process has shorter deadlines and also moves more quickly because no prior criminal conviction is required. *Id.* § 25-21,302(2), (12)(b).

Of course, timing is not the only variation between states. There are also seizure practices, notice requirements, available defenses, burdens of proof, and all the other incidents of civil proceedings that may (or may not) contribute to a state's goals. There is almost no end to the ways States customize their forfeiture proceedings at every step—from seizure to judgment.

**Seizure.** Start with the seizure itself. At the most basic level, states usually allow law enforcement to seize personal property[2] if they have probable cause to believe that the property is subject to civil forfeiture. *E.g.*, Cal. Health & Safety Code § 11471; Ga. Code Ann. § 9-16-6(b); Ind. Code § 34-24-1-2(a). Law enforcement often may seize property "incident to an arrest or search pursuant to a search warrant or to an inspection under an inspection warrant." Ga. Code Ann. § 9-16-6(b); *see also*, *e.g.*, Cal. Health & Safety Code § 11471(a); 725 Ill. Comp. Stat. 150/3.1(c); Ind. Code § 34-24-1-2(a); Minn. Stat. § 609.531(4); Vt. Stat. Ann.

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[2] Real property is treated differently, as it cannot be seized until after a hearing has taken place. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 46 (1993).

tit. 18, § 4242(b). And sometimes courts will issue warrants specifically authorizing seizure of property because it is subject to civil forfeiture. For example, in Georgia a court may issue a warrant for the seizure of property based "on an affidavit demonstrating that probable cause exists for its forfeiture." Ga. Code Ann. § 9-16-6(a); *see also*, *e.g.*, Cal. Health & Safety Code § 11471; Vt. Stat. Ann. tit. 18, § 4242(a).

When law enforcement seizes forfeitable property without a warrant, some States require a prompt ex parte probable cause determination—and well before the State has time to sort out who exactly has an ownership interest. *E.g.*, Ind. Code § 34-24-1-2(b) (within 7 days); 725 Ill. Comp. Stat. 150/3.5(a) (within 14 days); Vt. Stat. Ann. tit. 18, § 4242(c) ("forthwith"); Minn. Stat. § 609.531(4)(a)(3) ("as soon as is reasonably possible"); Ga. Code Ann. § 9-16-14(4) (within 30 days of a claim being filed). In other States, this determination comes much later. *E.g.*, Colo. Rev. Stat. § 16-13-505(2)(b) (within 63 days of seizure, State files forfeiture petition; court then assesses probable cause). And in some States this requirement can be satisfied by a probable cause determination at a preliminary hearing in the related criminal case. *E.g.*, 725 Ill. Comp. Stat. 150/3.5(d).

**Notice of seizure.** Notice is particularly important in the civil forfeiture process because the owner may not have possessed the property when it was seized. Neither Culley nor Sutton, for example, were present when a family member and a friend, respectively, were arrested using the Petitioners' cars to

transport drugs. Pet'rs' Br. 8–9. And even when an owner is the one committing criminal activity, there may be other parties, such as joint owners or lienholders, with property interests to protect.

States ensure that the owners, possessors, and all other parties with interests in a property are given notice of the seizure and pending forfeiture, but they do not always do it in the same ways. In Illinois, for example, the State must attempt to give notice to any "owner or interest holder" within 28 days of receiving either a claim against the seized property or the notice from the law enforcement agency that seized it. 725 Ill. Comp. Stat. 150/4; *see also*, *e.g.*, Conn. Gen. Stat. § 54-36h(b) (90 days to file complaint, then court orders notice); Minn. Stat. § 609.5313(a) (60 days); Vt. Stat. Ann. tit. 18, § 4243(d) (60 days to give notice). In Georgia, the state attorney must post public notice of the civil forfeiture in the courthouse and serve a copy of the notice on the owner if the owner is known or on the public record. Ga. Code Ann. § 9-16-11(a)–(b); *see also* Cal. Health & Safety Code § 11485 (publish notice in newspaper); 725 Ill. Comp. Stat. 150/4(2) (same); Vt. Stat. Ann. tit. 18, § 4243(g) (same).

Some States give parties more lead time before holding a forfeiture hearing, which gives potential claimants more time to make their claim on the property. *E.g.*, Cal. Health & Safety Code § 11485 (minimum 90 days' notice before property deemed abandoned); Del. Code Ann. tit. 16, § 4784 and Del. Sup. Ct. R. Civ. Pro. 71.3 (notice within 60 days and hearing within 150 days of seizure); Haw. Rev. Stat.

§ 712A-12(4), (6) (30 days after notice to file a claim, hearing within 60 days of claim). Other States move quickly. *E.g.*, Neb. Rev. Stat. § 25-21,302(4), (12).

Of course, whether to require longer notice periods comes with tradeoffs for property owners. If an owner already knows about the forfeiture, then time waiting is time wasted. But, on the other hand, more time helps protect oblivious owners from having property forfeited out from underneath them. *See*, *e.g.*, *Lucas v. United States*, 775 F.3d 544, 546 (2d Cir. 2015). The government can usually forfeit the property by default if no one claims it. *See*, *e.g.*, Cal. Health & Safety Code §§ 11485 (automatic forfeiture after 90 days); Colo. Rev. Stat. § 16-13-505(8) (failure to attend "first [court] appearance"); Ga. Code Ann. § 9-16-11(c)(4) (30 days after service or second publication of notice); 725 Ill. Comp. Stat. 150/6(D) (45 days); Wis. Stat. § 961.55(1r)(e) (at least nine months).

**Temporary release of property pre-hearing.** Some States provide a statutory mechanism for owners to request use of their property during the civil forfeiture proceedings. In Illinois, vehicle owners who would suffer significant hardship can ask for their vehicles to be returned pending the merits hearing. 725 Ill. Comp. Stat. 150/3.5(e). They must show that seizure "creates a substantial hardship and allege[] facts showing that the hardship was not due to his or her culpable negligence," which the court balances against "the State's interest in safeguarding the conveyance." *Id.* If the court orders temporary release of the

property, it may also require the owner to "post a cash security" first. *Id.*

Other States also allow owners to post bond to repossess property while the proceedings finish. *E.g.*, Ala. Code § 28-4-287; Minn. Stat. § 609.531(5a); Mo. Rev. Stat. § 513.610(1). And sometimes States allow owners to petition for remission or mitigation, which gives the prosecutor broad discretion to return the property. *E.g.*, Haw. Rev. Stat. § 712A-10(4)–(8); Minn. Stat. § 609.531(7).

Other States require property to be released automatically if the government holds onto the property too long without initiating a forfeiture proceeding. In Georgia, the owner's property must be returned if law enforcement fails to report the seizure to the district attorney within 30 days or if the district attorney fails to initiate a forfeiture proceeding within 60 days of the seizure. Ga. Code Ann. § 9-16-7(c); *see also*, *e.g.*, Cal. Health & Safety Code § 11488.2 (property must be returned if law enforcement fails to refer to Attorney General for forfeiture within 15 days); Ind. Code § 34-24-1-3(c) (prosecuting attorney has 90 days from seizure and 21 days after owner demand to file civil complaint); Minn. Stat. § 609.5313(b) (property must be returned if failed to give notice).

**Commencing proceedings.** Once a person has filed a claim against the seized property, or if the property is valued above a certain threshold, most States require the government to initiate an *in rem* action in state court within a fixed period. The time limit varies

depending on what procedural steps precede the filing of the action, whether that is a seizure, a probable cause hearing, the service or publication notice, or the owner submitting a claim. In Georgia, the complaint must be filed within 60 days of the seizure and within 30 days of any claim on the property. Ga. Code Ann. §§ 9-16-7(b); 9-16-11(c)(3); *see also* Colo. Rev. Stat. § 16-13-505(2)(a) (within 63 days of seizure); Conn. Gen. Stat. § 54-36h(b) (within 90 days of seizure); 725 Ill. Comp. Stat. 150/9(A) (within 28 days of receiving notice of the seizure); Minn. Stat. § 609.531(4)(a)(3) ("as soon as is reasonably possible" if property seized without process); Neb. Rev. Stat. § 25-21,302(4)(a) ("within a reasonable period of time"); Vt. Stat. Ann. tit. 18, § 4243(f) (within 14 days of the preliminary determination of probable cause).

Some States permit civil forfeiture proceedings to commence only after—and only if—the person who committed the underlying criminal activity is convicted, pleads guilty, or otherwise fails to secure favorable termination. *E.g.*, Cal. Health & Safety Code § 11488.4(i)(3); Mont. Code Ann. § 44-12-207(1); Vt. Stat. Ann. tit. 18, § 4243(a); Conn. Gen. Stat. § 54-36h(c). On the one hand, requiring a conviction often takes time and thus delays the resolution of the civil forfeiture proceedings. But on the other, these laws also limit a State's ability to bring civil forfeiture actions because they limit forfeiture to situations where the State can prove beyond a reasonable doubt that the owner or possessor of the property committed a crime. Many other States therefore provide quicker

resolution of the civil forfeiture proceedings by not requiring proof of an independent criminal conviction. *See*, *e.g.*, Colo. Rev. Stat. § 16-13-505(1.7)(c); Ga. Code Ann. § 9-16-17(a)(1); Neb. Rev. Stat. § 25-21,302(12)(b).

**Timing and number of hearings.** Some States resolve the merits of a civil forfeiture claim in a single proceeding. In Georgia, for example, once the complaint is filed in the *in rem* proceeding, an owner or interest holder may file an answer within 30 days, and the court may permit limited discovery as necessary. Ga. Code Ann. § 9-16-12(c), (f). The court must hold a bench trial within 60 days of the service of the complaint, which is at most 30 days after the answer is filed. *Id.* States that resolve civil forfeiture cases in a single proceeding leave enough time for parties to develop their cases but also tend to reach the merits more quickly. *See*, *e.g.*, Neb. Rev. Stat. § 25-21,302(12)(a). But, even with one hearing, the process may take longer in States that postpone the forfeiture hearing until after related criminal proceedings finish. *E.g.*, Conn. Gen. Stat. § 54-36h(c).

Other States split up the proceeding into multiple hearings that span a longer period. In Colorado, after the prosecuting attorney files the forfeiture petition, the court schedules a "first appearance" no earlier than 35 days after (but within 63 days of) notifying the parties of the petition. Colo. Rev. Stat. § 16-13-505(2)(b). At that hearing the court schedules a merits hearing, which must be held within 49 days. *Id.* § 16-13-505(2)(c).

**Consideration of owner's culpability.** The variety of approaches grows when looking at how States handle the merits of whether property qualifies for civil forfeiture. Civil forfeiture proceedings are often *in rem* proceedings, and whether the property is forfeitable turns largely on whether it was used in or is the fruit of criminal activity. "[T]he offence is attached primarily to the thing," meaning that the property itself is "considered as the offender." *Bennis v. Michigan*, 516 U.S. 442, 447 (1996) (quotation omitted). So it isn't necessary to consider whether the owner is complicit in the criminal activity triggering forfeiture. *Id.* at 453. The property is the culprit.

Most States opt to consider owner culpability anyway, in one form or another. Some States do not require the government to prove owner culpability but allow the owner to argue as an affirmative defense that they did not know of, did not consent to, and acted reasonably to prevent the criminal activity. *E.g.*, Alaska Stat. § 17.30.110(4)(A)–(B); Minn. Stat. § 609.5314(1a)(f) (for vehicles); Neb. Rev. Stat. § 25-21,302(2); Vt. Stat. Ann. tit. 18, § 4244(d). In Georgia, an owner can avoid civil forfeiture if he proves: (1) that he did not know of or consent to the criminal activity, (2) that a reasonable owner would not have known that the activity was likely to occur, (3) that he did not acquire "substantial proceeds" from the criminal activity, (4) that he was not a joint owner with the criminal actor (for vehicles only), (5) that he did not hold the property to benefit the criminal actor, and (6) that he acquired ownership

before the criminal activity occurred or after but as a bona fide purchaser. Ga. Code Ann. § 9-16-17(a)(2).

Other States put the burden on the government, requiring it to prove that the owner knew of, consented to, or failed to reasonably prevent the use of their property for criminal activity. California, for example, requires the government to prove that the owner knew "that [her property] would be or was used for a [criminal] purpose." Cal. Health & Safety Code § 11488.5(d)(1); *see also*, *e.g.*, Colo. Rev. Stat. § 16-13-504(2.1)(a); Conn. Gen. Stat. § 54-36h(d); Ind. Code § 34-24-1-4(a) (for vehicles). Some States go even further and require not only that the government prove the owner knew of the crime, but that the government first secure a criminal conviction against *the owner* of the property. *E.g.*, Mo. Rev. Stat. §§ 513.607(4)–(5), 617(1)–(2) (criminal forfeiture only, except for abandoned property); Mont. Code Ann. §§ 44-12-207(1), 210(1); N.M. Stat. Ann. § 31-27-4.

The States that provide an innocent-owner hearing also structure the hearing differently. Minnesota and Wisconsin, for example, simply split the merits into two hearings,[3] but Illinois inverts the burden of

[3] In Minnesota, a vehicle owner can request a hearing on her "innocent owner" affirmative defense within 60 days of receiving notice of its seizure. Minn. Stat. § 609.5314(1a)(a). The prosecutor then has 30 days to file a complaint, and the court must hold a hearing within 60 days. *Id.* § 609.5314(1a)(b), (d). At the hearing, the owner must prove by a preponderance of the evidence that she lacked "actual or constructive knowledge" of and took "reasonable steps to prevent" use of the vehicle for criminal activity. *Id.* § 609.5314(1a)(f).

proof at the earlier hearing, requiring the owner to prove her innocence, 725 Ill. Comp. Stat. 150/9.1(a), (d). If the owner fails to prove that her property may not be forfeited, then another hearing must be held, the burden flips back, and the State must prove both that the owner is culpable and that the property is subject to forfeiture. *Id.* 150/9(G). Getting into the merits twice like this can drag on, because the parties must be given time to conduct "limited discovery as to the ownership and control of the property, the claimant's knowledge, or any matter relevant to the issues raised or facts alleged in the claimant's motion." *Id.* 150/9.1(b). And parties must be given "sufficient time to review and investigate the discovery responses." *Id.* 150/9.1(c).

So other States try to minimize redundancy by providing narrower hearings. Alabama's innocent-owner hearing is limited to "the sole issue of whether probable cause for forfeiture of the property or proceeds exists"—the government does not need to make out its full case on the merits. Ala. Code §§ 20-2-93(w), 15-5-63(3). Indiana provides only a "provisional release" hearing, which entails cursory review of owner culpability and requires the owner to confirm that the property will be preserved and kept out of criminal activity. Ind. Code § 34-24-1-2(d)–(k). Oregon likewise provides an earlier hearing, but only for particular types of claimants such as financial institutions and

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In Wisconsin, the owner may request an early hearing, but then the government must prove that the owner had "actual or constructive" knowledge of the criminal activity. Wis. Stat. § 961.555(5)(c).

innocent owners who unknowingly purchased property slated for civil forfeiture. Or. Rev. Stat. §§ 131A.240, 245.

**Bench or jury trial.** Some States conduct civil forfeiture proceedings by bench trial. *E.g.*, Ala. Code § 20-2-93(o); Colo. Rev. Stat. § 16-13-505(6); Ga. Code Ann. § 9-16-12(f). Other States provide a right to a jury trial in civil forfeiture cases. *E.g.*, Cal. Health & Safety Code § 11488.5(c)(2); Fla. Stat. § 932.704(3); Mo. Rev. Stat. § 513.612.

**Burden of proof.** States are all over the place on the burden of proof. Some States require that the government make its case beyond a reasonable doubt, *e.g.*, Fla. Stat. § 932.704(8), others require only clear and convincing evidence, *e.g.*, Neb. Rev. Stat. § 25-21,302(12)(b), and still others require only a preponderance of the evidence, *e.g.*, Ind. Code § 34-24-1-4(a). On top of that, some States do not allow civil forfeiture unless someone is convicted for the criminal activity supporting the forfeiture. In those States, the government must first make out its criminal case against some related person beyond a reasonable doubt, and then it must prove a nexus between the property and criminal activity either beyond a reasonable doubt, *e.g.*, Cal. Health & Safety Code § 11488.4(i), with clear and convincing evidence, *e.g.*, Conn. Gen. Stat. § 54-36h(b)–(c), or by a preponderance of evidence, *e.g.*, Ark. Code Ann. §§ 5-64-505(g)(5)(B). Some States vary the burden of proof depending on the crime, the property interest at issue, or the results of the related criminal

proceedings. *E.g.*, Ky. Rev. Stat. Ann. § 218A.410(1)(j); 725 Ill. Comp. Stat. 150/9(G), (G-10).

**Liability for wrongful seizure.** Some States protect property owners by imposing liability on law enforcement when they fail to comply with forfeiture procedures. When officers fail to promptly return property that is not subject to forfeiture, they can be held liable for conversion. *E.g.*, *Denault v. Ahern*, 857 F.3d 76, 79, 86 (1st Cir. 2017) (liability under Massachusetts law); *Case v. Eslinger*, 555 F.3d 1317, 1331 (11th Cir. 2009) (In Florida, "law enforcement officers may be liable for conversion for the seizure or retention of personal property." (quotation omitted)); *Bullock v. Dioguardi*, 847 F. Supp. 553, 562 (N.D. Ill. 1993) ("Illinois recognizes the common law tort of conversion and has applied it to hold local officials liable for a wrongful taking of property.").

* * *

On top of all this, none of the State regimes are static. Approaches and reform efforts are constantly catching on or dying out, as States grapple with the consequences of seeking out the most efficient ways to combat crime and property rights. And of course, the examples here could be multiplied, but the basic point remains: States have varied interests, priorities, and experiences with civil forfeiture. That variance manifests in widely varying procedural systems, not one-size-fits-all regimes.

## II. Petitioners ask the judiciary to impose step-by-step procedures on state civil forfeiture regimes, but this is not constitutionally required and would greatly undermine States' varied schemes.

Petitioners have policy ideas about how States should run their civil forfeiture schemes. At bottom, they want this Court to create a constitutional rule that a hearing on a statutory innocent-owner defense must precede the ordinary civil forfeiture hearing. Pet'rs' Br. 45. They want an immediate hearing, to prevent "the state [from holding] the property during the forfeiture proceedings" whenever the innocent-owner defense applies. *Id.* at 46.

There may or may not be policy reasons to add more hearings, but this dispute should remain in state legislative hallways. Some state legislatures seem to agree with Petitioners and have provided for upfront hearings. Many state legislatures have not done so. As shown, the variety of approaches here is wide, and the overlapping interests are many. Were this Court to go beyond where it has gone before (generally requiring notice and *a* prompt hearing) and begin to layer new constitutional requirements on civil forfeiture proceedings, the judiciary would be required to act as a super-legislature, prescribing minute details of procedure for 51 different civil forfeiture regimes. That would be bad for the judiciary, bad for States, and potentially harmful to property owners, too.

### A. Due process requires a prompt forfeiture hearing, not a complicated code of procedures patched together under *Mathews v. Eldridge*.

This Court's cases establish that due process requires a post-seizure forfeiture hearing, and that is all. A "forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect [an owner]'s property interest in [personal property]." *United States v. Von Neumann*, 474 U.S. 242, 249 (1986). Whatever interest an owner has in her property, it is protected by a post-seizure hearing.

The relevant constitutional question is whether the hearing has been provided promptly, and to answer that question, this Court has held that the proper analysis comes from *Barker v. Wingo*, 407 U.S. 514 (1972). *Barker* requires courts to apply four factors to determine whether a delay in the forfeiture hearing was reasonable: "the length of any delay, the reason for the delay, the defendant's assertion of his right, and prejudice suffered by the defendant." *Von Neumann*, 474 U.S. at 247. A challenge to "the length of time between the seizure and the initiation of the forfeiture trial . . . mirrors the concern of undue delay encompassed in the right to a speedy trial." *United States v. $8,850*, 461 U.S. 555, 564 (1983). "The flexible approach of *Barker* . . . is thus an appropriate inquiry for determining whether the flexible requirements of due process have been met." *Id.* at 564–65.

Protecting owners from delay (Petitioners' interest here) is exactly why this Court imposed the *Barker* test. *$8,850*, 461 U.S. at 564. Petitioners thus cannot make out a due process claim because they cannot show "that the procedures employed [are] constitutionally inadequate." *Davison v. Rose*, 19 F.4th 626, 642 (4th Cir. 2021) (quotation omitted); *see Reed v. Goertz*, 143 S. Ct. 955, 961 (2023) (no claim if existing process is adequate). Indeed, in *$8,850* the Court held that an 18-month delay before a hearing was justified, 461 U.S. at 569, because the delay was largely attributable to "pending administrative and criminal proceedings," *Von Neumann*, 474 U.S. at 248.

That cautious approach makes sense, because the "function [of the Due Process Clause] is negative, not affirmative, and it carries no mandate for particular measures of reform." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (quotation omitted). As long as "the government chooses to follow a historically approved procedure, it necessarily provides due process." *Id.* (emphasis omitted). Petitioners cannot demand different process just because they prefer it. A "process of law, which is not otherwise forbidden, 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 v. Superior Ct. of California, Cnty. of Marin*, 495 U.S. 604, 619 (1990) (quotation omitted).

Petitioners try to manufacture a "new" property interest that in turn requires "new" procedures, and they would prefer those procedures to be subject to the

test delineated in *Mathews v. Eldridge*, not *Barker*. They demand a "retention hearing . . . to test 'the probable validity of continued deprivation of a claimant's property during the pendency of legal proceedings.'" Pet'rs' Br. 25 (quoting *Krimstock v. Kelly*, 306 F.3d 40, 48 (2d Cir. 2002)). In plain language, they want "a retention hearing for owners [to] assert[] their innocence" and stop the forfeiture proceedings. *Id.* at 13. Petitioners argue that *Mathews* should apply to this question because they reject the conclusion that a timely "merits hearing on forfeiture . . . is all due process requires," *id.* at 36, and would prefer to ask "whether due process requires *more procedures* in [the civil forfeiture] setting," *id.* at 26 (emphasis added).

It is no surprise that Petitioners are keen on inserting *Mathews* into civil forfeiture proceedings in their specific case. It is an "intrusive" test, inappropriate where "States have considerable expertise" that is "grounded in centuries of common-law tradition." *Medina*, 505 U.S. at 445–46. Petitioners seek to leverage *Mathew*'s "open-ended rubric," *id.* at 443, because they would like to override the careful balance state legislatures have struck in structuring their civil forfeiture laws—laws with roots running back to the founding of the nation. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

Handling civil forfeiture through a single, post-seizure hearing is a "procedure concededly approved by traditional and continuing American practice" and thus satisfies due process. *Pac. Mut. Life Ins. Co.*, 499 U.S. at 36 (Scalia, J., concurring). And because of its

historical pedigree, it is inappropriate for courts to repeatedly question whether adding to or adjusting the process would better fit some vague notion of fairness. *Id.* Open-ended policy analysis and statutory modernization is inherently a legislative enterprise. Legislatures, not courts, are tasked with ensuring the various interests here are addressed.

### B. Petitioners' approach would demand a one-size-fits-all civil forfeiture scheme, enforced by courts imposing vague policy concerns.

Petitioners' argument is wrong, but it is also highly impractical and would undermine the benefits of state variation on this issue. That is because Petitioners' claim, though they try to disguise it, is essentially a claim about *when* a hearing on the merits should take place. They want a hearing on Alabama's innocent-owner defense sooner. But that is just another way to say they want a *hearing* sooner—and *Von Neumann* already held that *Barker*, not *Mathews*, controls questions of timing. So, in essence, Petitioners seek to elide or overrule *Von Neumann* and apply *Mathews* to every nook and cranny of the civil forfeiture process. That would eviscerate the ability of States to take different approaches to these issues.

Petitioners' demand is hard even to make sense of, as a practical matter. A merits hearing cannot happen without preparation, so it cannot happen immediately. Whether an owner is innocent of the criminal activity triggering forfeiture will usually require discovery and

investigation. That cannot happen in a day: "an investigation inherently is time-consuming . . . [even when] pursued with diligence." *$8,850*, 461 U.S. at 567–68; *see supra* § I. That is why even the States that voluntarily provide an earlier innocent-owner hearing—e.g., Illinois—impose prerequisite steps that can take months to complete. It may be that an innocent-owner hearing on the merits would happen no sooner than a final forfeiture hearing would happen in States with streamlined processes like Nebraska or Georgia. Petitioners want a full-blown "innocent owner" merits hearing at the beginning of the process, but all that would happen is the process would become harder to navigate and necessarily *lengthen* as the parties prepared for this newly required hearing.

And judicially imposing another hearing would upset the fine-tuned processes States already have in place. Perhaps the States with already abbreviated timelines will avoid the mess of introducing a second hearing. But States that require a criminal conviction first (which, to be clear, benefits property owners) will be forced to hold two merits hearings, as Petitioners reject the idea that "[p]ending criminal proceedings [justify] delay in instituting civil forfeiture proceedings." *$8,850*, 461 U.S. at 567. That burden may lead States to drop the criminal conviction requirement altogether so that they can stick with one hearing. Petitioners' request may therefore, in the end, precipitate substantive changes that make it easier for the government to forfeit property. Other States may face similar dilemmas and cut interim processes that benefit

owners, such as opportunities for discovery, so that they can hold their merits hearing more quickly and thus avoid the onerous burden of duplicative hearings.

Likewise, forcing States that provide innocent-owner protections to hold another, resource-consuming hearing will only discourage other States from providing more protections. Right now, States can easily provide statutory defenses for innocent owners without gumming up civil court dockets. But if this Court holds that such protections require doubling the number of hearings a State provides, States will generally be discouraged from innovating, because every innovation is likely to engender due-process attacks and possibly new due-process requirements. That is hardly a pro-property-owner outcome. And introducing the *Mathews* balancing test into the civil forfeiture context will unmoor the Due Process Clause from its historical framework and empower eager litigants to flood courts with every conceivable procedural challenge:

- If a state law requires the government to prove owner culpability, does that burden shift to the owner at the early hearing? What would the burden of proof be?
- Do the parties get discovery? Do they get briefing?
- Must it be a final hearing on the merits of owner culpability, or only a limited hearing for temporary release of the property?

- Is every owner entitled to two hearings? Just certain groups? Just those with substantial need?
- How does a court decide whether a "retention" hearing is timely?
- Can a State hold only one *very* timely hearing instead of two?

In the end, the disagreement around civil forfeiture will require courts, under Petitioners' framework, to ossify a detailed code of civil forfeiture procedure. That is not the judiciary's function, and that is not what the Constitution requires.

Petitioners' request is particularly heavy-handed because property owners do not even have a substantive right to assert their innocence in civil forfeiture proceedings. When "virtually any type of property" is used to support a criminal enterprise, the government may civilly forfeit the property—even if the owner did not join the criminality. *Calero-Toledo*, 416 U.S. at 683. That is, Petitioners are not constitutionally entitled to oppose civil forfeiture by arguing that they are an "innocent" owner. *Bennis*, 516 U.S. at 453. Because the property itself furthered criminal activity, "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Id.* at 449 (quotation omitted). So Petitioners would have this Court rewrite, under the guise of *Mathews*, the procedural requirements for state-provided affirmative defenses that are not even required. This Court should reject this "undue interference with . . . considered

legislative judgments" via the constitutionalization of every minute detail of civil forfeiture law. *Medina*, 505 U.S. at 443.

When compared to other areas of constitutional law, it quickly becomes clear that creating a constitutional right to an immediate hearing for this statutory affirmative defense would be extreme. Even a person arrested and charged with murder is not entitled to an immediate post-arrest hearing on the merits of a self-defense argument, nor is a person charged as a felon in possession entitled to a hearing on whether he knew he was a felon. It would be unusual to say the least to hold that process unnecessary to protect criminal defendants is somehow necessary for personal property.

Nor is it even clear that imposing more procedural requirements would be good for *property owners*. Holding more hearings requires everyone to spend both time and resources. Resolving everything promptly and all at once is better for owners who are innocent, not because of a lack of knowledge of criminal activity, but because their property was wrongly implicated in criminal activity. And requiring owners to affirmatively demand another hearing to raise an innocent-owner defense may be a trap for the unwary. The more complicated the process, the more likely owners will lose the defense simply because they overlooked that part of the process. *See*, *e.g.*, Minn. Stat. § 609.5314(1a)(a) (only 60 days to request hearing on owner culpability).

The two federal courts that have held that due process demands a "retention" hearing provide little reason for confidence. In *Krimstock*, the Second Circuit "decline[d] to dictate a specific form for the prompt retention hearing," but said it should turn on whether the government had probable cause to seize the vehicle and to seek civil forfeiture. 306 F.3d at 69. In doing so the court warned against what Petitioners ask for here: "a forum for exhaustive evidentiary battles that might threaten to duplicate the eventual forfeiture hearing"—like an innocent-owner hearing. *Id.* But it also provided little detail on what *was* required. *Id.*

The Seventh Circuit similarly demanded a hearing on the merits but refused to explain how to do it: "The district court, with the help of the parties, should fashion appropriate procedural relief consistent with this opinion." *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008), *vacated sub nom. Alvarez v. Smith*, 558 U.S. 87 (2009). It declared that the hearing should not include "lengthy evidentiary battles which would duplicate the final forfeiture hearing," but then instructed that the hearing should serve exactly the same purpose as the final hearing: the hearing should "protect the rights of both an innocent owner and anyone else who has been deprived of property." *Smith*, 524 F.3d at 838–39.

These cases make little sense, by their own terms. To hold a hearing on part of the merits (an affirmative, innocent-owner defense) requires all the preparatory steps that led this Court to explain in *$8,850* that it

is appropriate for some time to elapse between the seizure and the *final* forfeiture hearing on the merits. 461 U.S. at 565–68. It is no surprise, then, that the two courts that have gone wrong here could not exactly explain what they were doing. And if this Court were to travel down that road, the capacity for confusion would multiply. There is no obvious way to reconcile this Court's cases with what Petitioners' demand, and certainly no way to do it without judge-made, ad hoc rules regarding the precise contours of civil forfeiture proceedings, which, again, vary widely by state.

* * *

There is no reason to invite any of this confusion. The Court should hold that its past cases *still* control: due process in civil forfeiture requires a timely hearing, as measured by *Barker*, and that is all. Any other answer would undermine the authority of the States, force uniformity in an area that does not demand it, and engage the judiciary in a long-term project to rewrite civil forfeiture procedure codes for the States.

## CONCLUSION

For the reasons stated above, the Court should affirm.

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Respectfully submitted,

CHRISTOPHER M. CARR
Attorney General

STEPHEN J. PETRANY
Solicitor General
*Counsel of Record*

JAMES E. BARRETT
Honors Fellow

OFFICE OF THE GEORGIA
ATTORNEY GENERAL
40 Capitol Square SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov
*Counsel for Amici Curiae*

## ADDITIONAL COUNSEL

TREG TAYLOR
Attorney General of
Alaska

TIM GRIFFIN
Attorney General of
Arkansas

RAÚL LABRADOR
Attorney General of
Idaho

LYNN FITCH
Attorney General of
Mississippi

AUSTIN KNUDSEN
Attorney General of
Montana

MICHAEL T. HILGERS
Attorney General of
Nebraska

JOHN M. FORMELLA
Attorney General of
New Hampshire

GENTNER DRUMMOND
Attorney General of
Oklahoma

MICHELLE A. HENRY
Attorney General of
Pennsylvania

ALAN WILSON
Attorney General of
South Carolina

MARTY JACKLEY
Attorney General of
South Dakota

JONATHAN SKRMETTI
Attorney General of
Tennessee