No. 23-1050

In the Supreme Court of the United States

LUIS SANCHEZ, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a timely-filed 21 U.S.C. § 853(n) petition challenging a forfeiture may be amended to cure a pleading deficiency after the30-day filing period has run, as the Second and Seventh Circuits hold; or whether § 853(n)(2)'s 30-day deadline for filing a petition precludes any amendment after the filing deadline has expired, as the Eleventh and Fifth Circuits hold.

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Other Authorities

American Civil Liberties Union of Pennsylvania, *Guilty Property: How Law Enforcement Takes $1 million in Cash from Innocent Philadelphians Every Year—and Gets Away with It* (2015), https://www.aclupa.org/sites/default/files/Guilty_Property_Report_-_FINAL.pdf 19

Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure & Its Impact on Indigent Property Owners*, 35 B.C.J.L. & Soc. Just. 257 (2015) 19

Brent Mast, Bruce Benson & David Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 Pub. Choice 285 (2000) 12

C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows,* Reason (June 13, 2017), https://reason.com/2017/06/13/poor-neighborhoods-hit-hardest-by-asset/ 19

Chris W. Surprenant & Jason Brennan, *Injustice for All: How Financial Incentives Corrupted and Can Fix the US Criminal Justice System* (2020) 10, 13, 14

Civ. Rights Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* (2015), https://www.justice.gov/sites/default/files/opa/press-

releases/attachments/2015/03/04/ferguson_police_department_report.pdf 17, 18

Conor Freiderdorf, *Police Ignore Illegal Drugs, Focus on Seizing Cash*, The Atlantic (May 24, 2011), https://www.theatlantic.com/national/archive/2011/05/police-ignore-illegal-drugs-focus-on-seizing-cash/239349 10

Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture & the War on Drugs: Lessons from Economics & History*, 33 San Diego L. Rev. 79 (1996) 7

Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi L. Rev. 35 (1998) 8, 9, 11, 14

John L. Worrall & Tomislav V. Kovandzic, *Is Policing For Profit?: Answers from Asset Forfeiture*, 7 Criminology & Pub. Pol'y 219 (2008) 12, 13, 14

John L. Worrall, *Addicted to the drug war: The role of civil asset forfeiture as a budgetary necessity in contemporary law enforcement*, 29 J. Crim. Just. 171 (2001) 14

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Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives,*

and Local Budgets, 91 J. Pub. Econ. 2113 (2007) 11, 12

Michael D. Makowsky, Thomas Stratmann & Alex Tabarrok, *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. Legal Stud. 189 (2019) 15, 16, 18

Michael Sallahet et al., *Stop and Seize*, Wash. Post, Sept. 7, 2014, https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/ 20

Nathan Dorn, *Evidence from Invisible Worlds in Salem*, Library of Congress (Aug. 20, 2020), https://tinyurl.com/Evidence-from-Invisible-Worlds 22

Oliver Wendell Holmes, *The Common Law* (1881) 21, 23

Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 Yale J.L. & Human. 1 (1999) 21

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1989, The Buckeye Institute is an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals. The Buckeye Institute's Economic Research Center provides reliable economic research, data analysis, and econometric modeling at the state level. The Buckeye Institute is a non-profit organization dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference.

The Buckeye Institute is a leading advocate for criminal justice reform, promoting policies that keep communities safe through fair processes and fair laws that produce just outcomes. The Buckeye Institute has a particular interest in this case because the

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

unrestricted use of fines, fees, and civil forfeiture proceedings pose a grave threat to individual liberty and the right to use and enjoy property.

SUMMARY OF THE ARGUMENT

This brief marshals the empirical research and analysis of economists and legal scholars over the last quarter century to support the common-sense conclusion that civil forfeiture regimes inject impermissible and irrelevant factors into law enforcement decisions and disproportionately burden those on the lower rungs of the socio-economic ladder. The economic literature—drawn from across decades—shows that these financial incentives not only drive law enforcement priorities, but that the strategies that law enforcement agencies employ to maximize their revenue disproportionately burden poor and minority communities, and those least able to protect their property rights. Yet these forfeiture practices persist.

This Court has held that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Due process should always be a core value in all aspects policing and judicial law enforcement. Here, the government seized $9,000 belonging to Mr. Sanchez—a man who was neither convicted, charged, or even suspected of a crime. While the forfeiture itself fails to satisfy the appearance of justice, the Eleventh Circuit added insult to injury by upholding the denial of Mr. Sanchez's petition to recover his $9,000 based on a misplaced signature. Even when arrests are factually supported and objectively reasonable, the profit motive lurking in the federal forfeiture regime, which allows federal law

enforcement agencies to keep a portion of the proceeds of forfeited property, taints the public's perception of its motives. When the police get to keep what they seize, citizens cannot help but wonder—did the police make an arrest for public safety reasons, or to raise revenue? This uncertainty and appearance of impropriety reflects poorly on both the legitimacy of law enforcement agencies and the judicial system.

Worse still, scholarly research on civil forfeitures shows that this public cynicism is warranted. Allowing law enforcement agencies to keep what they seize warps law enforcement priorities. This appears in the type of statutes that law enforcement agencies choose to enforce, the way they conduct investigations, and most troubling, in the demographics of whose property is seized. Law enforcement agencies, like everyone else, respond to economic incentives. These incentives are thus incompatible with due process. The Court should grant the writ to review whether these practices are in any way constitutional and if so, to articulate the process due to a third-party whose assets have been seized.

ARGUMENT

When asked why he robbed banks, Willie Sutton famously replied, "[b]ecause that's where the money is." See *United States v. Cravens,* 275 F.3d 637, 638 (7th Cir. 2001). Sutton's response rings humorous; his candor reveals his amorality. Yet it also resonates because Sutton expressed a common-sense economic truth that professional economists and laymen alike understand—financial incentives influence behavior. Forfeiture statutes that allow police agencies and prosecutors to retain a portion of the value of forfeited

property for their own institutional use, create a powerful financial incentive to abuse police powers—specifically, sweeping law enforcement power—to secure revenue through forfeiture. This practice of relieving citizens of their private property on the mere suspicion of criminal wrongdoing and with no proportionality between the seizure and any alleged offense deserves no more respect than Sutton's. Indeed, it is all the more galling because the data shows that the incentive structure embedded in civil forfeiture laws perverts the agencies charged with protecting people and property.

Incentives that tempt government officials to set aside the impartiality required to enforce the law are incompatible with the Due Process Clause. Economic and legal scholars who have studied this issue over the past three decades demonstrate with empirical data that law-enforcement agencies, like Willie Sutton, will focus their efforts "where the money is." The result is a system where revenue generation—not crime prevention—is the primary driver of law enforcement decisions. Importantly, even when revenue generation and crime prevention are not mutually exclusive, the profit motive exacerbates a significant and growing distrust of law enforcement. With recent protests questioning the integrity and even legitimacy of police departments, eliminating improper financial incentives will safeguard citizens' due process rights and help restore trust in law enforcement.

I. Dedicating Forfeiture Proceeds to Police and Prosecutors Creates an Impermissible Financial Incentive That Offends Due Process.

Due process does not permit any "procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance, nice, clear and true between the state and the accused . . . ." *Tumey v. Ohio,* 273 U.S. 510, 532 (1927); see also *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Harjo v. City of Albuquerque,* 326 F. Supp. 3d 1145, 1145 (D. N.M 2018). The constitutional infirmity in all of these cases was not that the forfeiture regime violated the due process rights as applied to a particular defendant, but that the statutes at issue created incentives that necessarily called into doubt the fundamental fairness of any proceedings convened under it. The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This neutrality requirement guarantees that "life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); see also *Mathews v. Eldridge*, 424 U.S. 319 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done" by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *Joint Anti-Fascist Committee v.*

McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

In fact, this Court has recognized that when it comes to due process—particularly in criminal proceedings—perception is reality. Due process demands that "justice must satisfy the appearance of justice." *Offutt*, 348 U.S. at 14. To satisfy this test, the temptations inherent in any law-enforcement regime must be reviewed "under a realistic appraisal of psychological tendencies and human weakness . . . ." *Marshall,* 446 U.S. at 252 (quoting *Withrow v. Larkin,* 421 U.S. 35, 47 (1975)). Here, the empirical data relating to civil forfeiture by the federal and state law enforcement over the last thirty years confirms that police agency decisions are guided in significant part by the ability to generate revenue through civil forfeiture. Further, because victims of civil forfeiture bear the burden of proof at trial and are not afforded a right to counsel, the seizing law enforcement agency essentially acts as prosecutor, judge, and jury in a scheme in which they are financially rewarded as a successful plaintiff.

In the case of federal seizures, the Comprehensive Crime Control Act of 1984 requires that forfeiture proceeds be deposited into the Asset Forfeiture Fund, from which the Attorney General may pay expenses related to the forfeiture program. 28 U.S.C. § 524(c). The Attorney General may also—at his discretion—fund a wide array of law enforcement programs. See *id.* This skewing of incentives and burdens renders the federal scheme unconstitutional. At the very least, in light of the federal incentive to keep forfeited property, this Court should grant the writ to clarify that

forfeiture should be disfavored and the remedies afforded to innocent third parties should be read broadly, consistent with their Fifth Amendment rights.

II. Economic Data Shows that Fiscal Incentives Affect Law Enforcement Decisions

In *Tumey v. Ohio,* 273 U.S. at 532 and *Ward v. Village of Monroeville*, 409 U.S. at 59–60, this Court intuitively recognized that the incentives inherent in civil forfeiture laws influence law enforcement decisions. While this conclusion seems obvious, this Court has the benefit of decades worth of data and economic studies that support it. Beginning in the mid-1990s, economists began conducting empirical studies of civil forfeiture statutes and their effects on law enforcement behavior. These early studies confirmed what common sense predicted: The financial incentives created by allowing law enforcement agencies to keep or share in the forfeiture proceeds led law enforcement to expand their enforcement of laws where they stood to realize forfeiture revenue, even at the expense of enforcing other statutes. See Donald J. Boudreaux & A.C. Pritchard*, Civil Forfeiture & the War on Drugs: Lessons from Economics & History*, 33 San Diego L. Rev. 79, 93 (1996) ("In sum, economic analysis indicates that civil forfeiture leads to: (1) bigger government; (2) inefficient and overly aggressive enforcement of the drug laws; and (3) increased violence and theft.").

A. Economic Incentives of Civil Forfeiture Drive How Law Enforcement Agencies Deploy Their Resources.

In their seminal work, *Policing for Profit: The Drug War's Hidden Economic Agenda,* economists Eric Blumenson and Eva Nilsen studied two decades of drug enforcement forfeitures by analyzing Justice Department reports and conducting numerous interviews of law enforcement officials. Based on that research, Blumenson and Nilsen explained how police shifted their enforcement priorities to maximize forfeiture revenue through "reverse stings":

> Consider first police investigations. The shift in law enforcement priorities, from crime control to funding raids, is perhaps best revealed by the advent of the "reverse sting," a now common police tactic that rarely was used before the law began channeling forfeited assets to those who seized them. The reverse sting is an apparently lawful version of police drug dealing in which police pose as dealers and sell drugs to an unwitting buyer. The chief attraction of the reverse sting is that it allows police to seize a buyer's cash rather than a seller's drugs (which have no legal value to the seizing agency).

Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi L. Rev. 35, 68–69 (1998) (internal citations omitted).

One of the reverse-sting participants interviewed

by Blumenson and Nilsen explained the advantage of seizing money rather than seizing drugs:

> This strategy was preferred by every agency and department with which I was associated because it allowed agents to gauge potential profit before investing a great deal of time and effort. [Reverse stings] occurred so regularly that the term reverse became synonymous with the word deal.

Id. at 67.

Blumenson and Nilsen further noted "the otherwise baffling policy" implemented in New York City and Washington, D.C. of seeking to enforce traffic laws more vigorously based on the direction of the traffic flow. *Id.* at 68. They discovered the reason for this lopsided enforcement in congressional testimony offered by Patrick Murphy, the former Police Commissioner of New York City, who stated:

> Police . . . have a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.

Id. at 69 (citing Congressional testimony of former New York City Police Commission, Patrick Murphy).

Law enforcement's decision to focus on the arteries carrying money rather than those carrying drugs

graphically illustrates how financial incentives affect law enforcement decisions. Not surprisingly, in the years since Blumenson & Nilsen first observed the "baffling policy," journalists and academics identified focused enforcement based upon the direction of money flow in other areas of the country. For example, in a 2016 study on forfeitures, the *Texas Tribune* reported that more than 80% of the cash seizures made by Webb County law enforcement agencies were made on the southbound lanes of I-35 heading into Mexico. Jolie McCullough, Acacia Coronado & Chris Essis, *Texas police can seize money and property with little transparency. So we got the data ourselves*, Tex. Trib. (June 7, 2019), https://apps.texastribune.org/features/2019/texas-civil-asset-forfeiture-counties-harris-webb-reeves-smith. According to a Laredo Police Department Spokesman, on the day he was interviewed, Webb County agencies made only two seizures on the northbound lanes of I-35, compared with 16 cash seizures from the southbound lanes. *Id.*

Similarly, *The Atlantic* reported that in Tennessee, where eastbound I-40 "includes vehicles importing drugs from Mexico," police focus 90% of their efforts on the *westbound* lanes, where cars are "carrying cash back towards Mexico." Conor Freiderdorf, *Police Ignore Illegal Drugs, Focus on Seizing Cash*, The Atlantic (May 24, 2011), https://www.theatlantic.com/national/archive/2011/05/police-ignore-illegal-drugs-focus-on-seizing-cash/239349; see also Chris W. Surprenant & Jason Brennan, *Injustice for All: How Financial Incentives Corrupted and Can Fix the US Criminal Justice System* 101 (2020) ("Instead of trying to seize illegal

drugs to prevent them from being distributed, law enforcement officers [on I-40] seemed more interested in seizing the cash connected to their sale to help fund their own operations."). As Professors Blumenson and Nilsen explained, "[t]he consequence of [targeting lanes carrying money] was that the drugs that would have been purchased continued to circulate freely." Blumenson & Nilsen, *supra*, at 69.

B. The Economic Incentives of Civil Forfeiture Impact the Type of Statutes that Law Enforcement Agencies Choose to Enforce.

In addition to impacting *where* law enforcement agencies focus their efforts, the economic incentives imbedded in civil forfeiture result in agencies focusing on what laws to enforce. In particular, police direct their attention to non-violent drug offenses at the expense of other types of crime. Ten years after the Blumenson and Nilson paper, a similar study conducted by economists at UCLA and the University of California, Irvine examined whether the amount of forfeited property that flowed directly back to the law enforcement agency affected law enforcement behavior. Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets,* 91 J. Pub. Econ. 2113 (2007). The authors found that "when law enforcement agencies get to keep more of the assets they seize, they respond by devoting substantially more of their effort to anti-drug [i.e., more profitable] policing and away from other petty crimes." *Id.* at 2115. Baicker and Jacobson explained:

> The police [ ] seek to maximize some

> function of their effort, which they dislike, and their budget, which they want to increase (perhaps because they care about the crime reduction their budget finances, because of Leviathan motivation, because their job is more pleasant with greater resources, or because they benefit directly from higher salaries or perks.)

Id. at 2117.

This response is entirely rational considering that the illicit drug trade is a cash-only business and typically relies on motor vehicles to move merchandise. Enforcement of drug laws thus tends to yield cash and cars that are easily convertible into cash. Thus, it is unsurprising that when law enforcement agencies are permitted to keep seized assets, drug arrests increased as a portion of total arrests by nearly 20%. See Brent Mast, Bruce Benson & David Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 Pub. Choice 285 (2000). It is simply more profitable to focus on drug arrests rather than violent crime.

Similarly, economists John Worrall and Tomislav Kovandzic at the University of Texas drew on the Law Enforcement Management and Administrative Statistics surveys from 1997 and 2000, which contained data on 1,443 observations drawn from surveys regarding forfeitures provided by law enforcement agencies with over 100 sworn officers. John L. Worrall & Tomislav V. Kovandzic, *Is Policing For Profit?: Answers from Asset Forfeiture*, 7 Criminology & Pub. Pol'y 219 (2008). They studied the

effect of incentives on law enforcement agency behavior by comparing how often agencies in states with more restrictive state forfeiture statutes partner with the federal government under the federal "Equitable Sharing" forfeiture program (which allows state law enforcement agencies to utilize federal preemption to bypass state restrictions including caps on the percentage of funds that law enforcement can receive from a forfeiture) with agencies in states with more permissive forfeiture statutes. See 18 U.S.C. § 983.

> Assisted by state law enforcement agencies motivated by this ['Equitable Sharing'] program, the federal government seized over $5 billion in assets (yes billion, with a 'b') in 2014, a 550% increase over the amount seized in 2004 and 50% more than what was stolen by burglars in the US during the same year.

Surprenant & Brennan, *supra*, at 100. The data unsurprisingly shows that "police agencies rationally elect to pursue the most lucrative avenues for asset forfeiture . . . ." Worrall & Kovandzic, *supra*, at 234.

The authors also cited with approval prior studies that suggested that "forfeiture may be clouding the judgment of law-enforcement agencies in the war on drugs," noting that "more than 60% of police agencies surveyed reported dependence on asset forfeiture or were 'addicted to the drug war.'" *Id.* at 222 (citing John L. Worrall, *Addicted to the drug war: The role of civil asset forfeiture as a budgetary necessity in*

contemporary law enforcement, 29 J. Crim. Just. 171 (2001)).

Most significantly, however, while the Worrall and Kovandzic study was not designed to determine whether asset forfeiture distorts law enforcement goals and could thus not answer that question, it noted that "neither drug arrests nor crime were significant predictors of forfeiture" in any of their models. Worrall & Kovandzic, *supra*, at 239. Worrall and Kovandzic explain that finding's ramification with chilling understatement, stating "[t]his finding suggests that forfeiture activities may be pursued independent of crime." *Id.*; see also Surprenant & Brennan, *supra*, at 98–99 (discussing particularly egregious example).

This troubling implication is borne out by studies showing that up to 80% of civil forfeitures are not accompanied by a criminal conviction. See Blumenson & Nilsen, *supra*, at 56. This sobering statistic means that in a substantial majority of forfeiture cases studied, the law-enforcement agency lacked either the evidence or the will to prosecute any crime.

While a comprehensive look at the substantial body of economic literature on civil forfeitures could fill volumes, it is important to note that studies performed more recently are consistent with those of the mid-1990s. In their 2019 paper *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, Michael D. Makowsky, Thomas Stratmann, and Alex Tabarrok examined data from a sample of 36 states "to study the fiscal determinants of arrest patterns, including arrests by race." Michael D. Makowsky, Thomas Stratmann & Alex Tabarrok, *To Serve and Collect: The Fiscal and Racial*

Determinants of Law Enforcement, 48 J. Legal Stud. 189, 191 (2019). The authors hypothesized that "police departments that can keep seized assets are more likely to make the kinds of arrests that lead to seized assets, especially when department budgets are tight." *Id*. They explained their modelling as follows:

> Incentives are more important when enforcement effort is a choice. Thus, a revenue-driven model of enforcement predicts that police will focus on crimes that are more responsive to police effort and, of those crimes, those which are more productive of revenue. Our model also predicts that revenue-driven law enforcement will increase when revenue demands become more salient relative to other demands and when revenue control accrues to agents who influence law enforcement choices. In particular, we predict that revenue-driven law enforcement will increase when municipalities run deficits. . . . Holding deficits constant, we expect departments that can retain revenues to engage in more revenue driven policing.

Id. at 193.

The data supported their hypothesis. Specifically, the authors found that "drug arrests increase in counties where local governments are running deficits, but only in states that allow police departments to retain seizure revenue." *Id*. at 207. The data showed that "optimal deterrence is not the sole criteria for arrests, and that police officer

behavior is influenced by local fiscal conditions." *Id*. at 217. Thus, law-enforcement agencies incentivized by permissive forfeiture laws will—like Willie Sutton—focus their efforts according to where the money is.

C. The Economic Incentives of Civil Forfeiture Incentivize Law Enforcement to Focus Stops and Seizures on the Poor and Minorities.

While evidence that police change their law-enforcement behavior in response to institutional financial incentives would be enough to disqualify forfeiture regimes, studies further show that the economics of civil forfeiture encourage law-enforcement agencies to focus their efforts on poor and minority communities where forfeiture victims often lack the resources to contest the forfeiture. This is terrible public policy and contributes to the frayed relationship between police and minority communities. For example, the Justice Department's report on policing in Ferguson, Missouri highlighted how the need to generate revenue resulted in over-policing and distrust of the police:

> The City budgets for sizeable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved.

Civ. Rights Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_dep

artment_report.pdf.

The Ferguson report discussed how the importance of using police power to generate revenue, was not merely an unconscious response to economics incentives, it was department policy:

> The importance of focusing on revenue generation is communicated to [Ferguson Police Department (FPD)] officers. Ferguson police officers from all ranks told us that revenue generation is stressed heavily within the police department, and that the message comes from City leadership. The evidence we reviewed supports this perception.

Id.

The report found that this focus on revenue generation drove arrests in minority communities:

> The City's emphasis on revenue generation has a profound effect on FPD's approach to law enforcement. Patrol assignments and schedules are geared toward aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation. Officer evaluations and promotions depend to an inordinate degree on "productivity," meaning the number of citations issued. Partly as a consequence of City and FPD priorities, many officers appear to see

> some residents, especially those who live in Ferguson's predominantly African American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue. This culture within FPD influences officer activities in all areas of policing, beyond just ticketing.

Id.

While the Ferguson report focused more on fines and fees than forfeitures, the report demonstrates the invidious results that occur when police are driven by a need to raise revenue rather than a legitimate law enforcement motive.

Indeed, Makowsky, Stratmann, and Tabarrok found the same disproportionate effect of revenue driven policing on minorities. Their research demonstrated that in counties facing deficits, increases in drug arrests were "only observed for black and Hispanic drug arrests; white drug arrests remain unchanged." Makowsky, Stratman & Taborrok, *supra*, at 15. Their study also found that "both black and Hispanic DUI arrest rates are increasing with deficits and seizure laws, while white DUI arrests are not." *Id.* at 16. Makowsky, Stratmann, and Tabarrok further reported that "the seizure of non-narcotic property from black and Hispanic arrestees is increasing with [the] size of the deficit in states where police departments can retain revenue from seized property." *Id.*

Likewise, a 2017 study conducted by *Reason* magazine, Lucy Parson Labs, and *The Chicago*

Tribune demonstrated that forfeitures were clustered in poorer Chicago neighborhoods. Even more striking is that these seizures were not headline-making major drug busts but typically cars and cash of low value. The average estimated value of a seizure in the Chicago study was $4,553, while the median value was $1,049. C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows,* Reason (June 13, 2017), https://reason.com/2017/06/13/poor-neighborhoods-hit-hardest-by-asset/. Nearly 75% of all of these seizures were cash. *Id*. Similarly, an ACLU analysis of forfeitures in Philadelphia between 2011 and 2013 revealed that half of the forfeiture cases involved less than $192. American Civil Liberties Union of Pennsylvania, *Guilty Property: How Law Enforcement Takes $1 million in Cash from Innocent Philadelphians Every Year—and Gets Away with It* (2015), https://www.aclupa.org/sites/default/files/Guilty_Property_Report_-_FINAL.pdf.

Because law enforcement seeks to capitalize on a high volume of small seizures, "[t]he financial motivations behind forfeiture actions have the potential to disproportionately impact lower income parties. This is because one way for law enforcement agencies to generate profits is to target low-income parties who are financially incapable of challenging seizures." Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure & Its Impact on Indigent Property Owners*, 35 B.C.J.L. & Soc. Just. 257, 274–77 (2015). The incapability or economic inefficiency of challenging small seizures is exacerbated by the fact that individuals whose property has been seized have no Sixth Amendment

right to counsel because the civil asset forfeiture is accomplished through a civil *in rem* proceeding rather than a criminal action. With no right to counsel, there is a strong economic disincentive to challenge the relatively small dollar seizures documented by Ciaramella and Crawford. This economic reality is sadly consistent with Justice Thomas' recent observation that "forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Leonard v. Texas*, 580 U.S. 1178, 1178 (2017) (Thomas, J., statement respecting denial of certiorari) (citing Michael Sallah et al., *Stop and Seize*, Wash. Post, Sept. 7, 2014, at A1, A10, https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/). Ironically, while Willie Sutton focused his efforts on a few well-protected banks, law-enforcement officials seem to focus theirs on volume.

While these studies focused on state forfeiture—albeit state forfeiture often aided and assisted by the federal government—there is no reason to believe that federal law enforcement officials are immune from these economic incentives. This is not to suggest that the uses to which forfeited funds are applied are not important ones. It is the importance of those uses that adds to the temptation for forfeiture abuse. Law enforcement officials naturally want to keep the public safe and a regime that allows them additional resources to realize that mission gradually become part of the mission. Likewise, what government department manager would not want additional revenue, independent of Congress?

III. Modern Civil Forfeiture is a Legal Patchwork that Cannot Be Justified Based on Legitimate Jurisprudential History.

The doctrine of *in rem* civil forfeiture as embodied in the federal forfeiture regime is a Frankenstein's monster pieced together from prehistoric ritual, discarded feudal notions, and "hoary legal fictions" created for the economic necessities of a time long passed. See *Bennis v. Michigan*, 516 U.S. 442, 466 (1996) (Stevens, J., dissenting); see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–686 (1974) (detailing the historical development of civil forfeiture law from the "Biblical and pre-Judeo-Christian practices" of deodand, through English common law, and statutes designed to combat piracy on the high-seas); see also Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 Yale J.L. & Human. 1 (1999).

As Justice Brennan noted in *Calero-Toledo*, the legal justification for civil forfeiture is rooted in irrationality and superstition, which taught that "the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand"—an offering to God. *Calero-Toledo*, 416 U.S. at 680–681. In essence, the "instrument of death was accused" and "religious expiation was required." *Id.* at 681 (citing Oliver Wendell Holmes, *The Common Law*, c. 1 (1881)). The King, in turn, would put the forfeiture to charitable uses. *Id.* This practice and the revenue it generated were expedient to the Crown, and its religious origins were subsumed by its practical advantages.

"[D]eodand became a source of Crown revenue . . . justified as a penalty for carelessness." *Id.* While historical, these practices are no more a sound basis for jurisprudence than the 17th-century witch trials. Societal fears of the time seemed to legitimate the legal doctrines utilized to combat the cultural superstitions. Nathan Dorn, *Evidence from Invisible Worlds in Salem*, Library of Congress (Aug. 20, 2020), https://tinyurl.com/Evidence-from-Invisible-Worlds (discussing the use of "spectral evidence" to support a conviction for witchcraft in Salem).

Fortunately, deodands never became part of American common law. *Calero-Toledo*, 416 U.S. at 682. Yet the underlying mystical notion that inanimate objects could be "treated as the offender" snuck into our jurisprudence, apparently because it seemed "the only adequate means of suppressing the offence or wrong, or insuring indemnity to the injured party." *Id.* at 684 (quoting *United States v. Brig Malek Adhel*, 43 U.S. 210 (1844)).

So, superstition—hidden beneath the gloss of government convenience—seems to have survived into modern legal justifications for confiscation of private property. Like Dr. Frankenstein's creation, when viewed from a distance, the bolts and seams holding the doctrine together are not apparent. A closer view, however, reveals it for the monster it is. In *Leonard v. Texas*, Justice Thomas hinted that eventually courts will need to face civil forfeiture head on and determine whether the poorly assembled doctrine of a bygone era can lumber into the 21st century. See *Leonard*, 580 U.S. at 1178 (Thomas, J., statement respecting denial of certiorari) ("Whether this Court's treatment of the

broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail.").

This case presents the Court with the opportunity to clarify that civil forfeiture as it is practiced today lacks any common law justification. Looking at how the incentives embedded in statutes like 18 U.S.C. § 983 and 28 U.S.C. § 524(c) operate in today's world should be part of that analysis. As Justice Holmes observed, "[e]xperience is the lifeblood of the law." Holmes, *supra*, at 1. Here, that experience is reflected in the empirical findings collected by economists over the last three decades showing that law-enforcement agencies bend their priorities to chase revenue, and that this comes at the expense of the society's most vulnerable. This distortion fails the most basic demand of due process, namely that "justice must satisfy the appearance of justice," *Offutt*, 348 U.S. at 14.

CONCLUSION

For all the foregoing reasons, the writ should be granted.

Respectfully submitted,

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