No. _____

In The
Supreme Court of the United States

GERARDO SERRANO,

Petitioner,

v.

U.S. CUSTOMS AND BORDER PROTECTION, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the government seizes a vehicle for civil forfeiture, does due process require a prompt post-seizure hearing to test the legality of the seizure and continued detention of the vehicle pending the final forfeiture trial?

PARTIES TO THE PROCEEDINGS BELOW

Gerardo Serrano was Plaintiff in the United States District Court for the Western District of Texas and Appellant in the United States Court of Appeals for the Fifth Circuit.

Defendants in the district court were U.S. Customs and Border Protection ("CBP"); Kevin McAleenan, in his official capacity as Acting Commissioner of CBP; the United States of America; Juan Espinoza, a forfeiture specialist at CBP sued in his individual capacity; and John Doe 1-X, unknown agents of CBP sued in their individual capacity. The above-named Defendants were also Appellees in the Fifth Circuit, except that Mark A. Morgan was substituted as Acting Commissioner of CBP.

Amici in the Fifth Circuit were the National Association of Criminal Defense Lawyers, Cato Institute, Due Process Institute, Americans for Forfeiture Reform, James E. Pfander, Alexander A. Reinert, Joanna C. Schwartz, and Stephen I. Vladeck.

RELATED CASES

U.S. District Court for the Western District of Texas:

Serrano v. U.S. Customs & Border Protection, Case No. 2:17-cv-00048-AM-CW. Judgment entered September 28, 2018.

U.S. Court of Appeals for the Fifth Circuit:

Serrano v. Customs & Border Patrol, Case No. 18-50977. Judgment entered September 16, 2020.

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Gerardo Serrano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-28) is reported at 975 F.3d 488. The opinion of the district court (App. 29-82) is unreported.

JURISDICTION

The court of appeals entered its judgment on September 16, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix. App. 140-47.

STATEMENT

Under modern civil forfeiture, government routinely seizes vehicles without any pre-seizure process and then holds them for months or years without any post-seizure hearing. In this case, for instance, U.S. Customs and Border Protection ("CBP") agents seized

Petitioner Gerardo Serrano's truck without a warrant on the facially absurd theory that Gerardo, having accidentally left five low-caliber bullets in his center console, was attempting to export "munitions of war." Gerardo repeatedly requested his day in court, but CBP held the truck over two years without a hearing.

Delay is an expected part of modern civil forfeiture. It is built into forfeiture procedures at every level of government, but the archetype lies at the federal level, where property owners must pass through so-called "administrative forfeiture" procedures before prosecutors will even *file* a judicial complaint—which, of course, is itself just an intermediate step to a hearing. And such delays are particularly egregious in the customs context where this case arises, as, in that context, statutory time limits on administrative forfeiture procedures do not apply. Even if the government moves with dispatch—which it need not—property owners must wait months or years for an opportunity to be heard.

The question presented asks whether, given the delays built into modern civil forfeiture, due process requires a prompt post-seizure hearing to test the legality of the seizure and retention of a vehicle pending the final forfeiture trial. This is distinct from the question of how long government can delay the forfeiture trial, which this Court has held is governed by the same speedy trial test that applies in the criminal context. *See United States v. $8,850*, 461 U.S. 555 (1983). Rather, the question is whether due process requires

an intermediate hearing analogous to a post-arrest probable cause hearing.

This question has split the Courts of Appeals, as well as state high courts. The Second Circuit, in an opinion by then-Judge Sotomayor, held that prompt post-seizure hearings are required. *See Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002). But other courts, both before and after *Krimstock*, have splintered. In recognition of the importance of the question, this Court granted certiorari to address it in *Alvarez v. Smith*, 558 U.S. 87 (2009), but then could not reach the issue for procedural reasons not at issue here. And now the Fifth Circuit has joined those courts that do not require a hearing—holding, instead, that *Krimstock* can be limited to its facts.

The question presented would also warrant review even without that split. The delay built into modern civil forfeiture cannot be justified under this Court's due process precedents, which require either a *pre*-seizure or *prompt* post-seizure hearing. Such lengthy deprivations—unreviewed by any neutral adjudicator—are antithetical to due process. And such delays also cannot be justified as a matter of historical practice: To the contrary, the First Congress adopted a procedure designed to place forfeiture cases promptly before the courts.

Every year, governments across the country seize billions of dollars of property under civil forfeiture procedures that do not meet basic due process requirements. *See* Dick M. Carpenter, *Policing for Profit: The*

Abuse of Civil Asset Forfeiture (2015).[1] Delay provides a potent weapon to force settlements, and many forfeitures are resolved without any court case ever being filed. Requiring a prompt post-seizure hearing would introduce an important element of judicial oversight, and it would ensure that property owners do not languish for months or years without the ability to challenge warrantless seizures. By enforcing basic due process principles, this Court could rein in abuses associated with modern civil forfeiture.

A. Modern Administrative Forfeiture.

Today, most civil forfeiture occurs outside the courts, under administrative procedures overseen by seizing agencies. These procedures force property owners to wait months or years for a hearing; would have been unrecognizable to the Founders; and have resulted in well-documented abuse.

1. When government seizes property valued below $500,000, the seizure is processed administratively. *See* 19 U.S.C. §§ 1607-1610.[2] The seizing agency initiates the administrative forfeiture by sending notice to

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[1] *Available at* https://ij.org/report/policing-for-profit/. Agencies within the Department of the Treasury and Homeland Security reported forfeiture revenues over $1.2 billion in 2018. *See* Dep't of Treasury, Executive Office of Asset Forfeiture, *Congressional Budget Justification and Annual Performance Report and Plan* 6 (FY 2020) ("*Forfeiture Budget*"), https://bit.ly/2UrY2Lz.

[2] By contrast, property valued over $500,000 can generally only be forfeited by filing a complaint. 19 U.S.C. § 1607.

the property owner. *Id.* § 1607. The notice presents the owner with a menu of options—none of which provide a prompt hearing for a person who wants to contest the seizure.

First, the notice invites the owner to submit an "offer in compromise" by sending a "bank draft, cashier's check or certified check" to the seizing agency. App. 134.

Second, the notice invites the owner to "abandon the property" by filling out an enclosed form. App. 135.

Third, the notice states that the owner can file a petition for remission or mitigation with the seizing agency. App. 132. A remission petition is a request for clemency—akin to a pardon petition—and does not result in a hearing on the validity of the seizure. "[F]orfeitability is presumed and the petitioner seeks relief from forfeiture on fairness grounds." *United States v. German*, 76 F.3d 315, 318 (10th Cir. 1996) (marks and citation omitted). Because the remission process is discretionary, this Court has also held there is also no requirement for the agency to rule on a petition in a timely way. *See United States v. Von Neumann*, 474 U.S. 242, 250 (1986).

Fourth, the notice invites the owner to file a claim and accompanying cost bond with the seizing agency, which serves as a "request to have this matter referred to the U.S. Attorney for institution of judicial forfeiture proceedings." App. 135. The prosecutor will then "inquire into the facts" and "laws applicable thereto." 19 U.S.C. § 1604. If the prosecutor decides to move

forward, she files a complaint, and, after another notice period, the owner must file a second claim as well as an answer. *See* Fed. R. Civ. P. Supp. R. G. Following discovery and motions practice, the court will eventually hold a forfeiture trial.

While this final option does provide a route to a judicial hearing, the resulting hearing is in no sense prompt. The Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), which, ironically, was intended to limit pre-filing delays, allows the government 60 days to send notice after seizure and an additional 90 days to file a complaint after a claim. *See* 18 U.S.C. § 983. Even if a property owner files a claim immediately after receiving notice, CAFRA thus allows the government *150 days* to file a complaint. And those deadlines do not apply in the customs context where this case arises, *see id.* § 983(i)(2)(A), with the result that it is not uncommon to see pre-filing delays exceeding even the 150-day delay contemplated by CAFRA.[3] And, of course, the complaint itself is generally followed by months of discovery and motions practice.

Although the seizure notice does not mention it, a property owner can in unusual circumstances file an independent civil action seeking return of property—sometimes styled as an action under Federal Rule of

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[3] *See*, *e.g.*, *LKQ Corp. v. United States*, No. 18-cv-1562, 2019 WL 3304708, at *2 (D.D.C. July 23, 2019) (delay of 24 months); *United States v. Two Land Rover Defs.*, No. 14-cv-2093, 2015 WL 4603271, at *7 (D.S.C. July 29, 2015) (15 months); *United States v. Thirty-Six (36) 300CC on Rd. Scooters*, No. 11-cv-130, 2012 WL 4483281, at *5 (S.D. Ohio Sept. 27, 2012) (19 months).

Criminal Procedure 41(g). For instance, an action under Rule 41(g) might potentially be available if the government failed to provide adequate notice to the property owner. *See Muhammed v. DEA*, 92 F.3d 648, 654 (8th Cir. 1996). Importantly, however, when property owners seek to use Rule 41(g) to obtain prompt hearings following a seizure, courts hold that the property owner must instead challenge the seizure following the notice-and-claim procedures set forth above. *See infra* pp. 25-26 (citing cases). And even when Rule 41(g) motions are available, there is no requirement for courts to hear them quickly.

A research report, analyzing data obtained through the Freedom of Information Act, illustrates the delays faced by property owners. *See* Dick M. Carpenter, *Seize First, Question Later* (2015).[4] The report looked at a subset of cash seizures by the federal government and found that—in cases where a forfeiture complaint was filed—the average time from seizure to forfeiture was 460 days. *Id.* at 19. Some cases took far longer, with one taking an incredible 2,390 days to resolve. *Id.*

2. Modern administrative forfeiture bears no resemblance to forfeiture laws enacted at the Founding. *See Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari).

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[4] *Available at* https://bit.ly/2ID58u5; *see also* Jennifer McDonald, *Jetway Robbery?* 18 (July 2020), *available at* https://bit.ly/2SQxJOh.

The First Congress enacted a civil forfeiture law that was designed to place cases before the courts in a timely way. The law directed government agents to file a complaint directly in "the proper court having cognizance thereof," and then, after a 14-day notice period, provided that the court "shall proceed to hear and determine the cause according to law." Collections Act of 1789, § 36, 1 Stat. 29, 47. Ten years later, Congress amended these procedures to emphasize that government officials were "enjoined to cause suits for [forfeiture] to be commenced without delay." Collections Act of 1799, § 89, 1 Stat. 627, 695. These procedures "enjoin[ed] the collector, within whose district a seizure shall be made, or forfeiture incurred, to cause suits for the same to be commenced without delay, and prosecuted to effect." *Jones v. Shore's Ex'r*, 14 U.S. (1 Wheat.) 462, 469 (1816).

Modern forfeiture procedures began to emerge later, in 1844, when Congress first introduced prefiling notice and claim procedures. *See* Tariff Act of 1844, § 1, 5 Stat. 653. "Prior to the act of April 2, 1844, it was the duty of the collector, or other principal officer of the revenue, in making a seizure, to cause a suit for forfeiture to be commenced without delay." *McGuire v. Winslow*, 26 F. 304, 306 (C.C.N.D.N.Y. 1886).

Still, even after 1844, administrative forfeiture was limited to "cases where the property was of inconsiderable value." *McGuire*, 26 F. at 307. That only began to change in 1978, when the limit for administrative forfeitures was raised from $2,500 to $10,000. *See* Pub. L. No. 95-410, § 111, 92 Stat. 888, 897 (1978). Since

then the limit has increased to $500,000, *see* 19 U.S.C. § 1607, with the result that most forfeitures are subject to pre-filing administrative delay.

3. The rise of modern civil forfeiture has led to "egregious and well-chronicled abuses." *Leonard*, 137 S. Ct. at 848.

In numerous cases, federal officials have seized property under questionable circumstances and then held it months or years without a hearing. In one case, federal officials seized an entire bank account from a small business because the owners made cash deposits in amounts under $10,000 and then held the money over two years without a hearing.[5] In another similar case, the government held the money three years.[6] And in another case, CBP seized cash from an innocent traveler at an airport and held the funds for seven months without filing a complaint.[7]

A recent inspector general report describes cases where CBP extracted settlements without any involvement by the relevant U.S. Attorney's Office—or even where the U.S. Attorney's Office declined to pursue

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[5] Shaila Dewan, *Law Lets IRS Seize Accounts on Suspicion, No Crime Required*, N.Y. Times (Oct. 25, 2014), https://nyti.ms/34VsNNF.

[6] Nick Wing, *IRS Returns Baker's Money After 3 Years. Now It Wants To Put the Owners in Prison*, Huffington Post (May 25, 2016), https://bit.ly/3dnlHWd.

[7] Christopher Ingraham, *A 64-Year-Old Put His Life Savings In His Carry-On. U.S. Customs Took It Without Charging Him With A Crime*, Wash. Post (May 31, 2018), https://wapo.st/3lNEsEX.

forfeiture—and concluded that "CBP may be taking a portion of property from innocent property owners." Office of Inspector General, Dep't of Homeland Security, *DHS Inconsistently Implemented Administrative Forfeiture Authorities Under CAFRA* 7 (Aug. 27, 2020) ("*OIG Report*").[8]

Reports also allege misconduct by CBP when seizing automobiles. For instance, CBP seized over two dozen imported Land Rovers from their owners in predawn paramilitary raids—based on alleged violations of environmental regulations—only to return them after nearly a year.[9] The American Civil Liberties Union has also detailed cases where vehicles were seized because a driver picked up a hitchhiker who turned out to be undocumented, because a drug dog alerted on the vehicle (although no contraband was found), and (in one case) for no stated reason at all.[10]

Notably, CBP also has a financial incentive to forfeit property. When CBP forfeits property, the proceeds are deposited in a dedicated fund where they are available to pay the expenses of the agency. *See* 31 U.S.C. § 9705. In 2019, the agency used over $600 million in forfeiture funds to pay for construction of a border

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[8] Available at https://perma.cc/G2HQ-2DVW.

[9] Patrick George, *Feds to Return Trucks Seized In Armed Raids To Their Owners*, Jalopnik (June 2, 2015), https://bit.ly/3lHc3k2.

[10] Letter from ACLU Border Litigation Project to CBP Office of Professional Responsibility (June 28, 2016), available at https://bit.ly/2SU7nuU.

wall.[11] And in 2020, the agency plans to fund over $42 million in mandatory obligations out of the forfeiture fund.[12]

B. Case Background.

This case began on September 21, 2015, when Petitioner Gerardo Serrano drove his Ford F-250 truck to the U.S.-Mexico border in Eagle Pass, Texas. Gerardo is a U.S. citizen and a resident of Tyner, Kentucky, and he was travelling to Mexico to visit family.

While on the U.S. side of the border, Gerardo began taking photos with his iPhone, planning to post them on social media. Two CBP agents objected and, after stopping Gerardo's truck, physically removed him from it, took possession of his phone, and repeatedly demanded the password. Gerardo, a staunch believer in civil liberties who has run for elected office on a platform of respect for constitutional rights, suggested that the agents obtain a warrant. The border agents responded by telling Gerardo they were "sick of hearing about [] rights."

While searching inside Gerardo's truck, the border agents found five .380 caliber bullets and one .380 caliber magazine in the center console. There was no gun in the vehicle. Gerardo explained that he had a valid concealed-carry permit issued by his home state of

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[11] William L. Painter & Audrey Singer, Cong. Rsch. Serv., DHS Border Barrier Funding (Jan. 29, 2020), https://bit.ly/33Ser1k.

[12] *Forfeiture Budget*, *supra* n. 1, at 8.

Kentucky, and he explained that he had forgotten the bullets and magazine were in the truck. As he had not yet crossed into Mexico, he offered to turn around and leave the facility.

CBP agents handcuffed Gerardo and detained him for about three hours, trying to unlock his phone. Subsequently, one of the agents told Gerardo he was free to go but that the government was seizing his truck. Gerardo left the detention facility on foot.

On October 1, 2015, CBP sent Gerardo a notice of seizure, informing him that the agency intended to use civil forfeiture to take his truck on the ground that he had attempted to export "munitions of war." Gerardo filed a timely claim with CBP seeking a court hearing.

On four separate occasions between October 2015 and September 2017, Gerardo called CBP to inquire about the status of his case. During one of these calls, a CBP employee told Gerardo that his case was taking so long because he had asked to see a judge.

C. Proceedings Below.

Petitioner filed the instant case in the United States District Court for the Western District of Texas on September 6, 2017. The case was filed as a putative class action under Federal Rule of Civil Procedure 23(b)(2) and sought class-wide injunctive relief on behalf of all U.S. citizens whose vehicles are or will be seized by CBP for civil forfeiture and held without a prompt post-seizure hearing.

Petitioner also filed a Motion for Class Certification along with the Complaint. The Motion explained that this case presents a straightforward case for class certification under Rule 23(b)(2), as the Complaint seeks class-wide injunctive relief to remedy a uniform violation of class members' due process rights.

On October 16, 2017, attorneys for CBP contacted Gerardo's attorneys stating that the government was returning the truck. The government then moved to dismiss, arguing both that the case was moot and that Petitioner's claims failed on the merits.

1. The District Court Opinion.

On September 28, 2018, the district court granted the government's motion to dismiss.[13]

To begin, the district court held that Petitioner's class claims are not moot. App. 43. The district court determined that the claims escaped mootness because the government's return of the vehicle just one month after filing amounted to an attempt to frustrate judicial review by "picking off" the named class representative.

Turning to the merits, the district court analyzed the due process issue under the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), and concluded that "due process does not require a prompt post-seizure, pre-forfeiture hearing." App. 59. On the

[13] In doing so, the district court largely adopted an earlier report and recommendation. App. 30, 83-130.

first factor, it found that "the seizure of a vehicle implicates an important private interest." *Id.* at 55-56. But, on the second factor, it found that "the risk of erroneous deprivation is minimal" because "CBP agents are well-trained," *id.* at 56-57, and federal forfeiture laws provide "alternative remedial processes" other than a prompt hearing, *id.* at 57. Finally, on the third factor, the district court reasoned that the government has a significant interest in enforcing customs laws and would face added administrative burdens if required to provide prompt hearings. *Id.* at 59.[14]

2. The Fifth Circuit's Opinion.

The Fifth Circuit affirmed. At the outset, the Fifth Circuit held that Petitioner's "timely filed and diligently pursued motion for class certification" saved the claims from mootness. App. 2 n.1 (marks and citation omitted).

Like the district court, the Fifth Circuit analyzed the merits under *Mathews*. App. 13-21. The government had argued that the case was controlled by *Von Neumann*, 474 U.S. at 249, which held that government is not required to provide a prompt decision on a remission petition, but the Fifth Circuit found that case "not dispositive." *Id.* at 21. At the same time, however, the Fifth Circuit quoted language from *Von Neumann* stating that the " 'right to a forfeiture proceeding

[14] Having dismissed the class claims on the merits, the district court denied the motion to certify on the sole ground that "[n]o issues remain to base class certification on." App. 59-60.

meeting the [speedy trial] test satisfies any due process right'" and treated the decision as "pertinent to our due process analysis." *Id.* at 21-22 (quoting 474 U.S. at 251).

With respect to the *Mathews* analysis, the Fifth Circuit acknowledged that the "seizure of a vehicle implicates an important private interest." App. 13. However, addressing the second *Mathews* factor, the Fifth Circuit reasoned that the "federal scheme at issue affords multiple alternative remedial processes, lowering the risk of erroneous deprivation," including a petition for remission, "an independent evaluation and determination by the U.S. Attorney regarding forfeiture proceedings," the final forfeiture hearing, and an action for return of property under Rule 41(g). *Id.* at 14, 16. The Fifth Circuit acknowledged CBP's financial interest in forfeiture proceeds but found that these procedures provide "safeguards to counter CBP's alleged interest." *Id.* at 19.

Turning, at last, to the third *Mathews* factor, the Fifth Circuit reasoned that the "Government's interest in preventing the unlawful exportation of munitions, drugs, and other contraband is significant." App. 20. Also, "a significant administrative burden would be placed on the Government if it was required to provide prompt post-seizure hearings in every vehicle seizure." *Id*.

The Fifth Circuit acknowledged that the Second Circuit, in *Krimstock*, weighed the *Mathews* factors

and held that due process requires "a prompt post-seizure, prejudgment hearing." App. 23 n.19. But it concluded that *Krimstock* can properly be "limited to the specific New York City statute at issue." *Id*. at 23.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted to resolve a split of authority concerning whether due process requires a prompt post-seizure opportunity to challenge the seizure and retention of property pending a final forfeiture trial. The Second Circuit holds that such hearings are required. *See Krimstock*, 306 F.3d at 40; *see also Lee v. Thornton*, 538 F.2d 27, 31-32 (2d Cir. 1976). The Seventh Circuit—in an opinion that this Court granted certiorari to review, but then had to vacate as moot—reached the same conclusion. *Smith v. City of Chicago*, 524 F.3d 834, 837-38 (7th Cir. 2008), *vacated*, 558 U.S. 87, 89 (2009). The New York Court of Appeals is in accord. *Cty. of Nassau v. Canavan*, 802 N.E.2d 616 (N.Y. 2003). And the Minnesota and Ohio Supreme Courts require such a hearing in at least some circumstances. *See Olson v. One 1999 Lexus*, 924 N.W.2d 594 (Minn. 2019); *State v. Hochhausler*, 668 N.E.2d 457 (Ohio 1996). On the other hand, the Ninth and Eleventh Circuits, joined by the Illinois Supreme Court, hold that no such hearing is required. *See United States v. One 1971 BMW*, 652 F.2d 817 (9th Cir. 1981); *Gonzales v. Rivkind*, 858 F.2d 657 (11th Cir. 1988); *People v. One 1998 GMC*, 960 N.E.2d 1071 (Ill. 2011).

The Fifth Circuit here joined those courts that decline to require a prompt post-seizure hearing. While the Fifth Circuit stated that *Krimstock* was "materially distinguishable," App. 23, it did not say how. The Fifth Circuit highlighted various federal forfeiture procedures, but none provide for anything resembling a prompt post-seizure hearing.

Moreover, certiorari is also warranted because the case raises a question of exceptional importance that ought to be decided by this Court. Government's ability to hold property under the civil forfeiture laws without any hearing is a legal and historical anomaly. It cannot be justified under this Court's precedents, and it finds no support in the forfeiture laws enacted at the Founding. Yet billions of dollars in property is seized under those anomalous procedures every year.

Finally, this case provides an appropriate opportunity to decide the question presented, which was squarely presented and ruled on below. The Court should take this opportunity to resolve this important due process question.

I. The Decision Below Deepens A Split That This Court Previously Granted Certiorari To Address, But Was Unable To Resolve.

This Court previously granted certiorari to decide whether due process requires a prompt post-seizure hearing in *Alvarez v. Smith*, 558 U.S. 87 (2009), but was unable to resolve the question because the case became moot on appeal. The decision below deepens the split

on that question, as the Fifth Circuit found due process satisfied even though the relevant laws do not provide any mechanism to obtain a prompt post-seizure hearing.

A. The due process right to a prompt post-seizure hearing has split the lower courts.

The Second Circuit, in an opinion by then-Judge Sotomayor, held that due process requires a prompt post-seizure hearing. *See Krimstock*, 306 F.3d at 44. Like the federal laws at issue here, the scheme at issue in *Krimstock* allowed the City of New York to wait "months or even years" before adjudicating civil forfeiture proceedings. *Id*. at 43-44, 54. Given such delays, the Second Circuit held that owners were entitled to a prompt post-seizure hearing at which they could challenge the seizure and continued retention of the vehicle pending trial. *Id.* at 44.

The Second Circuit distinguished this Court's earlier decisions, explaining that *Von Neumann* concerned "the different issue of what process was due in proceedings for remission or mitigation," 306 F.3d at 52 n.12, and that *$8,850* concerned "delays in rendering final judgment" rather than "the need for prompt review of the propriety of continued government custody," *id.* at 68.

Instead, the Second Circuit analyzed the due process question under *Mathews*. On the first factor, the Second Circuit stressed the importance of a car as a mode of transportation and means to earn a living. *Id*. at 61-62. On the second factor, the Second Circuit

acknowledged that "the risk of erroneous seizure and retention of a vehicle is reduced" where property is seized directly from an alleged offender, but nonetheless concluded that "the arresting officer's unreviewed probable cause determination" cannot "fully protect against an erroneous deprivation." *Id*. at 62. Finally, with respect to the third factor, the Second Circuit acknowledged the government's strong interest in "prevent[ing] a vehicle from being sold or destroyed," but observed that this interest carried less weight in the *post*-seizure context, where the property by definition is "in the hands of the police." *Id.* at 64-65.

In an earlier decision cited by *Krimstock*, 306 F.3d at 53, the Second Circuit reached the same conclusion in the customs context. *See Lee*, 538 F.2d at 33. There, plaintiffs whose vehicles were seized by customs officials at the border claimed that they were entitled to "immediate post-seizure hearings." *Id.* at 31. The court agreed, explaining that the eventual forfeiture trial was not an adequate procedure because forfeiture "proceedings necessarily consume substantial periods of time" and "[d]eprivation of means of transportation for such periods requires an opportunity to be heard." *Id.* at 32.

The Seventh Circuit has also held that prompt post-seizure hearings are required, although that opinion was vacated as moot. *See Smith*, 524 F.3d at 837-38. Under the state forfeiture scheme at issue in *Smith*, anywhere between 97 and 187 days could elapse before the commencement of the forfeiture proceeding. *Id*. at 835-36. The Seventh Circuit agreed with

Krimstock that "there should be some mechanism to promptly test the validity of the seizure." *Id*. at 837. The Seventh Circuit found *Von Neumann* distinct, explaining that it "involved proceedings for remission or mitigation." *Id.*[15] And the Seventh Circuit found a hearing required under *Mathews*, especially given that "[t]he private interest involved, particularly in the seizure of an automobile, is great." *Id*. at 838. The court rejected arguments based on alleged administrative burdens, observing that hearings need not be "protracted" and could even be "rather informal." *Id*.

The New York Court of Appeals is in accord. *See Canavan*, 802 N.E.2d at 623-24. The case involved a county forfeiture scheme, under which property owners had to wait 120 days after seizure for commencement of the forfeiture proceeding. *Id*. at 142. Balancing the *Mathews* factors, the court held that "due process requires that a prompt post-seizure retention hearing before a neutral magistrate be afforded, with adequate notice, to all defendants whose cars are seized and held for possible forfeiture." *Id*. at 144.

The Minnesota Supreme Court also has held that "due process urgently requires" a prompt post-seizure hearing, at least in circumstances where a vehicle owner raises "innocent owner defenses." *Olson*, 924 N.W.2d at 613. The court specifically rejected the

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[15] The Seventh Circuit further distinguished *Von Neumann* based on the availability of relief under Rule 41(g); but, whatever role Rule 41(g) may have played when *Von Neumann* was decided, that role is substantially more limited today. *See infra* p. 25 & n. 18.

argument that remission procedures can substitute for a prompt post-seizure hearing, explaining that such petitions ask the government to "grant mercy to the person requesting remission," and "[d]ue process is not satisfied by a rule that allows a person's property right to turn on the whim of a prosecutor." *Id*. at 614.

The Supreme Court of Ohio also held that due process requires a prompt post-seizure hearing, at least when the "vehicle is operated by the third party." *Hochhausler*, 668 N.E.2d at 469. Weighing the *Mathews* factors, the court agreed that "'[n]o governmental interest justifies a delay of several days before the government is required to establish probable cause.'" *Id*.[16]

On the other hand, the Ninth Circuit has weighed the *Mathews* factors and determined that no prompt post-seizure hearing is required. *See One 1971 BMW*, 652 F.2d at 820-21. After stating that "[g]reat weight must be given" to Congress's judgment about "what process is due," *id.* at 820, the Ninth Circuit concluded that the interests of property owners are "not so compelling as to outweigh the substantial interest of the government in controlling the narcotics trade without

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[16] Several district courts have also followed *Krimstock*. *See Washington v. Marion Cnty. Prosecutor*, 264 F. Supp. 3d 957, 978-97 (S.D. Ind. 2017), *remanded on other grounds*, 916 F.3d 676 (7th Cir. 2019); *Brown v. District of Columbia*, 115 F. Supp. 3d 56, 66-67 (D.D.C. 2015). The Florida Supreme Court has also required a prompt post-seizure hearing under the State's due process clause. *See Dep't of Law Enf't v. Real Prop.*, 588 So. 2d 957, 965 (Fla. 1991).

being hampered by costly and substantially redundant administrative burdens," *id*. at 821. The Ninth Circuit also leaned on the idea that "[t]he risk of an erroneous seizure was minimized by the duty of the United States Attorney immediately after notification of the seizure to investigate . . . [and] determine whether initiation of forfeiture proceedings was warranted." *Id*. at 821. And, like the Fifth Circuit, the Ninth Circuit highlighted the right of eventual judicial review as well as the right to petition for remission. *Id*. at 820.

Likewise, the Eleventh Circuit has determined that the final forfeiture trial "affords a claimant of seized property all process to which he is constitutionally due." *Gonzales*, 858 F.2d at 661. Instead of weighing the *Mathews* factors, the Eleventh Circuit based this conclusion on "the teaching of" this Court's decisions in *$8,850* and *Von Neumann*, and particularly the statement (also cited by the Fifth Circuit here) that the " 'forfeiture proceeding, without more, provides the postseizure hearing required by due process.' " *Id.* (quoting 474 U.S. at 249).

The Supreme Court of Illinois has also held that due process does not require prompt post-seizure hearings. *See One 1998 GMC*, 960 N.E.2d at 1071. That court also found *Von Neumann* controlling, as it read that opinion for the proposition that "the due process right to a meaningful postseizure hearing at a meaningful time requires only the forfeiture proceeding." 960 N.E.2d at 911 (citing 474 U.S. at 249, 251). The court acknowledged the Second Circuit's contrary

holding but concluded that "*Krimstock* was wrongly decided." *Id.* at 1083.[17]

B. The Fifth Circuit below deepened this split, as it rejected a claim that CBP should be required to provide a prompt post-seizure hearing. The Fifth Circuit addressed the Second Circuit's decision in *Krimstock* and stated that it was "limited to the specific New York City statute at issue, which is materially distinguishable." App. 23. But this attempt to limit *Krimstock* to its facts is unavailing. The Fifth Circuit does not say what aspects of the relevant statutes are "distinguishable." And, while it highlights several procedures that it apparently thinks provide adequate procedural safeguards, none provides for a prompt hearing before a neutral adjudicator.

1. First, the Fifth Circuit states that a property owner can file a petition for remission or mitigation with the seizing agency. App. 15.

However, a remission petition does not allow a property owner to contest a seizure before a neutral adjudicator. A remission petition is the civil-forfeiture equivalent of a pardon petition; it "grants the Secretary the discretion not to pursue a complete forfeiture

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[17] The Sixth Circuit also considered these issues in *Nichols v. Wayne County*, 822 F. App'x 445 (6th Cir. 2020). The Sixth Circuit did not resolve the due process question, as a majority of the panel concluded that the plaintiff (who was seeking damages under *Monell*) had not sufficiently "allege[d] a municipal 'policy or custom.'" *Id.* at 446. But two judges stated their conflicting views in concurring and dissenting opinions. *See id.* at 453 (McKeague, J., concurring); *id.* at 458 (Moore, J., dissenting in part).

despite the Government's entitlement to one." *Von Neumann*, 474 U.S. at 249-50. Accordingly, "a petitioner seeking remission or mitigation of a forfeiture does not contest the legitimacy of the forfeiture." *United States v. Morgan*, 84 F.3d 765, 767 n.3 (5th Cir. 1996). "[F]orfeitability is presumed and the petitioner seeks relief from forfeiture on fairness grounds." *German*, 76 F.3d at 318 (marks and citation omitted). As the Minnesota Supreme Court held in *Olson*, that kind of discretionary procedure "is irrelevant to the due process analysis." 924 N.W.2d at 614.

Moreover, remission is not prompt. Precisely because remission is discretionary, this Court has held that the agency need not rule on a remission petition in a timely fashion. *See Von Neumann*, 474 U.S. at 249-50. The only remedy if the agency unreasonably delays addressing a remission petition is to file a claim if it is not too late to do so—thereby terminating the remission proceeding and putting the property owner in the same position she would have occupied if she had filed a claim at the outset. *See* App. 133-34; *see also CFMOTO Powersports, Inc. v. United States*, 780 F. Supp. 2d 869, 878 (D. Minn. 2011) (holding that property owner waives any due process right to a timely hearing by filing a remission petition). Far from providing a prompt hearing, a remission petition can lead to additional delay.

2. Second, the Fifth Circuit highlights the property owner's ability (nowhere mentioned in the government's seizure notice) to file "a civil complaint under the court's general equity jurisdiction" raising "a

motion under Federal Rule of Criminal Procedure 41(g)." App. 17-19.

This does not distinguish *Krimstock*. The government there argued that property owners could file suit to challenge the seizures, but the Second Circuit declined to "place the onus on each plaintiff to bring a separate civil action in order to force the City to justify its seizure and retention of a vehicle." 306 F.3d at 59. Due process requires a hearing, not a right to sue.

Regardless, the Rule 41(g) mechanism is generally unavailable when a case is processed as an administrative forfeiture. *See Brown*, 115 F. Supp. 3d at 65. If a property owner files an action under Rule 41(g) promptly after a seizure, courts hold that the government can forestall a decision simply by sending its notice letter—as "once the administrative process has begun, the district court loses subject matter jurisdiction to adjudicate the matter." *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 479 (2d Cir. 1992); *see also Ibarra v. United States*, 120 F.3d 472, 475 (4th Cir. 1997) (citing cases).[18] Courts reject efforts to use Rule 41(g) motions to obtain prompt post-seizure hearings as "improper collateral challenge[s] to the [agency's] appropriately-instituted administrative

[18] To the extent that *$8,850* and *Von Neumann* arguably imply a broader scope for Rule 41(g), it is notable that, under the laws in force at the time, neither was processed as an administrative forfeiture. *See* 461 U.S. at 557 n.2; 474 U.S. at 244 n.4.

forfeiture proceeding." *Haltiwanger v. United States*, 494 F. Supp. 2d 927, 930 (N.D. Ill. 2007).[19]

Indeed, at every stage of the civil forfeiture process, actions under Rule 41(g) generally do not result in a hearing. After the property owner files a claim, the government can prevent a hearing in the Rule 41(g) proceeding by filing its forfeiture complaint. *See United States v. $83,310.78*, 851 F.2d 1231, 1235 (9th Cir. 1988). Even a promise to file a complaint in the future may be enough to forestall a hearing. *See*, *e.g.*, *In re Seizure of Aluminum Pallets*, No. 16-cv-2640, 2017 WL 10581077, at *3 (C.D. Cal. Apr. 21, 2017) (staying Rule 41 proceeding for 90 days to allow government to file complaint). And, after a forfeiture complaint is filed, the Rule 41 mechanism is likewise unavailable. *See United States v. One 1974 Learjet*, 191 F.3d 668, 673 (6th Cir. 1999). A property owner can file a Rule 41(g) motion and still wait months or years for a hearing.

Even imagining the government allowed a Rule 41(g) motion to proceed to a hearing, moreover, nothing suggests it would be prompt. For instance, in one case where CBP held seized property over three years without a hearing, a district court responded to a Rule 41(g) motion by setting a briefing schedule under which CBP was allowed over two months to file a response. *See*,

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[19] *See also United States v. Premises of 2nd Amendment Guns, LLC*, 917 F. Supp. 2d 1120, 1122 (D. Or. 2012); *$8,050.00 in U.S. Currency v. United States*, 307 F. Supp. 2d 922, 927 (N.D. Ohio 2004); *Wilson v. United States*, No. 13-mc-11, 2013 WL 1774810, at *1 (M.D. Fla. Apr. 2, 2013).

e.g., *In re Seizure of Compact Disc Recordable Media*, No. 11-cv-8614, 2012 WL 1213138, at *1 (C.D. Cal. Feb. 1, 2012).[20] Any suggestion that a Rule 41(g) motion provides a means to obtain a prompt post-seizure hearing is pure fantasy.

3. The Fifth Circuit also suggests that "independent evaluation and determination by the U.S. Attorney" provides the necessary safeguards. App. 16. But this also does not distinguish *Krimstock* or its progeny. *See Krimstock*, 306 F.3d at 45; *Olson*, 924 N.W.2d at 614.

Evaluation by a prosecutor plainly cannot substitute for a hearing before a neutral adjudicator. After all, "a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate." *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975); *see also id.* at 118-19 (holding that "the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial"). And even if review by a prosecutor could somehow substitute for a hearing, that review is not prompt, as CAFRA allows prosecutors up to 150 days to make

[20] *See also Naylor v. United States*, No. 13-cv-2481, 2013 WL 6909521, at *3 (S.D. Cal. Dec. 27, 2013) (taking over two months to grant unopposed Rule 41 motion, after government held property over three years); *Abbott v. United States*, No. 07-mc-517, 2008 WL 346359 (E.D. Mo. Feb. 6, 2008) (taking four months to order return of property seized over a year-and-a-half previously).

their decision—and even longer in the customs context. *See supra* p. 6.[21]

Moreover, given the rise of administrative forfeiture, prosecutors do not always play a meaningful role in forfeiture cases. CBP's own inspector general has found that the agency extracts punitive settlements from potentially innocent property owners without prosecutors ever being involved. *OIG Report*, *supra* p. 10, at 5.

4. Finally, the Fifth Circuit points to the final forfeiture trial, suggesting that Petitioner "concedes that the forfeiture proceeding itself would provide the post-seizure hearing required by due process if it were held promptly." App. 17. This misses the point. There would be no need for an interim hearing if the final forfeiture hearing was held shortly after the seizure—say, within fourteen days—but the due process problem arises precisely because modern forfeiture procedures ensure that property owners must wait months or years for a hearing. "[T]o say that the forfeiture proceeding, which often occurs more than a year after a vehicle's seizure, represents a meaningful opportunity to be heard at a meaningful time on the issue of continued impoundment is to stretch the sense of that venerable phrase to the breaking point." *Krimstock*, 306 F.3d at 53.

C. The Fifth Circuit offered no other basis to distinguish the *Krimstock* line of cases. And, indeed, there is none. The Fifth Circuit simply disagrees with those

[21] By contrast, in *Krimstock*, prosecutors had to make their decision within 25 days. 306 F.3d at 45.

decisions, and this Court should resolve that disagreement.

1. Under the first *Mathews* factor, there is no question that "the seizure of a vehicle implicates an important private interest." App. 13.

2. Under the second *Mathews* factor, there is no meaningful difference in the risk of erroneous deprivation. The Second Circuit explained that, when government seizes property without a warrant, the warrantless seizure "by itself does not constitute an adequate, neutral 'procedure' for testing the [government's] justification for continued and often lengthy detention of a vehicle." 306 F.3d at 53; *see also Canavan*, 802 N.E.2d at 143-44. The same reasoning applies here.

The Fifth Circuit suggested, by contrast, that the "risk is minimal . . . when we consider the remedial procedures available." App. 14. But, as discussed *supra* pp. 23-28, none of the available procedures prevents government from holding property for months or years without review by a neutral adjudicator. And while the district court reasoned that "CBP agents are well-trained," App. 56, the Second Circuit disposed of a similar argument by observing that "[s]ome risk of erroneous seizure exists in all cases," 306 F.3d at 50; *see also Olson*, 924 N.W.2d at 615 ("If men were angels, no government would be necessary." (marks and citation omitted)). If anything, the risk is higher here: Many CBP seizures occur without any accompanying arrest, and even CBP's own inspector general has

stated that the agency "may be taking a portion of property from innocent property owners." *OIG Report*, *supra* p. 10, at 5.[22]

3. As to the third *Mathews* factor, the government's interest does not distinguish this case from the *Krimstock* line of cases. The Fifth Circuit anticipated that prompt post-seizure hearings would impose "a significant administrative burden." App. 20. But it is not clear how that burden would be any different from the one imposed when administering the city ordinance at issue in *Krimstock*, the state laws in *Smith* and *Olson*, or the county ordinance in *Canavan*. It is true that the number of vehicles seized at the border is large. But so is the number of vehicles seized by state and local governments, particularly given the relative size of the jurisdictions.[23] And not all property owners would necessarily avail themselves of the right to a prompt hearing.

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[22] Another recent inspector general report concludes that "DHS does not have sufficient policies and procedures to address employee misconduct." Office of Inspector General, Dep't of Homeland Security, *DHS Needs to Improve Its Oversight of Misconduct and Discipline* 1 (June 17, 2019), https://bit.ly/38pgYm7.

[23] For example, between February 1999 and July 2001, New York City seized more than 4,000 vehicles from people accused of drunken driving. *See* Jacob H. Fries, *4,000 Cars Seized in Effort to Halt Drunken Driving*, N.Y. Times (July 3, 2001), https://nyti.ms/2KbtzPP. Despite these caseloads, *Krimstock* hearings have been recognized as a success. Brief for The Legal Aid Society as Amicus Curiae Supporting Respondent, *Alvarez v. Smith*, 558 U.S. 87, 2009 WL 2524056, at *8.

The Fifth Circuit also identified "an important interest in enforcing customs law." App. 19-20. But that interest is in no way incompatible with a prompt post-seizure hearing. The government's interest in enforcing the customs laws may be a reason to dispense with a *pre*-seizure hearing, but it does not justify the failure to provide a prompt hearing once the vehicle is safely in custody. "Just as with real property . . . there is no danger that these vehicles will abscond." *Krimstock*, 306 F.3d at 65.

D. Finally, beyond the *Mathews* analysis, the relevant decisions also reveal significant confusion concerning the interpretation of this Court's decision in *Von Neumann*, 424 U.S. at 249. Several courts correctly explain that decision involved remission procedures and does not address the question here. *See Krimstock*, 306 F.3d at 52 n.12; *Smith*, 524 F.3d at 837. On the other hand, other courts find *Von Neumann* controlling. *See Gonzales*, 858 F.2d at 661; *One 1998 GMC*, 960 N.E.2d at 911. And the Fifth Circuit here split the baby, acknowledging that *Von Neumann* "is not dispositive" but also treating it as somehow "pertinent to [the] due process analysis." App. 21. Because the underlying split emanates in part from confusion about this Court's own decisions, only this Court can bring clarity to the law.

II. The Due Process Right To A Prompt Post-Seizure Hearing Is An Important Issue Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

Even beyond the above conflict, certiorari is warranted because this case presents an important question that should be settled by this Court. This Court's prior due process opinions lead to the conclusion that a prompt hearing should be required, and that conclusion is amplified by historical practice at the time of the Founding.

A. While this Court has not squarely addressed the issue, the need for a prompt post-seizure hearing is nonetheless confirmed by this Court's precedents.

The need for a prompt post-seizure hearing emerges from *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), which held that government must provide a *pre*-seizure hearing when it seeks to forfeit real property. *Id.* at 55. That decision explains that government can dispense with a pre-seizure hearing in cases involving moveable property, given the "pressing need for prompt action," *id.* at 56, but those exigencies disappear as soon as the property is seized. At that point, with the property secure, a prompt hearing is required. *See Krimstock*, 306 F.3d at 67-68; *Smith*, 524 F.3d at 836-37.

This Court's decision in *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614, 619 (1976), is also in accord. There, the Court held that a taxpayer was entitled to a timely opportunity to challenge a seizure, as,

"to permit the Government to seize and hold property on the mere good-faith allegation . . . would raise serious constitutional problems." *Id.* at 629. "[T]he Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of pre-deprivation or prompt post-deprivation hearing." *Id.*

More broadly, the "fundamental right to notice and a meaningful hearing at a meaningful time has been recognized in many different contexts." *Krimstock*, 305 F.3d at 51. For example, *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972), held that due process requires pre-deprivation notice and hearing before government may seize property as collateral on a debt under a writ of replevin. If government must provide a hearing *before* it can seize a refrigerator as collateral on a debt, how can the government possibly be allowed to seize and hold a person's automobile for months or even years without *any* pre- or post-deprivation hearing at all?

B. Certiorari is also warranted to address the rise of modern administrative forfeiture. Notwithstanding the requirements of Article III, *see Stern v. Marshall*, 564 U.S. 462, 482-84 (2011), modern forfeiture procedures ensure that the vast bulk of forfeiture cases are never reviewed by any court. Even those property owners who receive a hearing must wait months or years. These modern procedures bear no resemblance to the forfeiture laws enacted at the time of the Founding.

As explained *supra* pp. 7-8, early civil forfeiture laws enacted procedures calculated to put forfeiture

cases promptly before a judge. These early procedures did not provide for *any* pre-filing administrative process; rather, seizing authorities were required "to cause a suit for forfeiture to be commenced without delay." *McGuire*, 26 F. at 306; *see also* Collections Act of 1799, § 89, 1 Stat. 627, 695-96 (seizing agency is "hereby enjoined to cause suits for [forfeiture] to be commenced without delay"). Then, once suit was filed, the case was placed before the court after a 14-day notice period. *See id.* (following 14-day notice period, "the court shall proceed to hear and determine the cause"); *see also* Collections Act of 1789, § 36, 1 Stat. 29, 47 (same).[24] By contrast, under modern procedures the judiciary becomes involved in forfeiture cases—if at all—only months or years after a seizure.

Requiring a prompt post-seizure hearing would restore the judiciary's appropriate role in forfeiture cases. Prolonged administrative forfeiture procedures—all held behind closed doors, without any benefit of public oversight—allow the executive branch to use delay as a weapon to extract coercive settlements. *See OIG Report*, *supra* p. 10, at 7. A prompt post-seizure hearing would ensure greater oversight by the judiciary; and, just as "open criminal proceedings give assurances of fairness to both the public and the accused," *Press-Enter. Co. v. Superior Ct. of Cal. for*

[24] This Court, in *Gerstein*, also observed that English common law provided for a prompt hearing following seizures of allegedly stolen property, under which "the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods." 420 U.S. at 116 n.17.

Riverside Cty., 478 U.S. 1, 9 (1986), would also open the forfeiture process to greater scrutiny by the public at large.

III. This Would Be An Appropriate Case To Decide The Question Presented.

This would also be an appropriate case in which to decide the question presented. Unlike in cases involving claims for retrospective damages, the question does not have to be viewed through the distorting lens of immunity doctrines. And, as both courts below recognized, the question presented is offered squarely for decision. No obstacle stands in the way of further review.

This case does not present the mootness problem that frustrated review in *Smith*. That case became moot on appeal when the government returned the seized vehicles. 558 U.S. at 89. The Court acknowledged that a class certification motion could have avoided mootness, but explained that the plaintiffs there had not appealed the denial of class certification. *Id.* at 92-93. This case is unlike *Smith* because Petitioner filed a motion for class certification before his vehicle was returned and preserved that motion on appeal. App. 7, 11-13.[25]

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[25] While the district court denied the motion for class certification, it did so for the sole reason that it believed the underlying claims failed on the merits. *See* App. 59-60. Petitioner "retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined," *U.S. Parole Comm'n v.*

Although the government here returned the seized vehicle, the courts below correctly held that did not moot the class claims. *See* App. 2 n.1, 43. The district court and the Fifth Circuit both reached this result under a well-recognized exception to mootness, under which a pending motion for class certification saves a claim from mootness where government seeks to "pick off" class representatives before a class can be certified. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Wilson v. Gordon*, 822 F.3d 934, 947 (6th Cir. 2016); *Richardson v. Bledsoe*, 829 F.3d 273, 283 (3d Cir. 2016). A contrary rule "would frustrate the objectives of class actions" and "would invite waste of judicial resources." *Roper*, 445 U.S. at 339.[26]

Geraghty, 445 U.S. 388, 404 (1980), and may appeal the basis for the denial of certification.

Notably, apart from the lower courts' erroneous merits determination, there can be no serious dispute that class certification is appropriate, as Petitioner seeks class-wide injunctive relief to remedy a uniform class-wide procedural deprivation. *See Krimstock v. Kelly*, No. 99-cv-12041, 2005 U.S. Dist. LEXIS 43845, at *3 (S.D.N.Y. Dec. 2, 2005) (finding that it "would be difficult to conceive" of any basis *not* to certify proposed class); *Washington*, 264 F. Supp. 3d at 966-67 (claim for prompt post-seizure hearing was "a 'prime example' of a proper class under Rule 23(b)(2)"); *Hoyte v. District of Columbia*, 325 F.R.D. 485, 492-95 (D.D.C. 2017) (certifying class even under more demanding standard of Rule 23(b)(3)).

[26] The government below cited *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013), as to the contrary, but that decision addressed collective actions under the Fair Labor Standards Act and emphasized that "Rule 23 actions are fundamentally different." *Id.* at 74. Lower courts have continued to apply the "picking off" doctrine to Rule 23 class actions following *Genesis*. *See*, *e.g.*, *Wilson*, 822 F.3d at 949-50; *Richardson*, 829 F.3d at 283.

Moreover, this case also falls squarely within the "inherently transitory" doctrine recognized in *Gerstein*, 420 U.S. at 110 n.11, and *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991). Those cases involved strikingly similar claims: Just as Petitioner argues that property owners are entitled to a prompt post-seizure hearing, the plaintiffs in those cases sought a prompt hearing after arrest. The claims in this case are inherently transitory for the same reason as the claims there. *See Krimstock*, 306 F.3d at 70 n.34; *Washington*, 264 F. Supp. 3d at 970-71.[27]

This Court should take the opportunity to decide this issue now. Cases cleanly presenting this issue are rare: Because administrative forfeiture proceedings occur behind closed doors, a case can only arise if an individual with a live claim reaches out to attorneys willing to litigate such a claim in time to file a complaint and motion for class certification. Eleven years have now passed since *Smith*, and the Court should not allow another decade to pass before it addresses the

[27] The government below argued the claims cannot be transitory given how long it sometimes holds property without a hearing. But government can also hold individuals for long periods after arrest. *See Gerstein*, 420 U.S. at 106. A claim for a prompt hearing is transitory not because of the length of the seizures but rather because the government can unilaterally moot the claim. *Cf. Nielsen v. Preap*, 139 S. Ct. 954, 963 (2019) (applying the doctrine to detentions that could last years); *see also Unan v. Lyon*, 853 F.3d 279, 287 (6th Cir. 2017) (explaining that the doctrine applies where government "may quickly and unilaterally grant relief").

rampant due process violations associated with the nation's civil forfeiture laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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