

No. 22-585

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IN THE  
**Supreme Court of the United States**

HALIMA TARIFFA CULLEY, *et al.*,  
*Petitioners,*

v.

STEVEN T. MARSHALL,  
ATTORNEY GENERAL OF ALABAMA, *et al.*,  
*Respondents.*

**On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

**BRIEF OF THE NATIONAL FEDERATION OF  
INDEPENDENT BUSINESS SMALL BUSINESS  
LEGAL CENTER, INC. AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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## **INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

*Amicus* takes interest in this case because civil asset forfeiture proceedings harm small business owners. This harm may include loss of money, vehicles, or even real estate based on a misunderstanding with law enforcement or the actions of a third party. In such instances, they deserve a prompt post-seizure hearing to assert an innocent owner defense.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Civil asset forfeiture runs roughshod over due process. It punishes innocent owners for the actions of others, it treats anyone who carries cash like a criminal, it wastes time with proceedings that take too long to begin, and it is not subject to rules that govern

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.



in most other contexts. It can harm any American who carries valuables or lets anyone else use their property. It's no surprise that small businesses, who rent, sell, and conduct cash transactions with the public, are particularly vulnerable to seizures.

The Framers of the Constitution would have roundly condemned the government placing such extreme consequences on the shoulders of property owners. James Madison famously said that “[g]overnment is instituted no less for protection of the property, than of the persons, of individuals.” *The Federalist* No. 54 at 369 (Easton Press ed. 1979) (James Madison). John Adams was even more forceful. “The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.” John Adams, *Defence of the Constitutions of Government of the United States* in 1 *THE FOUNDERS’ CONSTITUTION* 591, 591. (Philip B. Kurland & Ralph Lerner eds., Univ. of Chicago Press 1986).

Likewise, Blackstone described property as the “third absolute right” of individuals, following personal security and personal liberty, and that “the principal aim of society is to protect individuals in the enjoyment of those absolute rights[.]” 1 W. Blackstone, *Commentaries on the Laws of England* \*124, \*138 (1753) (cleaned up). For Blackstone, the law’s protection of private property was so fundamental, “that it will not authorize the least violation of it; no, not even for the general good of the whole community.” *Id.* at \*139 (cleaned up).

The twin roots of our founding and the common law are clear: the government’s job is to defend property, not to burden the people with onerous seizures. And certainly, it must not do so without adequate due process.

This case affords the Court an opportunity to bring the practice of civil asset forfeiture in line with the Fifth Amendment’s Due Process Clause. As Petitioners have briefed at length, *Mathews v. Eldridge*, 424 U.S. 319 (1976) already dictates a set of clear standards for determining due process when the government deprives a person of property. Here, the Eleventh Circuit has instead extended the speedy trial test of *Barker v. Wingo*, 407 U.S. 514 (1972) to civil asset forfeiture, holding that the forfeiture process itself provides adequate due process. But the Eleventh Circuit erred in its holding—indeed, as Petitioners argue, a proper application of the *Mathews* test would result in a ruling that Petitioners were each entitled to a prompt post-deprivation hearing.

Under the Eleventh Circuit’s reasoning, no prompt retention hearing is required either before or after depriving someone of property. Yet in nearly every other context where someone is deprived of liberty or property, that person is entitled to—at minimum—a prompt hearing. It’s rare that courts forgo this necessity outside of civil forfeiture proceedings, precisely because of the “risk of an erroneous deprivation,” *Mathews*, 424 U.S. at 335, a prophecy fulfilled every time innocent people have their property taken without a hearing.

Small businesses especially are targeted and injured in the absence of clear constitutional guardrails around civil asset forfeiture. When business owners are unjustly deprived of property without adequate due process, they may encounter three distinct harms.

First, civil asset forfeiture subjects people who drive vehicles, including business owners, to roadside seizures. This effectively criminalizes driving with cash, which hurts small businesses, many of whom use cash. A

small business owner may be driving with large amounts of cash to make a sale or deposit, or purchase business equipment. Without a hearing, it can take months or even years for innocent owners to recover improperly seized money, which imposes significant financial harm on their business.

Second, the financial burden for the public's illegal conduct is often passed onto businesses through civil asset forfeiture. The reality of operating a business open to the public is that one can't stop every potential misuse of a product or rental property. Whether the illegal act comes from someone renting a room or a suspicious customer, all a business can do is call the police. However, when police seize a property and use it to fund their budgets, they do so on the logic that even innocent business owners have to pay for the crimes of others.

Third, civil asset forfeiture punishes business owners for the conduct of employees, even when the employee acts outside of the scope of employment. If an employee does something illegal at his or her place of work, the government can seize vehicles, real estate, or even the entire business. Without a hearing, law-abiding business owners are forced to go through a lengthy forfeiture process, where they may not recover their property for years.

Such manifest injustice violates due process and particularly punishes businesses—most do not have the deep pockets necessary to sustain potentially years-long litigation,<sup>2</sup> especially when the assets they

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<sup>2</sup> The average income for small business owners is \$51,816 per year—\$26,084 for unincorporated businesses. *Small Business Statistics*, Chamber of Commerce, accessed Jun. 16, 2023, <https://tinyurl.com/mryy4wfa>.

could otherwise use to fight a legal battle are in the government's possession. The Court should establish that, at the very least, innocent owners are entitled to a prompt post-deprivation hearing to mitigate this harm.

## ARGUMENT

### I. Civil Asset Forfeiture Proceedings Suspend the Ordinary Rules of Due Process.

Individuals and businesses need the ability to promptly challenge seizures of their property. This is the bare minimum that the Constitution requires. In truth, it may demand much more: the Court has long recognized “the general rule that individuals must receive notice and an opportunity to be heard *before* the Government deprives them of property”, *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993) (citations omitted) (emphasis added), except in “extraordinary situations[.]” *Id.* at 53 (quotation omitted). *Ex parte* deprivations of property are thus as uncommon as they are frowned upon—the Court’s “entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute.” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 438–39 (1974).

Here, the Eleventh Circuit held that merely providing a merits hearing—in other words, a trial—long after the seizure of property dispenses with the constitutional requirement to have a retention hearing promptly after seizure. *See Culley v. Att’y Gen., Alabama*, No. 21-13484, 2022 WL 2663643, at \*3 (11th Cir. July 11, 2022). If that were true, Alabama’s civil forfeiture statute would be self-authenticating when it comes to due process—but as this Court has long held, due process is more than just evidence of *any* process.

See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“Once it is determined that due process applies, the question remains what process is due.”). Without providing a retention hearing before or directly after seizure of property, the statute did worse than an *ex parte* deprivation, by rubber-stamping warrantless seizures until trial.

Aside from forfeiture proceedings, deprivations of property without a hearing rarely arise in the civil context.<sup>3</sup> Even exercises of eminent domain require a hearing. *Walker v. City of Hutchinson, Kan.*, 352 U.S. 112, 115 (1956) (“[D]ue process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation.”). Criminal asset forfeiture requires a grand jury finding “probable cause . . . that the defendant has committed an offense permitting forfeiture.” *Kaley v. United States*, 571 U.S. 320, 323 (2014). And in all other criminal contexts, defendants are entitled to a probable cause hearing within 48 hours. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 58–59 (1991); See also *James Daniel Good*, 510 U.S. at 50 (“Unlike [civil asset forfeiture], the arrest or detention of a suspect occurs as part of the regular criminal process, where other safeguards ordinarily ensure compliance with due process.”). Civil asset forfeiture requires us to suspend fundamental due process principles that apply in all other contexts.

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<sup>3</sup> One noteworthy exception is the Defend Trade Secrets Act of 2016 (DTSA), 18 U.S.C. § 1836, under which courts can issue an *ex parte* order for seizure of property “only in extraordinary circumstances.” 18 U.S.C. § 1836(b)(2)(A)(i). However, to do so, a court must find that the person used improper means to misappropriate or conspired to misappropriate a trade secret, 18 U.S.C. § 1836(b)(2)(A)(ii)(IV), thus excluding innocent owners.

To give another example, the government ordinarily bears the burden of proving guilt. Yet in civil asset forfeiture proceedings, the burden often rests on the property owner to prove that he or she is an innocent owner. In Texas, for instance, “[c]riminals . . . enjoy a presumption of innocence, requiring government to prove their guilt beyond a reasonable doubt. But property owners are actually treated worse, presumed guilty and required to prove their innocence.” *El-Ali v. State*, 428 S.W.3d 824, 827–28 (Tex. 2014) (Willett, J., dissenting to the denial of the petition for review).

Proponents of civil asset forfeiture may argue that the procedural due process afforded to those at risk of a criminal conviction does not attach to those who have their property seized civilly. But when a person is deprived of property as a punishment, it’s a distinction without a difference. *See United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (holding that the Eighth Amendment Excessive Fines Clause applies to civil asset forfeitures when the measure is punitive). Attaching the word “civil” to asset forfeiture, far from providing insight into the nature of the process, hides its punitive aspects behind a curtain of civil practice. It should not be used to deprive innocent owners of the due process to which they would otherwise be entitled.

## **II. Civil Asset Forfeiture Cripples Small Businesses.**

Though some people who have their property seized under civil asset forfeiture are indisputably criminals, 80% are never charged with a crime. Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 783 (2009); *see also* Veronika Bondarenko, *4 out of 5 people who had cash seized by the Drug Enforcement Administration weren’t charged with a crime*, BUSINESS INSIDER (Mar. 30, 2017),

<https://tinyurl.com/2dycy42r>. Small business owners are among the innocent who may lose their life's savings, a vehicle, or even their place of business. Our society cannot allow such financially ruinous consequences simply based on an unfounded assumption made by law enforcement.

In a civil asset forfeiture proceeding, it can take years for an innocent owner to recover his or her property. This delay is unreasonable for people who did nothing wrong. America's small business community, affected by labor shortages, supply chain disruptions, and inflation, should not need to add civil asset forfeiture to their list of concerns.

**A. Forfeiture Can Affect Anyone Who Drives, Especially Business Owners, and Effectively Criminalizes Carrying Cash.**

Motorists are often subject to civil asset forfeiture, even though most are never criminally charged. Michael Sallah, et al., *Stop and seize*, WASH. POST (Sept. 6, 2014), <https://tinyurl.com/2xzmydtf>. This places the 83% of Americans who drive frequently squarely in the sights of law enforcement. Megan Brennan, *83% of U.S. Adults Drive Frequently; Fewer Enjoy It a Lot*, GALLUP (July 9, 2018), <https://tinyurl.com/27tfvbse>.

When the government targets motorists and seizes their property, it also harms businesses, as an increasing number of Americans make their living in the transportation industry. More than 3.5 million Americans drive trucks for a living, and over 700,000 of them are self-employed. Jennifer Cheeseman Day and Andrew W. Hait, *Number of Truckers at All-Time High*, CENSUS.GOV (June 6, 2019), <https://tinyurl.com/mrkp2zj3>. Business owners, especially those who drive trucks, may travel with cash to make purchases when starting

or expanding their businesses. And cash is the most seized asset, accounting for nearly 70% of forfeited property. Lisa Knepper, Jennifer McDonald, Kathy Sanchez and Elyse Smith Pohl, *Policing for Profit*, INSTITUTE FOR JUSTICE (Dec. 2020), <https://tinyurl.com/3buzfmr6>. A business owner on the way to conduct a cash transaction thus becomes a prime target for seizure.

Take, for example, three nearly identical stories of small business owners who took cash with them to buy vehicles and had their money seized. First, Kermit Warren, who made the mistake of traveling with cash to buy a tow truck for his scrapping business. The DEA seized \$30,000—his life’s savings, as it turns out—without charging him with any crime. Michael Levenson, *Former Shoe Shiner Wins Back Nearly \$30,000 Seized by Federal Agents*, N.Y. TIMES (Oct. 31, 2021), <https://tinyurl.com/3pjep53j>. Second, Ameal Woods, who brought his life’s savings on the road with him as he sought to buy a second tractor-trailer for his small business, and a deputy seized all \$40,000 of it—likewise without citing, ticketing, or charging him. Nick Sibilla, *Lawsuit: Texas Cops Use “Cut And Paste Allegations” To Seize Couple’s Life Savings*, FORBES (Sept. 13, 2021, 2:00 PM), <https://tinyurl.com/3kd55ptj>. Third, Jerry Johnson, who saved \$39,500 to buy a third truck for his shipping company, only to have the cash seized by police. Perry Vandell, *Man had \$39,500 seized by Arizona police for nearly 3 years. He finally received his money back*, USA TODAY (Mar. 3, 2023, 6:51 PM), <https://tinyurl.com/ymabvyz4>.

A wide array of businesses<sup>4</sup> suffer from seizures in transit, not just trucking or shipping companies.

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<sup>4</sup> Even non-profits and religious organizations may fall victim to civil asset forfeiture. Police seized \$28,500 in parishioners’ donations from Victor Ramos Guzman, who was driving to buy a



There's the story of Empyrean Logistics, an armored car company whose transported cash has been seized by police on three separate occasions. Andrew Wimer, *Sheriffs Team Up With The Feds To Hold Up Armored Car Company, Civil Forfeiture Makes It Possible*, FORBES (Feb. 3, 2022, 7:30 AM), <https://tinyurl.com/mr38z3dm>. Likewise, Nang Thai and Weichuan Liu had over \$100,000 seized from them as they were en route to buy a plot of farmland as a business venture. Rich Schapiro, *'Highway robbers': How a trip to buy farmland ended with police taking all his cash*, NBC NEWS (Oct. 16, 2021, 5:01 AM), <https://tinyurl.com/5yrdemcc>.

In short, civil asset forfeiture sends the message that carrying cash is a crime, and small business owners are not safe to travel with it. And as this case illustrates, vehicles themselves can also be seized. Anyone who drives is therefore subject to civil asset forfeiture. This becomes an even greater problem when, in seizing assets, the government fails to provide due process. Businesses ought to have the right to promptly contest seizures—often their life's savings—yet are left without a timely remedy, creating a challenging environment in which businesses cannot thrive.

### **B. When Members of the Public Commit a Crime, Forfeiture Proceedings Make Business Owners Pick Up the Tab.**

Opening a business to the public often means that people will use a product or service in ways that are prohibited by law, despite an owner's attempts to

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parcel of land for his church. Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://tinyurl.com/2dpy4tvs>.

prevent such use. When a third party's criminal behavior results in a seizure, innocent owners—businesses among them—are left high and dry without a prompt hearing and are often deprived of their property for years.

For instance, in *United States v. Lot Numbered One (1) of Lavaland Annex*, 256 F.3d 949, 952 (10th Cir. 2001), the government seized a motel because of drug deals occurring on the premises, even when the owner instructed employees to call the police. The Tenth Circuit overturned the district court's rejection of the innocent owner defense. *Id.* at 958.

In *United States v. 434 Main St., Tewksbury, Mass.*, 961 F. Supp. 2d 298 (D. Mass. 2013), the government seized another motel property due to on-site drug deals.<sup>5</sup> The owner called the police when suspected crimes occurred, *id.* at 304, allowed police to review guest registration information, including photocopies of licenses, *id.* at 305, and even provided free rooms to police during stakeouts, *id.* at 304. Despite clear evidence that he was an innocent owner, his property was seized in 2009 and wasn't recovered until after the 2013 court decision. Jacob Sullum, *Drug Dealing and Legal Stealing*, REASON (Feb. 2013), <https://tinyurl.com/4cp8fmmu>.

Businesses may also encounter forfeiture over legal business deals if another company does something

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<sup>5</sup> Profit may have been the real motivation. A DEA agent said in his deposition that the agency targeted properties for seizure when they had more than \$50,000 in equity—the motel here was worth \$2 million. Melissa Quinn, *After Having His Motel Seized by the Government, Victim of Civil Asset Forfeiture Reflects on His Fight*, THE DAILY SIGNAL (May 7, 2015), <https://tinyurl.com/en88b3uu>.

illegal with a product. For example, the FBI seized a pharmaceutical wholesaler's interest in bank accounts because a pharmacy it sold to was illegally pilfering prescription drugs. *United States v. Four Hundred Sixty-Three Thousand Four Hundred Ninety-Seven Dollars & Seventy Two Cents (\$463,497.72) in U.S. Currency from Best Bank Acct. #£XXX2677*, 853 F. Supp. 2d 675 (E.D. Mich. 2012). However, the wholesaler was innocent. Though the pharmacy it sold to turned out to be a drug ring, it hardly stood out as one—it “had a valid DEA license, had no Internet pharmacy operations, was serving doctors who had valid DEA licenses, and was located in a strip mall with good tenants in an upscale suburb of Detroit, Michigan.” *Id.* at 681. Neither the volume nor frequency of shipments triggered any alarm. *Id.* at 688. The wholesaler sold a legal product to an entity that likewise appeared to be following the law. Yet the government took their money anyway. The court found that the company was an innocent owner and returned the accounts plus interest, but almost a year had passed since the money was improperly forfeited. *Id.* at 691.

Sales-in-progress are just as vulnerable to forfeiture as completed sales and rentals, as illustrated in *El-Ali v. State*, where a small business owner's truck was seized when the person driving it was arrested for driving while intoxicated. 428 S.W.3d at 826 (Willett, J., dissenting to the denial of the petition for review). Though the driver was making payments on the truck, the businessman owned the deed, and he was in no way implicated in the crime. *Id.* But after four years of litigation—five total after the seizure—the owner lost. Nate Blakesly, *This Silverado Fought the Law, and the Law Won*, TEXAS MONTHLY (Apr. 16, 2014), <https://tinyurl.com/3r9539zc>.

Business owners can do everything right in their interactions with the public, down to providing free rooms to assist in police investigations. *434 Main St.*, 961 F. Supp. 2d at 304. Yet, the government still takes their property. They are forced to wade through months or years of litigation, without any guarantee that they will get their property back.

And what happens to those assets that aren't returned? Often, they're used to supplement police budgets. J. Justin Wilson, *New Report Finds Civil Forfeiture Rakes in Billions Each Year, Does Not Fight Crime*, INSTITUTE FOR JUSTICE (Dec. 15, 2020), <https://tinyurl.com/38b8sad9>. In effect, this shifts the financial burden of criminal behavior onto individuals and businesses who have done nothing wrong.<sup>6</sup>

### **C. Forfeiture Proceedings Punish Innocent Owners for Employees' Out-of-Scope Actions.**

Much like Petitioner, small business owners sometimes entrust their property to someone who misuses it. In Halima Culley's case, it was her son—for most small businesses, it is employees. When an employee's actions are unsanctioned by an owner and are outside of the scope of employment, courts can easily apply an innocent owner defense. But no matter how speedy the trial once it commences, it does not restore the months or years spent litigating over a seizure that never should have happened in the first place.

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<sup>6</sup> It's no coincidence that this principle also animates the core of the Takings Clause, which "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In one such case, a minority shareholder employee permitted a drug-smuggling plane to land on a business's property. *United States v. One Parcel of Real Est. Consisting of Approximately 4,657 Acres Located in Martin Cnty., Fla.*, 730 F. Supp. 423, 425 (S.D. Fla. 1989). The majority shareholders had no knowledge of this, *id.* at 428, and the action was not taken for the benefit of the company, *id.* at 427, yet it took almost a year for the company to be declared an innocent owner and the property returned. *Id.* at 425, 428.

In another, a woman let her son, who was also her employee, use a company truck, and he was arrested for DWI and drug possession. *Valley Oil, Inc. v. 2002 Chevy Tahoe, VIN: 1GNEK13212J222521, MN License Plate | NUW688*, No. A08-0338, 2009 WL 66965, at \*1 (Minn. Ct. App. Jan. 13, 2009). She had no knowledge of his illegal use of her property, and he wasn't on the job at the time of his arrest. *Id.* at \*3. The arrest occurred in 2005, *id.* at \*1, but the case didn't conclude until 2009 when the court of appeals affirmed the district court's ruling that the company was entitled to an innocent owner defense. *Id.* at \*5.

An innocent business owner should not have to spend years needlessly litigating a forfeiture action, especially when the seizure was predicated on a problem employee's out-of-scope action. If the government erroneously assigns blame to innocent owners, they should be able to quickly block the forfeiture before it eats up months or years of their time. And as Petitioners correctly assert, *Mathews* provides a pathway for the Court to explicitly define the right to a prompt post-deprivation hearing for innocent owners, drastically reducing this burden.

**CONCLUSION**

For the reasons above, *Amicus* urges this Court to hold that *Mathews*, not *Barker*, governs whether due process requires a retention hearing in civil forfeiture actions, and that Respondents violated Petitioners' right to due process by failing to give them a retention hearing to protect their interest in their vehicles during the forfeiture proceedings.

Respectfully Submitted,

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