No. 12-464

In The Supreme Court of the United States

KERI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to protecting the right to property, both because individuals' control over their property is a tenet of personal liberty and because property rights are inextricably linked to all other rights. The government's ability to interfere with private property without adequate safeguards gravely threatens individual liberty. For this reason, IJ both litigates original cases to defend property rights and files *amicus curiae* briefs in relevant cases, including *Florida v. Harris*, 133 S.Ct. 1050 (2013); *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012); *Alvarez v. Smith*, 558 U.S. 87 (2009); *Bennis v. Michigan*, 516 U.S. 442 (1996); and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

The federal government's aggressive use of forfeiture poses a grave threat to property rights and can cause irreparable injury when property is withheld before forfeiture is even ordered. The strong pecuniary interest that law enforcement has in maximizing forfeiture proceeds has both distorted police and prosecutorial practices and, in many cases, led to the restraint or seizure of untainted assets.

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[1] All parties in this case have consented to the filing of this *amicus* brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* IJ, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

In filing this *amicus* brief in support of Petitioners, IJ urges this Court to hold that when the government obtains a pretrial order restraining a defendant's property, due process requires a pretrial evidentiary hearing where the defendant can contest the basis of the restraint, regardless of whether the property is needed to retain counsel. IJ urges this Court, in so holding, to apply the well-suited framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

SUMMARY OF ARGUMENT

"[There's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."

"Suppose he never commits the crime?" said Alice.

"That would be all the better, wouldn't it?" the Queen said, as she bound the plaster round her finger with a bit of ribbon.

Alice felt there was no denying that. "Of course it would be all the better," she said: "but it wouldn't be all the better his being punished."

– Lewis Carroll in *Through the Looking Glass*

Congress's procedure for restraining a defendant's property before trial resembles the White Queen's "punish first, have the trial later" approach in Lewis Carroll's classic. At a time when individuals are presumed innocent, prosecutors with unfettered discretion can obtain an *ex parte* order freezing the individuals' property – the very means to secure not only their liberty but the basic necessities of life. The government justifies this punishment before trial to ensure that it can claim the property under forfeiture should the defendant be convicted. Untroubled by the fact that prosecutors stand to benefit from forfeiture, Congress has further denied defendants any guaranteed opportunity to contest the restraint of their property until the trial itself. And what if the judge or jury finds no crime was committed at all? "That would be all the better," Congress implies, indifferent to the hardships imposed on innocent owners. Fortunately, the Due Process Clause does not sanction Congress's backward approach of punishing first.

IJ files this *amicus* brief to explain why due process requires a prompt hearing, regardless of whether the assets are needed for counsel. The right of individuals to be free from arbitrary government interference with their property is deeply rooted in our constitutional history. Based on this Court's precedents, the government cannot withhold a person's property for months without promptly giving him an opportunity to challenge the basis for the government's action.

The heart of due process is the opportunity to be heard. Affording individuals a chance to contest the basis for the deprivation prevents mistaken deprivations of property caused by arbitrary government encroachment. To be of value, the opportunity to be heard must be afforded at a meaningful time and in a meaningful manner.

This Court has developed a three-factored balancing test – the *Mathews* framework[2] – to determine the constitutional adequacy of an opportunity to be heard. For over three decades this Court has applied *Mathews* in a variety of contexts, including criminal, to assess the adequacy of procedures under the Due Process Clause. A majority of circuits addressing the issue presented by this case have applied *Mathews* to require an evidentiary hearing.

The Eleventh Circuit, however, applied the ill-suited *Barker v. Wingo*[3] test, formulated to judge violations of the right to a speedy trial. The *Barker* test looks at the reasonableness of a *delay in process* rather than *what process* is required. Viewing the issue through the wrong lens, the Eleventh Circuit ruled that the defendant should be given a pretrial evidentiary hearing only when he could not otherwise afford counsel of choice. Further, the court incorrectly limited the scope of the hearing to the connection

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[2] 424 U.S. 319, 321 (1976).

[3] 407 U.S. 514, 530 (1972).

between the restrained property and the offenses charged in the indictment.

Due process requires much more than the Eleventh Circuit's limited hearing. The government argues that because a hearing was granted below, this Court should avoid resolving the proper standard for determining whether a pretrial evidentiary hearing is required at all. However, the same *Mathews* analysis that dictates a hearing also informs the question of what that hearing looks like, while the *Barker* test does not.

Applying *Mathews*, due process requires a hearing where an individual may contest the factual basis of the restraint of property. First, both the private interests of the individual in his property and the irreparable injury caused by its interim deprivation warrant a prompt evidentiary hearing. Second, without a prompt hearing, the risk of error is high because of the direct financial stake law enforcement has in the trial's outcome. Moreover, neither the initial *ex parte* proceeding nor a more limited hearing is adequate to safeguard against mistaken deprivations. Third, the government's interest in avoiding additional safeguards is minimal. Congress provided a specific procedure to preserve assets for forfeiture by seizing them – a procedure that allows for pretrial evidentiary hearings to contest the seizure. Additionally, existing criminal and civil cases show that a pretrial evidentiary hearing would not pose an undue administrative burden. Finally, the government has

adequate means to avoid revealing its trial strategy, including not seeking a restraining order.

In sum, this Court should reject the notion that the Due Process Clause condones the pretrial restraint of property without affording individuals a pretrial evidentiary hearing to contest the factual basis for the restraint.

ARGUMENT

I. The Pretrial Restraint of Assets Is a "Nuclear Weapon" of Prosecutors, Requiring Strong Procedural Safeguards To Prevent Unjustified Deprivations of Property.

This Court has aptly characterized the pretrial restraint of assets as a "nuclear weapon."[4] The government argues that this powerful weapon should be left to the unfettered discretion of prosecutors, with no or limited opportunity for property owners to be heard. The Constitution forbids vesting such unchecked power in the hands of government officials, particularly when they stand to financially benefit from the outcome of the proceedings. Stacking the deck so heavily in the government's favor conflicts

[4] *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 332 (1999) (federal court could not preliminarily enjoin the defendant in an action for money damages from transferring assets in which there was no lien or equitable interest).

with constitutional guarantees of fairness rooted in the Due Process Clause.

Forfeiture proceedings, both criminal and civil, warrant extra caution because they involve direct financial incentives for the government. Under federal and most state laws, forfeiture proceeds go directly to fund law-enforcement activities.[5] Under the equitable sharing program, state and local law enforcement receive up to 80 percent of proceeds for forfeiture cases they refer to federal law enforcement.[6] When a trial results in forfeiture, prosecutors' offices can reap direct financial benefits, creating a systemic bias in targeting cases that entail potentially lucrative forfeitures.[7] Consequently, prosecutors have

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[5] Marian R. Williams, Ph.D., *et al*., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, at 17 (Institute for Justice, 2010), *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

[6] *See generally*, Dick M. Carpenter II, Ph.D., *et al*., *Inequitable Justice: How "Equitable Sharing" Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain* (2011), *available at* http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf.

[7] For example, a Fulton County prosecutor used forfeiture funds for football tickets, office parties, and other questionable purchases. Ray Henry, *In Ga., A Push to Change Civil Forfeiture Laws*, The Atlanta Journal-Constitution (June 15, 2013, 5:22 PM), http://www.ajc.com/ap/ap/crime/in-ga-a-push-to-change-civil-forfeiture-laws/nYL9K/.

little impetus to appropriately weigh competing interests or the defendant's rights or hardships.[8]

In criminal cases, the pretrial restraint of property is a discretionary "add-on to ordinary prosecution" in which the potential for abuse is real.[9] Following an indictment, the prosecutor can immediately obtain a restraining order against the defendant's property in an *ex parte* proceeding, if he: (1) shows the indictment charges a forfeitable offense; and (2) simply alleges that the property identified in the notice of forfeiture would be subject to forfeiture following a conviction.[10]

Further, prosecutors enjoy tremendous discretion at each stage of the criminal process. They initiate the criminal action and choose the nature and number of charges.[11] In this case, when the magistrate judge initially found that only $140,000 of the

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[8] *See Morrison v. Olson*, 487 U.S. 654, 728-29 (1988) (Scalia, J., dissenting) (warning of potential for abuse when prosecutors do not have to weigh competing interests); *United States v. Kaley* (*Kaley II*), 677 F.3d 1316, 1331 (11th Cir. 2012) (Edmondson, J., concurring).

[9] *Kaley II*, 677 F.3d at 1331-32 (Edmondson, J., concurring).

[10] *See* 21 U.S.C. § 853(e)(1)(A); Fed. R. Crim. P. 32.2.

[11] *See*, *e.g.*, Orin Kerr, *The Criminal Charges Against Aaron Swartz* (*Part 2: Prosecutorial Discretion*), The Volokh Conspiracy (Jan. 16, 2013, 11:34 PM), http://www.volokh.com/2013/01/16/the-criminal-charges-against-aaron-swartz-part-2-prosecutorial-discretion/ (describing prosecutorial overreaching in Aaron Swartz case as "business as usual in federal criminal cases around the country").

$500,000 restrained assets were traceable to the alleged offenses, prosecutors filed a superseding indictment adding a money-laundering count.[12] This additional count enabled the government to notice for forfeiture the Kaleys' home and the full $500,000 certificate of deposit under a broad "facilitation" theory – a theory that has troubled members of this Court.[13]

The only hurdle prosecutors must clear is convincing a grand jury to indict for probable cause – a low hurdle given that grand juries essentially operate as an arm of the prosecutor.[14] Because forfeiture is simply an aspect of punishment and not a separate crime,[15] the grand jury is not required to (and in fact does not) consider whether the property noticed in the

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[12] *See* Pet'rs' Merits Brief at 9.

[13] *James Daniel Good*, 510 U.S. at 81 (1993) (Thomas, J., concurring in part and dissenting in part) (noting disturbing breadth of forfeiture statutes "which subject to forfeiture *all* real property that is used, or intended to be used, in the commission or even the *facilitation* of a [crime].").

[14] *See* W. Thomas Dillard, *et al*., *A Grand Facade: How the Grand Jury Was Captured by Government, Policy Analysis*, Cato, 1 (2003) ("[O]ver-reaching prosecutors have been able to pervert the grand jury, whose original purpose was to check prosecutorial power, into an inquisitorial bulldozer that enhances the power of government and now runs roughshod over the constitutional rights of citizens.").

[15] *See Libretti v. United States*, 516 U.S. 29, 38-39, 41 (1995); Fed. R. Crim. P. 32.2(a) (notice of forfeiture should not be designated as separate count in indictment).

indictment is subject to forfeiture.[16] Additionally, the defendant has no right to appear or testify in grand jury proceedings; the prosecutor has no duty to disclose exculpatory evidence; and the government can rely entirely on hearsay or illegally acquired evidence.[17] "The grand jury . . . is not a mechanism well designed to protect a defendant against an erroneous deprivation."[18] Furthermore, prosecutors exercise significant leverage in the plea-bargaining process.[19]

The defendant, on the other hand, is placed in a precarious position. Potentially unable to secure his liberty by paying bail or to use his property to obtain private counsel, he faces the mighty resources of the federal government.[20] Without an opportunity to contest the restraint of his property, the defendant's ability to provide for himself and his family could be seriously injured. In this case, putting aside the need to pay for counsel, the Kaleys would need to liquidate

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[16] 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 14.02[2] (2012).

[17] Fed. R. Crim. P. 6(d).

[18] *United States v. Kaley* (*Kaley I*), 579 F.3d 1246, 1267 (11th Cir. 2009) (Tjoflat, J., concurring).

[19] "[D]efense counsel may feel more like a beggar than a bargainer, left with little more than the unenviable chore of imploring a mean-spirited prosecutor to be fair or reasonable." Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 Clinical L. Rev. 73, 94 (1995).

[20] *See Kaley II*, 677 F.3d at 1332 (Edmondson, J., concurring).

their unrestrained assets – a retirement account and their children's college funds – incurring penalties of $183,500 just to pay for living expenses.[21] Those of more modest means would face a tougher predicament.

In civil cases, the government's restraint of property pending trial is even more problematic. Prosecutorial overreaching is also troubling in civil-forfeiture actions. For example, in 2009, the U.S. Attorney for Massachusetts brought a civil-forfeiture action against a family-run budget motel, valued at over $1.5 million. The complaint was based solely on a few "isolated drug-related incidents spread out over the course of more than a decade, none of which involved the [m]otel owner or employees."[22] After more than four years of litigation, the district court ruled that the government never should have filed the case in the first place.[23] Notably, during that time, the government's *lis pendens* prevented motel owner Russell Caswell from securing a loan to pay private counsel. Mr. Caswell had considered settling the case due to the financial hardship. It was only through the *pro bono* assistance provided by *amicus* that Mr. Caswell

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[21] *See* Pet'rs' Merits Br. at 10.

[22] *United States v. 434 Main St.*, Civ. A. No. 09-11635-JGD, 2013 WL 308981, *1 (D. Mass. Jan. 24, 2013).

[23] *Id*. at *19-22 (government lacked sufficient evidence to prove motel was substantially connected to drug crimes to support forfeiture).

was able to win his property back without jeopardizing his retirement savings.

Consider also 22-year-old Frederick Simms, whose vehicle was seized in 2011 without any hearing and retained during the criminal trial. Even after being acquitted of all charges, he needed to pay $800 for the opportunity to contest the seizure at the ensuing civil-forfeiture trial. Worse, the forfeiture trial did not commence until six months after the acquittal and was expected to last over a year. Mr. Simms's reaction is telling of the typical hardships faced by property owners:

> I cannot afford to pay $800 to try to get my car back. All of the money I make from my [$12 hourly] wages goes to transportation, rent, daycare, utilities, groceries, car insurance, and the $360 a month I pay on the car loan . . . for a car I can't even use.[24]

Fortunately for Mr. Simms, a federal court ruled that due process required immediate release of his car pending forfeiture proceedings.[25]

Mr. Caswell and Mr. Simms's victories are unusual. All too often, property owners ensnared in forfeiture proceedings settle for a fraction of their

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[24] *Federal Judge Overrules DC Car Seizure*, THENEWSPAPER.COM (July 11, 2012), http://www.thenewspaper.com/news/38/3840.asp.

[25] *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 104-05 (D.D.C. 2012).

properties' worth or simply abandon hope of retrieval, particularly if the property's value is less than the costs of the legal battle.

Allowing the government to carry out potentially debilitating seizures or restraints of property without an adequate opportunity to be heard eviscerates the fundamental guarantee of the Due Process Clause. With prosecutors holding all the cards, prompt and meaningful judicial oversight is a crucial check against unjust deprivations of property.

II. The Heart of Due Process Is an Opportunity To Be Heard at a Meaningful Time and in a Meaningful Manner.

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This constitutional command protects individuals and their property against arbitrary government action by ensuring procedural fairness.[26] Here, the pretrial order restraining the Kaleys' home and assets deprived them of property interests protected by the Due Process Clause.[27] The only question is whether the Kaleys were afforded all the process that the Constitution requires. After all,

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[26] *See*, *e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

[27] Even temporary or partial deprivations of property are subject to due process constraints. *See*, *e.g.*, *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991).

"the *Due* Process Clause is not the *Some* Process Clause."[28]

A necessary element to due process is the opportunity to be heard.[29] By promoting the affected individual's participation, the opportunity to be heard prevents unfair or mistaken deprivations.[30] To accomplish this goal, the opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

To determine the adequacy of the opportunity to be heard when the government seeks to deprive an individual of property, this Court invariably has balanced the individual's interests against the government's interests, an approach that ultimately led this Court to formulate the now-familiar *Mathews* framework. As discussed below, this Court has used this framework to determine the constitutional sufficiency of an opportunity to be heard in a variety of contexts, including in criminal cases. Nevertheless, the Eleventh Circuit applied a different test, causing it erroneously to limit both when a hearing is required and the scope of that hearing.

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[28] *Medina v. California*, 505 U.S. 437, 463 (1992) (Blackmun, J., dissenting).

[29] *James Daniel Good*, 510 U.S. at 53.

[30] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

A. *Mathews* Provides the Proper Framework To Determine What Constitutes a Sufficient Opportunity To Be Heard Under the Due Process Clause.

For over a half-century, this Court has balanced the individual and government interests to determine the sufficiency of procedures when the government seeks to take an individual's property. Even before *Mathews*, this Court weighed these countervailing interests to determine whether due process was met.[31] In *Mathews*, this Court articulated the three factors courts must consider in identifying the "specific dictates of due process":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 334-35. Although the *Mathews* framework was developed in the administrative context, for more than 35 years this Court has consistently applied it in a variety of other situations to determine whether an

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[31] *See*, *e.g.*, *Fusari v. Steinberg*, 419 U.S. 379, 388 (1975); *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

individual was afforded constitutionally adequate procedures.[32]

Most notably, this Court applied the *Mathews* framework when it last ruled on the timing and scope of a required hearing in the forfeiture context. In *James Daniel Good*, this Court held that individuals were entitled to a hearing before the government could seize their homes for potential forfeiture. This Court emphasized that the Due Process Clause provided stand-alone guarantees, in addition to those of the Fourth Amendment. 510 U.S. at 49. Moreover, this Court concluded that due process required a pre-seizure hearing even though, in an *ex parte* proceeding, a judge already had found probable cause that the property was subject to forfeiture. *Id*. at 47. Although *James Daniel Good* involved seizure and not restraint of property, the same analysis holds true here. Apart from separate Sixth Amendment concerns for the right to counsel, the Due Process Clause guarantees a prompt evidentiary hearing to contest

[32] *Turner v. Rogers*, 131 S.Ct. 2507 (2011) (whether entitled to counsel at civil-contempt proceeding for failing to pay child support); *Wilkinson v. Austin*, 545 U.S. 209 (2005) (procedures governing assignment to Supermax prison); *Gilbert v. Homar*, 520 U.S. 924 (1997) (suspension of university officer before hearing); *Santosky v. Kramer*, 455 U.S. 745 (1982) (standard of proof for termination of parental rights over objection); *Addington v. Texas*, 441 U.S. 418 (1979) (standard of proof for involuntary indefinite civil commitment to mental hospital).

the government's *ex parte* showing of probable cause to restrain the property.[33]

This Court has not limited the application of *Mathews* to the strictly civil context. A plurality of this Court applied the *Mathews* framework to wartime detentions off the battlefield. In *Hamdi v. Rumsfeld*, this Court held that under *Mathews*, a citizen detained as an enemy combatant was entitled to receive "notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. 507, 533 (2004).

Likewise, *Mathews* has guided the Court to assess the adequacy of criminal procedures under the Due Process Clause.[34] For example, in *Ake v. Oklahoma*, this Court held that *Mathews* was the appropriate test for determining whether an indigent defendant was entitled to a psychiatrist to present his insanity defense. 470 U.S. 68, 77 (1985). Applying the *Mathews* framework, this Court ruled that due process required a court-appointed psychiatrist when the

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[33] *See*, *e.g.*, *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 475 (5th Cir. 2007).

[34] *See*, *e.g.*, *United States v. Raddatz*, 447 U.S. 667 (1980) (citing *Mathews* in challenge to federal statute authorizing magistrates to make findings and recommendations on motions to suppress); *Burns v. United States*, 501 U.S. 129, 148 (1991) (Souter, J., dissenting) (arguing *Mathews* analysis could determine what process is due under federal sentencing guidelines).

defendant shows that his sanity at the time of the offense will likely be a significant factor at trial.[35]

A majority of circuits have applied *Mathews* to the precise issue in this case, holding that due process required a pretrial evidentiary hearing.[36] The Eleventh Circuit's departure from this proven framework led it to commit the two fundamental errors discussed below.

B. By Wrongly Applying *Barker v. Wingo*'s Speedy-Trial Test, the Eleventh Circuit Incorrectly Limited Both When a Pretrial Evidentiary Hearing Is Required and the Scope of That Hearing.

Constrained by its own erroneous precedent, the Eleventh Circuit's application of the *Barker v. Wingo* speedy-trial test caused it to wrongly limit both when

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[35] *But see Medina*, 505 U.S. at 443 ("In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process."). *Medina* is distinguishable on principles of federalism that are not implicated in this case. Because this Court was reviewing the adequacy of state criminal procedures, it was mindful of the deference it owed state legislatures. *Id*. at 446.

[36] *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008); *United States v. Farmer*, 274 F.3d 800, 803-04 (4th Cir. 2001); *United States v. Jones*, 160 F.3d 641, 645-46 (10th Cir. 1998); *United States v. Michelle's Lounge*, 39 F.3d 684, 697, 700-01 (7th Cir. 1994); *United States v. Monsanto*, 924 F.2d 1186, 1193, 1203 (2d Cir. 1991) (*en banc*).

a pretrial evidentiary hearing is required and the scope of that hearing. The *Barker* test determines whether a delay between an indictment and the criminal trial violated a defendant's Sixth Amendment right to a speedy trial, not whether the procedure itself satisfied the Fifth Amendment right to due process. Notwithstanding this Court's use of the *Barker* test to determine the reasonableness of delay in filing a civil-forfeiture action, this test is ill-suited to determine either whether a pretrial evidentiary hearing is required or the scope of that hearing.

In *Barker v. Wingo*, this Court set criteria by which to judge whether a defendant's right to a speedy trial was violated. 407 U.S. at 516. Rejecting "rigid approaches," the Court established a four-part test that weighed the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id*. at 530. In fashioning this test, the Court was mindful of the differences between the right to a speedy trial and other constitutional guarantees. *Id*. at 519-22. Unlike other constitutional rights, deprivation of the right to a speedy trial "may work to the accused's advantage." *Id*. at 521 ("Delay is not an uncommon defense tactic."). This distinction between the right to a speedy trial and other constitutional guarantees weighs against importing *Barker*'s balancing test into other contexts.

Nevertheless, more than a decade later, this Court used *Barker* to answer a separate inquiry – the reasonableness of the government's delay in filing a civil-forfeiture action. *See United States v. $8,850*,

461 U.S. 555 (1983). In that case, the government seized a woman's cash for failure to comply with currency reporting requirements but failed to file the forfeiture complaint until 18 months after the seizure. *Id*. at 556. Recognizing that "*Barker* dealt with the Sixth Amendment right to a speedy trial rather than the Fifth Amendment right against deprivation of property without due process of law," the Court used the *Barker* test because the "claim here – which challenges only the length of time between the seizure and the initiation of the forfeiture trial – mirrors the concern of undue delay encompassed in the right to a speedy trial." *Id*. at 564.[37] Applying *Barker*, the Court concluded that the delay did not violate due process.[38]

Relying predominantly on *$8,850* (and without even mentioning *Mathews*), the Eleventh Circuit had previously and incorrectly applied *Barker*'s speedy-trial test to hold that the pretrial restraint of a defendant's assets did not violate due process. *See United States v. Bissell*, 866 F.2d 1343, 1352 (11th Cir. 1989). In *Kaley I*, the Eleventh Circuit felt constrained to follow this precedent applying *Barker*.[39]

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[37] *See also id*. at 562 (property owner was not challenging lack of pre-seizure hearing nor "sufficiency of the judicial hearing that was eventually held").

[38] *Id*. at 569-70. Justice Stevens dissented, concluding that "a rule that allows the Government to dispossess a citizen of her property for more than 18 months without her consent and without a hearing is a flagrant violation of the Fifth Amendment." *Id*. at 570 (Stevens, J., dissenting).

[39] *Kaley I*, 579 F.3d at 1252.

However, by all accounts, *Bissell* was wrongly decided.[40] Even the government has conceded that *Bissell* is wrong.[41]

The *Barker* test, which focuses on the reasonableness of the delay in process, is ill-suited to deciding what process is even required. By weighing the prejudice to the defendant at trial (rather than the private interests weighed in *Mathews*), the *Barker* test gives short shrift to property rights, focusing only on whether that property is needed to retain counsel, or at most fund litigation expenses for investigators or experts. A person who cannot afford basic living expenses might not suffer any prejudice at trial but the private interests at stake cannot be disputed. Moreover, the *Barker* test cannot answer questions about what the pretrial evidentiary hearing looks like, including the hearing's scope.

Notably, this Court has not followed *Barker* to determine whether due process has been violated by a delay in holding a hearing. *See City of Los Angeles v. David*, 538 U.S. 715 (2003) (applying *Mathews* and concluding 30-day delay in holding hearing to challenge parking-violation fees did not violate due process) (*per curiam*). Likewise, lower courts have

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[40] *See Kaley I*, 579 F.3d at 1259 ("If we were writing on a blank slate today we would be inclined . . . to apply . . . *Mathews*."); *Jones*, 160 F.3d at 645-46 n.3 (rejecting *Bissell*'s analysis as wholly unworkable).

[41] *See United States v. Melrose E. Subdivision*, 357 F.3d 493, 499 n.4 (5th Cir. 2004) (Department of Justice's forfeiture expert admits *Bissell* is wrong).

held that the question of whether and by what means forfeitability can be challenged pretrial differs from the question of the speed of the forfeiture proceedings.[42]

The United States urges this Court to avoid resolving this dispute on the proper legal test (*Mathews* or *Barker*) because the court below granted a hearing.[43] In *United States v. Monsanto*, this Court left open the question of whether due process requires a hearing *before* a pretrial restraining order can be imposed because the Second Circuit ordered an evidentiary hearing before entering a restraining order. 491 U.S. 600, 615 n.10 (1989). On remand, the district court held an extensive four-day hearing on the question of probable cause. This Court declined to inquire whether the hearing was adequate because the Second Circuit's *en banc* decision did not address the procedural due process issue. *Id*.

After almost a quarter century, the time has come for this Court to resolve this issue. While the Eleventh Circuit alone applies *Barker* to pretrial restraint of assets, the circuits are split on the proper

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[42] *See Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), *vacated as moot, sub nom*. *Alvarez v. Smith*, 558 U.S. 87 (2009); *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) (Sotomayor, J.); *Simms*, 872 F. Supp. 2d 90.

[43] Br. of United States on Pet. for Writ of Cert. at 19.

legal test in civil-forfeiture cases.[44] Indeed, this Court was poised to answer this very question in *Alvarez v. Smith*, but the case was mooted. Moreover, unlike in *Monsanto*, the questions of whether and when a hearing is required and the adequacy of that hearing are all properly before this Court and addressed by the Eleventh Circuit, albeit under an incorrect legal standard. Furthermore, the same *Mathews* analysis that governs the adequacy of the hearing informs whether a hearing is required at all. Consequently, unlike in *Monsanto*, resolving whether a pretrial evidentiary hearing is required would not be "pointless." *Id*.

The Kaleys have been deprived of a property interest and are contesting the validity of the restraint without an opportunity to be heard until trial. Undeniably, these facts put them in the terrain of *Mathews*, not *Barker*.

III. Applying *Mathews* Requires a Pretrial Evidentiary Hearing at Which the Owner Can Contest the Validity of the Restraint.

The *Mathews* framework requires a pretrial evidentiary hearing at which the property owner can contest the validity of the restraint. Although the

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[44] *Compare Krimstock v. Kelly*, 464 F.3d 246, 253-55 (2d Cir. 2006) (relying on *Mathews*) *with United States v. Ninety-Three Firearms*, 330 F.3d 414, 425-26 (6th Cir. 2003) (relying on *Barker*).

Court has carved out distinct exceptions, such as wartime exigencies[45] or public harm,[46] the general rule is that the Constitution prohibits the deprivation of property without a prior hearing. *Connecticut v. Doehr*, 501 U.S. 1, 9-10, 16-18 (1991) (holding prejudgment attachment of real estate, without prior notice or hearing or a showing of exigent circumstances, violated due process).

Forfeiture does not constitute a *per se* exception to requiring a pre-restraint hearing. *See*, *e.g.*, *James Daniel Good*, 510 U.S. at 53.[47] Rather, under the Constitution, courts must hold a pre-restraint evidentiary hearing unless the government shows why it needs to withhold notice and an opportunity to be heard until after the restraining order is entered.[48]

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[45] *See*, *e.g.*, *Yakus v. United States*, 321 U.S. 414 (1944) (failure to hold hearing prior to issuance of price controls for beef in wartime does not offend due process).

[46] *See*, *e.g.*, *N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (summarily seizing food as unfit for human consumption without preliminary hearing did not deny owner due process).

[47] *See also* Smith, *supra*, ¶ 14.02[1] ("If the seizure involves real property, an opportunity for a pre-seizure adversarial hearing would be required by [ ] *James Daniel Good*."). Additionally, unlike *in rem* civil-forfeiture cases, courts need not obtain jurisdiction by seizing the property in *in personam* criminal forfeiture actions like this case. *See James Daniel Good*, 510 U.S. at 57; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

[48] *See Nat'l Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 205-09 (D.C. Cir. 2001) (organization entitled to notice and hearing before State Department designates

(Continued on following page)

Indeed, in *James Daniel Good*, this Court noted that an *ex parte* restraining order could be obtained if "there is evidence, in a particular case, that an owner is likely to destroy his property when advised of the pending action." *Id*. at 58.

Even assuming the Government made this kind of particularized showing at the *ex parte* hearing in this case, due process nevertheless also requires an immediate post-restraint opportunity to contest the validity of the restraint of assets. The private interests at stake and the risk of error caused by the profit incentive underlying forfeiture outweigh the government's minimal interests.

A. The Individual's Right to Property and the Irreparable Injury That Can Result from Deprivation Until Trial Necessitate a Pretrial Evidentiary Hearing.

The private interest at stake in this case is of enormous magnitude. Under federal law, the government can obtain an *ex parte* restraining order against assets not yet proven to be tainted. Putting aside

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it as terrorist, unless Secretary can show need to withhold notice and hearing until after designation because of property interests affected by terrorist designation); *United States v. Riley*, 78 F.3d 367, 370 (8th Cir. 1996) (before post-indictment restraining order may issue, "government must demonstrate at hearing that the defendant is likely guilty and that the property to be restrained will be subject to criminal forfeiture").

other constitutional rights that may be infringed when seizing an individual's property (like the right to counsel[49] or freedom of speech[50]), depriving an individual of his or her own property without an opportunity to be heard offends the strong tradition of property rights in this nation. "Property rights, in themselves, deserve to be amply guarded by American courts. But when a citizen's liberty (as in the present case) depends to a high degree on his property, the stakes are particularly high." *Kaley II*, 677 F.3d at 1332 (Edmondson, J., concurring). Furthermore, the interim deprivation of property can irreparably injure an individual's ability to pay not only for counsel, but also necessary living expenses.

1. The Right to Property, in Itself, Is Entitled to Great Weight.

Private-property rights form the foundation of a free society and were fundamental to this nation's founding. A primary reason that individuals came together to form government was not to *create* the right to property, but to help *secure* it. As James Madison stated, "Government is instituted no less for protection of the property, than of the persons, of

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[49] *See* Pet'rs' Merits Br. at 53.

[50] *See*, *e.g.*, *Fort Wayne Books v. Indiana*, 489 U.S. 46, 65-66 (1989) (pretrial seizure of bookstore owner's books and films based on probable cause but before judicial determination that seized items were, in fact, obscene violated First Amendment).

individuals."[51] Moreover, the Founders correctly viewed strong private-property rights as the most effective bulwark against other usurpations of liberty.[52] "Property is surely a right of mankind as real as liberty. . . . The moment the idea is admitted into society that property is not 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."[53]

This Court has consistently recognized the "high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."[54] In *Lynch v. Household Finance Corporation*, this Court observed, "the dichotomy between personal liberties and property is a false one." 405 U.S. 538, 552 (1972). Similarly, this Court has rejected the idea that property rights "should be relegated to the status of a poor relation" to rights protected by the First or Fourth Amendments. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). And perhaps most forcefully, this Court noted that "[i]ndividual freedom finds tangible

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[51] The Federalist No. 54 (James Madison).

[52] James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights xi (3d ed. 2008) ("The founding generation stressed the significance of property ownership as a safeguard for political liberty against arbitrary government.").

[53] John Adams, Defence of the Constitutions of Government of the United States (1787), in 6 *The Works of John Adams* 8, 8-9 (Charles Francis Adams ed. 1856).

[54] *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

expression in property rights." *James Daniel Good*, 510 U.S. at 61.

Particularly when judging the adequacy of procedures before an individual can be deprived of property, this Court has consistently held the right to property to be "a private interest of historic and continuing importance." *Id*. at 53-54. For example, this Court has recognized that the right to maintain control over one's home deserves the highest protection. *Id*. at 54 (seizure of house "deprived Good of valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive tenants"). Other forms of property also enjoy strong protection, even if not needed to pay for counsel or the absolute necessities of life. This Court has found property interests in goods, household furniture, and appliances, significant enough to warrant at least a prompt, post-deprivation hearing to contest the seizure's validity.[55] The Due Process Clause does not merely protect some property; it protects all property.

Moreover, this Court has invalidated encumbering property rights short of seizure without procedural safeguards. Although the government has not actually seized the Kaleys' home or other property, the restraining order significantly interferes with their property rights. *See Doehr*, 501 U.S. at 12 ("[E]ven

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[55] *See*, *e.g.*, *Mitchell v. W.T. Gant Co*., 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection."). In striking down Connecticut's *ex parte* prejudgment attachment procedures for real estate, this Court observed that "attachment ordinarily clouds title, impairs the ability to sell or otherwise alienate the property, taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Id*. at 11.

Given the constitutional imperative to protect property rights, courts must be vigilant against wrongful deprivation by the government by affording individuals an opportunity to contest the deprivation when it matters most.

2. Because the Interim Deprivation of Property Causes Irreparable Injury, Due Process Requires a Pretrial Evidentiary Hearing.

Beyond the strong interest that each citizen has in his or her property generally, the restraint of a citizen's property can cause irreparable injury. To protect against this injury, the Constitution requires significant procedural safeguards.

Depriving people of property not proven to be tainted can work a great hardship, pauperizing wealthy defendants and especially burdening those of

more modest means. It can prevent the individual from defending against a prosecution by securing counsel, as in this case,[56] or even bail money,[57] as in the case of Beverly Greer.[58] After Greer's son was arrested on drug charges, a drug task force in Brown County, Wisconsin told Greer to bring $7,500 in cash as bail. When she brought the money to the jail, police confiscated it as drug proceeds under state forfeiture laws even though she could prove the legitimacy of the funds through tax returns and disability checks. It took four months and the help of counsel to finally recover the money that police seized from her.[59]

Restraining property pretrial also "may deprive an [individual] of the very means by which to live

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[56] *Kaley II*, 677 F.3d at 1330 (Edmondson, J., concurring) ("By freezing a citizen's property at a time when he is presumed innocent of crime, the citizen (and as a practical matter, his family and perhaps others) is subjected to severe hardship . . . includ[ing] the inability to employ counsel of Defendants' choice to defend them in court from the mighty power of the federal government.").

[57] *See Commissioner of IRS v. Shapiro*, 424 U.S. 614, 620 (1976).

[58] *See* Radley Balko, *Under Asset Forfeiture Law, Wisconsin Cops Confiscate Families' Bail Money*, The Huffington Post (May 21, 2012), http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-confiscated_n_1522328.html.

[59] *See also* Andrew Amelinckx, *Attorney claims police illegally seized $10,000 cash supposed to be used as bail*, The Berkshire Eagle (June 1, 2013), http://www.berkshireeagle.com/portal/news/ci_23366610?source=rss&_loopback=1.

while he waits" for trial.[60] Restraining assets can harm the ability of those of more modest means "to obtain essential food, clothing, housing, and medical care";[61] to make mortgage[62] or car payments; or pay utility[63] and other bills. Moreover, the restraint can damage a person's credit rating, reducing the ability to obtain a loan to pay for these necessities.[64] As this Court has repeatedly recognized, the Due Process Clause requires a hearing before the government can deprive individuals of property needed to pay for living expenses.[65]

Even if the property owner ultimately prevails at trial and the assets are returned, the interim

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[60] *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *id.* at 264 ("[The] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress. . . .").

[61] *Id*.

[62] *Doehr*, 501 U.S. at 11 ("[A]ttachments, liens, and similar encumbrances" can "place an existing mortgage in technical default where there is an insecurity clause.").

[63] *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 18 (1978) ("Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of times may threaten health and safety.").

[64] *Doehr*, 501 U.S. at 11.

[65] *See*, *e.g.*, *Craft*, 436 U.S. at 22 (due process requires notice of availability of procedures for disputing utility bill and administrative procedure for customer complaints prior to termination of services); *Goldberg*, 397 U.S. at 266 (New York's termination of welfare benefits without prior evidentiary hearing denied due process).

deprivation works an irreparable injury. This Court has repeatedly cautioned that a final determination, "coming months after the seizure, would not cure the temporary deprivation that an earlier hearing might have prevented." *James Daniel Good*, 510 U.S. at 56.[66] The availability of an eventual trial "is no recompense for losses caused by erroneous seizure." *Id*.

> This Court has [] repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made.[67]

Just as in these cases, the preconviction freezing of assets without affording the owner an opportunity to be heard inflicts an irreparable injury.

In sum, both the individual's right to property and the irreparable injury caused by the length of the

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[66] *See also Doehr*, 501 U.S. at 15 ("It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented."); *Craft*, 436 U.S. at 20 ("Although utility services may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation.").

[67] *Shapiro*, 424 U.S. at 629.

deprivation before trial necessitates a prompt post-restraint hearing.

B. The Profit Incentive Facing Law Enforcement Creates a High Risk of Erroneous Deprivation, Which Can Only Be Mitigated By a Pretrial Evidentiary Hearing.

The second *Mathews* factor considers the risk of error under current procedures and the probable value of additional safeguards.[68] The direct financial stake inherent in the current system of distributing forfeiture proceeds warrants additional procedural safeguards. A pretrial evidentiary hearing would curb the systemic incentives and mitigate the risk of erroneous deprivations. After first discussing the magnitude of the government's financial interest in forfeiture, this section describes how this Court has been especially vigilant when public officials stand to financially benefit from the outcome of government proceedings. Finally, this section explains why the procedures the Eleventh Circuit has put in place are insufficient to guard against this risk of error.

Allowing law-enforcement officials to retain forfeiture proceeds creates a perverse financial incentive to seize forfeitable property. Consequently, under modern civil-forfeiture laws, unlike their predecessors, filling law enforcement's coffers is often the primary purpose of the seizure. As the former chief of the

[68] *Mathews*, 424 U.S. at 321.

federal government's Asset Forfeiture and Money Laundering Offices observed, "We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws."[69] According to a 2010 GAO report, one of the three primary goals of the U.S. Department of Justice's Assets Forfeiture Fund, the largest of the federal government's forfeiture funds, is "to produce revenues in support of future law enforcement investigations and related forfeiture activities."[70]

Incentivizing law enforcement to seize property under forfeiture has caused federal forfeitures to grow exponentially, as illustrated by the Assets Forfeiture Fund. In 1986, the year after it was created, the fund took in $93.7 million in proceeds from forfeited assets.[71] By 2008, the fund for the first time in history topped $1 billion in net assets, *i.e.*, forfeiture proceeds free and clear of debt obligations and now available for use by law enforcement.[72] And from

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[69] Richard Miniter, *Ill-Gotten Gains*, Reason Magazine (Aug./Sept. 1993) 32, 34 (quoting Michael F. Zeldin, former director of the Justice Department's Asset Forfeiture & Money Laundering Office), http://reason.com/archives/1993/08/01/ill-gotten-gains.

[70] U.S. Gov't Accountability Office, GAO-12-736, *Justice Assets Forfeiture Fund: Transparency of Balances and Controls Over Equitable Sharing Should Be Improved* 6 (2012), http://www.gao.gov/assets/600/592349.pdf.

[71] *Id*. at 11.

[72] *Id*.

fiscal years 2000 to 2012, the fund's net assets grew steadily from $536.5 million to $1.6 billion, an increase of over 202 percent.[73]

Giving closer scrutiny to the actions of public officials and agencies when they have a direct financial stake in the outcome of proceedings is nothing new.[74] A long line of cases supports the proposition that when government officials have an incentive to act for self-interested reasons, courts must stand guard against unwarranted deprivations of property. In *Tumey v. Ohio*, this Court overturned a fine where the mayor also sat as a judge and personally received a share of the proceeds.[75] It is not just the prospect of personal gain that merits vigilance. In *Ward v. Village of Monroeville*, this Court held that, where a substantial portion of the town's revenues came from fines, having the mayor sit as a judge violated due process.[76] And in *Marshall v. Jerrico, Inc.*, this Court cautioned about the "possibility that [the official's] judgment will be distorted by the prospect of institutional gain

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[73] *Compare* U.S. Dep't of Justice, *Assets Forfeiture Fund and Seized Asset Deposit Fund, Ann. Fin. Statements FY 2000*, http://www.justice.gov/jmd/afp/01programaudit/auditreport92002.htm *with Ann. Fin. Statements FY 2012*, http://www.justice.gov/oig/reports/2013/a1307.pdf.

[74] *See Harmelin v. Michigan*, 501 U.S. 957, 977 n.9 (1991) (Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

[75] 273 U.S. 510 (1927).

[76] 409 U.S. 57 (1972).

as a result of zealous enforcement efforts." 446 U.S. 238, 250 (1980).[77]

In light of the strong profit incentive underlying forfeiture laws, relying on *ex parte* procedures to restrain assets creates an unacceptable risk of error. In criticizing the *ex parte* summary designation of groups as Communist, Justice Frankfurter famously remarked:

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring). An *ex parte* proceeding "affords little or no protection to the innocent owner." *James Daniel Good*, 510 U.S. at 55. The "Government is not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have. Nor would that inquiry, in the *ex parte* stage, suffice to protect the innocent owner's interests." *Id.* Additionally, a grand jury, when issuing an indictment, is not required to

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[77] *Id*. at 249-50 ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.").

find probable cause that the property is subject to forfeiture.

Moreover, a hearing limited to the nexus between the property and the criminal charges fails to safeguard the interests of the innocent. In issuing a restraining order, the magistrate judge invariably, as here, incorrectly relies on the indictment.[78] Without an evidentiary hearing, there has been no independent finding of probable cause to believe that the assets are forfeitable. Just like in *Hamdi*,[79] *James Daniel Good*,[80] and other cases,[81] property owners must be afforded the opportunity to rebut the showing of probable cause.

C. The Government's Interest in Avoiding a Pretrial Evidentiary Hearing Is Minimal.

Under the third *Mathews* factor, the government's interest in avoiding a pretrial evidentiary hearing is minimal. The government relies on three justifications: (1) to preserve assets from being dissipated before trial; (2) to avoid the administrative and financial burden of a pretrial hearing; and (3) to avoid prematurely disclosing its case before trial. None

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[78] *Kaley II*, 677 F.3d at 1327; *Jones*, 160 F.3d at 645.

[79] 542 U.S. at 509.

[80] 510 U.S. at 62.

[81] *Doehr*, 501 U.S. at 15.

of these justifications outweigh the countervailing *Mathews* factors.

First, the Government's interest in preserving assets for forfeiture is unavailing for two reasons. Initially, the fact that assets will be dissipated is what justifies the *ex parte* restraint without prior notice or opportunity to be heard. The dissipation of property does not, however, justify withholding a pretrial evidentiary hearing that affords a meaningful opportunity to contest whether the property is even subject to forfeiture.[82]

Additionally, Congress specifically set forth a procedure to ensure the availability of property for forfeiture. Under 21 U.S.C. § 853(f), the government may seize property when the court determines that a restraining order may not be sufficient to preserve the property for any eventual forfeiture. In using this procedure, the government may not rest upon the indictment for its probable-cause showing.[83] Instead, it must demonstrate probable cause to believe the

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[82] *Compare Calero-Toledo*, 416 U.S. at 679 (*ex parte* seizure of yacht for forfeiture without prior notice and hearing satisfied due process because yacht "could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given") *with James Daniel Good*, 510 U.S. at 52-53, 62 (*Calero-Toledo* provided "no occasion to decide whether the same considerations apply to the forfeiture of real property, which by its very nature, can be neither moved nor concealed" and prohibiting *ex parte* seizure of real property without prior notice and hearing).

[83] Smith, *supra*, at 14-16.

property would be subject to forfeiture and a restraining order would not ensure that the property would be preserved.[84] Notably, seizures of property under Section 853(f) can be challenged under Federal Rule of Criminal Procedure 41(g) for lack of probable cause or for failure to demonstrate that a restraining order preserves the property. Because of this opportunity, seizure procedures under Section 853(f) do not raise the same due-process concerns as the Section 853(e) restraining orders at issue in this case. The Eleventh Circuit ignored this crucial distinction below when it applied *Bissell*, a case involving seizure under Section 853(f), not restraint under 853(e).

Second, any administrative burden imposed by a pretrial evidentiary hearing does not justify foregoing the hearing. When an individual is arrested based on prosecutor's assessment of probable cause, this Court has required a prompt probable-cause hearing. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Property owners should get the same opportunity to contest probable cause when their property is seized. In civil-forfeiture cases, several jurisdictions have interpreted the Constitution to require prompt preliminary hearings. *See Krimstock*, 306 F.3d at 44 (Sotomayor, J.); *Simms*, 872 F. Supp. 2d at 92. There is no evidence that these preliminary hearings pose an undue

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[84] *See*, *e.g.*, *United States v. Walker*, 943 F. Supp. 1326, 1329-31 (D. Colo. 1996) (voiding Section 853(f) pretrial seizure after determining defendants would not liquidate assets and flee country, contrary to affiant's claims).

administrative burden – especially not one which outweighs the enormous private interests at stake.

Finally, the government argues that a probable-cause hearing would force it to tip its hand and reveal trial witnesses and evidence. But the government can avoid doing so by not moving to restrain the assets.[85] Additionally, to prove probable cause, the government does not need to reveal all the evidence it will rely on at trial. The government can avoid revealing its evidence, including names of witnesses, in other ways, including obtaining a protective order.[86]

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[85] *See Goldberg*, 397 U.S. at 267 n.14 ("Due process does not . . . require two hearings. If . . . a State simply wishes to continue benefits until after a 'fair' hearing, there will be no need for a preliminary hearing.").

[86] *See Kaley II*, 677 F.3d at 1331 n.1 (Edmondson, J., concurring); *E-Gold, Ltd.*, 521 F.3d at 419; *Monsanto*, 924 F.2d at 1198.

CONCLUSION

For the foregoing reasons, when the government seeks to restrain or seize assets as subject to forfeiture, due process requires a pretrial evidentiary hearing at which a property owner can contest the validity of the seizure.

Respectfully submitted,

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