No. 08-351

In the Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

PETITIONER,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER, AND TONY WILLIAMS,

RESPONDENTS.

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

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARIZONA, COLORADO, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, MASSACHUSETTS, MICHIGAN, NEVADA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, WASHINGTON, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In determining whether the Due Process Clause requires a state or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial test" employed in *United States v. $8,850*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

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INTEREST OF THE *AMICI CURIAE*

Most States and the federal government subject personal property used or intended for use in the commission of narcotics crimes to civil forfeiture. Such laws provide a "significant beneficial effect in deterring the rising incidence of the abuse and trafficking of [controlled] substances," and they "secure for State and local units of government some resources for deterring drug abuse and drug trafficking." 725 ILCS 150/2 (2008). The Seventh Circuit's holding below—that the warrantless seizure of personal property must be followed closely by an adversarial "probable cause to detain" hearing, in advance of the actual forfeiture proceeding—imposes massive, unnecessary costs on States seeking to achieve these aims.

Most States do not offer the interim hearing that the Seventh Circuit now demands.[1] And even those

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[1] In requiring adversarial preliminary hearings, the Seventh Circuit focused on the length of time—97 days for property worth more than $20,000 and 142 days for property worth less than $20,000, if the claimant is diligent—that may elapse under Illinois law between the seizure of property and an opportunity to seek its release. Pet. App. 3a, 10a. But the vast majority of state drug forfeiture statutes do not provide for a preliminary hearing in advance of the actual forfeiture hearing. Several States, including Colorado, Delaware, Hawaii, Maryland, and New Hampshire, allow the passage of a similar amount of time prior to an adversarial hearing; other States, such as California, Idaho, Iowa, Maine, Mississippi, Missouri, Montana, South Dakota, Utah, Vermont, and Wisconsin, provide that the adversarial hearing must occur more quickly than Illinois law requires, but likely not soon

that do generally require only a judicial determination that there is probable cause to find a nexus between the property and illegal drug activity,[2] well short of what the Seventh Circuit's new due process rule seems to anticipate.

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enough to meet the Seventh Circuit's rule; and a large number of States, including Alabama, Alaska, Arkansas, Connecticut, Indiana, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wyoming, do not provide any statutory deadline for the adversarial hearing. Moreover, while a minority of States offer some form of preliminary hearing, most of these States (Arizona, Georgia, Kansas, Louisiana, Nebraska, North Carolina, Ohio, Oregon, and South Carolina) do not provide it within ten days of the seizure, as respondents demanded, and perhaps not sufficiently quickly to satisfy the Seventh Circuit. The relevant state drug forfeiture statutes may be found in Table A, attached to this brief. Affirmance of the decision below will call into question not only these laws but also myriad other state forfeiture statues.

[2] For example, Georgia and Kansas provide for a preliminary hearing within thirty days but only if there was no prior judicial determination, even *ex parte*, of probable cause and only on the issue of probable cause, not innocent ownership. See Ga. Code Ann. § 16-13-49(q)(4) (2008); Kan. Stat. Ann. § 60-4112(c) (2008). And although cited favorably by the Seventh Circuit, Arizona limits its preliminary hearing to probable cause and does not allow adjudication of innocent ownership until the actual forfeiture proceeding. See Ariz. Rev. Stat. § 13-4310 (2009).

If affirmed by this Court, the holding below not only threatens most state forfeiture laws, but it offers no ready fix for States seeking to preserve their statutes. It is indifferent to expense or administrative burden, requiring a prompt, interim hearing in all cases and in all jurisdictions, no matter the circumstances. Equally troubling, the decision below transplants the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to a context where it has no place, and then applies that framework to invalidate a state law wholesale without first asking whether the law is amenable to constitutional application. These doctrinal innovations—on which the holding below depends—threaten countless state laws beyond the forfeiture context.

STATEMENT

On November 22, 2006, respondents filed a complaint against the City of Chicago, its police superintendent, and the State's Attorney of Cook County, Illinois, alleging that defendants' seizure of automobiles and money under the Illinois Drug Asset Forfeiture Procedure Act ("Act"), 725 ILCS 150/1 *et seq*. (2008), violated their due process rights because defendants, as the Act allows, had held their property "for more than 10 days without a probable cause to detain hearing." J.A. 34a.[3] Respondents asked the district court to certify a class of "persons who have had, or will have, property seized by Chicago police

[3] The Cook County State's Attorney is petitioner here. Chicago and its police superintendent have informed the Court that they adopt the position of State's Attorney Alvarez and do not intend to file briefs in this case.

officers" and were not or will not be given a "prompt post-seizure probable cause to detain hearing," declare that respondents "have a due process right to a prompt post-seizure probable cause hearing" and that defendants must hold such a hearing "within ten business days of any seizure," and enjoin defendants' alleged "current practice and policy of seizing property and retaining custody for months without a judicial determination of probable cause." *Id.* at 35a-36a.

Previously, the Seventh Circuit had refused to recognize a due process entitlement to a prompt, post-seizure probable cause hearing, for this Court had "made clear that the Constitution does not require any procedure prior to the actual forfeiture proceeding." *Jones v. Takaki*, 38 F.3d 321, 324 (7th Cir. 1994) (relying on *United States v. Von Neumann*, 474 U.S. 242 (1986)). Bound by *Jones*, the district court below dismissed respondents' complaint before defendants had an opportunity to file an answer. Pet. App. 12a. But on appeal the Seventh Circuit reversed, overruled *Jones*, and invalidated the Act. *Id.* at 8a-11a. Applying the balancing test set forth in *Mathews*, the court focused on the "length of time which can result" between the seizure of property pursuant to the Act and any opportunity to contest probable cause, as well as the "hardship posed" by the loss of an automobile, particularly on "innocent owner[s]." *Id.* at 8a, 10a. The court remanded the case to the district court to fashion "appropriate procedural relief," consistent with its view that owners of seized property must receive notice and a "prompt" hearing at which they have a chance "to test the validity of the retention of the property" as a means of "protect[ing] the rights of both an innocent owner and anyone else who has been

deprived of property and * * * to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending." *Id.* at 9a-10a.

Petitioner filed a request for rehearing, seeking an opportunity to answer respondents' complaint, contest the allegations at trial, and present evidence that—although the Act announces baseline, state-wide protections—the Cook County State's Attorney's Office already provides the type of post-seizure process contemplated by the panel decision below. The Seventh Circuit denied the petition for rehearing, Pet. App. 14a, and, on February 23, 2009, this Court granted certiorari.

SUMMARY OF ARGUMENT

The decision below rests on three fundamental errors. First, the Seventh Circuit's wholesale invalidation of the Act is impossible to square with the well-established rule that plaintiffs raising facial challenges must prove a statute unlawful in all its potential applications. Notwithstanding that respondents brought their suit as an as-applied challenge, the court below found the Act facially unconstitutional based on the complaint alone, without regard to often stark differences among enforcing jurisdictions and claimants' individual circumstances. Whatever legal test the Court applies to respondents' claims, the judgment below may be affirmed only if the Act would fail that test under any conceivable set of circumstances.

Second, even if *Mathews* provides the appropriate analysis for judging respondents' claims, the Seventh

Circuit applied *Mathews* incorrectly by conflating the need to establish probable cause and Illinois' innocent owner defense. No constitutional entitlement to an "innocent owner" defense exists, and under *Von Neumann* the availability of this exemption from forfeiture therefore cannot form the basis of a procedural due process claim.

Finally, the Seventh Circuit erred in choosing to apply the *Mathews* analysis in the first place. *Mathews* originated as a way to evaluate due process claims in the context of modern, administrative law and has never been applied to due process challenges across the board. The Act is properly analyzed, if not (as petitioner ably argues) under the test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), then under the "reasonableness" standard long used to judge the constitutionality of the seizure and detention of property under the Fourth Amendment.

ARGUMENT

I. Whichever Test The Court Applies, It Must Accommodate Widely Varying Circumstances.

In remanding the case for the district court to "fashion appropriate procedural relief"—including notice and a "prompt" post-seizure, probable cause hearing in advance of the actual forfeiture hearing—the Seventh Circuit facially invalidated the Act. Pet. App. 10a. Nothing was left standing. The Act may never be enforced without an interim hearing, no matter how insignificant the hardship imposed by the temporary deprivation of the property or how great the administrative burden. In using *Mathews* to invalidate the Act wholesale, however, the court below

ignored this Court's admonitions, recently reiterated, that a state statute should be invalidated only where "'no set of circumstances exists under which the Act would be valid,' *i.e.*, * * * the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[4]

1. "A facial challenge to a legislative Act is * * * the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745; see also *Wash. State Grange*, 128 S. Ct. at 1190 ("all agree that a facial challenge must fail where the statute has a plainly legitimate sweep") (internal quotations and citation omitted). This is so for at least three reasons. First, facial challenges "often rest on speculation," and thus "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Wash. State Grange*, 128 S. Ct. at 1191 (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). Second, they "run contrary to the fundamental principle of judicial

[4] The Seventh Circuit's error stems at least in part from its invalidation of the Act before defendants had any opportunity to answer the complaint. But *amici* States do not contend that a statute may never be facially invalidated based on a complaint alone, and thus do not seek review of the petition's second question (on which the Court declined certiorari). Rather, *amici* urge that the need to be sensitive to the burden in mounting a successful facial challenge should inform the Court's determination regarding the appropriate due process analysis against which the Act should be tested, as well as the application of that analysis to the Act.

restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ibid.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, *J.*, concurring)). "Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Ibid.* For this last reason, courts must "keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008) (op. of Stevens, *J.*) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006)).

Thus, in *Salerno*, the Court upheld the Bail Reform Act, for "[t]he fact that [the Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." 481 U.S. at 745. And in *Sabri*, the Court declined to invalidate a bribery statute on its face because, "[a]lthough passing on the validity of a law wholesale may be efficient in the abstract," "any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks." 541 U.S. at 608-609. Most recently, in *Washington State Grange*, the Court refused to hold Washington's blanket primary system facially invalid. See 128 S. Ct. at 1187. That the system "could conceivably be" implemented in a constitutional manner was "fatal" to the facial challenge. *Id.* at 1194-1195; see also *Crawford*, 128 S. Ct. at 1615, 1621-1622

(op. of Stevens, *J.*) (holding that "the evidence in the record is not sufficient to support a facial attack on the validity" of Indiana's law requiring government-issued photo identification to vote, while emphasizing the "heavy burden of persuasion" borne by plaintiffs in facial challenges, and the need "to give appropriate weight to the magnitude of that burden").

2. This Court has recognized the same need to evaluate case-specific facts in resolving due process challenges in general, and challenges to civil forfeiture statutes in particular. In *United States v. $8,850*, 461 U.S. 555 (1983), the Court emphasized that determining "whether the basic due process requirement of fairness has been satisfied" in the civil forfeiture context "necessarily depends on the facts of the particular case." *Id.* at 565; accord *id.* at 565 n.14 (noting that due process inquiry "depends so heavily on the context of the particular situation"). The Court accordingly applied the *Barker* test because its "flexible approach * * *, which 'necessarily compels courts to approach speedy trial cases on an *ad hoc* basis,'" is "an appropriate inquiry for determining whether the flexible requirements of due process have been met." *Id.* at 564-565 (quoting *Barker*, 407 U.S. at 530). Even the *Mathews* test, properly applied, recognizes that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," and therefore seeks to identify "such procedural protections as the particular situation demands." 424 U.S. at 334 (internal quotations and citations omitted).

Thus, under either the *Barker*/*$8,850* analysis urged by petitioner or the *Mathews* balancing

embraced by respondents and adopted by the Seventh Circuit, a proper assessment of respondents' constitutional challenge must consider the facts and circumstances of each case. Tellingly, respondents conceded as much below, arguing that "the better course of action is to remand for discovery and full development of the facts" because the "*Mathews* inquiry is fact intensive and the facts are not developed in this case." Reply Brief of Plaintiff-Appellant Chermane Smith at 24, *Smith v. City of Chicago*, 07-1599 (7th Cir. Nov. 21, 2007). In invalidating the Act wholesale, the court below failed to heed this admonition.

3. The Act sets deadlines by which the State must send notice to the vehicle's owner and conduct the forfeiture hearing. In holding the Act facially invalid, the court below implicitly (but necessarily) determined that *Mathews* balancing requires a preliminary hearing under any conceivable set of circumstances. But this ignores that the Act applies to numerous independent jurisdictions, and to a broad spectrum of individual circumstances.

For some people, deprivation of their automobile pending forfeiture proceedings will not impose a substantial hardship; they may have a second car, for example, or live in an area where public transportation is readily available. In other words, while the Seventh Circuit's view that "[o]ur society is * * * highly dependent on the automobile" may be correct as a general matter, Pet. App. 8a, that does not mean that there exists "no set of circumstances" under which the Act would be valid. Indeed, even the court below acknowledged that the loss imposed by the seizure of

one's car "is hard to calculate," *ibid.*, but that makes it impossible to conclude—much less to hold with the confidence needed to override the legislative will—that the private interest the court identified exists to an equal extent in all circumstances. And the court's refusal to allow petitioner even to answer the complaint and put respondents to their proof resulted in the Act's invalidation on a "barebones record" consisting solely of speculation, as the Court's cases prohibit. See *supra* pp. 7-8.

Moreover, in acknowledging that "the preforfeiture hearing would impose some"—but apparently not a sufficiently great—"administrative burden on [Chicago]," Pet. App. 9a, yet invalidating the Act as it applies throughout Illinois, the Seventh Circuit failed to consider that the extent of the burden will vary from place to place. Illinois has 102 counties, and Cook County, where Chicago is located, is by far the largest. While the burden on defendants of providing preforfeiture hearings might be tolerable, as the court below implied—although it took no evidence on this point, notwithstanding respondents' concession that "whether and to what extent an informal pretrial hearing would affect [defendants] is unknown," Reply Brief of Plaintiff-Appellant Chermane Smith at 24, *Smith v. City of Chicago*, 07-1599 (7th Cir. Nov. 21, 2007)—the impact on other governmental units is likely to be different and, in many cases, far greater.

Smaller counties within Illinois, and in other States, have fewer prosecutorial and law enforcement resources. The Seventh Circuit cited two States (Arizona and Florida) that have determined that the administrative burden of preliminary hearings is

sufficiently manageable to require them. Pet. App. 9a. But the vast majority of other States have reached a different conclusion. See *supra* pp. 1-2 n.1 & Table A. And the Seventh Circuit's mandate goes even further than Arizona's statute, which does not contemplate adjudication of the issue of innocent ownership at the preliminary hearing. See *supra* p. 2 n.2. Because the facts underlying innocent ownership are known solely by the claimant, and thus unavailable to the State without discovery, a hearing that includes innocent ownership will be even more burdensome than one on probable cause alone.

By engaging in across-the-board assessments of the interests at stake, likely over-estimating the private interest and under-estimating the government's interest in many cases, the Seventh Circuit's decision thus rests on hypotheticals and speculation about potential applications of the Act. In proceeding this way, the court imposed too exacting a standard on the power of the Illinois General Assembly to legislate for incalculable future circumstances. If this case is to proceed as a facial challenge (contrary to respondents' complaint), respondents must be held to their burden of establishing that the Act fails under any circumstances and in any Illinois county. Respondents cannot carry this burden; accordingly, whatever test the Court applies, the judgment below should be reversed and the case remanded for discovery and an adjudication of respondents' constitutional challenge as applied to the facts of their case.

II. Even Under *Mathews*, The Judgment Below Must Be Reversed Because The Seventh Circuit Erroneously Conflated The "Innocent Owner" Defense With The State's Need To Prove Probable Cause.

Even if *Mathews* were the proper standard, the court below misapplied this test by relying heavily on a legally improper factor. In balancing public and private interests, the Seventh Circuit stressed the private interests of "innocent owner[s]" and sought to remedy the "hardship" imposed on these non-culpable individuals by furnishing them with an early opportunity to contest the detention of their property. Pet. App. 8a. A concern for innocent owners also undergirds the Second Circuit's invalidation of a similar law in *Krimstock v. Kelly*, upon which the Seventh Circuit relied. See 306 F.3d 40, 53 (2d Cir. 2002). But this reliance on the "innocent owner" exemption to forfeiture is fundamentally flawed, for there is no due process right to a prompt determination of "innocent ownership," and this exemption should not be part of the Seventh Circuit's proposed new preliminary hearing in any event.

1. Under Illinois forfeiture law, probable cause means "reasonable grounds for the belief that there exists a nexus between the property and illegal drug activity, supported by less than *prima facie* proof but more than mere suspicion." *People v. 1945 N. 31st St.*, 841 N.E.2d 928, 942 (Ill. 2005). It "requires only a probability or substantial chance of the nexus and not an actual showing." *Ibid.* Under the Act, probable cause is the standard the State must meet to establish that property is subject to forfeiture in judicial *in rem*

proceedings. See 725 ILCS 150/9(G) (2008). And as in many States, Illinois law never requires the State to prove any culpability on the part of the property owner. See *ibid.* Establishing probable cause alone constitutes the "State's [c]ase in [c]hief." *1945 N. 31st St.*, 841 N.E.2d at 940.

The Act does provide an "exemption" from forfeiture for property owners who can demonstrate their innocence by proving the existence of certain statutory factors. 725 ILCS 150/8 (2008); see also *1945 N. 31st St.*, 841 N.E.2d at 940 (exemption did not apply because owner "was unable to satisfy all of the pertinent conditions" of the Act, even though she was not involved in drug transaction and was not "legally accountable for the conduct giving rise to the forfeiture") (internal quotations omitted). Whether a claimant has satisfied the exemption is addressed in a separate "portion" of the proceedings, called the "[c]laimant's [c]ase," *id.* at 942, 944, which is subject to stricter evidentiary rules than the State's case, see 725 ILCS 150/9(B) (2008).

But this "innocent owner" exemption—with its strict evidentiary burden on the owner—is not constitutionally required. "[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." *Bennis v. Michigan*, 516 U.S. 442, 446 (1996). The claimant in *Bennis* "did not know that her [jointly owned] car would be used in an illegal activity that would subject it to forfeiture," but the Court nevertheless concluded that "the Due Process Clause of the Fourteenth Amendment [did] not protect

her interest against forfeiture by the government." *Id.* at 449. Thus, "well-established authority reject[s] the innocent-owner defense" as a constitutional entitlement. *Id.* at 451; see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) ("the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense").

2. Because the "innocent owner" exemption is not part of the State's probable cause showing, adjudication of this issue would not occur during a preliminary, probable cause hearing. Respondents recognized this below: they requested a probable cause hearing, but they never argued that they should be permitted to advance an "innocent owner" defense in that proceeding. See J.A. 36a; Brief of Plaintiff-Appellant Chermane Smith at 12, *Smith v. City of Chicago*, 07-1599 (7th Cir. May 29, 2007).

Nor is there any independent due process entitlement to a prompt adjudication of an "innocent owner" defense. In *Von Neumann*, this Court rejected the argument that the government's failure to provide for speedy disposition of the claimant's remission petition violated due process because, while remission is available as a matter of federal statutory law, "remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required." 474 U.S. at 250 (emphasis in original). "Thus there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition." *Ibid.*

Similarly, the State need not prove that respondents are in any way culpable for the conduct that made their property forfeitable—the absence of an "innocent owner" exemption is not an element of forfeiture under the Constitution or state law. See *Bennis*, 516 U.S. at 446, 451; 725 ILCS 150/9(G). Under the logic of *Von Neumann*, therefore, respondents have no constitutional entitlement to a speedy resolution of any "innocent owner" defense. See 474 U.S. at 250. To be sure, the decision whether to allow remission was discretionary in *Von Neumann*, while Illinois law makes the "innocent owner" exemption mandatory if a claimant can prove each of its elements, but this is constitutionally irrelevant. Cf. *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986) (due process evaluation of sentencing factor would not change if factor were discretionary rather than mandatory). And even if respondents could claim some due process right to a rapid "innocent owner" determination, they could not demand its adjudication at a preliminary probable cause hearing any more than a criminal defendant could insist that an insanity defense be adjudicated at a hearing required by *Gerstein v. Pugh*, 420 U.S. 103 (1975).

3. In short, the Seventh Circuit should not have found—and, indeed, respondents never sought—a due process right to prompt adjudication of Illinois' "innocent owner" exemption. And when the exemption is properly put to one side, the appellate court's analysis necessarily fails, even under *Mathews*.

Concern for the rights of "innocent owners" permeated the decision below. In the court's own words, the whole "point" of the proposed preliminary

hearing "is to protect the rights of both an innocent owner and anyone else who has been deprived of property." Pet. App. 10a. When assessing the first *Mathews* factor, the private interest, the Seventh Circuit thus emphasized the plight of the "owner of an automobile which is seized because the driver—not the owner—is the one accused and whose actions cause the seizure." Pet. App 8a. As explained, however, the preliminary hearing that the Seventh Circuit demands would not vindicate the rights of innocent owners; properly constituted, it would review solely the police determination that the vehicle was likely involved in illegal drug activity.

The opinion below does not address the second *Mathews* factor, the likelihood that additional procedural safeguards would reduce errors. But that likelihood is low when the analysis is properly limited to the probable cause determination. While an arresting officer may conclude erroneously that there is a reasonably likely nexus between the property and illegal drug activity, the chance of error is relatively small and the additional safeguard of judicial review would likely yield only minimal benefits. See *Gerstein*, 420 U.S. at 120 ("These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. * * * This issue can be determined reliably without an adversary hearing."); *Krimstock*, 206 F.3d at 62-63 (second *Mathews* factor favors government because likelihood of error is slim).

The decision below is nearly as cursory in its treatment of the third *Mathews* factor, the governmental interest, acknowledging merely that preliminary hearings "would impose some

administrative burden" and, moreover, that the government has an interest in "being certain that a vehicle is not destroyed before a court can issue a judgment" of forfeiture. Pet. App. 9a. Putting aside that this vastly underestimates the burden of adjudicating probable cause and innocent ownership shortly after a seizure, see *supra* p. 12, the weight of this factor in the calculus would surely increase if the government's interest were properly identified not as in possessing the property of possibly innocent owners but in "confiscat[ing] property used in violation of the law." *United States v. Ursery*, 518 U.S. 267, 284 (1996); see also *8,850*, 461 U.S. at 565-566 (government has "an interest in a rule that allows [it] some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture"); *Calero-Toledo*, 416 U.S. at 686-687 ("Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.").

In sum, even if *Mathews* were applicable here (and it is not, see *infra* Part III), the court below critically misapplied it by including—indeed, focusing chiefly upon—interests vindicated by the state law "innocent owner" exemption. This Court should hold that the Act satisfies even *Mathews*, when properly applied, or at a minimum vacate the Seventh Circuit's judgment and remand for proper application of the *Mathews* factors, excluding the "innocent owner" exemption.

III. The *Mathews* Test Does Not Apply To Civil Forfeiture.

The Seventh Circuit embraced respondents' argument that the applicable analysis for their due process claim is the *Mathews* balancing test, which asks courts to weigh the private and governmental interests at stake, taking into account the likelihood that additional procedural safeguards will reduce errors. See 424 U.S. at 335. The Court acknowledged that *Mathews* arose in a very different context—"the termination of Social Security disability benefit payments"—but found that its analysis is "pervasive" and "has been used in everything." Pet. App. 6a n.2. But this Court has never understood *Mathews' ad hoc* balancing to apply so broadly, and it should resist the invitation to expand *Mathews* here. As petitioners explain, Pet. Br. 36-39, 46, 58-60, the traditional speedy-trial test set forth in *Barker* and applied to civil forfeiture in *$8,850* and *Von Neumann* is applicable where, as here, the concern is that too much time elapses between a seizure and the adversarial hearing on its validity. If not the *Barker* test, however, the Court should evaluate respondents' claims pursuant to the Fourth Amendment "reasonableness" standard long used to ensure compliance with the probable cause requirement for seizure and detention of persons and property.[5]

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[5] In the Seventh Circuit, petitioner argued that *Mathews* does not provide a "one-size-fits-all" analysis for due process claims and that its test is inapplicable because it is not "specifically tailored" to the civil forfeiture context. State's Attorney Br. 19. To be sure, petitioner urged the court to reaffirm its own prior decision in *Jones*, which

"[T]he *Mathews* balancing test was first conceived to address due process claims arising in the context of administrative law." *Medina v. California*, 505 U.S. 437, 444 (1992); accord *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). And although the Court has "since invoked *Mathews* to evaluate due process claims in other contexts," the Court has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims." *Dusenbery*, 534 U.S. at 167-168. Indeed, *Mathews* suffers from several acknowledged limitations. Its "balancing" analysis "is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 562 (1985) (Rehnquist, *J.*, dissenting). This "lack of any principled standards" means that the *Mathews* test can give rise to decisions

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relied on the *Barker* test, see *id.* at 20, but that does not prevent this Court from looking to the Fourth Amendment "reasonableness" test if it concludes *Barker* does not apply. Identification of the appropriate standard for evaluating respondents' due process claim—among all available alternatives—is "'predicate to an intelligent resolution of the question presented.'" *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (quoting *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)). Even respondents acknowledge that the issue here is whether due process requires an interim adversarial hearing independent of the actual forfeiture proceeding and that this inquiry is not limited to any particular test or tests. See Opp. Br. i. Accordingly, our argument is "fairly included" within the question presented, U.S. Sup. Ct. R. 14.1(a), and may properly be considered by this Court, see *Caterpillar*, 519 U.S. at 75 n.13; *Robinette*, 519 U.S. at 38; *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).

that are both "unpredictable" and "devoid of any principles which will either instruct or endure." *Id.* at 562-563.

1. Accordingly, members of the Court have cautioned against "indiscriminately appl[ying] [its] balancing analysis" to due process claims "without regard to whether the procedure under challenge was (1) a traditional one and, if so, (2) prohibited by the Bill of Rights." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 36 (1991) (Scalia, *J.*, concurring in the judgment); see also *id.* at 40 (Kennedy, *J.*, concurring in the judgment) ("Justice Scalia's historical approach to questions of procedural due process has much to commend it," although "widespread adherence to a historical practice" may not "always foreclose[] further inquiry"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, *J.*, joined by Stevens, *J.*, dissenting) (rejecting plurality's use of *Mathews* balancing "where the Constitution and the common law already supply an answer"); *id.* at 594 (Thomas, *J.*, dissenting) (also rejecting *Mathews* test as "the appropriate analytical tool with which to analyze this case").

And in fact where no newly recognized property interest is at stake (as it was in *Mathews*), the Court often defines due process requirements by looking to more specific constitutional entitlements and to historical practice. This was so in *Medina*, where the Court held that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which * * * are part of the criminal process." 505 U.S. at 443. Instead, the Court made a "narrower inquiry," based on historical practice, into whether the rule "'offends some principle

of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 445 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). In the criminal context, the Court recognized the limited effect of due process as a freestanding right, "'[b]eyond the specific guarantees enumerated in the Bill of Rights.'" *Id.* at 443 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). "[T]he criminal process is grounded in centuries of common-law tradition," and it was to that tradition that the Court looked first and foremost to ascertain the bounds of fundamental fairness. *Id.* at 445-446; accord *Herrera v. Collins*, 506 U.S. 390, 407-408 (1993).

Likewise, in *Dusenbery*, the Court rejected a claimant's request to apply *Mathews* to his due process challenge to the adequacy of the notice the government provided of its intent to forfeit property seized during the execution of a search warrant. The proper test, the Court explained, was the "well-settled practice" set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), "which espouse[d] a more straightforward test of reasonableness under the circumstances." 534 U.S. at 167-168. Even the dissent did not doubt the applicability of this historical, reasonableness test in lieu of *Mathews*. See *id.* at 173 (Ginsburg, *J.*, dissenting) ("The Court correctly identifies" *Mullane* as "the foundational case on reasonable notice as a due process requirement.").

And in *Weiss v. United States*, 510 U.S. 163 (1994), the Court declined to apply *Mathews* to a due process challenge to a facet of the military justice system. The Court explained that neither *Mathews* nor *Medina* (whose test the government urged) "arose in the

military context," and thus neither "supplie[d] the appropriate analytical framework" for determining what process is due in a court-martial proceeding. 510 U.S. at 177. Rather, the proper test was the military-specific one previously set out in *Middendorf v. Henry*, 425 U.S. 25 (1976). See 510 U.S. at 177. Again, the Court relied on standards evolved in the same narrow legal context to determine what due process demands.

2. Especially relevant here are the Court's decisions in *Gerstein* and *Graham v. Connor*, 490 U.S. 386 (1989). In those decisions, the Court once again looked to existing legal standards developed specifically for the brand of claim at issue, this time applying the longstanding, Fourth Amendment "reasonableness" test to plaintiffs' due process challenges to the seizure and detention of their person. In *Gerstein*, the Court held that procedures for detaining a criminal defendant pending trial are judged under the Fourth Amendment, rather than more general due process norms, because:

> [t]he historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial.

420 U.S. at 125 n.27. The Court thus rejected plaintiffs' claim to an adversary hearing on their pre-trial detention, because its "safeguards are not essential for the probable cause determination required by the Fourth Amendment." *Id.* at 120.

Similarly, in *Graham*, the Court held that the Fourth Amendment, not the Due Process Clause, restricts the use of force in effecting a personal seizure. See 490 U.S. at 395. Unlike the latter, "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct," and therefore it "must be the guide for analyzing these claims." *Ibid.* The Fourth Amendment's "objective reasonableness" test thus sets the standard for determining the constitutionality of a seizure, both in terms of "*when* it is made" and "*how* it is carried out." *Id.* at 388, 395 (emphasis in original); accord *Portuondo v. Agard*, 529 U.S. 61, 74 (2000); *Conn v. Gabbert*, 526 U.S. 286, 293 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

So too here, the reasonableness requirement of the Fourth Amendment furnishes an "explicit textual source of constitutional protection" for use in assessing respondents' claims that their property was seized and detained without a constitutionally adequate probable cause determination. It would be an odd result indeed if the Fourth Amendment provided all the process due when the government detained or used force in seizing a person, but that these same protections were inadequate when the government detained personal property.

To be sure, the Fourth Amendment's probable cause requirement is only one of several ways in which the Constitution protects the rights of those whose property has been seized for forfeiture. *Cf. Gerstein*, 420 U.S. at 126 n.27 ("the Fourth Amendment probable cause determination is in fact only the *first* stage in an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct") (emphasis in original). The Constitution also provides safeguards against excessive delay in initiating the actual forfeiture proceedings, see *$8,850*, 461 U.S. at 564, and inadequate notice, see *Dusenbery*, 524 U.S. at 167-168. In addition, the Eighth Amendment's Excessive Fines Clause applies to civil *in rem* forfeiture proceedings, see *Austin v. United States*, 509 U.S. 602, 604 (1993), as does the Fourth Amendment's exclusionary rule, see *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965), and, in some circumstances, the Fifth Amendment privilege against self-incrimination, see *United States v. United States Coin & Currency*, 401 U.S. 715, 721-722 (1971). Insofar as the initial probable cause determination is concerned, however, *Gerstein* and its progeny make clear that the Fourth Amendment alone applies.

3. Because the lower court used *Mathews* to assess the constitutionality of the Act, this Court should vacate the judgment below and remand for application of the Fourth Amendment's reasonableness test. See, *e.g.*, *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) ("we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment"); *Ker v. California*, 374 U.S. 23, 33 (1963) ("the reasonableness

of a search or seizure is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case").

Although the lower courts must be afforded an opportunity to apply the correct test, all indications suggest the Act is constitutional under a Fourth Amendment analysis. "In determining when a search or seizure is unreasonable," the Court "begin[s] with history" and "look[s] to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 128 S. Ct. 1598, 1602 (2008); accord *Atwater v. City of Lago Vista*, 432 U.S. 318, 326 (2001) ("In reading the Amendment, we are guided by 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.'") (quoting *Wilson*, 514 U.S. at 931). As petitioner explains, this Court's earliest cases recognize that the judicial forfeiture proceeding itself is sufficient to protect the rights of property owners, and no interim probable cause hearing is required. See Pet. Br. 34-35. This is confirmed by the Court's subsequent determination—in a case upholding summary proceedings for the collection of unpaid income taxes—that "mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of liability is adequate." *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-597 (1931).

And if historical practices are not definitive on this point, the second stage of the Fourth Amendment inquiry—which requires courts, in cases where "history

has not provided a conclusive answer," to "analyze[] a search or seizure in light of traditional standards of reasonableness 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests,'" *Moore*, 128 S. Ct. at 1604 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))—should confirm the result.

"[R]easonableness under the Fourth Amendment does not require" the State to "employ[] the least intrusive means" available to serve its legitimate interests. *Bd. of Ed. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 837 (2002); accord *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973). Thus, the Fourth Amendment test may permit a wider range of governmental conduct than *Mathews*. See, *e.g.*, *Lafayette*, 462 U.S. at 648 (reasonableness test does not permit courts to "second-guess" the "practical administrative method[s]" of law enforcement). In fact, when "assessing whether a detention [wa]s too long in duration," this Court has declined to find a Fourth Amendment violation merely because "some other alternative was available," so long as the government did not "act[] unreasonably in failing to recognize or to pursue it." *United States v. Sharpe*, 470 U.S. 675, 687 (1985). Here, the Seventh Circuit invalidated the Act because, in its view, early adversarial hearings are the best means of protecting the rights of property owners (particularly innocent ones), notwithstanding the acknowledged—and as of yet undetermined—cost to the particular government entity. Pet. App. 8a-10a. But the government is not required to adopt an alternate method, much less the

"least intrusive" one, merely because it is "available." Proper application of the Fourth Amendment reasonableness test would not hold the government to so high a standard, indicating that the Act would be upheld under the correct test.

4. Perhaps the most obvious rejoinder to the foregoing reliance on the Fourth Amendment is this Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) ("*Good*"), upon which the Seventh Circuit itself relied. Pet. App. 5a-6a. In that case, a sharply divided Court applied *Mathews* to hold that due process requires the government to afford notice and an adversarial hearing prior to seizing *real* property for civil forfeiture. See 510 U.S. at 46, 53. The majority agreed that "the Fourth Amendment applies to searches and seizures in the civil context," including seizures for civil forfeiture, "and may serve to resolve the legality of these governmental actions without reference to other constitutional provisions." *Id.* at 51. But it concluded that "even assuming that the Fourth Amendment were satisfied in this case," the Due Process Clause imposed its own, additional requirements. *Id.* at 52.

The *Good* majority carefully limited its holding to seizures of real property. See *infra* pp. 33-34. If the Court were to conclude that *Good* is nevertheless applicable to personal property, however, its reasoning should be rejected for the reasons described in the dissent.

In particular, two dissenting members of the Court would have held that "the Fourth Amendment specifically governs the process afforded in the civil forfeiture context," because it is through that

Amendment, not the Due Process Clause, that the Constitution balances "the people's security in their persons, houses, papers, and effects and the public interest in effecting searches and seizures for law enforcement purposes." 510 U.S. at 67, 69 (Rehnquist, *J.*, joined by Scalia, *J.*, concurring in part and dissenting in part) (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 559 (1978); *Maryland v. Buie*, 494 U.S. 325, 331 (1990); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)).[6] The dissent explained that the majority's "fixation on *Mathews* sharply conflicts with both historical practice and the specific textual source of the Fourth Amendment's 'reasonableness' inquiry." *Id.* at 67.

The dissent's reasoning should control here. First, although the majority relied on *Soldal v. County of Cook*, 506 U.S. 56 (1992), to dismiss the dissent's "view that the applicability of" the Fourth Amendment "pre-empts the guarantees" of the Fourteenth, *Good*, 510 U.S. at 49, *Soldal* cannot bear so much weight. On review there was a decision by the court of appeals *declining* to apply the Fourth Amendment to claims

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[6] Two other members of the Court would have rejected plaintiff's challenge to the forfeiture statute as applied in that case. See 510 U.S. at 77 (O'Connor, *J.*, concurring in part and dissenting in part) ("But this case is an *as applied* challenge to the seizure of Good's property; on these facts, I cannot conclude that there was a constitutional violation.") (emphasis in original); accord *id.* at 83 (Thomas, *J.*, concurring in part and dissenting in part) ("in circumstances such as these, a preseizure hearing is not required as a matter of constitutional law").

arising out of the seizure of property. See 506 U.S. at 60. In holding that plaintiffs' claims must be evaluated in terms of the Fourth Amendment, the Court in *Soldal* reiterated that in cases where both the Fourth Amendment and the Due Process Clause "target[] the same sort of governmental conduct," the Court must choose "the more 'explicit textual source of constitutional protection' over the 'more generalized notion of substantive due process.'" *Id.* at 70 (quoting *Graham*, 490 U.S. at 394-395). As explained, see *supra* pp. 23-25, this is such a case.[7]

Second, while both the majority and the dissent pointed to *Calero-Toledo*, where this Court held that the Constitution does not require notice or a hearing prior to seizing a yacht for forfeiture, the dissent's view of that case is more easily reconciled with the Court's later decisions. Compare *Good*, 510 U.S. at 51, with *id.* at 69 (Rehnquist, *J.*, concurring in part and dissenting in part). *Calero-Toledo* was decided prior to *Gerstein* and *Graham* and, as a result, before this Court made

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[7] In an effort to resolve "what at first blush may seem a tension between" *Graham* and *Gerstein* "on the one hand" and *Good* and *Soldal* "on the other," one member of the Court offers a "rule of reserving due process for otherwise homeless substantial claims" while declining to apply the Due Process Clause "when doing so would have duplicated protection that a more specific constitutional provision already bestowed." *Albright v. Oliver*, 510 U.S. 266, 288 & n.2 (1994) (Souter, *J.*, concurring in the judgment). Even this rule recognizes, however, that due process has no role where a constitutional claim is covered by a specific constitutional provision, including the Fourth Amendment, see *ibid.*, as it is here.

clear that the Fourth Amendment provides the only relevant analysis in circumstances where it applies of its own force. Thus, *Calero-Toledo*'s failure to reference the Fourth Amendment is not surprising. Nevertheless, as the *Good* dissent recognized, *Calero-Toledo* focused its analysis on the historical treatment of civil forfeiture procedures, as the Fourth Amendment test demands. See *Good*, 510 U.S. at 69 (Rehnquist, *J.*, concurring in part and dissenting in part) ("As we decided in *Calero-Toledo* * * * , there is no need to look beyond the Fourth Amendment in civil forfeiture proceedings involving the Government because *ex parte* seizures are 'too firmly fixed in the punitive and remedial jurisprudence of this country to be now displaced.'") (quoting *Calero-Toledo*, 416 U.S. at 686). Moreover, because *Calero-Toledo rejected* plaintiff's claim to additional process, the test that the Court applied there, to the extent it does not track the Fourth Amendment standard exactly, is at best *dicta* and does not counsel in favor of the additional procedural protections respondents seek here.

The majority in *Good* also distinguished *Gerstein* and *Graham* because those cases involved "the arrest and detention of criminal suspects, subjects we have considered to be governed by the provisions of the Fourth Amendment without reference to other constitutional guarantees." 510 U.S. at 50. The majority did not doubt, however, that the Fourth Amendment applies to civil as well as criminal proceedings. See *id.* at 51. And while it sought to put *Gerstein* and *Graham* to the side based upon the "other safeguards" available in criminal proceedings to "ensure compliance" with the Constitution, *id.* at 50, this ignores the constitutional protections that attach

during civil *in rem* forfeiture proceedings—when the question is whether the elements of forfeiture are satisfied, not whether the police had probable cause for the *seizure*, see *supra* p. 25. And it does not acknowledge the "paradox[]" of providing more favorable protections to the detention of property than to the detention of the person. *Good*, 510 U.S. at 67 (Rehnquist, *J.*, concurring in part and dissenting in part); see also *supra* p. 24.

The *Good* Court also feared that "the purpose and effect of the Government's action[s]" in the forfeiture context "go beyond the traditional meaning of search or seizure" because the government "assert[s] ownership and control over the property" and thus does not limit itself to "preserv[ing] evidence of wrongdoing." 510 U.S. at 52. But this Court has consistently recognized that civil forfeiture serves a law enforcement purpose by taking property used for illegal activity out of the hands of criminals. See, *e.g.*, *Ursery*, 518 U.S. at 284 (civil forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct"). This goal is reflected in the Illinois law at issue here. See 725 ILCS 150/2 (detailing legislative findings that forfeiture of property pursuant to Act "will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State" and "may secure for State and local units of government some resources for deterring drug abuse and drug trafficking"). That forfeiture seeks to deter criminal conduct above and beyond preservation of evidence should be of no moment.

But *Good* is properly limited to the real property context in any event. Repeatedly, this Court has acknowledged "the unique nature of the home," and has held that "'[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.'" *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)); see also *Miller v. United States*, 357 U.S. 301, 307 (1958) (describing "precious interest" "summed up in the ancient adage that a man's house is his castle"). Indeed, the Court recently reaffirmed the constitutionally material distinction between an individual's interest in real property and the lesser interest in personal property, such as a vehicle. See *Arizona v. Gant*, 129 S. Ct. 1710, No. 07-542, 2009 WL 1045962, at *8 (U.S. Apr. 21, 2009) (motorist's interest "in his vehicle is less substantial than in his home").

The *Good* majority likewise recognized that the "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance," 510 U.S. at 53-54, and stressed that its holding applied to the forfeiture of real property, specifically, see, *e.g.*, *id.* at 46 ("The principal question presented is whether, in the absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard."); *id.* at 53 (*Mathews* "provides guidance" for determining "[w]hether the seizure of real property for purposes of civil forfeiture justifies such an exception"); *id.* at 61 ("[t]he constitutional limitations we enforce in this case apply

to real property in general"); *id.* at 62 ("we hold that the seizure of real property * * * is not one of those extraordinary instances that justify the postponement of notice and hearing"). Indeed, in distinguishing *Calero-Toledo*, the *Good* majority emphasized the unique nature of real property, which, unlike personal property, cannot be "'removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.'" *Id.* at 52 (quoting *Calero-Toledo*, 416 U.S. at 679).

Thus, *Good* does not speak to the issue of whether *Mathews* should be applied to forfeitures of personal, as opposed to real, property. But even if *Good* did apply to personal property, its reasoning should be rejected here because it is the Fourth Amendment that protects against "unreasonable" seizures of property, and thus there is "no occasion or justification" for a court to "strike a new balance" by invalidating a seizure unless additional procedural requirements, not required by the Fourth Amendment, are met. *Stanford Daily*, 436 U.S. at 559.

CONCLUSION

The judgment of the court of appeals should be reversed; in the alternative, the judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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Table A

Statutory Civil Forfeiture Provisions

Alabama: Ala. Code 1975 § 20-2-93: proceedings must be instituted "promptly" following seizure; no set time for hearing.

Alaska: Alaska Stat. §§ 17.30.114, 17.30.116: ex parte probable cause determination within forty-eight hours of seizure; government must provide notice within twenty days, no set time for trial.

Arkansas: Ark. Code Ann. §§ 5-64-505(f), (g): government must file complaint within sixty days of seizure; no set time for hearing.

Arizona: Ariz. Rev. Stat. § 13-4310: court may issue order to show cause for hearing on probable cause within five business days if no prior judicial determination, even ex parte, of probable cause.

California: Cal. Health & S. § 14888.5(c): hearing shall occur within thirty days of verified claim by property owner.

Colorado: Colo. Rev. Stat. §§ 16-13-505(2)(a)-(c): government must file forfeiture complaint within sixty days of seizure and first adversarial hearing on merits may be at least 165 days following seizure.

Connecticut: Conn. Gen. Stat. § 54-36h(b): proceedings must be instituted within ninety days of seizure, followed by court ordering government to give notice to property owners, and hearing to be held "not less than two weeks after notice."

Delaware: Del. Code Ann. tit. 16, §§ 4784, 4786 and Del. Sup. Ct. R. Civ. Pro. 71.3: notice of seizure within sixty days of seizure and hearing may be at least 150 days following seizure.

Florida: Fl. Stat. Ann. § 932.703(2)(a): government must provide notice within five business days of seizure and preliminary hearing must be held within ten days after request is received.

Georgia: Ga. Code Ann. § 16-13-49(q)(4): claimant can obtain probable cause hearing within thirty-five days of seizure if no prior judicial determination, even ex parte, of probable cause, although date can be extended for good cause.

Hawaii: Haw. Rev. Stat. §§ 712A-7, 712A-9, 712A-11, 712A-12: seizing agency has thirty days to request that prosecuting attorney seek forfeiture; prosecuting attorney has forty-five days after written request from seizing agency to initiate proceedings, upon which clerk shall give notice to property owner, and hearing can be held within sixty days of filing of claim; order to show cause yielding probable cause hearing within thirty days set aside upon filing of petition.

Idaho: Idaho Code Ann. § 37-2744(d)(3): government has thirty days following seizure to institute proceedings, at which time notice must be given to property owners, and hearing can be up to thirty days from time property owner subsequently files verified answer.

Indiana: Ind. Code § 34-24-1-3(a): government must initiate proceedings within 180 days of seizure or

ninety days of written demand by property owner; no specific rule regarding timing of hearing.

Iowa: Iowa Code §§ 809.3, 809.4: property owner can institute proceedings for immediate return, and hearing may be held within thirty days afterward.

Kansas: Kan. Stat. Ann. § 60-4112(c): claimant can obtain probable cause hearing within thirty-five days of claim if no prior judicial determination, even ex parte, of probable cause, although date can be extended for good cause.

Louisiana: La. Rev. Stat. Ann. § 40:2611.C: claimant can secure probable cause hearing within thirty-five days of claim.

Maine: Me. Rev. Stat. Ann. tit. 15, § 5823.2: for vehicle, hearing can be fifty-five days after seizure.

Maryland: Md. Code Ann., Crim. Proc. §§ 12-304(b), 12-306(b), 12-308(a): for motor vehicles, complaint must be filed within forty-five days of seizure, notice given within twenty days of that and hearing within next sixty days, for total of 125 days.

Massachusetts: Mass. Gen. Laws ch. 94C § 47: no specific date petition must be filed or hearing held.

Michigan: Mich. Comp. Laws § 333.7523: forfeiture proceedings must be instituted "promptly;" no set time for hearing.

Minnesota: Minn. Stat. §§ 609.5311-609.5314: claimant must file civil action subject to standard rules of civil procedure with no specific deadline as to hearing.

Mississippi: Miss. Code Ann. §§ 41-29-177, 41-29-179: for property over $10,000, proceedings must be instituted within thirty days of seizure and hearing within thirty days of answer; for property under $10,000, claimant must file petition after receiving notice and proceedings are then governed by rules of civil procedure.

Missouri: Mo. Rev. Stat. §§ 513.607.6(2), 513.612: government must file petition within fourteen days of seizure and claimant can file motion to dismiss that must be ruled on within ten days.

Montana: Mont. Code Ann. §§ 44-12-201, 44-12-203: government must file petition within forty-five days of seizure, and hearing must be held within sixty days of filed answer, for 105-day total.

Nebraska: Neb. Rev. Stat. § 28-431(4): claimant may obtain preliminary hearing on issue of innocent ownership, not probable cause, without specific time line.

Nevada: Nev. Rev. Stat. §§ 179.1171, 179.1173, 453.301: government has sixty days to file complaint, and court should proceed as soon as practicable.

New Hampshire: N.H. Rev. Stat. Ann. §§ 318-B:17-b.II(e), 318-B:17-b.IV(c): government has sixty days to file petition, court can schedule hearing with ninety days of filing, for 150-day total.

New Jersey: N.J. Stat. Ann. §§ 2C:64-3a, f: government has ninety days following seizure to file action and court sets summary hearing "as soon as practicable" following filing of answer.

New Mexico: N.M. Stat. §§ 30-31-34, 30-31-35, 31-27-5.A, 31-27-6.C(2): government must file forfeiture complaint within thirty days, and then proceedings are held in accord with rules of civil procedure.

New York: N.Y. Pub. Health Law §§ 3388.4, 3388.9: government must institute proceedings twenty days after written demand or two years following seizure and proceedings "shall conform as much as possible to the procedure for attachment."

North Carolina: N.C. Gen. Stat. §§18B-504(d), (h), 90-112(f): no set time-line after seizure but process depends on trial for underlying offense; innocent owner can apply for return of property "at any time before forfeiture is ordered," with no set time-line for adjudication.

North Dakota: N.D. Cent. Code § 19-03.1-36.3: forfeiture proceedings must be instituted "promptly" following seizure; no specified time for hearing.

Ohio: Ohio Rev. Code Ann. § 2981.03(A)(4): property owner can petition for hearing, to be held "promptly," at which claimant may prove by preponderance of evidence that seizure was unlawful.

Oklahoma: Okla. Stat. tit. 12 § 95, tit. 63 § 2-506: one year statute of limitations on filing proceeding; no limitation on time of hearing.

Oregon: Or. Rev. Stat. § 475A.045(8): property owner can petition court for order to show cause with five days' notice to government.

Pennsylvania: 42 Pa. Cons. Stat. §§ 6801(c), 6802: proceedings must be instituted "forthwith" following seizure, and no set time for hearing.

Rhode Island: R.I. Gen. Laws §§ 21-28-5.04.2(f)-(h): seizing agency shall within thirty days of seizure send property to attorney general; for property valued under $20,000, attorney general has sixty days to file response to petition for mitigation or remission; claimant can request subsequent judicial review; for other property, attorney general has twenty days to file complaint, without specified date for hearing.

South Carolina: S.C. Code Ann. §§ 44-53-586(a), 44-53-520(c), (j), 44-53-530: property owner may petition court for rule to show cause hearing, although court may deny petition; seizing agency must submit report to prosecuting attorney within ten days or reasonable time, and proceedings must be instituted within reasonable time, with no set time for hearing.

South Dakota: S.D. Codified Laws §§ 34-20B-76, 34-20B-88: government must institute proceedings within thirty days of seizure, trial must be within sixty days after filing of verified complaint for total of ninety days.

Tennessee: Ten. Code Ann. § 53-11-451(c): proceedings must be instituted "promptly" following seizure no specific time for hearing.

Texas: Tex. Code Crim. Proc. Ann. art. 59.04(a): proceedings must be instituted within thirty days of seizure; no set time for hearing.

Utah: Utah Code Ann. §§ 58-37-13.7, 24-1-7.11, 24-1-4.3(a), 6(b): government must file proceedings within

sixty days of seizure and proceedings should be "expedited"; property owner can apply for interim "hardship" release with decision on that motion due within twenty days of motion or ten days of service.

Vermont: Vt. Stat. Ann. tit. 18 §§ 4242(c), 4243(a), 4244(a): after seizure government must apply "forthwith" in ex parte hearing for probable cause determination; petition must be filed fourteen days after that followed up to thirty days later with hearing.

Virginia: Va. Code. Ann. §§ 19.2-386.3A, 19.2-386.10: proceedings must be instituted within ninety days of seizure, and court "shall proceed to trial" upon appearance by claimant.

Washington: Wash. Rev. Code § 69.50.505: seizure considered to begin forfeiture hearings; claimant with "reasonable opportunity to be heard" but no set time for hearing.

Wisconsin: Wis. Stat. § 961.555(2): proceedings must be instituted within thirty days of seizure and hearing must be set within sixty days of the answer for total of ninety days.

Wyoming: Wyo. Stat. Ann. § 35-7-1049(c): proceedings must be instituted "promptly" following seizure, with no specified date for hearing.