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No. 08-351

IN THE

Supreme Court of the United States

ANITA ALVAREZ,
STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS,
Petitioner,

v.

CHERMANE SMITH, ET AL.,
Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that DAFPA is facially invalid because it does not provide for a preliminary postseizure hearing.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] The States have used forfeiture in aid of law enforcement for centuries. In recent years civil forfeiture laws such as DAFPA have become an important means of "deterring the rising incidence of the abuse and trafficking of [controlled] substances." 725 Ill. Comp. Stat. 150/2. Because of the importance to *amici* and their members of effectively combating drug crimes, *amici* submit this brief to assist the Court in its resolution of this case.

STATEMENT

1. *The purpose of drug asset forfeiture.* Illegal drugs inflict enormous costs on society. In 2002, the economic impact of drug-related crimes alone approached $110 billion in expenses and lost productivity. *See* Office of National Drug Control Policy, *The Economic Costs of Drug Abuse in the United States, 1992 - 2002* xii & fig. 6 (2004), *available at* http://www.ncjrs.gov/ondcppubs/publications/pdf/economic_costs.pdf (total cost of drug abuse may exceed $180 billion).

To combat drug trafficking and organized crime, all States and the Federal Government use forfeiture

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

laws.[2] By targeting the assets and proceeds of trafficking networks, such laws enable the government to disrupt and dismantle these organizations instead of targeting individual conspirators. The Office of the President, in its annual drug control policy report, stated that "[u]ndermining the financial infrastructure of trafficking organizations has proven to be one of the most effective means to disrupt the market for illegal drugs." Office of National Drug Control Policy, *National Drug Control Strategy: 2009 Annual Report* 28, *available at* http://www.whitehousedrugpolicy.gov/publications/policy/ndcs09/2009ndcs.pdf.

This recognition of forfeiture's efficacy is likewise shared by the States. Entrusted with protecting the health and welfare of their citizens, state and local governments are at the front lines in the fight against trafficking. But the breadth of the drug problem requires a high level of cooperation between all levels of government.[3] In addition to coordinating

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[2] Recently, in response to the growing crisis posed by drug and gun trafficking across the Mexican border, the White House moved to identify and freeze the assets of three Mexican cartels. *See* Spencer S. Hsu, *Obama Targets Mexican Cartels*, Wash. Post, Apr. 16, 2009. Forfeiture was also used after September 11, 2001 to freeze the assets of suspected terrorists, *see* Mike Allen & Paul Blustein, *Bush Moves to Cut Terrorists' Support*, Wash. Post, Sept. 25, 2001, at A1, and to freeze Bernie Madoff's assets. *See* Charles A. Intriago & Robert A. Butterworth, *Fund Government with Dirty Money*, N.Y. Times, Apr. 27, 2009.

[3] The Domestic Highway Interdiction Program, for example, is coordinated by state and local authorities who patrol the highways of 48 States in partnership with federal and Canadian law enforcement agencies. *See* Office of National Drug Control Policy, *2009 Annual Report*, *supra*, at 24. Through mid-2008, the program had seized $600 million dollars in narcotics and investigated over 160 trafficking organizations. *Id.*

investigations and seizures—and to maximize and enhance law enforcement resources—federal agencies may adopt state forfeiture actions and share equitably in the criminal proceeds. *See* 21 U.S.C. § 881(e)(1)(A) (authorizing equitable sharing); U.S. Dep't of Treasury, *Guide to Equitable Sharing for Foreign Countries and Federal, State, and Local Law Enforcement* (2004).

2. *Modern civil forfeiture law.* While forfeiture has a lineage extending through English common law and beyond, modern forfeiture laws were enacted in the 1970s to address the growing threat posed by organized crime. *See* Howard E. Williams, Asset Forfeiture: A Law Enforcement Perspective 11 (2002). In particular, the Racketeer Influenced and Corrupt Organization (RICO) and Continuing Criminal Enterprise (CCE) laws enabled the Federal Government to seize and institute forfeiture against property used in specified offenses, as well as the proceeds and property acquired through those offenses. *See Caplin & Drysdale v. United States*, 491 U.S. 617, 630 (1989) (identifying the purpose of RICO to "lessen the economic power of organized crime and drug enterprises"); *see also United States v. Ursery*, 518 U.S. 267, 284 (1996) (forfeiture laws "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct").

Subsequent federal laws authorized civil forfeiture of the proceeds of narcotics trafficking. The States soon followed, many—including Illinois—modeling their forfeiture laws after the federal drug forfeiture statute, 21 U.S.C. § 881. *See* Dee Edgeworth, Asset Forfeiture: Practice and Procedure in State and Federal Courts 30-31 (2008).

In 2000, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA) "[t]o provide a more just and uniform procedure for Federal civil forfeitures." 18 U.S.C. § 981. Under CAFRA, the Federal Government has 60 days to send written notice to interest holders. *Id.* § 983(a)(1)(A)(i). There are exceptions which reflect the necessity of longer time periods: in cases where state or local law enforcement has turned a case over to the Federal Government for adoption, notice may be sent 90 days from the date of seizure, *id.* § 983(a)(1)(A)(iv), and when the identity of an interest holder is not determined until after a seizure, notice may be sent 60 days after identity is determined. *Id.* § 983(a)(1)(A)(v). Moreover, a supervisory official may extend the time for sending notice by 30 days, and, upon motion to a court, by 60 days, if sending earlier notice would have an "adverse result"—*e.g.*, "endangering the life or physical safety of an individual," "intimidation of potential witnesses," and "otherwise seriously jeopardizing an investigation or unduly delaying a trial." *Id.* § 983(B)-(D)(v).

If a property owner files a claim to recover property, then the Federal Government has 90 days to file a complaint for forfeiture. *Id.* § 983(a)(2)-(3). This time period may also be extended by a district court for "good cause." *Id.* § 983(a)(3)(A).

3. *Illinois' Drug Asset Forfeiture Act.* Illinois adopted its Drug Asset Forfeiture Procedure Act (DAFPA) in 1990 to govern proceedings for forfeitable property under its Controlled Substances Act, Cannabis Control Act, and Methamphetamine Control and Community Protection Act. *See* 725 Ill. Comp. Stat. 150/5.

DAFPA, like many state forfeiture laws, reflects federal policy and law. In its statement of legislative purpose, the Illinois General Assembly stated that the law would "have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State." 725 Ill. Comp. Stat. 150/2. It also noted that because the federal statute upon which DAFPA was based "has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country," it intended that DAFPA "be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881." *Id.*

SUMMARY OF ARGUMENT

Contrary to the holding of the court below, DAFPA's time limits are not facially unconstitutional. This is because the determination of what process is due in a forfeiture case is fact-specific and not subject to categorical temporal rules. And this is true under both *United States v. $8,850*—in which the Court squarely held that due process determinations in civil forfeiture cases are to be made pursuant to the test of *Barker v. Wingo*—and *Mathews v. Eldridge*, the precedent incorrectly applied by the court below to facially invalidate DAFPA.

There is no basis in the Due Process Clause for judicially drawn bright lines. As this Court has repeatedly held, "the drawing of lines," temporal or otherwise, "is a peculiarly legislative task." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). Because Due Process rights resist quantification, this Court is reluctant to invalidate legislatively determined deadlines. Only rarely has the Court set categorical time limits that would require

wholesale displacement of the procedures crafted by state legislatures.

Because of its close resemblance to determining the timeliness of criminal trials, this Court has already recognized *Barker* as the governing framework for determining the timeliness of initiating forfeiture proceedings. *Barker*, a four-factor balancing test, is necessarily fact-specific and does not warrant the categorical invalidation of DAFPA.

Moreover, a due process analysis under *Eldridge* is likewise fact-specific. When it facially invalidated DAFPA, the court of appeals did not consider the extent to which private interests can vary from case to case. While acknowledging that DAFPA authorizes the forfeiture of "vehicles, aircraft, vessels, [and] money involved in certain drug crimes," Pet. App. 2, the court focused its analysis on the potential impact on an individual of the seizure of a car. It thus disregarded the fact that items seized under drug forfeiture laws also include jewelry, weapons, and drug paraphernalia.

The court of appeals also ignored the State's compelling interests in forfeiture, which include both its value as a law enforcement mechanism and the State's need for adequate time to conduct an investigation, evaluate the property, and decide whether to initiate forfeiture. "Both the Government and the claimant have an interest in a rule that allows the Government some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture so that, if not, the Government may return the [property] without formal proceedings." *United States v. $8,850*, 461 U.S. 555, 566 (1983).

ARGUMENT

DAFPA IS NOT FACIALLY UNCONSTITUTIONAL FOR NOT PROVIDING A PRELIMINARY POSTSEIZURE HEARING.

A statute is not facially invalid unless "no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *cf. Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring) (a statute is not facially invalid if it has a "plainly legitimate sweep"). Because the determination of what process is due in a forfeiture case is fact-specific and not amenable to *per se* temporal distinctions, the court of appeals' holding that DAFPA is facially unconstitutional should be reversed. Both the tests of *Barker v. Wingo*, 407 U.S. 514 (1972) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) typically involve case-by-case application and so neither supports facial invalidation of Illinois' deadlines.

A. State Legislatures, Not Courts, Should Set Time Limits for Civil Forfeiture Proceedings.

This Court has long held that because "there is no obvious bright line dictating when a postseizure hearing must occur," *United States v. $8,850*, 461 U.S. 555, 562 (1983), judicial determinations must be done on a case-by-case basis. The Due Process Clause "draws no bright lines around three-day, 10-day or 50-day deprivations of property," *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991), and even "[a] 9-month adjudication is not . . . unconstitutionally lengthy *per se*." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985). This is because "due

process is flexible and calls for such procedural protections as the particular situation demands." *Morissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances").

By contrast, "the drawing of lines . . . is a peculiarly legislative task," *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), and "[m]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than [the Court] ought to undertake." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330 (2006). This is especially true when drawing temporal distinctions. Because due process rights resist quantification, this Court is reluctant to invalidate legislatively-set time limits. *See FDIC v. Mallen*, 486 U.S. 230 (1988); *see also Yakus v. United States*, 321 U.S. 414 (1944); *Opp Cotton Mills, Inc. v. Adm'r*, 312 U.S. 126 (1941); *Phillips v. Comm'r*, 283 U.S. 589 (1931); *Wick v. Chelan Electric Co.*, 280 U.S. 108 (1929); *Campbell v. City of Olney*, 262 U.S. 352 (1923); *Bellingham Bay & British Columbia R.R. Co. v. New Whatcom*, 172 U.S. 314 (1899).

Very rarely has the Court set bright-line time limits that would require wholesale displacement of state procedures. One example is *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), in which the Court held that arrestees must be afforded judicial hearings on probable cause promptly following the "administrative steps incident to arrest"; subsequently, in *County of Riverside v. McLaughlin*, the Court determined

that 48 hours was the outer time limit within which the hearing must be held. 500 U.S. 44 (1991).

Rather than supporting affirmance, *Gerstein* and *Riverside* only reveal that the constitutional grounding for drawing a line in those cases is absent in civil forfeiture. Not only are those cases governed by the Fourth Amendment, but the line drawn in that context is derived from the law of arrest, in which the historical practice of holding prompt hearings to test the validity of detention reflects the special exigency of wrongly depriving persons of liberty. *See Gerstein*, 420 U.S. at 111-15; *Riverside*, 500 U.S. at 56-57 (48-hour limit contemplates time required to complete "administrative steps incident to arrest," as required by common-law practice); *id.* at 61-62 (Scalia, J., dissenting) (describing common law of arrest and collecting citations). The history of forfeiture, traditionally deferential to the government's authority,[4] differs from arrest and contains no support for similar procedural line-drawing. *See $8,850*, 461 U.S. at 565 n.14 (the "loss of liberty . . . may well be more grievous than the deprivation of one's use of property" in forfeiture proceedings).

Despite having no constitutional basis for distinguishing between time periods that comport with due process and those that do not, the court of appeals engaged in line-drawing properly reserved to the legislature. Of all the state drug forfeiture laws that specify time limits for filing forfeiture actions, only a handful incorporate *ex parte* proceedings that resem-

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[4] *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442 (1996); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *The Palmyra*, 25 U.S. (Wheat.) 1 (1827); *see also* Pet. Br. 29-41.

ble *Gerstein* hearings[5] and none mandate adversarial hearings by the 10-day limit urged by respondents.[6] Consequently, absent reversal, the judgment below could lead to judicial scrutiny of many other state forfeiture laws and the federal statute.

B. The Proper Test for the Timeliness of Forfeiture Proceedings Is Contained in *Barker v. Wingo*, Which Requires Case-by-Case Adjudication.

Consistent with the varying demands of due process, this Court has already determined that the timeliness of forfeiture proceedings is properly assessed by the balancing test of *Barker v. Wingo*. As the Court explained in *$8,850*, the concern that property has been deprived without a prompt hearing "mirrors the concern of undue delay encompassed in the right to a speedy trial." *$8,850*, 461 U.S. at 564; *see also United States v. Von Neumann*, 474 U.S. 242 (1986). The *Barker* test, which "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," *id.*, thus mandates the same for determining the timeliness of civil forfeiture proceedings.

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[5] *See* La. Rev. Stat. § 40:2606 (police who seize property without a warrant must apply for a warrant within 72 hours of seizure in an *ex parte* application to a judge demonstrating probable cause); Tenn. Code Ann. § 40-33-204 (prerequisite to a forfeiture proceeding is an *ex parte* application to the court, within 5 days of seizure, for a forfeiture warrant which establishes probable cause).

[6] More than 40 States and the District of Columbia have drug forfeiture laws specifying time limits for the institution of forfeiture proceedings or hearings, ranging from 14 days to a year, though some States place the burden on the owner to first make a claim for the property. *See* Appendix.

In adopting the *Barker* test to assess due process challenges to civil forfeiture proceedings, the Court recognized the infeasibility of specifying time limits to mark the point at which due process rights have been denied. The Court observed in *Barker* itself that such a bright-line rule

> would require this Court to engage in legislative or rulemaking activity . . . . We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

Barker, 407 U.S. at 523. Just as the States and the Federal Government have enacted procedural rules which more narrowly define the right to a speedy trial, so have they enacted specific deadlines for the State to institute forfeiture proceedings. In both instances, the function of line-drawing is squarely within the competence of the political branches.

It is therefore no surprise that in the speedy trial context courts have not invalidated speedy trial laws, but routinely entertain both constitutional and statutory claims. *See, e.g.*, *United States v. Knight*, 2009 U.S. App. LEXIS 6594 (11th Cir. Mar. 25, 2009); *United States v. Williams*, 557 F.3d 943 (8th Cir. 2009). Because legislative speedy trial limits are generally well within the period of delay required to trigger a *Barker* claim,[7] "it will be an unusual case in

[7] The length of time required to trigger a *Barker* speedy-trial analysis is roughly one year. *See United States v. Doggett*, 505

which the time limits of the Speedy Trial Act have been met but the Sixth Amendment right to speedy trial has been violated." *United States v. O'Dell*, 247 F.3d 655, 667 (6th Cir. 2001). Nonetheless, government compliance with the statute does not preclude a defendant from raising Sixth Amendment claims. *Cf. United States v. Dessesaure*, 556 F.3d 83, 85 (1st Cir. 2009) (where indictment was dismissed without prejudice for violation of Speedy Trial Act, Sixth Amendment claim could be viable if defendant were re-indicted). Similarly, if a plaintiff contesting a seizure of property were to raise a due process claim alongside a statutory claim, even a meritorious constitutional claim would not require invalidating the statutory limit altogether.

C. The Court of Appeals Erroneously Applied *Mathews v. Eldridge*, Which Also Requires Case-by-Case Adjudication.

Not only did the court of appeals fail to apply the correct legal test without the benefit of a factual record, its judgment should be reversed for two other reasons. First, *Eldridge*, like *Barker,* must be applied on a case-by-case basis. Second, proper consideration of the public and private interests identified by the Court in *Eldridge* reinforce the conclusion that DAFPA's time limits are not facially invalid.[8]

U.S. 647, 652 n.1 (1992). Lower courts which have applied *$8,850* to the timeliness of forfeiture proceedings have upheld similar delays. *See United States v. Turner*, 933 F.2d 240 (4th Cir. 1991) (16-month delay).

[8] Though *$8,850* and *Von Neumann* squarely support the application of *Barker* to assess delays in forfeiture proceedings, the Court has applied *Eldridge* to cases involving the timeliness of other post-deprivation hearings. *See, e.g.*, *City of Los Angeles*

The fact-bound balancing of *Eldridge* factors is well-illustrated by *Lassiter v. Dep't of Soc. Servs.*, in which the Court recognized that *Eldridge* did not compel a categorical rule requiring courts to appoint counsel for indigents during parental termination proceedings. 452 U.S. 18, 31-32 (1981). The Court observed that "[i]f, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that . . . due process did not therefore require the appointment of counsel." *Id.* at 31. But because "the *Eldridge* factors will not always be so distributed, and since due process is not so rigid," the Court declined to mandate appointed counsel in every case. *Id.* at 31-32.

The Court has similarly applied *Eldridge* in evaluating challenges to the timeliness of post-deprivation hearings. In *FDIC v. Mallen*, the Court considered the constitutionality of procedures allowing a suspended bank official to obtain a post-suspension hearing before the FDIC. 486 U.S. at 231. The federal statute in that case directed the FDIC to hold a hearing within 30 days of a notice of suspension and to issue a decision within 90 days. *See id.* at 244. In concluding that the statute was "not unconstitutional *on its face*," *see id.* at 248 (emphasis added), the Court observed that "the 90-day period is not so long that it will always violate due process. In many cases, perhaps most, it will be justified by an important government interest coupled

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v. David, 538 U.S. 715 (2003) (timeliness of hearing to contest a fine); *Mallen*, 486 U.S. at 230 (timeliness of hearing to contest job suspension); *Barry v. Barchi*, 443 U.S. 55 (1979) (timeliness of hearing to contest suspension of horse license).

with factors minimizing the risk of an erroneous deprivation."[9] *Id.* at 244. *Cf. Barry v. Barchi*, 443 U.S. 55, 66 (1979) (state provision unconstitutional on its face for failing to specify time limits that ensured plaintiffs the opportunity to be heard before "suffer[ing] the full penalty imposed" by license suspension); *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

The Court's guidance in *Mallen* underscores the fact-specific nature of the *Eldridge* inquiry. In assessing the timeliness of a post-suspension hearing, the Court explained, "it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by the delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Mallen,* 486 U.S. at 242.

Even if the *Eldridge* test were applicable to civil forfeitures, the court of appeals committed reversible error by using it to issue a categorical rule of procedure. In doing so, the court did not recognize the varying range of private interests that may be affected by forfeiture; nor did it give hardly any weight to the State's interest in its civil forfeiture proceedings. This error is manifest from a general assessment of the competing private and public interests implicated by DAFPA.

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[9] Lower courts have upheld much longer delays. *See e.g.*, *Jones v. City of Gary*, 57 F.3d 1435 (7th Cir. 1995) (three and six-month delays in receiving post-suspension hearing did not violate due process); *DeVito v. Chicago Park Dist.*, 972 F.2d 851 (7th Cir. 1992) (one-year delay, same).

1. The private interest will differ in each case.

In civil forfeiture cases, the private interests at stake will obviously vary according to the nature of property seized.[10] In one survey of federal and local agencies, cash, cars, boats, planes, jewelry, and weapons comprised 95% of all property seizures, but among "more unusual items" were kangaroos, gymnastic equipment, Kruggerands, and pill machines. G. Patrick Gallagher, Bureau of Justice Assistance, U.S. Dep't of Justice, *Asset Forfeiture: The Management and Disposition of Seized Assets* (1988). Yet the court below ignored the reality that some deprivations of property will be substantially less serious than others in holding that "*anyone* . . . who has been deprived of property" is entitled to an earlier hearing. Pet. App. 10 (emphasis added).

Because the deprivation of property will generally cause less hardship than the loss of a job, it would be irrational to require comparable or greater procedural protections for the seizure of property than what the Court upheld in *Mallen* to protect the suspension of a person's livelihood. *See $8,850*, 461 U.S. at 565 n.14 (noting that a loss of liberty is likely to be "more grievous" than property deprivation). Indeed, some property deprivations are *de minimis*. For example, after applying *Eldridge* to a 27-day delay in receiving a hearing, the Court considered a $134.50 fine, incurred when a plaintiff recovered his car from an impound lot, to be overwhelmed by the city's in-

[10] Even *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), upon which the court of appeals relied in this case, considered only the seizure of cars under a New York City ordinance, and limited its ruling to relief on that basis.

terest in administrative necessity. *David*, 538 U.S. at 716-18.

Though the monetary value of property is significant in evaluating the harm occasioned by delay (as in *David*), it is not controlling: the harm resulting from the seizure of a personal jet, for example, may be less severe than that resulting from the seizure of another person's only car. In short, the severity of the harm suffered is determined by the circumstances. *See, e.g.*, *Eldridge*, 424 U.S. at 340 (observing distinction between benefits "not based upon financial need and welfare "given to persons on the very margin of subsistence); *accord Bennis*, 516 U.S. at 457-58 (Ginsburg, J., concurring) (noting that the Bennises owned more than one car). And though the court below focused on the severity of the deprivation effected by the seizure of cars, the generalization that our society is "highly dependent on the automobile," Pet. App. 8, says nothing about the particular hardship the plaintiffs suffered in this case,[11] and ignores the fact that assets subject to seizure under DAFPA include far more than cars and cash.

2. The State has strong interests in seizing forfeitable property and having sufficient time to assess whether it should be forfeited.

On the other side of the ledger, Illinois possesses a variety of interests that were given no consideration by the court below. These interests were ac-

[11] The court of appeals also emphasized the hardship that the seizure of a car would have on innocent owners. Pet. App. 8. Because of the lack of a factual record, it is unclear whether any of the plaintiffs in this case are innocent owners; the fact that some of them had their criminal charges dropped, or had not been charged, does not demonstrate actual innocence.

counted for, however, in the legislative balancing that produced DAFPA.

All 50 States and the federal government utilize forfeiture as a "time-honored method to prevent illegal activity." *General Motors Acceptance Corp. v. United States*, 286 U.S. 49 (1932). And in particular, drug forfeiture laws like DAFPA provide the State with the critical ability to disrupt the organized drug trade by attacking its infrastructure. *See* Howard E. Williams, Asset Forfeiture: A Law Enforcement Perspective 11-12, 22 (2002). When enacting DAFPA, the Illinois General Assembly found that civil forfeiture would "have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of [controlled] substances within this State." 725 Ill. Comp. Stat. 150/2.

In furtherance of this legislative purpose, DAFPA provides the police with 52 days to decide whether to refer the seizure of property to the State's Attorney for review. *Id.* § 150/5. This initial period enables the police to conduct an investigation in which the property can be appraised and ownership ascertained, along with any encumbrances or liens. And because sophisticated criminal enterprises often hide their assets through elaborate financial mechanisms, "law enforcement agencies face major barriers in detecting and identifying the real ownership and sources of investment." Frank R. Booth, Bureau of Justice Assistance, U.S. Dep't of Justice, *Asset Forfeiture: Public Record and Other Information on Hidden Assets* (1988); *see also* Williams, Asset Forfeiture: A Law Enforcement Perspective, *supra*, at 224 ("Complex forfeiture cases often require the investigator to unravel complicated financial schemes."); *see also* 18 U.S.C. § 983(a)(1)(A)(v) (allowing an exten-

sion of time for providing notice where the identity of the owner cannot be ascertained).

Moreover, though many law enforcement agencies engage in "pre-seizure planning," sometimes police officers "must decide whether to seize property before all the facts of the case are available." Williams, Asset Forfeiture: A Law Enforcement Perspective, *supra*, at 223. Once the asset is seized, however, the burden falls on law enforcement agencies to hire contractors for appraisal and to store and manage the seized asset to preserve its value. *See id.* at 246-256; Gallagher, *Asset Forfeiture: The Management and Disposition of Seized Assets*, *supra*. Because of resource constraints, smaller seizing agencies with fewer resources may decide to turn over a forfeiture case to federal authorities. *See State v. Gray*, 21 S.W.3d 847, 851 (Mo. App. 2000). Federal guidelines give state and local agencies 30 days to make this decision. Dep't of Treasury, *Guide to Equitable Sharing*, *supra*, at 7.

A postseizure investigation may elicit facts that result in the release of property. For example, it may indicate that the property was not used in violation of the law, or that the person whose property was seized was an innocent owner. *See* 725 Ill. Comp. Stat. 150/8 (innocent owner exception); *see also* 28 C.F.R. § 8.6 (authorizing the agent in charge to "quick release" property if the owner is innocent or when release "would be in the best interest of justice and the Government"). Additionally, if the property is appraised below a threshold value, it may be returned because it is a financial liability to the State. *See* Williams, Asset Forfeiture: A Law Enforcement Perspective, *supra*, at 244 (listing U.S. Department of Justice minimum threshold value guidelines);

Dep't of Treasury, *Guide to Equitable Sharing*, *supra*, at 8. Conversely, because of the close connection between civil forfeiture actions and criminal proceedings, the postseizure investigation may reveal links to other criminal investigations or leads to other persons or property that may be involved in criminal activity.

The State's Attorney has 45 days to decide whether to file forfeiture proceedings once she is notified of a property seizure by the police. 725 Ill. Comp. Stat. 150/6. During this time, the prosecuting attorney must review the facts of the case and decide whether probable cause for forfeiture exists, and if it does, whether it is worthwhile to pursue forfeiture. This period also provides sufficient time to allow the prosecuting attorney to informally resolve claims. *See infra* page 24. Subsequently, if the attorney decides to initiate forfeiture, then depending on the value of the property the prosecutor is either required to initiate proceedings by filing a verified complaint, 725 Ill. Comp. Stat. 150/9 (for property exceeding $20,000), or send notice to all interest holders. *Id.* § 150/6(A) (for property less $20,000). In either event, these time periods are reasonable for the preparation of a legal case.

The decision to pursue forfeiture "is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win . . . but also to serve the cause of justice." *Cheney v. United States Dist. Court*, 542 U.S. 367, 386 (2004). Consequently, as in *Mallen*, there is a public interest "in a correct decision [that] counsels . . . against any constitutional imperative that might require overly hasty decisionmaking." *Mallen*, 486 U.S. at 243. Because the decision "is a serious one"

that "may involve complex issues," *id.* at 244, a prosecutor will be less likely to seek forfeiture in certain cases if she is able to make a considered decision following an investigation. *Cf. $8,850*, 461 U.S. at 566 ("[D]elay can favor both the claimant and the Government."). The interest in decisional accuracy likewise applies to the judge hearing the merits of the forfeiture case. A hearing that is held too early risks prejudicing the interests of both the State and the property owner.

D. DAFPA Satisfies Due Process.

DAFPA fulfills the essential mandate of due process—providing a meaningful opportunity to be heard "at some time before a State finally deprives a person of his property interests." *Parratt v. Taylor*, 451 U.S. 527, 540 (1981). Due process does not require *in addition*, as the court of appeals envisioned, some other "mechanism to promptly test the validity of the seizure" or "some . . . mechanism to test the validity of the retention."[12] Pet. App. 7, 10. These mechanisms would either duplicate the purpose of the forfeiture hearing or else are irrelevant to the due process analysis.

In *$8,850*, the Court noted the existence of interim avenues of relief under federal law. These include the filing of an equitable action compelling the

[12] To the extent that "the speed with which the civil forfeiture proceeding itself is begun" is "a different question" from "whether there should be some mechanism to promptly test the validity of the seizure," Pet. App. 7, the latter question is not contemplated by this Court's due process jurisprudence. Moreover, the validity of *seizure* already may be tested under 725 Ill. Comp. Stat. 5/114-12 ("A defendant aggrieved by an unlawful search and seizure may move the court for the return of property.").

filing of a forfeiture action or return of seized property, informally asking the seizing agency to refer the matter to a prosecuting attorney, and filing a motion under the Federal Rules of Criminal Procedure for a return of the property. *See $8,850*, 461 U.S. at 569. The option to file a petition for remission also furnished an additional means of expediting the return of property by administrative review. *See Von Neumann*, 474 U.S. at 249 n.8. None of these options were material to the speed of the forfeiture proceedings, however. Even though property owners utilized remission in 90% of customs seizure cases, the Court explained in *Von Neumann* that "[i]mplicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car." *Id.* at 249 & n.8.

Just as "remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required," *id.* at 250, other mechanisms that would afford interim relief are not constitutionally necessary, even though other remedies are in fact available in Illinois and the other States. *See* Pet. Br. 60-65 (citing caselaw and statutes); Edgeworth, Asset Forfeiture: Practice and Procedure, *supra*, at 58, 72-73 & tbl. 4-1, 100 (describing remedial mechanisms of bond, petition for remission, and hardship provision).

Indeed, as petitioner describes, it is the practice of the State's Attorney to give property owners notice that attorneys in her office are available to discuss the return of property; "meetings frequently occur, and as a result, the State's Attorney either settles or rescinds the majority of the administrative forfeiture

cases." Pet. Br. 64 n.6; Pet. 13. Like remission proceedings, this avenue conserves judicial resources and "suppl[ies] both the Government and the claimant a way to resolve a dispute informally rather than in judicial forfeiture proceedings." *Von Neumann*, 474 U.S. at 250; *see $8,850*, 461 U.S. at 565-66.

For this reason, the court of appeals disregarded the teachings of *$8,850* and *Von Neumann* in remanding to the trial court 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." Pet. App. 10. While such remedies may be sensible as a matter of policy, it is for the legislature and not the courts to implement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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MAY 2009

APPENDIX

State Statutory Time Limits for the Initiation of Forfeiture Proceedings

Alaska Stat. § 17.30.116(a)

Notice of pending forfeiture action must be given within 20 days of seizure.

Ariz. Rev. Stat. §§ 13-4308B, -4311D

Prosecuting attorney must file within 60 days of seizure; interest holder may file a property claim within 30 days of notice of seizure.

Ark. Code Ann. § 5-64-505(g)(2)(A)

Prosecuting attorney must file within 60 days of receiving report from police.

Cal. Health & Safety Code §§ 11488.2, 11488.4

Police must refer seized property to prosecuting attorney within 15 days, and attorney must file "as soon as practicable" or within one year, but claimants may move for return of property.

Col. Rev. Stat. § 16-13-505(2)(a)

Prosecuting attorney must file within 60 days of seizure unless he can show "good cause" for filing later.

Conn. Gen. Stat. § 54-36h

Prosecuting attorney must file within 90 days of seizure.

Del. Code Ann. § 4784(j)

Seized property automatically forfeited to the State unless claimant petitions the court within 45 days of notice.

D.C. Code § 48-905.02

Interest holder has 30 days from notice of seizure to file a claim.

Fla. Stat. Ann. § 932.703(2)(a)

If requested, hearing must be held 30 days after seizure "or as soon as practicable thereafter."

Ga. Code Ann. § 16.13-49

Police must report seized property to prosecuting attorney within 20 days, and attorney must file within 60 days of seizure.

Haw. Rev. Stat. § 712A-10

Interest holder must file claim or petition for remission within 30 days of notice of seizure; prosecuting attorney has 45 days from receipt of notice of the claim filing to pursue forfeiture action or 60 days to rule on petition for remission.

Idaho Code Ann. § 37-2744

Prosecuting attorney must file within 30 days of notice.

725 Ill. Comp. Stat. 150/5, 150/6, 150/9

Police must refer property seizure to prosecuting attorney within 52 days; if property is worth more than $20,000, prosecuting attorney must file within 45 days of receiving notice, and if worth less, within 90 days.

Ind. Code Ann. § 34-24-1-3

Prosecuting attorney must file within 180 days of seizure or 90 days from receiving written demand from claimant.

Iowa Code Ann. § 809A.8

Prosecuting attorney must issue notice of pending forfeiture within 90 days of seizure, and file a judicial action 90 days after issuing notice of pending forfeiture; if interest holder claims exemption, prosecuting attorney may delay filing judicial action for 180 days.

Kan. Stat. Ann. § 60-4107

Police must notify interest holders within 30 days of seizure and notify prosecuting attorney within 45 days; prosecuting attorney has 15 days from receiving notice to file.

La. Rev. Stat. § 40:1611

Owner may petition the court within 10 days of warrantless seizure of property and obtain a hearing within 30 days of the court's "show cause" order.

Me. Rev. Stat. Ann. §§ 5822-5823

No specified time limits except for vehicle seizures, in which case police must report such seizure to a prosecuting attorney within 21 days, and the prosecuting attorney must file forfeiture petition within 21 days of report.

Md. Code Ann. § 12-304(a)-(c)

Prosecuting attorney must file within 90 days of seizure, or if a vehicle is seized, within 45 days.

Mass. Gen. Laws ch. 94, § 47(d)

No specified time limits for filing, but upon filing a court will order notice sent to owners and must hold a hearing within 2 weeks of notice.

Mich. Comp. Laws § 333.7523(1)(c)-(d)

Property owner must file a claim and post bond within 20 days of seizure or else the property is forfeited.

Minn. Stat. Ann. § 609.5314

Notice must be given "within a reasonable time" and a property owner must file a demand for judicial determination within 60 days of receiving notice.

Miss. Code Ann. § 41-29-177(1)

Prosecuting attorney must file within 30 days of seizure.

Mo. Rev. Stat. § 513.607

Police must notify prosecuting attorney within 4 days of seizure, and prosecuting attorney must file proceeding within 10 days of receipt of notice.

Mont. Code Ann. § 44-12-201

Police officer must file within 45 days of seizure.

Neb. Rev. Stat. § 28-431(4)

Police officer must file within 10 days of seizure, and a hearing must be held between 30 and 90 days after seizure.

Nev. Rev. Stat. § 79.1171

Police officer must file within 60 days of seizure.

N.H. Rev. Stat. Ann. § 318-B:17-b(II)

Police must send notice within 7 days of seizure, and prosecuting attorney must file within 60 days of seizure.

N.J. Rev. Stat. § 2C:64-1

Prosecuting attorney must file within 90 days of seizure.

N.M. Stat. Ann. § 31-27-5

Prosecuting attorney must file within 30 days of seizure.

N.C. Gen. Stat. § 75D-5(f)

Prosecuting attorney must file within 30 days of receiving notice of seizure from police.

Or. Rev. Stat. §§ 475A-055, -075

Police must provide notice within 15 of seizure, property owners may file a claim within 21 days of receiving notice, and a prosecuting attorney must file within 15 days of receiving the claim or within 30 days of seizure.

R.I. Gen. Laws § 21-28-5.04.2

Police must report seizure to a prosecuting attorney within 30 days of seizure; if property is worth more than $20,000, the prosecuting attorney must file within 20 days of receiving the report.

S.D. Codified Laws §§ 34-20B-76, -84 to -86

In cases of warrantless seizure, prosecuting attorney must file within 30 days of seizure.

Tenn. Code Ann. §§ 40-33-107, -206, -207

Owner must file a claim within 30 days of receiving notice and a court will schedule a hearing date with-

in 30 days of the claim, but that hearing date is not mandatory; for vehicles, owners may file claim within 15 days of receiving notice and a court will schedule a hearing date within 45 days of the claim.

Tex. Code Crim Proc. Ann. art 59.04(a)

Prosecuting attorney must file within 30 days of seizure.

Utah Code Ann. § 24-1-4

Prosecuting attorney must file within 60 days of seizure.

Vt. Stat. Ann. § 4243(a)

Prosecuting attorney must file within 14 days of seizure.

Va. Code Ann. § 19.2-386.3

Prosecuting attorney must file within 90 days of seizure.

Wash. Rev. Code § 69.50.505(2)-(5)

Notice must be served on owner within 15 days; if owner files a claim within 45 days of notice, he "shall be afforded a reasonable opportunity to be heard."

W. Va. Code Ann. § 60A-7-705

Prosecuting attorney must file within 90 days of seizure.

Wisc. Stat. Ann. § 961.555(2)(a)

Prosecuting attorney must file within 30 days of seizure.