

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 OF THE INSTITUTE FOR JUSTICE AS
AMICUS CURIAE IN SUPPORT OF RESPONDENT**

—◆—
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INTEREST OF THE *AMICUS CURIAE*¹

The Institute for Justice (“IJ”) is a nonprofit, public-interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ’s mission is to protect property rights, both because an individual’s control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. The aggressive use of civil forfeiture by governmental organizations poses a grave threat to those rights. It is for this reason that IJ participated as *amicus curiae* in both *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) and *Bennis v. Michigan*, 516 U.S. 442 (1996). The strong pecuniary interest that law-enforcement agencies have in maximizing forfeiture proceeds has both distorted police and prosecutorial practices and, in some cases, led to seizures that lack probable cause. IJ therefore has an interest in the development of a rule of law that recognizes the importance of private property in our constitutional scheme and helps to curb those abuses.



¹ This brief is filed pursuant to the written blanket consents on file with this Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT

I. The Illinois Drug Asset Forfeiture Procedures Act

Illinois, like many other states, authorizes government officials to seek the forfeiture of personal and real property related to a drug violation. The Illinois Drug Asset Forfeiture Procedures Act (“DAFPA”) governs the process under which drug forfeitures take place. 725 ILL. COMP. STAT. 150/1.

Under DAFPA, law-enforcement officers may seize personal property they believe was involved in a drug crime. These seizures often take place without the officer first securing a warrant and are based solely on the officer’s suspicion that the property in some way helped to facilitate a crime. The law-enforcement agency must thereafter notify the State’s Attorney of the seizure within 52 days, along with the circumstances surrounding the seizure and the estimated value of the seized property. 725 ILL. COMP. STAT. 150/5. What happens next depends on the nature and value of the seized property. If the seized property has an estimated value of greater than \$20,000, or if it is real property, then the State’s Attorney must institute judicial-forfeiture proceedings within 45 days of receiving notice. 725 ILL. COMP. STAT. 150/6. If the seized property is personal property with an estimated value of less than \$20,000, though, then the State’s Attorney must give persons with an interest in the property notice of the pending forfeiture within 45 days. The owner then

has another 45 days to file a verified claim to the property with the State's Attorney. If the owner files a claim and posts a bond, the State's Attorney must file judicial-forfeiture proceedings within 45 days. *Id.*

Thus, the amount of time that can pass between the time of seizure and the filing of judicial forfeiture proceedings depends largely on the nature of the property. For property worth more than \$20,000, up to 97 days can elapse under DAFPA between the seizure of the property and the filing of judicial forfeiture proceedings. For property worth less than \$20,000, it could be as much as 187 days, although an owner may reduce that time to 142 days by immediately filing a verified claim.

Even after the state files a forfeiture proceeding, there is still a delay before an owner can get his day in court. Once the state files a verified forfeiture complaint, the property owner has 45 days to file an answer. Once that answer is filed, a hearing is supposed to take place within 60 days—that is, unless the court delays the proceeding on a showing of good cause. 725 ILL. COMP. STAT. 150/9. The net effect is that resolution of a forfeiture proceeding can take months, if not years, and during that time the owner of the seized property is denied its use. DAFPA provides the property owner with no way to test the validity of the initial warrantless seizure or the property's continued detention for the duration of the proceedings.

II. The Proceedings Below

On November 22, 2006, Respondent property owners brought a class action lawsuit against the city of Chicago, its police superintendent, and the State's Attorney of Cook County, Illinois. J.A. 29a. In that complaint, Respondents alleged that the Chicago Police Department had seized their personal property and that, because DAFPA does not provide for a prompt preliminary post-seizure hearing, they had been deprived of their property for months with no way to seek its return. J.A. 30a-35a. They asked the district court to declare that the Due Process clause requires a prompt preliminary post-seizure hearing where the state must demonstrate probable cause to continue detaining the property for the duration of the proceedings. J.A. 36a.

The district court soon thereafter dismissed the complaint on the basis that twelve years earlier, the United States Court of Appeals for the Seventh Circuit, in *Jones v. Takaki*, had interpreted *United States v. Von Neumann*, 474 U.S. 242 (1986) to hold that "the Constitution does not require any procedure prior to the actual forfeiture proceeding." 38 F.3d 321, 324 (7th Cir. 1994). But on appeal, the Seventh Circuit in this case reversed the district court, overturned its prior holding in *Jones*, and held that a preliminary post-seizure/pre-forfeiture hearing was constitutionally required under the three-part test laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976).



SUMMARY OF ARGUMENT

Private-property rights form the foundation of a free society. The right to acquire and possess property is not only a natural consequence of human liberty, but is one of the primary foundations of our constitutional republic.

Civil-forfeiture laws represent one of the most serious assaults on private-property rights in the nation today. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, this Court said that Due Process required no pre-seizure hearing for personal property in part because the government officials in charge of seizures generally did not have a pecuniary motive to their actions. 416 U.S. 663, 679 (1974). Since forfeiture proceeds went into general treasury funds, law enforcement had little reason to seize in an attempt to fill their agencies' coffers.

But subsequent changes in how civil-forfeiture statutes distribute forfeiture proceeds have fundamentally changed the incentives facing law-enforcement agencies. Amendments to both state and federal forfeiture laws after *Calero-Toledo* let law-enforcement agencies keep the proceeds from property forfeitures. In Cook County, Illinois, for instance, the seizing law-enforcement agency is entitled to 65% of all forfeiture proceeds while the Office of the State's Attorney receives another 25%.

This change in incentives has led to an explosion in civil-forfeiture activity, as law-enforcement agencies seek to seize as much as possible. Often, those

incentives have led to abuses where law-enforcement agencies seize and forfeit property with little or no connection to crime. Part of the reason for these strong-arm tactics is that, because of the cost, difficulty, and amount of time that it takes to successfully challenge the seizure of one's property, many innocent property owners fail to challenge the seizure or instead settle with law enforcement. In far too many cases the government will end up seizing and retaining property to which it has no right.

The unchecked discretion that seizing agencies have too long enjoyed is an affront to the protections that the Constitution affords to private-property rights. To guard against such abuses, the Due Process clause mandates judicial review of the seizure decisions. While pre-seizure hearings for personal property may be impractical in some instances, those difficulties evaporate as soon as the property is in the government's hands. At that time, the strong respect for individual property rights should require that courts promptly review whether the government had a valid basis for seizing the property in the first place.



ARGUMENT

I. Public Officials, Like Private Citizens, Are Self-Interested Actors

Self-interest is a universal human attribute. All people work to better their position or condition. The purpose of the law, through prohibitions on the use of

force and fraud, is to channel individual self-interest to productive ends. The result is that, in the private sphere of human activity, individuals must bargain with one another. By directing individuals to appeal to others' self-interest, the law limits the range of possible transactions to those that benefit both parties. More than two centuries ago, Adam Smith best explained what drives this broad cooperation:

It is not from the benevolence of the butcher, the brewer or the baker, that we expect our dinner, but from their regard to their own self interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.²

But just as private citizens are motivated by self-interest, so too does it motivate government officials.³ Whereas the private citizen might seek more wealth, government officials might seek out a larger budget, increased benefits and prestige, and more power to pursue their preferred policy agenda.⁴ The difference between the public and private spheres, however, is

² ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 7 (Robert Maynard Hutchins ed., Encyclopedia Britannica 1952) (1776).

³ JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962) (discussing the universality of the self-interest axiom and its implications for public policy decision-making); *see also* JAMES BUCHANAN, *CONSTITUTIONAL ECONOMICS* 37-38 (1991).

⁴ WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 38 (1st Paperback Print ed. 2007) (1971).

that where the private citizen must *persuade* to achieve his ends, the government official can employ force. It is therefore a constant threat that those in positions of power will use that force to serve their own self-interest at the expense of the broader populace. This concern reaches its zenith when government officials stand to benefit themselves or their agencies by seizing individuals' private property.

The Framers recognized this natural proclivity and drafted the Constitution to act as an institutional restraint on government action:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. . . . A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.⁵

It is because governmental actors can use coercion in pursuit of their self-interest that the Framers constrained their actions through clearly defined and strictly enforced constitutional rules. The constitutional requirement of due process is one of those rules, an "auxiliary precaution" that mandates that government actions be accompanied by certain procedural safeguards so as to protect individuals from unwarranted overreaching.

⁵ THE FEDERALIST NO. 51 (James Madison).

This Court has also recognized that the Constitution carefully guards against self-interested government action. For instance, in *Young v. United States ex rel. Vuitton Et Fils S.A.*, this Court concluded that prosecution by a private attorney whose client has a financial interest in the matter was improper because it “creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.”⁶ And while a state’s impairment of its contract with a private party may be constitutional under the Contracts Clause if it is reasonable and necessary, this Court said that “complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.”⁷

Unfortunately, however, this Court’s modern civil-forfeiture jurisprudence has failed to account for the self-interest that motivates both private and public actors alike. In *Calero-Toledo* this Court held, in part, that Puerto Rican authorities were not constitutionally required to provide notice and a hearing before seizing a yacht for forfeiture.⁸ In so doing, this Court distinguished its earlier ruling in *Fuentes v. Shevin*, where it held that due process required that a private party, before repossessing goods, must give notice and the opportunity for a

⁶ 481 U.S. 787, 811 (1987).

⁷ *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977).

⁸ 416 U.S. 663 (1974).

hearing.⁹ The *Calero-Toledo* Court reasoned that Puerto Rico did not have to provide any prior notice or hearing because “unlike the situation in *Fuentes*, seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes.”¹⁰

But as the Founders recognized and public-choice theory demonstrates, the government official is just as self-interested as the private party. There was no difference in character that distinguished the private repossessor in *Fuentes* from the government official in *Calero-Toledo*, but a difference in the incentives that each faced. The private parties in *Fuentes*, creditors to conditional sales contracts, had a direct pecuniary interest in applying for writs of replevin even when not entitled to the items. After all, the creditor could calculate that, in some instances, the debtor would not contest the seizure, leaving the creditor with a windfall. Conversely, the Puerto Rican officials in *Calero-Toledo* had no similar motivations. Any property that the officials seized, if ultimately forfeited, would be remitted to the Commonwealth. Since the officials would not share in any proceeds, they had no incentive to seize items indiscriminately.

⁹ 407 U.S. 67 (1972).

¹⁰ 416 U.S. at 479.

That neutral decisionmaking no longer exists. As discussed below, changes in the law since *Calero-Toledo* have given law-enforcement officials a pecuniary interest in civil-forfeiture proceeds that rivals the incentives that the private actors in *Fuentes* faced. The Court's jurisprudence needs to reflect that fundamental change. One measure to help curb the threat of executive overreach is a prompt judicial check in the form of a preliminary post-seizure hearing.

II. The Changing Landscape of Civil Forfeitures and Its Consequences

A seismic shift in civil forfeiture has occurred in recent years. Beginning in the early 1980's, federal and state governments began to let law-enforcement agencies keep a percentage of the forfeiture proceeds that they had seized. In so doing, the legislature created a powerful incentive in law enforcement to maximize their seizure of forfeitable assets. Not surprisingly, the amount of forfeiture activity has exploded as a result. But in so doing, the federal and state forfeiture systems have distorted police and prosecutor priorities, created agencies whose funding from outside the legislative process leaves them with little accountability, and led to systematic abuses.

A. The Shift in Law-Enforcement Incentives

For most of American history, the proceeds from forfeitures went not to the law-enforcement agencies

responsible for the seizures, but to the government's general fund. While the federal government made limited use of civil forfeiture during Prohibition, its first use in combating the trade in illegal drugs came as part of the Comprehensive Drug Abuse and Prevention Act of 1970.¹¹ The Act authorized federal officials to seize and seek the civil forfeiture of drugs, the equipment and raw materials used to make them, and the conveyances that were used to transport them.¹² But once the property had been forfeited, the Attorney General had to deposit any net proceeds into the Treasury's general fund.¹³

The radical change in federal law-enforcement incentives took place in 1984 when Congress amended portions of the Comprehensive Drug Abuse and Prevention Act.¹⁴ Those amendments created the Assets Forfeiture Fund into which the Attorney General was to deposit all net forfeiture proceeds for use by the Department of Justice and other federal law-enforcement agencies. Originally the statute allowed the government to use Fund proceeds for a relatively limited number of purposes, such as paying for forfeiture expenses, giving awards for information

¹¹ Pub. L. No. 91-513, 84 Stat. 1236.

¹² § 511, 84 Stat. at 1277.

¹³ Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301, 92 Stat. 3768, 3778.

¹⁴ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

that led to forfeitures, and paying for remissions or mitigations.¹⁵ Furthermore, the 1984 amendments said that any forfeiture proceeds exceeding \$5 million that were left in the Fund at the end of the fiscal year were to be deposited in the Treasury’s general fund.¹⁶ But subsequent amendments both eliminated the \$5 million cap and dramatically broadened the scope of what expenses the government could pay for with forfeited funds.¹⁷ The net effect is that, after the 1984 amendments, federal agencies were able to retain and spend forfeiture proceeds—subject only to very loose restrictions—that they would have had to turn over to the Treasury previously.¹⁸

¹⁵ § 310, 98 Stat. at 2052.

¹⁶ § 310, 98 Stat. at 2053.

¹⁷ Some of these expenses included “equipping for law enforcement functions any Government-owned or leased vessel, vehicle, or aircraft” and paying the “overtime salaries, travel, fuel, training, equipment, and other similar costs of State or local law enforcement officers that are incurred in a joint law enforcement operation with a Federal law enforcement agency . . . participating in the Fund.” 28 U.S.C. §§ 524(c)(1)(F)(i), (c)(1)(I) (2009).

¹⁸ In 2000, the Civil Asset Forfeiture Reform Act amended various provisions of federal forfeiture law. Pub. L. No. 106-185, 114 Stat. 202 (2000). The Act, among other things, shifted the burden of proof in a forfeiture hearing from the claimant to the government, eliminated the requirement that claimants post a cost bond before being able to contest a civil forfeiture in court, and provided representation for indigent claimants under certain circumstances. It did not, however, change how forfeiture proceeds are distributed or otherwise ameliorate the pecuniary interest law-enforcement agencies have in civil forfeitures.

Many states have followed suit by amending their civil-forfeiture laws to give law-enforcement agencies a direct share of forfeited proceeds. At last count, law-enforcement agencies in forty-one states receive some or all of the civil-forfeiture proceeds they seize.¹⁹ And agencies can be very protective of their position. In Nebraska, for instance, the state constitution requires that half of the moneys collected from state forfeiture proceedings go to schools.²⁰ To avoid sharing, law-enforcement agencies instead asked federal prosecutors to “adopt” their seizures. By forfeiting under federal law, the agency could keep 80% of the proceeds, the federal government would retain the other 20%, and the schools would get nothing. Not surprisingly, when a state senator introduced an amendment to require that those funds also be shared with schools, both state and federal law-enforcement officials fought tooth and nail against it.²¹

The reluctance to share forfeiture proceeds has even led to illegality. In November 2000, Utahns passed Initiative B, which required forfeiture proceeds to be deposited into the state’s Uniform School Trust Fund. But prosecutors in three counties ignored the law and diverted nearly a quarter of a

¹⁹ INSTITUTE FOR JUSTICE, *POLICING FOR PROFIT* (forthcoming 2009).

²⁰ NEB. CONST. art. VII, § 5(2).

²¹ Patrick Strawbridge, *Police Oppose Drug-Cash Plan*, THE OMAHA WORLD-HERALD, May 1, 1999, at 57.

million dollars into their own accounts. It was only after the threat of a lawsuit that the prosecutors capitulated.²² The police and prosecutors later persuaded the legislature to nullify the voter-approved initiative so that all forfeiture proceeds were again directed to law enforcement.

Like the federal government and other states, Illinois has amended its forfeiture laws to give state and local law enforcement the lion's share of any seized and forfeited property. The Illinois legislature in 1971 passed the Illinois Controlled Substances Act,²³ which permitted state law enforcement to seize property that was substantially similar to the types of property that federal officials could seize under the Comprehensive Drug Abuse and Prevention Act of 1970. Under the Illinois Controlled Substances Act, all proceeds from the sale of the forfeited property, minus the expenses incurred in the seizure, maintenance of custody, and forfeiture and sale of the property, were to be transmitted to the State of Illinois.²⁴ Illinois

²² Patty Henetz, *Prosecutors, Police Reluctantly Comply With Asset Seizure Law*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, July 17, 2003; see also 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 7.02(2) (2008) (discussing conspiracy between Missouri law enforcement and DEA to thwart state law requiring judicial approval before federal government may adopt a state forfeiture case).

²³ Ill. Pub. Act 77-757 (1971) (codified at 720 ILL. COMP. STAT. 570/100).

²⁴ Before the passage of DAFPA, the other major Illinois anti-drug statute, the Illinois Cannabis Control Act, 720 ILL.

(Continued on following page)

amended a number of controlled-substance laws in 1990 through the passage of the Drug Asset Forfeiture Procedures Act (“DAFPA”).²⁵ DAFPA harmonized forfeiture across Illinois’ various anti-drug statutes by deleting the previous requirement that all net forfeiture proceeds be remitted to the state. Instead, DAFPA mandated that the Director sell all forfeited property—other than contraband and what was transferred to the enforcement agency for its enforcement efforts—and turn over ninety percent of the proceeds to law enforcement: Sixty-five percent to the police agencies that “conducted or participated in the investigation resulting in the forfeiture,”²⁶ and twenty-five percent to the Office of the State’s Attorney.²⁷ Pursuant to DAFPA, forfeited proceeds shall be used for “the enforcement of laws governing cannabis and controlled substances.”²⁸

COMP. STAT. 550/5.1, also required Illinois officials to send all net forfeiture proceeds to the state general fund.

²⁵ Ill. Pub. Act 86-1382 (1990) (codified at 725 ILL. COMP. STAT. 150/1).

²⁶ Ill. Pub. Act 86-1382 at § 16.

²⁷ For counties with populations of less than three million, this money is split between the Office of the State’s Attorney that instituted the forfeiture and the Office of the State’s Attorneys Appellate Prosecutor. 720 ILL. COMP. STAT. 570/505(g)(2)(i).

²⁸ 720 ILL. COMP. STAT. 570/505(g)(1), (2)(i).

B. Law-Enforcement Retention of Civil-Forfeiture Proceeds Has Led to “Policing for Profit”

As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.²⁹

As one might expect, the new incentives facing law enforcement in the wake of changes to federal and state drug laws have led to an explosion of forfeiture activity. But in spurring this meteoric rise in asset seizures, these laws have created agencies that too often are more committed to securing forfeiture revenues than the fair and impartial administration of justice. As the former chief of the Asset Forfeiture and Money Laundering Offices stated, “we had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws.”³⁰ In addition to distorting police priorities, the change in incentives has also led to the kind of repeated abuses that demonstrate the need for judicial scrutiny.

²⁹ *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.)

³⁰ Richard Minter, *Ill-Gotten Gains*, 25 REASON 32, 34 (Aug./Sept. 1993) (quoting Michael F. Zeldin, former Chief, Department of Justice Asset Forfeiture & Money Laundering Offices).

One consequence of the changes in the federal and state forfeiture laws is the dramatic increase of forfeiture activity that took place in their wake. At the federal level, proceeds in the Department of Justice Assets Forfeiture Fund, which amounted to only \$27 million in 1985, swelled almost twentyfold to \$556 million by 1993.³¹ Since that time, the total amount of civil forfeiture has only continued to increase. By fiscal year 2008, the federal Assets Forfeiture Fund and Seized Asset Deposit Fund together held more than \$3.1 billion.³²

Mirroring the federal experience, the amount of civil forfeiture activity within Illinois has grown dramatically since DAFPA was adopted in 1991. In a survey called the Law Enforcement Management and Administrative Statistics (LEMAS), the Department of Justice asks state and local law-enforcement agencies about the revenue they receive from state-level civil-forfeiture proceedings. In 1993, the first LEMAS survey conducted after DAFPA's passage reported that Illinois law-enforcement agencies had collected \$6.9 million in proceeds from state and local civil-forfeiture actions. In a mere four years, that

³¹ U.S. DEP'T OF JUSTICE, ASSET FORFEITURE FACT SHEET (1993).

³² U.S. DEP'T OF JUSTICE, ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENT FISCAL YEAR 2008, REP. NO. 09-19 AT 6 (2009).

number had grown by over 400 percent to over \$33 million.³³

As state and federal law gave law-enforcement agencies permission to retain a sizable percentage of what they seized, the money flowing into their coffers from asset forfeiture continued to grow. Some state and local legislatures, reacting to this new revenue stream, have reduced appropriations to law enforcement by the amount of expected civil forfeitures to free up money for other programs.³⁴ For law-enforcement agencies whose budgets have been cut,

³³ BUREAU OF JUSTICE STATISTICS, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 1997: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS (1999).

³⁴ Replacing appropriations with asset-forfeiture proceeds also subverts legislative oversight. It is through appropriating money that the legislature can exercise a degree of control over agency action. If an agency is performing poorly or focusing on the wrong law-enforcement priorities, the legislature can punish it through reduced expenditures. Having a large percentage of an agency's budget come from forfeiture proceeds—a funding stream that is immune to the legislative process—breaks this link. *See* JUSTICE RESEARCH AND STATISTICS ASSOCIATION, MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE-YEAR REVIEW 1988-1992 at 9 (1993) (“Asset seizures play an important role in the operation of [multijurisdictional drug] task forces. One ‘big bust’ can provide a task force with the resources to become financially independent. Once financially independent, a task force can choose to operate without federal or state assistance.”).

securing continued forfeiture proceeds has become a paramount law-enforcement objective.³⁵

Not surprisingly, a substantial number of law-enforcement agencies are now dependent on civil-forfeiture proceeds and view civil forfeiture as a necessary source of income. In a survey of more than 1,400 law-enforcement executives, nearly 40% of police agencies reported that civil-forfeiture proceeds were a *necessary* budget supplement.³⁶ This dependency is also present at the federal level, where the Department of Justice in the past has urged its lawyers to increase their civil-forfeiture efforts so as to meet the Department's annual budget targets.³⁷ The resulting pressures have not only skewed agency decisions about what laws to enforce most vigorously, but they have also tilted law-enforcement practices in ways designed to maximize civil-forfeiture proceeds.

One consequence of giving law enforcement a pecuniary interest in forfeiture proceeds is that it can cause them to over-enforce crimes that carry the

³⁵ See Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113 (2007).

³⁶ John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 179 (2001).

³⁷ EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, U.S. DEPT' OF JUSTICE, 38 UNITED STATES ATTORNEYS' BULLETIN 180 (1990) ("Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.").

possibility of forfeiture to the neglect of other law-enforcement objectives. This makes basic economic sense; as the return to enforcing certain laws increases, one would expect law-enforcement agencies to devote a higher percentage of their resources to those aims.³⁸ This is not simply theory: One study shows that in states where agencies get to keep the majority of forfeiture proceeds, drug arrests—which often have the potential of a related civil forfeiture—constitute a significantly higher percentage of all arrests.³⁹

Furthermore, law enforcement's pecuniary interest skews not only which laws are enforced, but how they are enforced as well. Often times, agencies will enforce the law with an eye to maximizing forfeiture proceeds, even when that impedes other law-enforcement goals. One example is where a law-enforcement agency is made aware of drug activity but refrains from making any arrests until the dealer has sold most of his contraband.⁴⁰ While this tactic maximizes potential forfeiture proceeds, it means that most of the drugs remain on the street. Former New York City Police Commissioner Patrick Murphy

³⁸ Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 91 (1996).

³⁹ Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285 (2000).

⁴⁰ J. Mitchell Miller & Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 328 (1994).

was clear when he explained the city's motivation behind posting roadblocks on the southbound lanes of Interstate 95 heading into New York City to catch those coming to buy drugs:

[Police have] a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.⁴¹

The desperate desire for ever-greater forfeiture revenues also raises concerns that state and local law-enforcement officers may be tempted to seize property without probable cause.⁴² And, indeed, police in a number of instances have seized peoples' property without any reason to suspect it was subject to forfeiture. In Volusia County, Florida, for instance, the sheriff created the Selective Enforcement Team, a "drug squad" that operated along the corridors of Interstate 95. Under the sheriff's directions, Selective Enforcement Team members were to view any motorist that had more than \$100 in cash as a drug trafficker and seize his or her funds.⁴³ Other reasons

⁴¹ Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 68 (1998) (citing Richard Miniter, *Ill-Gotten Gains*, 25 REASON 32, 34 (Aug./Sept. 1993)).

⁴² Mike Gangloff, *Seized Assets Fund Law Enforcement Efforts*, THE ROANOKE TIMES (VIRGINIA), Mar. 29, 2009, at A1.

⁴³ HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 38 (1995).

to seize a person's cash included having no luggage in the car, having too much luggage in the car, or carrying bills in \$1, \$5, \$10, \$20, \$50 or \$100 denominations.⁴⁴ Selena Washington passed through Volusia County on her way from Charleston, South Carolina, to Miami to buy building materials to repair her home, which had been severely damaged by Hurricane Hugo. Despite no evidence of any drug involvement whatsoever, the sheriff's department seized more than \$19,000 from Ms. Washington and held her money for more than eight months. In the end, she settled for \$15,000 after her attorney told her that the cost of continuing to fight would exceed the amount of money seized.⁴⁵

A more recent, but equally troubling series of abuses occurred in Tenaha, Texas, a town near the Louisiana border. Over a two-year period, Tenaha police seized cash, jewelry, and cellular phones from more than 140 people—almost all of them African-Americans—who were not charged with any crime.⁴⁶ The police and the local district attorney offered these motorists an unpalatable choice: waive their rights to

⁴⁴ Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL, June 14, 1992, at A1.

⁴⁵ Steve Berry, *Vogel Faces Bias Suit Over Cash Seizures*, ORLANDO SENTINEL, June 18, 1993, at B1; see also HYDE, *supra* note 43, at 40.

⁴⁶ Howard Witt, *Highway Robbery? Texas Police Seize Black Motorists' Cash, Cars*, CHI. TRIB., March 10, 2009, http://www.chicagotribune.com/news/nationworld/chi-texas-profiling_wittmar_10,0,6051682.story.

contest the seizures or be charged for money laundering or other crimes. In one instance, an interracial couple had more than \$6,000 seized, money they planned to use to buy a used car. The couple signed a waiver after police threatened to take away their children and turn them over to child protective services.⁴⁷

These abuses arise because of the time, cost, and difficulty of challenging a seizure. For example, in Tennessee many months can elapse before a forfeiture hearing takes place. That kind of delay can be interminable for one deprived of needed funds or their only vehicle. For those in need of immediate relief, the best course may be to settle for a percentage of their property rather than to wait for their day in court. This is particularly true with depreciating assets like automobiles, where the vehicle continues to decline in value while it sits on the impound lot.⁴⁸ Illinois, which has similar delays between the time of the seizure and when the ultimate forfeiture proceeding takes place, is no different. According to the head of the Tennessee Department of Safety's Asset Forfeiture Division, only

⁴⁷ *Id.*

⁴⁸ Prolonged detention in addition harms the interests of others with a financial interest in the vehicle, such as secured creditors. To protect that interest, at least one circuit has said that creditors must be given notice and an opportunity to be heard in any vehicle forfeiture action in which the creditors hold a valid security interest. *Ford Motor Credit Co. v. N.Y. City Police Dep't*, 503 F.3d 186 (2d Cir. 2007).

10% of all seizures end up going before a court.⁴⁹ This means that, in the vast majority of cases, law enforcement's seizure decisions never receive any independent scrutiny. Knowing that their actions will only rarely be reviewed, the current civil-forfeiture system provides no effective check on law-enforcement overreaching.

III. The Importance of Private Property, and the Grave Risk of Erroneous Deprivations Due to the Incentives Facing Law Enforcement, Require Effective Judicial Oversight of Seizure Decisions

One of the most basic tenets of constitutional law is that persons may not be deprived of life, liberty, or property without due process of law.⁵⁰ Requiring due process serves two purposes: to prevent unjustified or mistaken deprivations and to promote participation and dialogue by affected individuals in the decision-making process.⁵¹ But a procedure can serve those ends only when it lets affected individuals participate at a meaningful time and in a meaningful manner.⁵² DAFPA's failure to provide property owners with any

⁴⁹ Dick Cook, *Forfeiture System Debated*, CHATTANOOGA TIMES FREE PRESS, Feb. 17, 2006, at B1.

⁵⁰ *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

⁵¹ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

⁵² *Fuentes*, 407 U.S. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965)).

preliminary post-seizure process whatsoever causes the Act to fail on both counts.

Mathews v. Eldridge provides the proper analytical framework by which to analyze the sufficiency of the process received by one who is deprived of a protected property or liberty interest.⁵³ Most notably, this Court employed the three-part *Mathews* framework in *United States v. James Daniel Good Real Property* when it held that the government must provide a property owner with notice and an opportunity to be heard before seizing real property.⁵⁴ The *Mathews* test looks to (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁵⁵ Each of these factors mandates a prompt preliminary post-seizure hearing.

⁵³ 424 U.S. 319 (1976).

⁵⁴ 510 U.S. 43, 53-62 (1993).

⁵⁵ 424 U.S. at 335.

A. The Right to Private Property, and the Irreparable Injury That Can Result From an Extended Deprivation, Mean the Private Interest Is Entitled to Great Weight

The private interest at stake in this case is of enormous magnitude. DAFPA permits the unilateral seizure of property with no judicial check for months, if not years. This is an affront to the strong tradition of private-property rights in this nation. Furthermore, the fact that the seizure of a conveyance or needed moneys can so often work an irreparable injury magnifies the private interest in a prompt judicial hearing.

The Chicago Police Department's warrantless seizures of Respondents' personal property have impinged on a fundamental individual right. Private-property rights form the foundation of a free society. The right to private property both pre-existed this nation and was one of the fundamental bases for its founding. Unlike Great Britain, where the traditional view held that all land belonged to the crown, the founding generation saw the right to property as one that individuals possessed in nature.⁵⁶ Consistent with that Lockean understanding, one of the primary reasons that people came together to establish

⁵⁶ *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D.Pa. 1795) (“[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.”).

government was not to *create* the right to property, but to help *secure* it. As James Madison stated, “[g]overnment is instituted no less for protection of the property, than of the persons, of individuals.”⁵⁷

The Founders’ zeal to protect private property against government encroachment was not simply born from a desire to create the potential for wealth and economic growth; instead, they correctly viewed strong private-property rights as the most effective bulwark against other usurpations of liberty.⁵⁸ They feared that once protections for property declined, all other personal freedoms would soon follow: “Property is surely a right of mankind as real as liberty. . . . The moment the idea is admitted into society that property is not sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”⁵⁹

⁵⁷ THE FEDERALIST NO. 54 (James Madison); *see also Boyd v. United States*, 116 U.S. 616, 627 (1886) (“The great end for which men entered into society was to secure their property.”) (quoting Lord Camden, J. in *Entick v. Carrington*, (1765) 95 Eng. Rep. 807, 817-18 (K.B.)).

⁵⁸ JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* xi (3d ed. 2008) (“The founding generation stressed the significance of property ownership as a safeguard for political liberty against arbitrary government as well as the economic utility of private property.”).

⁵⁹ John Adams, *Defence of the Constitutions of Government of the United States* (1787), in 6 *THE WORKS OF JOHN ADAMS* 8, 8-9 (Charles Francis Adams ed., 1856); *see also ELY, supra* note 58, at 28 (noting that the Founders, relying on the English Whig

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The strong respect accorded to property rights was in no way diminished by the passage of time. After the Civil War, those in Congress who attempted to protect the new freedmen understood that an individual's right to acquire, possess, and control property was of the utmost importance.⁶⁰ Statements following the passage of the Fourteenth Amendment also make clear that the right to private property was one of the chief rights the Amendment was enacted to protect.⁶¹

To this day, the strong respect for the sanctity of property lives on. In *Lynch v. Household Finance Corp.*, this Court said that “the dichotomy between personal liberties and property rights is a false one.”⁶² This Court has similarly rejected the idea that property rights “should be relegated to the status of a poor relation” to those protected by the First or Fourth Amendments.⁶³ And perhaps most forcefully,

tradition, felt that the “protection of private property was crucial to the preservation of freedom”).

⁶⁰ *E.g.* 1866 Civil Rights Act, 14 Stat. 27, 27 (1866) (counting among its purposes that all persons born in the United States, regardless of any previous condition of slavery, shall have the same right “to inherit, purchase, lease, sell, hold, and convey real and personal property . . .”).

⁶¹ CONG. GLOBE, 42d Cong., 1st Sess. 499 (1871) (stating that “the right that private property shall not be taken without compensation is among those privileges” protected by the Fourteenth Amendment) (statement of Sen. Fredrick Frelinghuysen).

⁶² 405 U.S. 538, 552 (1972).

⁶³ *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

this Court noted in *James Daniel Good* that “[i]ndividual freedom finds tangible expression in property rights.”⁶⁴ Without property, there can be no liberty.

Beyond the strong interest that each citizen has in his or her property generally, the seizure of one’s vehicle or money can cause great practical difficulties. The Seventh Circuit correctly noted that the loss of a vehicle can result in “missed doctor’s appointments, missed school, and perhaps most significant of all, loss of employment.”⁶⁵ Furthermore, a vehicle is a depreciating asset; it loses value over time. Therefore, when a seized vehicle is finally returned, it is almost assuredly worth less than when it was seized. The longer the detention, the greater the loss that the owner cannot recover. Likewise, the seizure of a substantial amount of cash can also cause serious hardships, regardless of what the resolution might be to the ultimate forfeiture proceeding. Recall Selena Washington, the woman discussed above who was travelling from South Carolina to buy building materials. The police seizure of her \$19,000 severely impaired her ability to repair her hurricane-damaged home. Even though Ms. Washington ultimately got most of her money back, the damage had been done.

⁶⁴ 510 U.S. at 61; *see also id.* at 81 (Thomas, J., concurring in part and dissenting in part) (stating that property rights “are central to our heritage”).

⁶⁵ *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008).

Similarly, for those of modest means, the seizure of a substantial sum of cash can mean missed bills, damage to credit reports, and the cessation of needed utilities. It does not matter how the ultimate forfeiture proceeding is resolved; the prolonged detention itself works upon them an irreparable injury.

This Court has consistently held that where the deprivation of one's property or liberty would lead to irreparable harm, a pre-deprivation or prompt post-deprivation hearing is constitutionally necessary.⁶⁶ In *Commissioner of Internal Revenue v. Shapiro*, this Court stated that:

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

⁶⁶ *James Daniel Good*, 510 U.S. at 56 (“And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, ‘would not cure the temporary deprivation that an earlier hearing might have prevented.’”) (quoting *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991)).

⁶⁷ 424 U.S. 614, 629 (1976).

While the deprivation in *Shapiro* was the summary seizure of funds that were needed to post bail, this Court in numerous other contexts has required immediate judicial oversight when a delay could lead to irreparable harm. One is that of an arrestee: this Court has said the state does not invariably need a prior judicial determination of probable cause before arresting someone.⁶⁸ But once an arrest does occur, the Constitution requires the state to justify the arrest at a prompt post-arrest hearing before a neutral magistrate.⁶⁹ Other examples where the threat of irreparable injury requires a preliminary adversarial hearing to establish the probable validity of the seizure include the temporary deprivation of wages,⁷⁰ the garnishing of a corporation's bank accounts,⁷¹ and the temporary deprivation of welfare payments.⁷² The seizure of one's vehicle or a substantial amount of cash poses the same threat of irreparable harm and is of no less constitutional significance. The same procedural protections that apply to deprivations in those contexts should apply here.

⁶⁸ See, e.g., *United States v. Watson*, 423 U.S. 411, 417 (1976).

⁶⁹ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

⁷⁰ *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341-42 (1969).

⁷¹ *N. Ga. Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975).

⁷² *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

B. The Incentives Facing Law Enforcement Pose a Grave Risk of Erroneous Deprivations That a Preliminary Post-Seizure Hearing Will Alleviate

The second *Mathews* factor considers the risk of an erroneous deprivation given current procedures, as well as the probable value of any additional procedural safeguards. The pecuniary interest that accompanies the current system of distributing forfeiture proceeds, where both federal and Illinois law-enforcement agencies “eat what they kill,” should give this Court pause. As discussed above, these incentives create too great a risk of erroneous deprivations and have, in fact, too often led to seizures lacking in probable cause. A prompt post-seizure hearing will help to curb law enforcement’s worst instincts and cut the risk of erroneous property deprivations.

Giving closer scrutiny to the actions of public officials and agencies when they have a direct financial stake in the outcome of proceedings is nothing new for this Court. In *Tumey v. Ohio*, this Court overturned a fine where the mayor also sat as a judge and personally received a share of the proceeds.⁷³ Nor is it just the prospect of personal gain that creates concern. This Court in *Ward v. Village of Monroeville* held that having the mayor sit as a judge where a substantial portion of the town’s revenues

⁷³ 273 U.S. 510 (1927).

came from fines violated due process.⁷⁴ Likewise, this Court in both *Marshall* and *James Daniel Good* noted the constitutional concerns that arise when an agency's decisions are clouded by a pecuniary motive.⁷⁵ The general principle throughout this line of cases is straightforward: when government officials have an incentive to act for self-interested reasons, the courts must stand guard against unwarranted and erroneous deprivations.

The changes that DAFPA made in Illinois forfeiture law gave both the Chicago Police Department and the State's Attorney Office for Cook County compelling financial reasons to seize property. For each dollar seized and forfeited, these two agencies receive 90 cents; this is the sort of direct, substantial, and unlimited pecuniary reward that gives rise to grave due-process concerns. First, unlike the civil penalties in *Marshall*, the forfeiture funds at issue here do not merely reimburse the police and prosecutor for the costs of seizing and bringing forfeiture proceedings.⁷⁶ Instead, Illinois law lets the police and prosecutors use the forfeited money for

⁷⁴ 409 U.S. 57 (1972).

⁷⁵ 446 U.S. at 250 (constitutional concerns raised when government official's "judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts"); 510 U.S. at 55-56 (constitutional considerations arise where "the Government has a direct pecuniary interest in the outcome of the proceeding").

⁷⁶ *Cf. Marshall*, 446 U.S. at 245 (citing 29 U.S.C. § 216(e)).

almost anything so long as it is tangentially related to “the enforcement of laws governing cannabis and controlled substances.”⁷⁷ Second, the more property the Chicago Police and State’s Attorney seize, the more proceeds they receive. This is starkly different than the civil penalties in *Marshall*, which had “never been allotted to the regional offices on the basis of the total amount of penalties collected by particular offices.”⁷⁸ And lastly, the Chicago Police Department received \$13.5 million in forfeiture proceeds in 2008,⁷⁹ an amount that vastly exceeds the civil penalties in *Marshall*.⁸⁰ In sum, the pecuniary interest that civil forfeiture places on the Chicago Police Department and State’s Attorney dwarfs the incentives that the assistant regional administrators faced in *Marshall* and demonstrates the need for prompt judicial oversight.

The Illinois DAFPA, however, curtails the courts’ ability to curb possible abuses. Because the statute does not provide for a prompt post-seizure preliminary hearing, the first time that any judicial scrutiny of Illinois officials’ seizure decisions occurs is months,

⁷⁷ 720 ILL. COMP. STAT. 570/505(g)(1).

⁷⁸ 446 U.S. at 246.

⁷⁹ Press Release, Chi. Police Dep’t, Chicago Committed to Reducing Violent Crime and Strengthening Community Partnerships in 2009 (Jan. 16, 2009), *available at* <http://www.chicagopolice.org/MailingList/PressAttachment/2008crimes tats.pdf>.

⁸⁰ 446 U.S. at 245.

if not years, after the fact. In the interim, many meritorious claims will fall to the wayside because of the delay and cost involved in waiting for the ultimate forfeiture proceeding. Rather than put the government to its burden, owners often will decide to drop their challenges altogether or to settle with the government for pennies on the dollar. Delaying consideration of whether there was probable cause for the initial seizure until the ultimate proceeding, as the Second Circuit has recognized, is insufficient to mitigate the risk of erroneous seizures.⁸¹

Indeed, the threat of unwarranted deprivations is of even more pressing concern in this case than in *James Daniel Good*. Under the statute that permitted the seizure of real property in *James Daniel Good*, law enforcement first had to secure a warrant of seizure from a magistrate judge.⁸² While the proceeding was *ex parte*, and only the government was able to present evidence, law enforcement still had to justify its intended actions to a neutral judicial

⁸¹ *Krimstock v. Kelly*, 306 F.3d 40, 50-51 (2d Cir. 2002) (“Some risk of erroneous seizure exists in all cases, and in the absence of prompt review by a neutral fact-finder, we are left with grave Fourth Amendment concerns as to the adequacy of an inquiry into probable cause that must wait months or sometimes years before a civil forfeiture proceeding takes place. Our concerns are heightened by the fact that the seizing authority in this case ‘has a direct pecuniary interest in the outcome of the proceeding.’”) (quoting *James Daniel Good*, 510 U.S. at 55-56).

⁸² 510 U.S. at 55.

official. Under Illinois law, however, law enforcement can seize both cash and conveyances without first securing any warrant. In that regime, the judiciary makes no appearance until months or years later when the ultimate forfeiture proceeding gets underway.

C. The Governmental Interest Is Minimal

In contrast to the direct and immediate benefits that a preliminary post-seizure hearing would afford to those whose property has been seized by the government, Illinois' interest in not providing a hearing amounts to little more than avoiding the minimal burden that a hearing would impose. There is no question that a preliminary proceeding would have some cost. But all efforts at due process involve some expenses; were administrative burdens a reason alone to curtail judicial proceedings, the protections afforded one deprived of a protected property or liberty interest would be few indeed.⁸³

Nor is a preliminary post-seizure hearing the administrative nightmare that Petitioner and her *amici* suggest. For several years, New York courts have held so-called *Krimstock* hearings, prompt

⁸³ *Fuentes*, 407 U.S. at 91 n.22 (“A . . . hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right.”).

post-seizure hearings at which the government must demonstrate—among other things—that it had probable cause to seize the vehicle and that continued retention of the vehicle for the duration of the forfeiture proceedings is necessary. As Respondents and fellow *amici* note, this type of preliminary hearing is a streamlined affair that has worked well and occurs only when a person with standing to contest the forfeiture requests it.⁸⁴ Despite the predictions of chaos, these orderly proceedings—even in one of the busiest court systems in the country—have not burdened the government in any meaningful way.

◆

CONCLUSION

Private property is one of this nation's most cherished principles, but it is a principle under assault. The changes to civil forfeiture that gave law-enforcement agencies a percentage of forfeiture proceeds have created a powerful incentive: seize, forfeit, and profit. But this pecuniary interest has distorted law-enforcement priorities, altered officer and prosecutor behavior, and, most disturbingly, led to a number of police and prosecutorial abuses. By acknowledging that due process requires the prompt

⁸⁴ *Amicus* Brief of Cato Institute, Goldwater Institute, and Reason Foundation.

judicial evaluation of the executive's seizure decisions, this Court will curb those abuses and protect one of our most fundamental rights.

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this Court affirm the opinion below.

Respectfully submitted,

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