No. 22-585

IN THE

Supreme Court of the United States

HALIMA TARIFFA CULLEY, ET AL., *Petitioners,*

v.

STEVEN T. MARSHALL, ATTORNEY GENERAL OF ALABAMA, ET AL., *Respondents.*

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ALABAMA, CATO INSTITUTE, AND RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

Evelyn R. Danforth-Scott
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm St.
San Francisco, CA 94111

LaTisha Gotell Faulks
AMERICAN CIVIL LIBERTIES UNION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106

Jay R. Schweikert
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001

Abram J. Pafford
Counsel of Record
Francis J. Aul
Timothy J. Whittle
APPELLATE JUSTICE INITIATIVE AT MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, D.C. 20006
(202) 857-1725
apafford@mcguirewoods.com

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 23219

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT..3

ARGUMENT...5

I. Modern Civil Forfeiture Schemes Often Fail to Provide Adequate Due Process Protections 5

A. Civil Forfeiture Regimes Are Rife with Abusive Practices that Proceed Largely Unchecked...5

B. The Innocent and Impoverished Suffer the Greatest Consequences of Civil Forfeiture 9

II. The Court Should Adopt the *Mathews* Due Process Framework, Not the *Barker* Speedy Trial Test 11

A. *Mathews* Is the Proper Test for Analyzing Due Process Challenges in the Property Deprivation Context 11

B. *Barker* Is Inapposite to the Question of Interim Procedures Presented Here 16

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Austin v. United States,
509 U.S. 602 (1993) 15

Barker v. Wingo,
407 U.S. 514 (1972) 3, 4, 11, 12, 13, 17, 18, 19, 20, 21

Beavers v. Haubert,
198 U.S. 77 (1905) 19

Cafeteria & Restaurant Workers Union v. McElroy,
367 U.S. 886 (1961) 14

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 11

Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989) 7

City of Chicago, Illinois v. Fulton,
141 S. Ct. 585 (2021) 10

Comm'r v. Shapiro,
424 U.S. 614 (1976) 13

Cnty. of Riverside v. McLaughlin,
500 U.S. 44 (1991) 15, 17

Culley v. Att'y Gen., Alabama,
No. 21-13484, 2022 WL 2663643 (11th Cir. July 11, 2022), *cert. granted sub nom. Culley v. Marshall*, 143 S. Ct. 1746 (2023) 18

Culley v. Marshall,
143 S. Ct. 1746 (2023) 18

Daniels v. Williams,
474 U.S. 327 (1986) 6

Doggett v. United States,
505 U.S. 647 (1992) 18

Dusenbery v. United States,
534 U.S. 161 (2002) 5

Ezagui v. City of New York,
726 F. Supp. 2d 275 (S.D.N.Y. 2010) 16

Fuentes v. Shevin,
407 U.S. 67 (1972) 6, 13

Gerstein v. Pugh,
420 U.S. 103 (1975) 14, 15, 17

In re Fulton,
926 F.3d 916 (7th Cir. 2019), *vacated and remanded sub nom. City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) 10

J. W. Goldsmith, Jr., Grant Co. v. United States,
254 U.S. 505 (1921) 10

Krimstock v. Kelly,
306 F.3d 40 (2d Cir. 2002) 6, 7, 10, 12, 14, 16, 17, 19, 21

Leonard v. Texas,
137 S. Ct. 847 (2017) 7, 15

Mathews v. Eldridge,
424 U.S. 319 (1976) 2, 3, 4, 6, 11, 12, 13, 14, 15, 16, 20, 21

Nichols v. Wayne County,
822 F. App'x 445 (6th Cir. 2020) 18

People v. One 1998 GMC,
960 N.E.2d 1071 (Ill. 2011) 18

Simms v. District of Columbia,
872 F. Supp. 2d 90 (D.D.C. 2012) 17

United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency,
461 U.S. 555 (1983) 20, 21

United States v. Ewell,
383 U.S. 116 (1966) 18

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 5, 8, 12, 13, 14

United States v. Von Neumann,
474 U.S. 242 (1986) 20, 21

Washington v. Marion Cnty. Prosecutor,
264 F. Supp. 3d 957 (S.D. Ind. 2017) 16

Constitution and Statutes

Ala. Code § 28-4-287 9

U.S. Const. Amend. VI 12, 17, 20

U.S. Const. Amend. XIV 3, 5, 11

Other Authorities

Natalia Alamdari, *Using Loophole, Seward County Seizes Millions from Motorists without Convicting Them of Crimes*, Nebraska Public Media (June 15, 2023), available at https://nebraskapublicmedia.org/en/news/news-articles/using-loophole-seward-county-seizes-millions-from-motorists-without-convicting-them-of-crimes/ 8, 9

Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449 (2019) 10, 15

Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. Pub Econ. 2113 (2007) 7

Institute for Justice, D. Carpenter, L. Knepper, A. Erickson, & J. McDonald, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. Nov. 2015) 7

Institute for Justice, Lisa Knepper, Jennifer McDonald, Kathy Sanchez, & Elyse Smith Pohl, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (3d ed. Dec. 2020) 6, 9

Policing and Profit, 128 Harv. L. Rev. 1723 (2015) ... 7

Michael Sallah et al., *Stop and Seize*, The Washington Post (Sept. 6, 2014), https://www. washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/ 8

Sarah Stillman, *Taken*, The New Yorker (Aug. 12 & 19, 2013), available at https://www.newyorker. com/magazine/2013/08/12/taken........................ 8, 10

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 (2001) 7

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. This case presents an issue of longstanding concern to the ACLU—namely, the scope of due process rights in civil forfeiture proceedings. The ACLU of Alabama is its state-based affiliate.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, constitutional and statutory safeguards for suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at

---

[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, its members, and its counsel made a monetary contribution to its preparation or submission.

no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

Amici curiae share concern about states and municipalities that use civil proceedings to forfeit private property, especially that of innocent owners, without affording adequate procedures for owners to obtain prompt return of their property for use while the forfeiture case is pending. The consolidated civil forfeiture cases before this Court represent a common scenario: states and municipalities, like Respondents here, seize all manner of property while delaying (sometimes for years) judicial recourse available to the owner of such property to seek its return. Modern civil forfeiture regimes are too often susceptible to actual and potential abuse. Aware of this reality, *Amici* write to highlight the importance of affording property owners a prompt post-seizure opportunity to challenge the government's retention of the seized property prior to a final forfeiture determination. *Amici* submit that the question of whether a jurisdiction's procedures for challenging the lawfulness of such seizures affords adequate due process should be determined under the due process framework outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Applying *Mathews* is a small but important step in clarifying the constitutional adequacy of some civil forfeiture practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici write to underscore two important points that are relevant to this Court's consideration of the question presented.

First, the Constitution requires adequate due process protections to address modern civil forfeiture regimes, which often operate largely unchecked. State and local governments execute civil forfeiture schemes with monetary incentives, powerful leverage, and little judicial oversight. This reality too often gives rise to abusive practices that impose heavy burdens on people whose property is seized and retained by the government when the connection of the property to the alleged offense is contestable. Yet, in many such instances, the property owner—even one who has an innocent owner defense—has no opportunity to challenge in a timely manner the government's retention of his or her property prior to a final forfeiture determination. To make matters worse, property owners of modest means often lack the resources to challenge the government's retention of their property. That concern is especially acute when forfeiture proceedings involve property—like vehicles—that are crucial to sustaining one's livelihood. Because forfeiture proceedings can take years to resolve, due process requires a timely opportunity to challenge the government's retention of property.

Second, the question of what due process is required is governed by *Mathews v. Eldridge*, 424 U.S. 319 (1976), and the Fourteenth Amendment's Due Process Clause, not *Barker v. Wingo*, 407 U.S. 514

(1972), and the Speedy Trial Clause. The former governs any deprivation of property, while the latter governs an entirely distinct question: namely, the outer limits of constitutionally acceptable delay in the provision of a criminal trial.

Not surprisingly then, this Court has consistently applied *Mathews* when the question is whether additional process is required in a civil setting prior to a final determination on the merits. It would be a category error to apply a test for determining the timeliness of a final adjudication on the merits (*Barker*) rather than the adequacy of procedures in the interim (*Mathews*).

Barker is the wrong test for additional reasons. That test presumes the prior resolution of other procedural steps—including the determination of probable cause to commence proceedings and bail—leaving only the issue of delay in reaching trial. It says nothing about prior procedures outside the context of a final determination on the merits. *Barker* also often permits significant delay in criminal trials owing to the recognition that such delay is often either in a criminal defendant's interest or is a product of the criminal defendant's own actions. It depends on the notion that a criminal prosecution is designed to move at a deliberate pace to protect the right of a criminal defendant to a fair trial. *Barker* is thus unsuitable for the evaluation of procedural requirements along the way to a final forfeiture determination, and would have the practical effect of all but foreclosing the possibility of challenging the government's retention of property in the interim.

ARGUMENT

I. Modern Civil Forfeiture Schemes Often Fail to Provide Adequate Due Process Protections.

Today's civil forfeiture practices bear little resemblance to historical practice at the founding. Proceeding largely unchecked, civil forfeiture practices have expanded dramatically in recent decades, leading to no shortage of abuse. The inadequacy of process in many such regimes comes at a high cost. Often, those who bear the greatest burdens are those without resources to contest government retention of their property. In these circumstances, governments operate with monetary incentives, powerful leverage, and little judicial oversight. Due process requires a timely opportunity to challenge government retentions of property before a final forfeiture detention, especially when assertedly innocent property owners are swept up by such schemes, as in the case before the Court here.

A. Civil Forfeiture Regimes Are Rife with Abusive Practices that Proceed Largely Unchecked.

Under the Due Process Clause of the Fourteenth Amendment, States may not "depriv[e] any person of property without 'due process of law.'" *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). That Amendment guarantees: "that individuals whose property interests are at stake are entitled to 'notice and an opportunity to be heard.'" *Id.* (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993)). "It is equally fundamental that the

right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quotation marks and citation omitted); *Mathews*, 424 U.S. at 333 (same).

These protections are "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quotation omitted). In particular, the due process guarantee serves to "protect [an individual's] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property." *Fuentes*, 407 U.S. at 80–81. These protections are especially critical in civil forfeiture schemes, where the affected party lacks many of the procedural guarantees afforded criminal defendants, and structural imbalances facilitate "arbitrary exercise of the powers of government." *Daniels*, 474 U.S. at 331 (quotation omitted). Challenging forfeitures can take years and prove costly. And in most cases the burden is on the owner to show that the property is not subject to forfeiture. *See* Institute for Justice, Lisa Knepper, Jennifer McDonald, Kathy Sanchez, & Elyse Smith Pohl, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 170-86 (3d ed. Dec. 2020) (table collecting the burden of proof for the innocent owner defense).

In this case, petitioners had to wait more than a year to successfully assert an innocent owner defense to respondents' seizure of their vehicles. Pet.App.3a. Given the "particular importance of motor vehicles" owing to "their use as a mode of transportation and, for some, the means to earn a livelihood," *Krimstock*

v. Kelly, 306 F.3d 40, 61 (2d Cir. 2002) (Sotomayor, J.), the lack of a prompt post-deprivation hearing to challenge the retention of a vehicle often imposes a severe hardship on the property owner.

Due process restraints are particularly necessary because civil forfeiture regimes are a significant source of revenue for states and municipalities, creating incentives to short-circuit the rights of owners. *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (statement of Thomas, J., respecting the denial of certiorari) (citing Institute for Justice, D. Carpenter, L. Knepper, A. Erickson, & J. McDonald, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (2d ed. Nov. 2015)); Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. Pub Econ. 2113 (2007); *Policing and Profit*, 128 Harv. L. Rev. 1723 (2015).

Indeed, the budget for many law enforcement agencies depends heavily on proceeds from forfeiture proceedings. 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); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989) ("[T]he Government has a pecuniary interest in forfeiture . . . . The sums of money that can be raised for law enforcement this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted.").

Thus, law enforcement agencies have a strong financial incentive to seize as much property with a conceivable connection to a crime as they can. *Cf.*

James Daniel Good, 510 U.S. at 85 (Thomas, J., concurring) (discussing the concerning breadth of federal civil forfeiture statutes and observing that "ambitious modern statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture").

The government's incentive to overclaim forfeitable property and the difficulties associated with challenging forfeitures have led to serious abuse.

For example, a 2014 investigation by the Washington Post identified over one thousand cases of property owners being forced to sign settlement agreements to recover money seized by the federal government. Michael Sallah et al., *Stop and Seize*, The Washington Post (Sept. 6, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/. The same report found that government officials routinely offered to drop forfeiture proceedings if the owner agreed to give up a portion of the proceeds. *Id.*

In Tenaha, Texas, authorities systematically used threats of criminal charges to pressure drivers into forfeiting cash taken during roadside seizures purportedly based on probable cause. Sarah Stillman, *Taken*, The New Yorker (Aug. 12 & 19, 2013), available at https://www.newyorker.com/magazine/2013/08/12/taken.

More recently, in Nebraska, a single county (Seward) accounted for one-third of that state's civil forfeiture proceeds along a stretch of Interstate 80. Natalia Alamdari, *Using Loophole, Seward County Seizes*

Millions from Motorists without Convicting Them of Crimes, Nebraska Public Media (June 15, 2023), available at https://nebraskapublicmedia.org/en/news/news-articles/using-loophole-seward-county-seizes-millions-from-motorists-without-convicting-them-of-crimes/. One of the affected motorists, Christopher Bouldin, was pulled over and his vehicle was searched, revealing $18,000 in cash. *Id.* Although he insisted the money was for travel expenses and the possible purchase of a car, the sheriff's deputies offered him a choice: "Sign this form, give up the cash and continue toward Colorado. Don't sign, and you're subject to felony charges." *Id.*

These examples are not outliers. Similar injustices play out every day in jurisdictions across the country. *See generally*, Knepper et al., *Policing for Profit*.

B. The Innocent and Impoverished Suffer the Greatest Consequences of Civil Forfeiture.

Civil forfeiture regimes impose the heaviest burdens on those persons with the least means. Under the Alabama law at issue here, for example, if a wealthy owner had his vehicle seized, he could post a bond double the value of the confiscated property to obtain its immediate return. Ala. Code § 28-4-287. But those of modest means who cannot afford to post such a bond have no recourse to retain their property pending resolution of the forfeiture proceeding.

Motor vehicles are among the most seized property type in civil forfeiture. Their seizure imposes a particularly heavy burden on the underprivileged

given the "particular importance of motor vehicles" owing to "their use as a mode of transportation and, for some, the means to earn a livelihood." *Krimstock*, 306 F.3d at 61; *cf. In re Fulton*, 926 F.3d 916 (7th Cir. 2019), *vacated and remanded sub nom. City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021) (discussing the City of Chicago's vehicle impoundment practices and the significant fines and costs).

There are countless other examples of overzealous forfeitures that upend the lives of persons with modest means. *See generally* Stillman, *Taken*. And even when individuals are able to obtain the return of their property, the delays they face in doing so can impose substantial costs. Someone who relies on her car to get to and from work may well lose her job if she cannot promptly obtain the return of her vehicle.

Additionally, there are heightened fairness and due process concerns related to civil forfeiture of property held by owners who are not charged with any wrongdoing. *See, e.g.*, Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449 (2019). When the owner of the forfeited property "did not participate in or have knowledge of the illicit use," forfeiture "seems to violate that justice which should be the foundation of the due process of law required by the Constitution." *J. W. Goldsmith, Jr., Grant Co. v. United States*, 254 U.S. 505, 510 (1921). And if an owner "proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property[,] . . . it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689–90 (1974).

II. The Court Should Adopt the *Mathews* Due Process Framework, Not the *Barker* Speedy Trial Test.

The question this case presents is what procedural protections apply when the government seizes property from an individual through civil forfeiture proceedings and that individual seeks a post-seizure, prejudgment opportunity to challenge the government's retention of the property. The answer to that question is governed by the Due Process Clause, not the Speedy Trial Clause. The former literally governs deprivations of property, while the latter governs an entirely distinct question: namely, the outer limits of constitutionally acceptable delay in the provision of a criminal trial. Civil forfeiture implicates the procedural guardrails on *civil* seizures of property, not the timeliness of *criminal* prosecutions. Accordingly, the *Mathews* due process calculus controls, not the *Barker* speedy trial test.

A. *Mathews* Is the Proper Test for Analyzing Due Process Challenges in the Property Deprivation Context.

The Due Process Clause and the Speedy Trial Clause afford individuals different constitutional guarantees. For its part, the Due Process Clause of the Fourteenth Amendment guarantees that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. That means ordinarily "individuals must receive notice and an opportunity to be heard before the Gov-

ernment deprives them of property." *United States v. James Daniel Good*, 510 U.S. at 48; *Mathews*, 424 U.S. at 333 ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.").

By contrast, the Speedy Trial Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. Amend. VI. It presumes "that all accused persons [are] treated according to decent and fair procedures," *Barker v. Wingo*, 407 U.S. 514, 519 (1972), and "prior resolution of any issues involving probable cause to commence proceedings and the government's custody of the property or persons *pendente lite*, leaving only the issue of delay in the proceedings." *Krimstock v. Kelly*, 306 F.3d 40, 68 (2d Cir. 2002).

The Constitution thus "distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other." *Id.* Due process protections kick in whenever the government attempts to deprive an individual of life, liberty, or property, even before final judgment has been rendered. The speedy trial guarantee, by contrast, promises only that the final judgment in a criminal trial will be rendered without unreasonable delay.

The due process clause's broader reach includes protections for those whose property has been seized and retained by the government. And it likewise includes protections before a final adjudication on the merits of that retention. Thus, this Court has long recognized that due process sometimes requires "an

opportunity for some kind of predeprivation or prompt post-deprivation hearing" to challenge property seizure by the government while "final adjudication of the rights of the parties" remains "pending." *Comm'r v. Shapiro*, 424 U.S. 614, 629 (1976). *See also Fuentes*, 407 U.S. at 97 ("Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, it is axiomatic that the hearing must provide a real test. Due process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property.'" (cleaned up)). Those guarantees are distinct from the Speedy Trial Clause, both in terms of the interests they protect and the stages at which they kick in.

It should come as little surprise, then, that this Court has developed different tests for the Due Process Clause (*Mathews*) and the Speedy Trial Clause (*Barker*). This Court has consistently applied *Mathews* to evaluate what process is required prior to a final determination on the merits of an agency or criminal proceeding, and it should do so again here.

Indeed, this Court has already acknowledged the appropriateness of the *Mathews* test in civil forfeiture proceedings prior to final adjudication. In *James Daniel Good*, the Court considered "whether, in the absence of exigent circumstances, the Due Process Clause . . . prohibits the Government . . . from seizing real property without first affording the owner notice and an opportunity to be heard." 510 U.S. at 46. The Court applied the *Mathews* calculus and

concluded that the Due Process Clause does require pre-deprivation notice and hearing for the seizure of real property. *Id.* at 46, 53–59. Neither the Eleventh Circuit nor the Respondents here have ever advanced a compelling explanation why *Mathews* should not also apply to a post-deprivation challenge to the seizure of property. Thus, this Court should follow *James Daniel Good* to its logical conclusion and apply the *Mathews* test to determine whether and when to require that "claimants be given a prompt post-seizure retention hearing, with adequate notice, for motor vehicles seized as instrumentalities of crime . . . ." *Krimstock*, 306 F.3d at 68–69.

The *Mathews* framework appropriately respects the flexible nature of due process. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) ("[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."). Civil forfeiture arises in a variety of procedural contexts. *Mathews* is the proper test for analyzing the due process challenges that arise in those varied settings.

In the analogous context of warrantless arrests, the defendant's right to a prompt hearing on the validity of his arrest is governed by the Fourth Amendment, not the Speedy Trial Clause. The Speedy Trial Clause regulates the timing of his ultimate trial. But the Fourth Amendment gives the arrestee a right to a prompt hearing to challenge his detention pending that trial. *See, e.g.*, *Gerstein v.*

Pugh, 420 U.S. 103, 112–13 (1975) (requiring prompt probable cause determination before a neutral magistrate following a warrantless arrest, because of the risk of unfounded charges of crime when arrest is based solely on evidence interpreted "by the officer engaged in the often competitive enterprise of ferreting out crime" (citations omitted)); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991) (defining "what is 'prompt' under *Gerstein*"). So, too, here, tough the Speedy Trial Clause may inform the timing of the ultimate hearing on whether property is actually forfeitable, the Due Process Clause governs what process the owner is due pending that ultimate determination.

The punitive nature of civil forfeiture further counsels strongly in favor of zealously protecting the due process rights of property owners. *Austin v. United States*, 509 U.S. 602, 618 (1993); *Leonard*, 137 S. Ct. at 847 (statement of Thomas, J., respecting the denial of certiorari). Modern civil forfeiture regimes bear little resemblance to historical practice in the Founding Era. *Leonard*, 137 S. Ct. at 848–49 (statement of Thomas, J., respecting the denial of certiorari); Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. at 1464–82. "In the absence of this historical practice, the Constitution presumably would require the Court to align its distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive state action and property deprivation." *Leonard*, 137 S. Ct. at 849 (statement of Thomas, J., respecting the denial of certiorari).

Applying *Mathews* and requiring a prompt, post-seizure hearing would provide meaningful procedural

relief to property owners. *See Krimstock*, 306 F.3d at 60–68 (holding that *Mathews* "requires that plaintiffs be afforded a prompt post-seizure, pre-judgment hearing before a neutral judicial or administrative officer to determine whether the City is likely to succeed on the merits of the forfeiture action and whether means short of retention of the vehicle can satisfy the City's need to preserve it from destruction or sale during the pendency of proceedings").

Finally, *Mathews* has already proved to be a workable standard for district courts in a variety of contexts, including civil forfeiture. *See, e.g.*, *Washington v. Marion Cnty. Prosecutor*, 264 F. Supp. 3d 957 (S.D. Ind. 2017) (applying *Mathews* and enjoining an Illinois law that allowed law enforcement to seize and retain vehicles for up to six months before property owners could challenge the government's retention); *Ezagui v. City of New York*, 726 F. Supp. 2d 275 (S.D.N.Y. 2010) (applying *Krimstock* and holding that the city violated plaintiff's due process rights by not providing him with notice of his right to a post-deprivation hearing).

B. *Barker* Is Inapposite to the Question of Interim Procedures Presented Here.

Recourse to the Speedy Trial Clause to assess the process due an individual whose property has been seized and retained is a category mistake. Even when it literally applies (to criminal trials), that clause governs only the delay acceptable for an ultimate determination of guilt or innocence. It says nothing about whether a prompt post-deprivation

hearing is required in the interim. *Barker* and the Speedy Trial Clause serve as the baseline for determining whether a criminal defendant has received his ultimate trial in a timely fashion. *See, e.g.*, *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 99–100 (D.D.C. 2012).

In contrast, in the civil forfeiture context, claimants seek a prompt post-seizure hearing at which a neutral arbiter can determine the validity of the initial seizure and decide whether the continued retention of the property pending lengthy forfeiture proceedings is justified. *Id.* The question claimants seek to raise when challenging the adequacy of civil forfeiture post-seizure process is "what process is due when the government seeks to deprive a person of a property interest pending a final decision on the deprivation." *Id.* at 100. But "*Barker* does not address this issue. Rather, it asks how long a government may keep open a case before it is fundamentally unfair to allow it to continue." *Id.*

Barker is the wrong fit for several additional reasons. To begin, "[t]he application of the speedy trial test presumes prior resolution of any issues involving probable cause to commence proceedings . . . leaving only the issue of delay in the proceedings." *Krimstock*, 306 F.3d at 68. This includes the presumption that criminal defendants have pursued their Fourth Amendment right to a prompt hearing on the validity of their loss of liberty. *See Gerstein*, 420 U.S. at 112–13; *Riverside*, 500 U.S. at 47. The Sixth Amendment contemplates only one step in the criminal process: "a speedy and public trial." It says nothing about the temporal rules governing ancillary but important

pretrial proceedings outside the context of the ultimate guilt or innocence determination.

Further, applying *Barker* to a civil forfeiture action would never result in a decision that a retention hearing was required because "a merits hearing on forfeiture, 'if timely,'" would be all due process requires. *Culley v. Att'y Gen., Alabama*, No. 21-13484, 2022 WL 2663643, at *2 (11th Cir. July 11, 2022), *cert. granted sub nom. Culley v. Marshall*, 143 S. Ct. 1746 (2023). *See also People v. One 1998 GMC*, 960 N.E.2d 1071, 1082 (Ill. 2011); *Nichols v. Wayne County*, 822 F. App'x 445, 453 (6th Cir. 2020) (McKeague, J., concurring). And "timely" does not mean "prompt," because the speedy trial test typically does not apply until the delay "approaches one year." *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992). Thus, applying *Barker* renders due process rigid and inflexible in the civil forfeiture context, contrary to fundamental due process principles.

The Speedy Trial Clause often countenances significant delay in the defendant's ultimate hearing out of recognition that such delay is often either in a criminal defendant's interest or is a product of the criminal defendant's own actions. Indeed, this Court in *Barker* explained that "[i]n large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *Barker*, 407 U.S. at 522 n.15 (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)). The Court noted that

"[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Id.* at 522 (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)). Civil forfeiture claimants, on the other hand, lack "many procedural safeguards provided an accused" and may have little or no interest in their proceedings "mov[ing] at a deliberate pace." *See Barker*, 407 U.S. at 522 n.15. Under the Speedy Trial Clause, civil forfeiture claimants would be stuck with the worst of both worlds: insufficient due process and a lack of judicial and executive haste in pursuing that minimal process.

In practical terms, applying *Barker* in this context would all but foreclose the possibility of an owner obtaining a prompt opportunity to challenge the retention of her property before final judgment. Forfeiture cases can easily take a year or more to resolve. *Krimstock*, 306 F.3d at 53. Add to that the fact that many civil forfeiture cases are stayed pending the outcome of any related criminal proceeding. In this common scenario, civil forfeiture proceedings will track the timeline of criminal proceedings, all the while depriving owners—even innocent ones who are not charged with any crime—of their property and absolving the government of the modest burden of making some showing that its retention is justified under law.

Barker itself is plainly unsuited for the resolution of run-of-the-mill due process issues that arise throughout the life of a judicial proceeding, much less the question presented here. *Barker* was concerned with a host of potential drawbacks (and constitutional problems) with a lengthy delay between the initia-

tion of a prosecution and trial. To take just a few examples, the Court expressed concerned about: backlogs of cases, defendants accused of violent crime on bond for years with the temptation to flee, prolonged detention if bail is not posted, the continuing availability of witnesses, fading memories, and tactical gamesmanship. 407 U.S. at 519–22. Given the impossibility of drawing a bright-line rule for holding a speedy trial and the potential motivations for both the government and defense to delay, this Court articulated a four-factor test to determine whether a defendant has been deprived of his Sixth Amendment right to a speedy trial. Those factors are: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id.* at 530. Those factors have little or no bearing on whether a deprivation of property requires a prompt post-deprivation hearing.

This test makes little sense when, as here, the question is whether an owner should have a prompt opportunity to challenge the government's seizure of her property. In this context, the balancing approach set forth in *Mathews*, focused on the individual and government interests at stake and the cost of providing further process, makes far more sense.

The occasions when this Court has applied *Barker* to customs forfeitures—*United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986)—do not require a different result. This Court's precedents indicate that the customs context raises distinctive procedural considerations. Customs processing typically takes

place at the border, on a short fuse, and without prior deliberation. Under the logic of both *$8,850* and *Von Neumann*, those practical realities may impose limits on preliminary opportunities to test the validity of government seizures. *See Von Neumann*, 474 U.S. at 249 n.7 (explaining that pre-seizure hearings "would make customs processing entirely unworkable"). Nevertheless, both cases also recognize that the government may skirt otherwise generally applicable procedural requirements only in an "extraordinary situation." *$8,850*, 461 U.S. at 562 n.12. The workaday civil forfeiture context provides no such extraordinary justification to depart from otherwise tried-and-true approaches to safeguarding property owners from unwarranted government seizures.

In short, *Barker* may be relevant in determining the appropriateness of "the speed with which civil forfeiture proceedings themselves are instituted or conducted," but *Mathews* "set[s] forth [the] factors to weigh in deciding whether the demands of the Due Process Clause are satisfied where the government seeks to maintain possession of property before a final judgment is rendered." *Krimstock*, 306 at 60, 68. Accordingly, *Mathews* "should be used to evaluate the adequacy of process offered in post-seizure, pre-judgment deprivations of property in civil forfeiture proceedings." *Id.* at 60.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Abram J. Pafford
Counsel of Record
Francis J. Aul
Timothy J. Whittle
APPELLATE JUSTICE INITIATIVE AT MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, D.C. 20006
(202) 857-1725
apafford@mcguirewoods.com

Jay Schweikert
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001

David D. Cole
AMERICAN CIVIL LIBERTIES UNION
915 15th Street, N.W.
Washington, D.C. 20005

Evelyn Danforth-Scott
AMERICAN CIVIL LIBERTIES UNION
39 Drumm St.
San Francisco, CA 94111

LaTisha Gotell Faulks
AMERICAN CIVIL LIBERTIES UNION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

Counsel for Amici Curiae