ORAL ARGUMENT NOT YET SCHEDULED

Case No. 24-5144

IN THE

United States Court of Appeals for the District of Columbia Circuit

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LINDA MARTIN,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION; ET AL.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia
(No. 1:23-cv-00618-APM)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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October 24, 2024

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel certifies:

Parties and Amicus:

a. The Plaintiff below and Appellant here is Linda Martin. Plaintiff is a person and not a subsidiary or affiliate of a publicly owned corporation, and no publicly owned corporation has a financial interest in the outcome of this case. The Federal Bureau of Investigation and Christopher A. Wray, in his official capacity as Director of the Federal Bureau of Investigation, were Defendants below and are Appellees here. There are currently no amici or intervenors.

b. The Cato Institute is a not-for-profit corporation, exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3); it has no parent corporation; and no publicly held company has a 10% or greater ownership interest in the Cato Institute.

Rulings Under Review: The ruling under review is a Memorandum Opinion and Order granting Defendants' Motion to Dismiss and denying Plaintiff's Motion for Class Certification, dated April 5, 2024, decided by Hon. Judge Amit P. Mehta in *Martin v. Federal Bureau of Investigation*, No. 23-cv-00618-APM, 2024 WL 1612084, and available at ECF 24 and ECF 25 below.

Related Cases: This case was not previously before this Court. Counsel for Cato Institute is not aware of any other case currently pending before this or any

other court that is related to these cases within the meaning of Circuit Rule 28(a)(1)(C).

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the Cato Institute is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public. Pursuant to D.C. Circuit Rule 26.1(b), the Cato Institute states that it is a 501(c)(3) nonprofit organization dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute, established in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, and conducts conferences and forums.

Cato's interest in this case arises out of the importance of implementing due-process protections in the use of civil forfeiture. These measures are necessary to ensure that the government respects the property and civil rights of law-abiding Americans.

Civil forfeiture is a process that enables law enforcement agencies to target the fruits of unlawful activity and deliver justice when the perpetrator may be difficult to reach. Agencies use forfeiture to seize assets such as illegal cargo, vehicles used to transport illicit materials, and the ill-gotten gains of criminal activity. Unfortunately, forfeiture has also become a ubiquitous funding mechanism for the government, creating perverse incentives to expand and expedite the use of

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amicus* contributed money intended to fund the brief's preparation or submission.

confiscatory measures. As the government has expanded the use of forfeiture, the relationship between confiscated property and an identifiable crime has become more tenuous. A vicious combination of administrative discretion, lack of judicial oversight, minimal procedural regulations, and federal loopholes has resulted in forfeiture proceedings that lack any semblance of due process while also targeting innocent parties.

The excesses of the modern civil forfeiture regime are a relatively recent occurrence. The incentives that drive abuse primarily arose from a 1984 law that significantly raised the maximum value of confiscations and established a federal fund financed by seized assets. Prior to 1984, civil forfeiture primarily targeted property associated with the illicit trafficking of goods. But since 1984, the desire to expand the regime to raise government funds has led to forfeiture attaching to exponentially more crimes and assets. As the scope of forfeiture has expanded, respect for civil rights has retracted, with notices becoming vague and difficult to answer. All these measures served their intended purpose: to minimize the friction that constitutional rights pose to resource extraction. But that friction is not just beneficial; it is vital to liberty. This Court should hold that the notice in this case did not meet minimum constitutional standards of due process.

ARGUMENT

I. MODERN CIVIL FORFEITURE IS A LUCRATIVE PRACTICE RIFE WITH DUE-PROCESS CONCERNS

Americans can disagree about seemingly anything. But one rare bipartisan point of agreement is frustration with the use of civil forfeiture against innocent citizens. *See* Shaila Dewan, *Police Use Department Wish List when Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014).[2] Linda Martin's experience with the FBI is only one of many shocking instances where law enforcement violated constitutional rights seemingly for personal gain. In Martin's case, law enforcement took her life savings with little explanation beyond a citation to a broad criminal statute, providing Martin little opportunity to substantively respond to and challenge this unjust taking. Complaint at 2, *Linda Martin v. FBI*, No. 1:23-cv-00618 (D.D.C. 2023). Martin was swept up in a broader FBI plan to seize and keep the assets of innocent third parties during the FBI's investigation of a private vault company. *Id*. In other cases, authorities have seized cars and substantial sums of cash for violations as minor as personal drug possession, in violation of the Eighth Amendment. *Platt v. Moore*, 15 F.4th 895 (9th Cir. 2021).

When an innocent victim of forfeiture attempts to petition the agency to have their valuables returned, the government engages in aggressive tactics to drag out

[2] Available at https://perma.cc/L3XQ-W9W7.

the process, impose crippling legal costs, and leverage procedural rules to confuse challengers. *See* Lisa Knepper, Jennifer McDonald, Kathy Sanchez and Elyse Smith Pohl, *Policing for Profit, The Abuse of Civil Asset Forfeiture*, INST. FOR JUST. (2020).[3] This behavior has all the earmarks of an attempt to capture and jealously guard scarce resources, not of a good-faith effort to protect and serve the public.

Sadly, modern civil forfeiture has become an essential funding tool for law enforcement agencies across the country. According to one study, 60 percent of 1,400 police departments surveyed "relied on forfeiture profits as a necessary part of their budget." Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcemen*t, 131 HARV. L. REV. 2387, 2406 (2018) (citing S. POVERTY L. CTR., FORFEITING YOUR RIGHTS (2018)). At the federal level, agencies have had a direct financial interest in forfeiture ever since the Comprehensive Crime Control Act of 1984 created the DOJ Asset Forfeiture Fund and increased the value cap for forfeited property to $100,000 (now $500,000). 19 U.S.C. § 1607(a)(1).

As a result of this monetary incentive, in 2018 alone, "42 states, D.C. and the federal government forfeited over $3 billion. Of that, $500 million was forfeited under state law and $2.5 billion under federal law through DOJ's and Treasury's

[3] Available at https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf.

forfeiture programs." *Policing for Profit*, *supra*, at 15. Furthermore, many police budgets now depend on forfeiture revenues for equipment, salaries, and officer bonuses. "In some Texas counties, forfeitures fund nearly 40% of police budgets." *How Crime Pays*, *supra*, at 2391 (citing Sarah Stillman, *Taken*, NEW YORKER (Aug. 12 & 19, 2013)).[4] The Cook County, Illinois, state's attorney's office anticipated $4.96 million in forfeiture revenues for its 2016 budget, which it earmarked to pay the salaries and benefits of 41 full-time employees. Joel Handley et al., *Inside the Chicago Police Department's Secret Budget*, CHI. READER (Sept. 29, 2016).[5]

These perverse incentives are compounded by the lack of structural protections to ensure that forfeitures are only directed at culpable parties. Prosecutors at the state level only need to request permission from a court, a request that will be weighed under a highly permissive standard. *Policing for Profit*, *supra*, at 6. And the federal government has an even lower burden to effect administrative forfeiture, where the agency only needs to dispense notice to the property owner. It is the property owner who must then challenge the action in court at great cost, often a cost so great that it exceeds the value of the property itself. *Id*.

Law enforcement has both a strong monetary incentive and extensive

[4] Available at https://perma.cc/N7T5-3SZA.

[5] Available at https://perma.cc/ELV9-MKC4.

discretion to engage in forfeiture proceedings. The result is a perfect storm for the degradation of constitutional rights. Lack of judicial oversight combined with financial dependence incentivizes agencies to streamline the process of resource extraction and maximize its scope. This reality led a district court to conclude in one forfeiture case "that the City of Albuquerque has an unconstitutional institutional incentive to prosecute forfeiture cases, because, in practice, the forfeiture program sets its own budget and can spend, without meaningful oversight, all of the excess funds it raises from previous years. *Harjo v. Albuquerque*, 326 F. Supp. 3d 1145, 1151 (D.N.M. 2018) (citing *Marshall v. Jerrico, Inc*., 446 U.S. 238, 251 (1980)). As a result, "there is a 'realistic possibility' that forfeiture officials' judgment 'will be distorted by the prospect of institutional gain' -- the more revenues they raise, the more revenues they can spend." *Id*. The prospect for institutional gain distorting judgment explains why forfeiture cases often violate numerous constitutional rights as law enforcement agencies attempt to find shortcuts to secure funding.

For example, in *Timbs v. Indiana*, police confiscated a $42,000 Land Rover over a minor drug charge, in violation of the Eighth Amendment. 139 S. Ct. 682, 689 (2019). In *Platt v. Moore*, an elderly couple's son was stopped for a window-tint violation and police discovered $32,000 in cash and a personal use quantity of marijuana. First Amended Complaint, No. CV-18-8262-PCT-BSB (D. Ariz. Dec. 21, 2016), ECF No. 20. Despite limitations imposed by state law on the use of

forfeiture, police attempted to confiscate the couple's vehicle anyways. *Id*. In *Serrano v. U.S. CBP*, a plaintiff had his truck confiscated by border patrol after they found five loose bullets in his vehicle and accused him of trafficking "weapons of war." Complaint, Civ. No. 2:17-cv-00048 (W.D. Tex. Sept. 6, 2017), ECF No. 1. The complaint explains how the agency attempted to prevent the plaintiff from challenging the seizure:

> Gerardo—who was never charged with any crime—asked to see a judge, an option requiring him to post a bond of 10% of the truck's value, around $3,800. The government cashed his check, but Gerardo saw no judge. Without a statutory mandate to hold a prompt postseizure hearing, the government dragged out the forfeiture process, a tactic that leads many owners to give up. It took two years and a lawsuit for Gerardo to get his truck back.

Id. In another case involving Customs and Border Patrol, the agency opted to use the victim's constitutional rights as a bargaining chip. According to an Inspector General report, after the U.S. Attorney's Office declined to pursue a forfeiture worth over $40,000, the agency "threatened to pursue the forfeiture itself unless the grandmother and registered nurse signed a 'Hold Harmless Release Agreement,' promising never to sue the agency for violating her due process rights." U.S. DEPT. OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., DHS INCONSISTENTLY IMPLEMENTED ADMINISTRATIVE FORFEITURE AUTHORITIES UNDER CAFRA 5

(2020).[6] When agencies have a tremendous profit incentive to pursue forfeiture, enabled by a lack of structural protections, such egregious violations of procedural and substantive rights are an unfortunately common occurrence.

Finally, although numerous states have enacted forfeiture reform and several have explicitly barred forfeiture in certain cases, a federal program known as equitable sharing drastically undermines these restrictions. *How Crime Pays*, *supra*, at 2405 (citing DICK M. CARPENTER II ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 25, 29 (2d ed. 2015)). The process of equitable sharing involves state or local law enforcement helping federal agencies enforce federal law while sharing the proceeds from forfeitures. *Id*. Due to equitable sharing, local law enforcement that might otherwise be prohibited from undertaking certain forfeitures are instead enabled and incentivized to execute forfeitures in collaboration with federal authorities. One example is when after an

> Anaheim, California police officer bought marijuana from a medical dispensary, state prosecutors refused to take forfeiture action against the property. Under separate California statutes, medical marijuana is legal and civil forfeiture of real property for a controlled substance offense is barred. Despite this, local Anaheim authorities teamed up with the Drug Enforcement Administration to pursue civil forfeiture of the office building from its lessor,

[6] Available at https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-66-Jul20.pdf.

> since marijuana remains federally criminalized and federal law allows forfeiture of real property.

Id. (citing Nick Sibilla, *The Shame of "Equitable Sharing*," SLATE (Apr. 2, 2014)).[7]

To make matters worse, state and local officials have no say in how such funds are allocated and law enforcement can only opt in or out entirely to equitable sharing programs. *Id*. at 2406 (citing Michael J. Duffy, Note, *A Drug War Funded with Drug Money: The Federal Civil Forfeiture Statute and Federalism*, 34 SUFFOLK U. L. REV. 511, 537 (2001)). Therefore, elected officials have no say in what forfeiture funds are used for, and underfunded police departments often cannot refuse the opportunity. This reality fuels a vicious cycle that "undermines these federalism principles. Though an imperfect fit with current Tenth Amendment coercive funding jurisprudence, equitable sharing nonetheless threatens state sovereignty by coopting local authorities into pursuing federal civil forfeitures through irrefusable funding offers." *Id*. at 2405. Although equitable sharing may have been well intentioned, the structure of the program incentivizes destructive behavior that degrades the constitutional order.

[7] Available at https://slate.me/1j0nYnX [https://perma.cc/46CX-DDSG].

II. MODERN FOREFEITURE RADICALLY DEPARTS FROM HISTORY AND TRADITION

Civil forfeiture originated as a precise tool to target the profits of certain crimes. Much if not all of the monetary incentives inspiring forfeiture abuse today stem from the Comprehensive Crime Control Act of 1984, which allowed agencies to confiscate up to $500,000 and created a federal forfeiture fund. Shawn Kantor et al., *Civil Asset Forfeiture, Crime, and Police Incentives: Evidence from the Comprehensive Crime Control Act of 1984*, NAT'L BUREAU OF ECON. RSCH., Working Paper No. 23873, at 2–3 (2017). The effects of this change combined with the use of administrative forfeitures were seismic and immediate, as "(n)et deposits in law enforcement funds grew from $27 million in 1985 to $2.8 billion in 2019—a 10,000% increase. Meanwhile, drug arrests increased only 143%." Memorandum on "The History of Notice of Cause in Administrative Forfeiture" from Daniel Nelson to Bob Belden and Rob Frommer 9 (Sept. 9, 2024) (on file with the Inst. for Just.) (citing Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 683, 694–95 (2014); *Policing for Profit*, *supra*, at 162; DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES, HUMAN RIGHTS WATCH (Mar. 2, 2009) (FBI data estimating 640,626 drug arrests in 1985),[8] 2019 CRIME IN THE UNITED STATES, FBI (FBI data estimating 1,558,862

[8] Available at https://tinyurl.com/2p9znyu5.

drug arrests in 2019)).[9] Shortly after the bill's passage, forfeiture began to attach to virtually every conceivable crime and anything vaguely connected to the pretense of crime.

This stands in stark contrast to the origins of forfeiture. Originally, forfeiture was not a profitable enterprise because it only targeted lower-value assets involved in crimes where the perpetrator could not be easily reached. Indeed, forfeiture is still sometimes used for this purpose today, such as the 2010 seizure of a painting originally stolen from a Jewish family by the Nazis. Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., *United States Announces $19 Million Settlement in Case of Painting Stolen by Nazi* (July 20, 2010). Justice Thomas explained the historic function of forfeiture in his statement in *Leonard v. Texas*:

> First, historical forfeiture laws were narrower in most respects than modern ones. Most obviously, they were limited to a few specific subject matters, such as customs and piracy. Proceeding in rem in those cases was often justified by necessity, because the party responsible for the crime was frequently located overseas and thus beyond the personal jurisdiction of the United States courts. These laws were also narrower with respect to the type of property they encompassed. For example, they typically covered only the instrumentalities of the crime (such as the vessel used to transport the goods), not the derivative

[9] Available at https://tinyurl.com/2bmfppn9.

> proceeds of the crime (such as property purchased with money from the sale of the illegal goods).

137 S. Ct. 847, 851 (2017) (Thomas, J., respecting the denial of certiorari).

The use of forfeiture originally followed a far more rigorous process than it does today. For one, notices precisely stated the reason why property was confiscated, and these notices often cited a statute. One emblematic example was an 1803 order seizing a ship illegally transporting slaves from Africa to Cuba. That order referenced "[a]n Act to prohibit the carrying on the Slave trade from the United States to any foreign place or Country." INFORMATION REGARDING THE BRIGANTINE MINERVA (R.H. D. 1803), NAT'L ARCHIVES (Feb. 22, 2024) (alleging violation of Act of Mar. 22, 1794, ch. 11, 347 and Act of May 10, 1800, 2 Stat. L. 70, ch. 51, § 1).[10]

Even if a notice did not cite a statute, efforts were made to ensure that property owners understood the nature of their alleged offenses. In the early 1800s, authorities seized a vessel and "alleged the ship Anthony Mangin was subject to forfeiture" because its owner had falsely sworn that he "was the sole owner of the said ship." *United States v. the Anthony Mangin*, 24 F. Cas. 833, 834, 838–39 (D. Pa. 1802). These notices sharply contrast with modern forfeiture notices, which might cite a highly general statute that effectively references hundreds of different possible

[10] Available at https://catalog.archives.gov/id/18542736?objectPanel=transcription.

crimes. Chief Justice Marshall even explicitly condemned the use of such general seizure notices, writing that a "substantial statement of the offence upon which the prosecution is founded, must be the rule of every Court where justice is the object, and cannot be satisfied by a general reference to the provisions of a statute." *The Hoppet*, 11 U.S. 389, 394–95 (1813).

Even when Congress authorized the use of administrative seizures, which allowed law enforcement to bypass the court system, agencies made efforts to respect constitutional rights. Congress authorized the use of administrative forfeiture in 1844 for items valued up to $100, allowing agencies to seize items of "inconsiderable value" without judicial approval. *McGuire v. Winslow*, 26 F. 304, 307 (C.C.N.D.N.Y. 1886). But even then, agencies still dispensed sufficient notice to property owners, as shown by an 1844 order stating that "three pieces of Blue Broadcloth . . . ha[d] been illegally imported into the United States." Three 1865 New York notices of seizure from the same customs officer alleged violations of different sections of "the act of 2d March, 1799." Memorandum, *supra*, at 7. Until 1984, administrative forfeiture typically respected due-process rights, even as the price cap on seizures gradually increased. Rachel J. Weiss, *The Forfeiture Forecast After* Timbs*: Cloudy with A Chance of Offender Ability to Pay*, 61 B.C. L. REV. 3073, 3081–82 (2020).

Forfeiture changed from a niche tool of law enforcement to a resource extraction mechanism almost immediately after the 1984 crime bill introduced significant monetary incentives. Virtually overnight, law enforcement agencies went from confiscating specific property linked to specific criminal activity to forfeitures like a 1985 notice taking a car for a nebulous "violation of the laws of the United States of America." Memorandum, *supra*, at 9. Other examples include a "1991 Alaska notice for 200 video game cartridges" that similarly alleged "violations of the laws of the United States." *Id*. Another example is a "2012 Texas notice that alleged, in the alternative, multiple disparate statutory violations (e.g., harboring aliens, trafficking drugs) and cited four different forfeiture provisions potentially authorizing the seizure." *Id*.

The proliferation of these boilerplate notices advanced the government's new monetary interests. These vague descriptions only serve to confuse property owners, streamline collection procedures, and stifle resistance from plaintiffs attempting to exercise their constitutional rights. The creation of such an apparatus signifies the shift of civil forfeiture from a tailored measure to seize property linked to crime toward a funding mechanism that indiscriminately takes private assets for government use. Allowing the plaintiffs in this case to challenge this exploitative system and impose meaningful constitutional limits on the use of civil forfeiture will

protect law-abiding Americans from future unjust attempts to seize their livelihoods and their freedoms.

CONCLUSION

For the reasons in this brief and those described by the Appellant, this Court should reverse the decision below.

Respectfully submitted,

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Dated: October 24, 2024

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 32(a)(7) and Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,164 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/Thomas A. Berry
Thomas A. Berry

Dated: October 24, 2024

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2024 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by CM/ECF.

/s/Thomas A. Berry
Thomas A. Berry

Dated: October 24, 2024

Counsel for Amicus Curiae