INSTITUTE FOR JUSTICE
Paul V. Avelar (Bar No. 023078)
Keith E. Diggs (Bar No. 032692)
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Telephone: 480.557.8300
Email: pavelar@ij.org
kdiggs@ij.org
Attorneys for Claimants William and Maria Platt

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF NAVAJO

IN THE MATTER OF:

ONE 2012 VOLKSWAGEN JETTA, VIN 3VW3L7AJ0CM366141; and $31,780 in U.S. Currency.

WILLIAM T. PLATT and MARIA B. PLATT,

Claimants.

Case No. CV2016-00217

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO STRIKE CLAIMS

(Oral Argument Requested)

"Arizona's forfeiture statutes are broad and far-reaching and therefore subject to potential prosecutorial abuse." *In re $315,900*, 183 Ariz. 208, 216, 902 P.2d 351, 359 (App. 1995). Claimants William "Terry" and Maria "Ria" Platt—two elderly, out-of-state retirees whose car the State is trying to forfeit—are the innocent victims of such an abuse. Terry and Ria have tried to fight back against the illegal forfeiture of their car, but the State—which will profit from the forfeiture—has attempted to prevent Terry and Ria from having their day in court. The State's Motion to Strike, if granted, would deny Terry and Ria the chance to contest the forfeiture of their car before a neutral judge and strip them of critical property, due process, and other rights. To make the State follow its own laws and protect Terry and Ria's rights, this Court must deny the State's Motion. Thereafter, if the State wishes to continue its unjust pursuit of Terry and Ria's car, the State can file a complaint for forfeiture and Terry and Ria will continue to oppose forfeiture before this Court.

The State's Motion to Strike is premised on just a single argument: that Terry and Ria, acting *pro se*, forever defaulted in objecting to the forfeiture because four words—"under

penalty of perjury"—do not appear on the face of their June 28 Petition for Remission or Mitigation (the "Petition," attached as Exhibit 1). Terry and Ria, acting *pro se*, set forth every bit of required information in their Petition and signed it believing themselves to be "under penalty of perjury." As non-lawyers, they understood "under penalty of perjury" to mean they could not lie in their Petition (which they did not) and nothing in Arizona's statutes or the State's Notice of Pending Forfeiture expressly requires those four words to appear on the face of their Petition. If Terry and Ria's *pro se* Petition is not in complete technical compliance with the requirements for a Petition, however, the very case on which the State relies here holds that a person opposing forfeiture must be given the opportunity to correct technical deficiencies "when 'the goals underlying the time restriction and the verification requirement are not thwarted.'" *State v. Benson (In re $70,269.91)*, 172 Ariz. 15, 21, 833 P.2d 32, 38 (App. 1991) (citation omitted). Here, those goals are met. Moreover, Terry and Ria's subsequent Claim expressly includes the "under penalty of perjury" language with their (notarized) signatures. But the State—which stands to profit from the forfeiture of Terry and Ria's car—is hyper-focused on the four missing words in the Petition even as it admits (as it must) that Terry and Ria's Petition was timely; admits the truth of the thing sought to be verified, Terry and Ria's ownership of the subject 2012 Volkswagen Jetta (the "car"); and seeks to strike the Claim, which includes the four "missing" words.

The State is not complying with its own law and is attempting an illegal forfeiture here. Rather than consider Terry and Ria's Petition on its merits as required by law, the State has persisted in attempting to deny Terry and Ria their day in court though a process called "uncontested forfeiture." *See* A.R.S. § 13-4309. Uncontested forfeiture is often a misnomer, always a euphemism, and certainly so here. Terry and Ria have done all that is required of them to contest the forfeiture of their car. It would be illegal and unjust to now strip Terry and Ria of their car without any opportunity to contest the forfeiture before a neutral arbiter when they have complied or substantially complied with the complex statutory requirements.

In this opposition, Claimants Terry and Ria Platt first explain Arizona's forfeiture procedures and the posture of this case. Second, they show that their June 28 *pro se* Petition

cannot be deemed "null and void" as the State claims, both because it satisfied the statutory requirements but also, in the alternative, because *Benson* requires them to have the opportunity to correct any technical deficiencies in their June 28 *pro se* Petition before losing their car. Third, they demonstrate that their Claim cannot be stricken because uncontested forfeiture, which lets prosecutors (rather than judges) adjudicate the taking of property for prosecutors' use, is unconstitutional. Finally, they address the State's factual allegations, which as a matter of law do not give rise to forfeiture.

I. "UNCONTESTED FORFEITURE" AND THE PROCEDURAL POSTURE OF THIS CASE.

In this case, the State is attempting to take private property through a procedure called "uncontested forfeiture." *See* A.R.S. § 13-4309. Uncontested forfeiture is one of many parts in Arizona's complex forfeiture procedures, and it is critical to understand why the State favors it, how it works, and where the dispute lies as to this case's posture. Claimants will accordingly explain those points in that order.

A. Why the State Favors Uncontested Forfeiture

Uncontested forfeiture is, from a prosecutor's point of view, the easiest of three procedural tracks that Arizona law creates for forfeiture, the other two tracks being "judicial in rem forfeiture" and "judicial in personam forfeiture."[1] *See* A.R.S. §§ 13-4311, -4312. The reason uncontested forfeiture is the easiest track is that it requires the State to carry its evidentiary burden of proof by a showing of mere probable cause, as opposed to a preponderance of the evidence. *Compare* A.R.S. § 13-4314(A) *with* A.R.S. § 13-4311(M).

Exacerbating the danger of the low standard of proof in uncontested forfeiture is the fact that law enforcement officials (meaning both prosecutors and police) have a direct financial interest in the outcome of all forfeiture proceedings. Arizona law gives prosecutors control of the fund into which the proceeds from forfeited property are deposited. A.R.S. §§ 13-2314.03(A), 13-4315(A)(2) ("[T]he attorney for the state . . . may . . . [s]ell forfeited property by

[1] This memorandum will not discuss judicial in personam forfeiture, which is not being attempted here and which, unlike uncontested forfeiture and judicial in rem forfeiture, requires the State to convict somebody of a crime before taking their property. *See* A.R.S. § 13-4312(G).

public or otherwise commercially reasonable sale . . . with the balance paid into the anti-racketeering fund of the . . . county in which the political subdivision seizing the property or prosecuting the action is located."). By law, prosecutors hold the proceeds for the benefit of (1) the agency or agencies that participate in the investigation and seizure of the property, and (2) themselves. A.R.S. § 13-2314.03(D). This financial interest in the outcome—the "profit incentive"—creates a conflict of interest for law enforcement; a conflict between pursuing the interests of justice and their own financial interests.[2]

B. How Uncontested Forfeiture is Supposed to Work

Whether a forfeiture proceeding will be "judicial" or "uncontested" is initially decided by the State. A.R.S. § 13-4308(A). If the State desires to pursue an uncontested forfeiture, the State issues a "notice of pending forfeiture" making uncontested forfeiture available. A.R.S. § 13-4309(1). When the State makes uncontested forfeiture available in a notice of pending forfeiture, a property owner has just thirty days to object. A property owner must object either by (1) filing a "claim" with the court, or (2) filing a "petition for remission or mitigation" (a "petition") with the prosecutor. A property owner may not file both a claim and a petition in response to a notice making uncontested forfeiture available, A.R.S. § 13-4309(2), though, as explained below, a property owner who initially files a petition may later file a claim. Regardless, any petition or claim must comply with A.R.S. § 13-4311(E)-(F). A.R.S. § 13-4309(2).

If a property owner initially files a claim, the forfeiture becomes "contested" and the property owner is entitled to be heard in court. A.R.S. § 13-4311(D). Once a claim is filed, the State has up to seven years in which to file a complaint for forfeiture. A.R.S. § 13-4308(B).[3] The complaint initiates a judicial in rem forfeiture proceeding where the claimant may file an answer, conduct discovery, present evidence, examine the State's witnesses, and otherwise try

[2] Eric Blumenson & Eva Nilson, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56 (1998) ("The most intuitively obvious problem presented by the forfeiture and equitable sharing laws is the conflict of interest created when law enforcement agencies are authorized to keep the assets they seize. It takes no special sophistication to recognize that this incentive constitutes a compelling invitation to police departments to stray from legitimate law enforcement goals in order to maximize funding for their operations.").

[3] There is also a separate deadline for filing the complaint, after which the State may be required to release the property from seizure while the seven-year statute of limitations runs. *See* A.R.S. § 13-4308(B).

the State's case before a judge by a preponderance of the evidence. A.R.S. § 13-4311(G)–(H), (L)–(M). Because a judge does not have the conflict of interest that a prosecutor does—the pecuniary interest in the outcome of the proceeding—contested forfeiture is a more meaningful opportunity to be heard than uncontested forfeiture provides.

By contrast, if a property owner initially files a petition, the "uncontested forfeiture" process is set in motion. Uncontested forfeiture is an administrative procedure. Arizona law requires the prosecutor to "inquire into whether the property is subject to forfeiture and the facts and circumstances" surrounding the petition. A.R.S. § 13-4309(3)(a). After inquiring, the prosecutor must issue "a written declaration of forfeiture, remission or mitigation" as he deems appropriate. A.R.S. § 13-4309(3)(b). Inevitably, however, the prosecutor's inquiry and decision will be influenced by the profit incentive conflict of interest; after all, "incentives matter."[4]

If a prosecutor issues a written declaration of forfeiture in response to a petition, Arizona law allows the property owner who filed the petition to file a claim with the court within thirty days. A.R.S. § 13-4309(3)(c). A claim filed after the declaration of forfeiture voids the declaration of forfeiture, creates a contested forfeiture, and entitles the property owner to be heard in a judicial in rem forfeiture proceeding as described above as if the property owner had initially filed a claim. *See* A.R.S. § 13-4309(6).

In theory, then, a property owner may always contest an "uncontested" forfeiture. In practice, however—and as happened here—that due process right is imperiled by the forfeiture statutes' susceptibility to abuse. *See In re $315,900*, 183 Ariz. at 216, 902 P.2d at 359.

C. The Application for Forfeiture

The last piece in the procedural puzzle is a filing called an "application for forfeiture." An application for forfeiture may be filed by the State when "no petitions . . . or claims are timely filed" (which, again, must be filed within thirty days of a notice of pending forfeiture or written declaration of forfeiture, as applicable). A.R.S. § 13-4314(A). An application for forfeiture has profound consequences for a property owner. First, an application for forfeiture

[4] Darpana Sheth, *Incentives Matter: The Not-So-Civil Side of Civil Forfeiture*, THE FEDERAL LAWYER, July 2016, at 46 (summarizing how forfeiture laws have incentivized seizing and forfeiting of property).

must be granted upon a showing of mere probable cause, A.R.S. § 13-4314(A), as opposed to a preponderance of the evidence, *see* A.R.S. § 13-4311(M). Second, "there is no provision in the statutes for anyone to intervene in the [forfeiture] proceeding once the state has applied to the court for an order of forfeiture." *Norriega v. Machado*, 179 Ariz. 348, 352, 878 P.2d 1386, 1390 (App. 1994). The lack of an opportunity to be heard distinguishes an application from a notice of forfeiture, a written declaration of forfeiture, and a complaint for forfeiture, because all the rest of these filings provide property owners a subsequent opportunity to be heard.

In essence then, an application for forfeiture makes the State the only party to the forfeiture proceeding and grants the State (which has a profit incentive conflict of interest) a very low standard of proof. Combining an ex parte proceeding that excludes property owners with a very low standard of proof means the excluded property owner is virtually certain to be permanently deprived of their property rights A.R.S. § 13-4314(B).

D. Where the Dispute Lies in This Case

There is a single basic point of dispute in this case: whether or not Terry and Ria's June 28 *pro se* Petition should or could be counted as a petition. Corollary to that dispute is whether Terry and Ria's August 10 Claim should be stricken, as the State argues.

The following points are undisputed:

- the State's Notice of Pending Forfeiture (the "Notice") made uncontested forfeiture available.
- the State has known of Terry and Ria's ownership of the subject car since before it issued the Notice. Continuation/Supplemental Report of Trooper Plumb (attached as Exhibit 5) at 5 ("I completed a vehicle history search . . . . The vehicle showed it was paid off and was in fact registered to [Shea] Platt's parents, William and Maria Platt with an address of 1931 Elwood Ave Prosser, WA 99350."); *see also* A.R.S. § 13-4307(1) (requiring service upon persons known to have an interest in property sought for forfeiture).
- the State mailed the Notice to Terry and Ria on May 29.

- the State admits it received Terry and Ria's Petition. Though the State plays coy as to the date, it does not dispute that the Petition was timely delivered on June 28.
- the State filed its Application for Forfeiture (the "Application") on July 5, offering the conclusory statement that Terry and Ria's Petition was "null and void." Appl. at 1. The State did not provide the Court with a copy of the Petition.
- the State never reached out to Terry and Ria to inform them of any purported defect in their Petition, although it certainly could have.
- Terry and Ria filed their Claim on August 10, asking that the Application be deemed a written declaration of forfeiture.
- the State filed the instant Motion to Strike Claim[] on September 6, arguing for the first time that Terry and Ria's June 28 *pro se* Petition was not signed under penalty of perjury and therefore they were not entitled to file their Claim.

The State contends, and Terry and Ria dispute, that Terry and Ria's June 28 *pro se* Petition was a "legal nullity." *See* Mot. Strike at 8. The State's Application represents—incorrectly—that "no timely claim or Petition for Remission has been filed." Appl. at 1. Rather, the Application admits that "correspondence was received by the County Attorney's Office from . . . William and Maria Platt," but claims that "that correspondence did not meet the legal requirements for a Claim or Petition for Remission, and were legally null and void under pursuant to [sic] A.R.S. §§ 13-4311(E) &(F), as well as 13-4309(2)." Appl. at 1. Nothing in the Application explains how Terry and Ria's "correspondence" allegedly failed to meet legal requirements. Neither did the State provide copies of the "correspondence" to allow this Court to make its own determination as to the sufficiency of Terry and Ria's Petition.

Because Terry and Ria's June 28 *pro se* Petition should not have been declared "null and void," the State's filing of the Application violated its duty under A.R.S. § 13-4309(3)(a-b) to inquire and declare forfeiture (or remission or mitigation). The uncontested forfeiture statutes do not allow the shortcut the State took in filing an application for forfeiture immediately following Terry and Ria's June 28 *pro se* Petition.

The State's illegal Application placed Terry and Ria in a procedural no man's land. They had done all that was required to that point to preserve their property rights to their car, but Arizona law purported to prevent them from opposing the forfeiture once the State filed its Application. *Norriega*, 179 Ariz. at 352, 878 P.2d at 1390. Arizona law does not and cannot vest unfettered discretion in prosecutors—who have a profit incentive to pursue forfeiture—to disregard forfeiture petitions. Desperate to preserve title to their car and have a court—which would be uncorrupted by forfeiture's profit incentive conflict of interest—decide their property rights, Terry and Ria regarded the State's Application as a declaration of forfeiture and timely filed their Claim on August 10 to protect their rights. *See* A.R.S. § 13-4309(3)(c); Ariz. R. Civ. P. 6(e); *State v. Counterman (In re $47,611)*, 196 Ariz. 1, 3–4, 992 P.2d 1, 3–4 (App. 1999) (applying Rule 6(e) to forfeiture claim filing deadline).

The State's Motion to Strike Claims doubles down on its Application. The State argues this Court must ignore the Claim because the State decided to invalidate Terry and Ria's June 28 *pro se* Petition. The implication of the State's argument is breathtaking: The State is arguing that this Court cannot review the legality of the State's actions here—actions taken under a profit incentive to take property for forfeiture—and the Court must ignore Terry and Ria's attempts to invoke judicial review of the State's decision to ignore Terry and Ria's June 28 *pro se* Petition. The State is wrong. And if the State is right, then Arizona's uncontested forfeiture statutes violate due process.

II. TERRY AND RIA'S JUNE 28 *PRO SE* PETITION WAS NOT NULL AND VOID AND THE STATE WAS NOT ALLOWED TO FILE AN APPLICATION FOR FORFEITURE.

When Terry and Ria completed and signed their June 28 *pro se* Petition, they believed they were signing it under penalty of perjury. The *only* basis for the State's argument that Terry and Ria's Petition was "null and void" is the absence of four words from the face of their Petition: "under penalty of perjury." Mot. Strike at 8. This is, first and foremost, an admission by the State that the Petition satisfies every other requirement of A.R.S. § 13-4311(E). But Terry and Ria's understanding of their statutory obligation—to provide information and tell the

truth while doing so or face a penalty—is the one that any layman would have drawn from the plain language of A.R.S. § 13-4311(E) and the Notice the State provided to them. Terry and Ria complied with A.R.S. § 13-4311(E) because there is nothing in the statute or Notice that actually tells property owners the words "under penalty of perjury" are necessary to include in a petition. In the alternative, if Terry and Ria's June 28 *pro se* Petition was not in full technical compliance, it was in substantial compliance, and *Benson* requires that they be given an opportunity to correct any technical deficiency. The State and this Court may not simply disregard their Petition.

A. Terry and Ria complied with all statutory requirements.

Terry and Ria complied with the plain language of A.R.S. § 13-4311(E) and therefore the State had no right to declare their June 28 *pro se* Petition "null and void." The State claimed that Terry and Ria's June 28 *pro se* Petition "did not meet the legal requirements for a Claim or Petition for Remission, and w[as] legally null and void under pursuant to [sic] A.R.S. §§ 13-4311(E)&(F), as well as 13-4309(2)." Appl. at 1. Although the State did not explain at the time what the legal shortcoming was, the State's Motion argues, for the first time, that the legal shortcoming was the absence of the words "under penalty of perjury" from Terry and Ria's June 28 *pro se* Petition. Mot. Strike at 8.

Arizona law does not say that the words "under penalty of perjury" must be included in a petition. Section 13-4309(2) states that a "claim or petition shall comply with the requirements for claims in section 13-4311, subsections E and F." Section 13-4311, subsections E and F, in turn provide:

> E. The claim shall be signed by the claimant under penalty of perjury and shall set forth all of the following:
>
> 1. The caption of the proceeding as set forth on the notice of pending forfeiture or complaint and the name of the claimant.
> 2. The address at which the claimant will accept future mailings from the court or attorney for the state.
> 3. The nature and extent of the claimant's interest in the property.
> 4. The date, the identity of the transferor and the circumstances of the claimant's acquisition of the interest in the property.
> 5. The specific provisions of this chapter relied on in asserting that the property is not subject to forfeiture.

6. All facts supporting each such assertion.
7. Any additional facts supporting the claimant's claim.
8. The precise relief sought.

F. Copies of the claim shall be mailed to the seizing agency and to the attorney for the state. No extension of time for the filing of a claim may be granted.

This language is repeated, verbatim, in the Notice. Not. at 1. No additional guidance is given to property owners.

Terry and Ria signed their June 28 *pro se* Petition believing themselves to be "under penalty of perjury," i.e., subject to legal punishment if they lied (which they did not). Decl. William "Terry" Platt (T. Platt Decl.") (attached as Exhibit 2) at ¶¶ 15-18; Decl. Maria "Ria" Platt ("R. Platt Decl.") (attached as Exhibit 3) at ¶¶ 15-18. They read the statutory language in the Notice carefully and, though confused, followed the instructions as best they could. T. Platt Decl. at ¶¶ 11-13, 19; R. Platt Decl. ¶¶ 11-13, 19. And although lawyers may appreciate the related but separate need to make explicit what is understood, Terry and Ria—and indeed most forfeiture victims, who have little money to begin with, no right to have an attorney provided, *and* have had assets taken from them which makes hiring an attorney even more difficult—were without a lawyer and had to proceed *pro se*. T. Platt Decl at ¶¶ 2, 5-11; R. Platt Decl. ¶¶ 2, 5-11.

Arizona statutes are to be interpreted according to their plain language. *State v. Hansen*, 215 Ariz. 287, 289, 160 P.3d 166, 168 (2007). "Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial." *City of Phoenix v. Yates*, 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949). "In giving effect to every word or phrase, the court must assign to the language its usual and commonly understood meaning unless the legislature clearly intended a different meaning." *Bilke v. State*, 206 Ariz. 462, 464-65, 80 P.3d 269, 271-72 (2003) (internal quotation marks omitted). And courts must remember that the inclusion of some items in a list and the exclusion of other items "implies the legislative intent to exclude those items not so included." *Sw. Iron & Steel Indus. v. State*, 123 Ariz. 78, 79, 597 P.2d 981, 982 (1979) (the principle of *expressio unius est exclusio alterius*).

Nothing in A.R.S. § 13-4311(E) or the Notice expressly required Terry and Ria's June 28 *pro se* Petition to set forth the words "under penalty of perjury." Although A.R.S. § 13-

4311(E) does say a petition "shall set forth" eight points, it does not require "under penalty of perjury" to be "set forth." Indeed, A.R.S. § 13-4311(E) specifically distinguishes between the "sign[ing] . . . under penalty of perjury" and the points to be "set forth." Accordingly, A.R.S. § 13-4311(E) is most logically read to require just the eight points to be "set forth," i.e., to be said expressly, in a petition. The State admits Terry and Ria did set forth those eight points in their June 28 *pro se* Petition. When it comes to signing, A.R.S. § 13-4311(E) also requires the petition to be signed under penalty of perjury, but does not require that fact to be "set forth," i.e., to be said expressly, in the petition. Section 13-4311(F) and the Notice then require copies to be sent to certain agencies. Again, the State admits Terry and Ria did this. To twist and conflate the petition requirements as the State does, to demand the express inclusion of words not required to be "set forth" by the plain language of A.R.S. § 13-4311(E), just sets a trap for the unwary and unrepresented.

Terry and Ria signed the Petition, and they wholly believed those signatures to subject them to legal penalty if it were later discovered that any of the averments in their Petition turned out to be false. Nothing in A.R.S. § 13-4311(E) or the Notice tells them their signatures would be insufficient or that the absence of the words "under penalty of perjury" would render an otherwise valid petition "null and void" (as the State claims) and would therefore cost them their car *and* the opportunity to contest the forfeiture of their car. And if that were not enough, whatever concerns the State may have about the truthfulness of Terry and Ria's June 28 *pro se* Petition, Terry and Ria's August 10 Claim—which is the only document the State is moving to strike[5]—explicitly reiterates "under penalty of perjury" what the State has known all along: that Terry and Ria own the car.

Terry and Ria's June 28 *pro se* Petition met every requirement of Arizona's forfeiture statutes and the Notice from the State. The State had no right to declare it null and void, to pretend that it did not exist, or to ask this Court to pretend it did not exist.

[5] Terry and Ria object that the State did not explain the alleged lack of verification either to Terry or Ria in response to their June 28 *pro se* Petition or to this Court in the State's July 5 Application.

B. In the alternative, if Terry and Ria were not in full technical compliance, they should have had the opportunity to correct any technical faults.

In the event that Terry and Ria's common-sense understanding of their obligations was incorrect and there was a technical defect in the verification of their June 28 *pro se* Petition, they have to be given an opportunity to correct the technical defect—which they did in their Claim—before the State permanently takes their car from them. Claimants agree with the State that the controlling authority is *Benson*. In *Benson*, would-be claimants omitted three of the eight points required by A.R.S. § 13-4311(E) from their claim and the state therefore moved to strike it. 172 Ariz. at 18, 833 P.2d at 35. The Court of Appeals held that it was an abuse of discretion to deny the claimants leave to amend their claim before striking it because, even though it was missing these points and not in full technical compliance with A.R.S. § 13-4311(E), the claim was in substantive compliance. In doing so, the court laid out a test: two substantive threshold concerns, followed by a three-factor balancing test if both thresholds are met. In the event that Terry and Ria's June 28 *pro se* Petition was not in full technical compliance with A.R.S. § 13-4311(E), under *Benson* this Court must allow them the opportunity to correct the technical violation, as by filing a corrected petition or a claim. Terry and Ria's August 10 Claim already corrects that supposed technical fault and Terry and Ria's Claim cannot be struck.

Terry and Ria satisfy both threshold concerns and the balancing test favors their Claim. The first substantive concern, not sincerely disputed by the State, is whether there is any danger that Terry and Ria's ownership claim is false. *Benson*, 172 Ariz. at 20, 833 P.2d at 37. The second substantive concern, also not in dispute, is whether Terry and Ria timely notified the State of their intent to contest the forfeiture. *Id.* If those substantive concerns are met, this Court must consider and balance the following factors:

> (1) whether [Terry and Ria] advised the . . . government of [their] interest in the property before the claim deadline;
> (2) whether allowing the amendment would prejudice the government; and
> (3) whether [Terry and Ria] made a good faith effort to comply with the statutory filing requirements.

Id. at 21, 833 P.2d at 38.

The State's argument—that Terry and Ria's signed June 28 *pro se* Petition does not say "under penalty of perjury"—is, in light of the facts and the State's own admissions, untethered to *Benson*'s substantive concerns. As *Benson* explains, the purpose of a verification requirement is the "[t]he danger of false claims in [forfeiture] cases is substantial"; if a petitioner can "effectively eliminate any danger that their claims [a]re false," the verification requirement is satisfied. 172 Ariz. at 20, 833 P.2d at 37 (internal citations and quotation marks omitted). Here, it obviously is. As in *Benson*, the State admits the veracity of the thing sought to be verified: the Platts' "[o]wnership claim[]." *Benson*, 172 Ariz. at 20, 833 P.2d at 37. It has never contested Terry and Ria's ownership of the car, and there is no credible way it could[6]—Terry and Ria are the registered owners under the laws of Washington state, and they provided the State with their car title. Ex. 1, Pet. at 1 ¶ 3 & Supp. at 29 (photocopy of valid car title); *accord* Claim at 36. The State has recognized this since the initial seizure, when DPS Trooper Plumb learned of Terry and Ria's ownership of the car through a standard title check and relayed the information to the prosecutor. Ex. 5 at 5. In this case, as in *Benson*, "no issue exists as to whether [Terry and Ria] own[] the property." 172 Ariz. at 20, 833 P.2d at 37.

Because the verification requirement is satisfied, and because the Petition was undisputedly timely, this Court must further consider *Benson*'s three prudential factors. *Id.* at 21, 833 P.2d at 38.

[6] The State insinuates in a footnote that "regardless of how titled, the Jetta was in fact Terence Platt's vehicle, as he was the person regularly using and maintaining it, rather than William and Maria Platt." Mot. Strike at 5 n.1. This insinuation is both mistaken and ridiculous. It is mistaken because the State is confusing William Platt—whose middle name is "Terence" and who goes by "Terry," with his son, Terence Shea Platt, who goes by "Shea." It is ridiculous because (even if the State were correct) it does not contest Terry and Ria's title to the car—only its regular use and maintenance, which has nothing to do with the legal or equitable power to convey the car. *Cf.* A.R.S. § 13-4304(4)(b) (providing affirmative defense to forfeiture for "innocent owners" who do not empower person suspected of crime with legal or equitable power to convey interest in property). Moreover, the State's confusion about the identity of the claimants and use of the car here demonstrates that it has not done even a cursory investigation into the facts of this case, in violation of Arizona law. *Cf.* A.R.S. §§ 13-4308(A) (requiring "inquiry and examination" by the prosecutor before instituting forfeiture proceedings of any kind), -4309(3)(a) (requiring the prosecutor to conduct an inquiry following receipt of a petition for remission or mitigation of forfeiture.).

Factor (1), whether [Terry and Ria] advised the . . . government of [their] interest in the property before the claim deadline," favor Terry and Ria. The State does not contest the timeliness of Terry and Ria's June 28 Petition—which prominently states on the first page that the forfeiture is "NOT UNCONTESTED!".

Factor (2), whether allowing the amendment would prejudice the government, also favors Terry and Ria because the State will not be prejudiced. When a party has notice of a case, it is not prejudicial to ask that party to litigate rather than win by default, and so the State is not prejudiced by having to argue its case against Terry and Ria before this Court. *See Lennar Corp. v. Auto-Owners Ins. Co.*, 214 Ariz. 255, 269, 151 P.3d 538, 552 (App. 2007) (where a losing party at trial missed the date by which to file an appeal and asked to vacate and reenter the judgment to timely appeal, the question was not whether the winning party "was prejudiced by [the losing party] being allowed to appeal but whether it was prejudiced by the appeal being delayed rather than timely"). The State has known of Terry and Ria's case all along and known since the June 28 *pro se* Petition that they were attempting to contest the forfeiture. Therefore, simply adding the words "under penalty of perjury" to Terry and Ria's June 28 *pro se* Petition (or their August 10 Claim, which does include those words) can hardly be said to introduce any element of surprise in this forfeiture proceeding. Additionally, the State has not pointed to any harm to itself arising in the seven days between the Petition and the Application (which failed to explain any alleged deficiency) or the 43 days between the allegedly deficient Petition and the not deficient Claim. All the State says is that it was "deprived . . . of any opportunity to consider" Terry and Ria's ownership of the car. *See* Mot. Strike at 8. But given all that Terry and Ria did and provided to the State, this claim cannot be taken seriously. (Moreover, as Claimants show in Part IV below, the State cannot be prejudiced here because it has no underlying case for forfeiture.)

Factor (3), whether Terry and Ria made a good faith effort to comply with the statutory filing requirements, strongly favors Terry and Ria. It is hard to conceive of a *pro se* petitioner doing more to comply with A.R.S. § 13-4311(E) than did Terry and Ria. Terry and Ria meticulously responded to all eight of that statute's requirements. They provided 29 pages of

supporting documentation including a photocopy of a two-year-old check to their auto lender and their vehicle title. Moreover, as explained in Section II.A., above, it is easy to see how Terry and Ria—like any *pro se* litigants would—acted in good faith by simply signing their Petition but (arguably) misunderstanding the "under penalty of perjury" requirement. Again, given Terry and Ria's extraordinary efforts, the State's complaint that it was "deprived . . . of any opportunity to consider" Terry and Ria's ownership of the car is laughable. Mot. Strike at 8.

Resolution of the *Benson* factors does leave one question: Whether *Benson*, which requires a property owner to be given the opportunity to correct a claim filed with the court before losing his property, also requires a property owner to be given the opportunity to correct a petition filed with the prosecutor before losing his property. To the best of counsel's knowledge, this issue—whether *Benson* applies to petitions as well as claims—is one of first impression in Arizona. But this is still an easy decision; *Benson* must allow property owners to correct petitions for all the same property rights and due process reasons that property owners must be allowed to correct claims. Moreover, there is a further, critical, reason that courts must give property owners the opportunity to correct technical deficiencies in petitions: Petitions are considered only by prosecutors who, unlike judges, have a profit incentive conflict of interest in the outcome of forfeiture proceedings. A.R.S. § 13-4315; *cf. State v. Conlin*, 171 Ariz. 572, 575, 832 P.2d 225, 228 (App. 1992) (noting that superior courts, unlike prosecutors, have no recognizable interest in drug fines which are deposited into drug and gang enforcement fund). This profit incentive conflict of interest offers a "possible temptation" to prosecutors to—as happened here—find technical defects where none exist or unjustly use technical defects to take property without further court proceedings. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (declaring such a profit incentive conflict of interest unconstitutional). This profit incentive conflict of interest thus requires a degree of judicial oversight greater even than that necessary when a judge finds a technical defect, as in *Benson*.

Even assuming Terry and Ria's June 28 *pro se* Petition was not in technical compliance with statutory requirements, the State was not allowed to just ignore it—declare it "null and void"—without an explanation or opportunity to amend. Accordingly, the State's July 5

Application was not permitted and Terry and Ria's August 10 Claim—which treated the improper Application as a declaration of forfeiture following their Petition—must be accorded full legal effect. Based on this Claim—which corrects the only alleged defect of the Petition—Terry and Ria should be considered parties to any subsequent forfeiture proceedings and the Court may not grant the State's Application.

III. TERRY AND RIA'S CLAIM CANNOT BE STRICKEN BECAUSE UNCONTESTED FORFEITURE IS UNCONSTITUTIONAL.

Because Arizona prosecutors have a profit incentive conflict of interest in these forfeiture proceedings, these proceedings violate Terry and Ria's due process rights. Because Arizona law gives prosecutors and seizing agencies a profit incentive conflict of interest in every forfeiture proceeding, *see* Section I.A, above, the due process rights of every property owner caught up in Arizona forfeiture proceedings is violated. But this due process violation is particularly acute in the case of uncontested forfeiture, where—as the State's conduct in this case proves—prosecutors act in a judicial or quasi-judicial capacity with regard to petitions in which they have a clear financial interest conflict of interest.

It violates the Fourteenth Amendment's due process protections to subject a person's "liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Due process is violated not just when the adjudicator receives the profits of the judgment directly, but also when the adjudicator's "executive responsibilities for . . . finances may make him partisan to maintain the high level of contribution" from the adjudications. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). Indeed, "administrative adjudicators" with a profit incentive conflict of interest, such as prosecutors considering petitions for remission in Arizona uncontested forfeiture proceedings, "should not adjudicate these disputes." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *accord In re Pima Cty. Anonymous, Juvenile Action No. J 24818-2*, 110 Ariz. 98, 101, 515 P.2d 600, 603 (1973) (outlining four types of violations of the right to a fair and impartial trier of fact, including

situations where "prosecutorial and adjudicatory functions become intertwined" and "situation[s] in which the trier of fact has an interest in finding against the accused").

This case is proof that uncontested forfeiture violates the constitutional right to due process of law. U.S. Const. amend. XIV; Ariz. Const. art. 2, § 4. Despite having recognized that Terry and Ria own the car, the State has moved swiftly and deliberately to deprive them not only of their car, but also of the fundamental right to contest the deprivation of the car in an adversarial proceeding, by unilaterally declaring their Petition "null and void." The State, in other words, is trying to act as both prosecutor and judge—*and* keep the fruit of the judgment.

Striking Terry and Ria's Claim would cement the constitutional violation here by validating, without judicial scrutiny, the prosecutors' summary suppression of the June 28 Petition. In the event the Court cannot sustain the Claim (as it should) on statutory grounds, it may still not strike the Claim because doing so would deprive Terry and Ria of their constitutional right to due process of law.

IV. THE STATE LACKS EVEN PROBABLE CAUSE FOR FORFEITURE.

Finally, the State's Motion to Strike, which asks this Court to order forfeiture based on the State's Application, must also be denied because the State has failed to meet the burden set out in Arizona law. The alleged facts set out in the State's Application and the additional (and unsupported) allegations in the Motion to Strike, even if true, do not, as a matter of statutory law, establish even probable cause for forfeiture.

The State's Application does not set forth any argument or facts in support of a finding of probable cause. Rather, it sets forth a boilerplate recitation of the legal conclusion the State would like this Court to reach by stating that "[t]he attached Exhibits [to the Application] set forth facts sufficient to demonstrate probable cause to believe that the aforementioned property is subject to forfeiture pursuant to A.R.S. §§ 13-2314(G)(3), 13-3413(A)(3)." Appl. at 1. But those exhibits do no such thing. Indeed, a simple reading of A.R.S. §§ 13-2314(G)(3) (which subjects property used in certain "racketeering" offenses to forfeiture) and 13-3413(A)(3) (which does the same for certain drug crimes) confirms that Arizona law does not permit forfeiture here.

The Exhibits to the Application include only a one-page Offense Report (attached as Exhibit 4), a five-page Continuation/Supplemental Report of Trooper Plumb (attached as Exhibit 5), and a one-page Continuation/Supplemental Report of Trooper Mortenson (attached as Exhibit 6).[7] The Exhibits allege "$31,780.US currency and *personal use* marijuana and drug paraphernalia." Ex. 4 (emphasis added). The allegations in the Motion to Strike, which largely restate without citing Trooper Plumb's narrative report, add nothing of substance to the State's case.

Under black-letter Arizona law, the allegations in the Application, Exhibits, and the Motion (even if true) do not give rise to forfeiture of Terry and Ria's car. Section 13-2314(G)(3), the racketeering-forfeiture enabling statute, permits forfeiture only of "proceeds traceable to an offense included in the definition of racketeering . . . and all monies, negotiable instruments, securities and other property used or intended to be used in any manner or part to facilitate the commission of" a racketeering offense. Critically, to be a "racketeering offense," an alleged crime *must* be "committed for financial gain." A.R.S. § 13-2301(D)(4)(b). Section 13-3413(A)(3), the drug-forfeiture enabling statute, permits forfeiture of "[v]ehicles to transport or in any manner facilitate the transportation, sale or receipt of, or in which is contained or possessed, any item or drug, except as provided in chapter 39 of this title." As set out below, however, there are critical threshold and financial gain restrictions on this section. Although the State never expressly states what crimes giving rise to forfeiture are at issue here, Officer Plumb's report references three potential crimes: "possession of marijuana," "possession of drug paraphernalia," and "money laundering" of the $31,780." Ex. 5, at 1. But these crimes as alleged either do not give rise to forfeiture of Terry and Ria's car or there is not probable cause to show any forfeitable offense.

First, the State's allegation of "personal use marijuana" is an admission that forfeiture is not allowed under the facts of this case. Arizona's forfeiture statutes provide that *no property may be forfeited* if the illegal drug-related conduct giving rise to the forfeiture both

[7] Terry and Ria did not receive copies of these Exhibits with the Application. Rather, counsel had to request the Clerk of Court to fax its entire file as of August 16, 2016 to obtain these documents.

(a) Did not involve an amount of unlawful substance greater than the statutory threshold amount as defined in § 13-3401.
(b) Was not committed for financial gain.

A.R.S. § 13-4304(3); *see also* § 13-3401(36)(h) (providing a statutory threshold of *two pounds* of marijuana). The State has the burden of showing that the threshold was exceeded or that the alleged crime was committed "for financial gain." A.R.S. § 13-4314(A).

Here, there is no evidence that Arizona's statutory threshold for marijuana possession has been exceeded. Moreover, "personal use" possession of marijuana is not "for financial gain," *i.e.*, for sale. Further, the alleged finding of "a small quantity of marijuana and a metal grinder," Ex. 5, at 4, would strongly suggest the marijuana was for personal use and not for sale. Because the State has shown neither financial gain nor an amount of marijuana in excess of the two-pound threshold, the State cannot meet its burden of proof for forfeiture under either A.R.S. § 13-2314(G)(3) (citing § 13-2301(D)) or A.R.S. § 13-3413(A)(3).

Second, possession of drug paraphernalia does not give rise to forfeiture of the car. Possession of paraphernalia is not a "racketeering" crime. *See* A.R.S. § 13-2301(D)(4). Neither is paraphernalia included in A.R.S. § 13-3413(A)(3), the drug-forfeiture enabling statute. Paraphernalia is categorized separately, and gives rise to forfeiture of nothing but the paraphernalia itself. *Compare* A.R.S. § 13-3415(D) (authorizing forfeiture of paraphernalia and nothing more) *with* § 13-3413(A)(3) (authorizing forfeiture of drugs *and* vehicles used to transport drugs, subject to limitations of §§ 13-3401(36)(h) and 13-4304(3)(a)).

Third, there is not probable cause to believe that money laundering[8] has occurred here. The State has not alleged any element of money laundering. The only "evidence" the State offers for that charge is an assertion by Officer Plumb that the money found in the car was "bundled." Ex. 5, at 4; *accord* Mot. Strike at 4. "Bundling," which every ordinary person does with their cash, is not probative of money laundering. And "'there is nothing even remotely criminal in possessing an automobile' or . . . a large sum of cash." *In re $315,900*, 183 Ariz. at

[8] Money laundering is not included in the drug-forfeiture enabling statute, and gives rise to forfeiture only under the racketeering-forfeiture enabling statute, which always requires proof of commission "for financial gain." *See* A.R.S. §§ 13-2314(G)(3), -2301(D)(4)(b)(xxvi).

216, 902 P.2d at 359 (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965)). The mere presence of money in the vicinity of a small amount of marijuana, with "no evidence whatsoever that the money was derived from, or used or intended for use in connection with, any drug-related offenses, money laundering or any other illegal activities," does not satisfy the constitutional requirement of probable cause. *In re $315,900*, 183 Ariz. at 214, 902 P.2d at 357. The State has pointed to no such evidence and none appears in the Exhibits the State relies on to make its showing. Accordingly, the constitutional requirement of probable cause has not been met here and the State is not entitled to forfeiture.[9]

It is apparent, even on the State's own (untested) allegations, that the State has no case for forfeiture and yet the State still aggressively seeks forfeiture. This fact simply highlights the effects the profit incentive conflict of interest can have. And it makes the State's demand that this Court hand over Terry and Ria's car while denying them the opportunity to have their day in court particularly unjust.

CONCLUSION

Terry and Ria have consistently attempted to contest this forfeiture in good faith since receiving notice, and have been stonewalled by the State in return. This Court should not permit such a miscarriage of justice. Because their Petition was verified, because uncontested forfeiture is unconstitutional, and because the State has alleged no facts giving rise to forfeiture, Terry and Ria respectfully pray that this Court deny the State's Motion to Strike their Claim and thereby allow them to appear before this Court to defend their interest in the subject car.

RESPECTFULLY SUBMITTED this 26th day of September, 2016.

INSTITUTE FOR JUSTICE

By: _____

Paul V. Avelar (Bar No. 023078)
Keith E. Diggs (Bar No. 032692)
398 South Mill Avenue, Suite 301
Tempe, AZ 85281

[9] Even if the State could make a probable cause showing, Terry and Ria's Claim demonstrates that they are innocent owners as defined in A.R.S. § 13-4304(4) and the State still may not forfeit their car.

Telephone: 480.557.8300
Email: pavelar@ij.org
kdiggs@ij.org
Attorneys for William and Maria Platt

CERTIFICATE OF SERVICE

I certify that on the 26th day of September, 2016, this Memorandum of Points and Authorities in Opposition to Motion to Strike was filed by depositing the same with a registered process server for filing.

I certify that on the 26th day of September, 2016, a true and correct copy of this Memorandum of Points and Authorities in Opposition to Motion to Strike was deposited with a registered process server for service on the following:

Jason Moore
Deputy Navajo County Attorney
100 East Code Talkers Drive
South Highway 77
Holbrook, Arizona 86025
Telephone 928-524-4026

Hon. Mark Brnovich
Attorney General of Arizona
1275 W Washington St
Phoenix, AZ 85007-2926
Telephone 602-542-5025

Rep. David Gowan, Sr.
Speaker of the House
1700 W Washington St
Phoenix, AZ 85007
Telephone 602-926-3312

Sen. Andy Biggs
President of the Senate
1700 W Washington St
Phoenix, AZ 85007
Telephone 602-926-437

By: _____
Paul Avelar
Institute for Justice