MARK BRNOVICH
Arizona Attorney General (Firm Bar No. 014000)
Thomas Rankin (Bar No. 012554)
Kenneth R. Hughes (Bar No. 028274)
Rusty D. Crandell (Bar No. 026224)
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007-2997
Telephone: (602) 542-8493
Thomas.Rankin@azag.gov
Kenneth.Hughes@azag.gov
Rusty.Crandell@azag.gov
Attorneys for the State of Arizona

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

William Terrence Platt and Maria B. Platt, Plaintiffs, v. Jason Moore, *et al.*, Defendants.	Case No. CV-16-8262-PCT-BSB **INTERVENOR STATE OF ARIZONA'S MOTION TO DISMISS** **(Oral Argument Requested)**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Intervenor-Defendant, the State of Arizona, moves this Court to dismiss the First, Second, and Third Causes of Action for failure to state a claim upon which relief can be granted.

I. INTRODUCTION

The State of Arizona moved to intervene in this matter for the purpose of defending the facial constitutionality of its civil asset forfeiture statutes. Although the

First Amended Complaint sets forth a multitude of facts, legal assertions, and general grievances, the Platts' facial challenges are focused on three sets of statutory provisions: A.R.S. §§ 13-4309, 13-4314(A) (the "Uncontested Forfeiture Statutes"); A.R.S. §§ 13-2314.03, 13-4315 (the "Expenditure Statutes"); and A.R.S. §§ 13-4314(E)–(F) (the "Fee-Shifting Statutes"). (Compl. 44–45 ¶¶ A, C, D, and F.) These facial challenges are embodied in the First, Second, and Third Causes of Action. None of these three causes states a claim for relief that is "plausible on its face," and therefore each should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (upholding Rule 12(b)(6) dismissal of § 1983 claim that was not "alleged under a cognizable legal theory").

II. ARGUMENT[1]

A. THE FIRST CAUSE OF ACTION SHOULD BE DISMISSED.

In their First Cause of Action, the Platts argue that the Uncontested Forfeiture Statutes and the Expenditure Statutes violate due process because they: (a) allow for forfeiture to be obtained without an adversarial hearing; (b) allow an attorney for the State to force a claimant through the uncontested forfeiture process; and (c) allow an attorney for the State to adjudicate a matter in which he has a pecuniary interest. (Compl. ¶¶ 246–57.)

The First Cause of Action fails because the Uncontested Forfeiture Statutes provide property owners with a variety of procedural due process protections and require judicial determination of all forfeitures entered in Arizona. An attorney for the State simply does not and cannot "adjudicate" a forfeiture matter. Because the First Cause of Action relies on no cognizable or plausible legal theory, it must be dismissed.

[1] The State joins and adopts the Statement of Material Facts and standing arguments made by the County/City/Town Defendants in their separate Motion to Dismiss.

1. The Uncontested Forfeiture statutes provide notice, an opportunity for property owners to be heard, and the right to demand an adversarial judicial hearing.

Uncontested forfeiture is one type of forfeiture proceeding authorized by Arizona law, and it is the only type challenged in the instant lawsuit. Uncontested forfeiture bears some similarity to federal administrative forfeiture, but it differs in a fundamental way: uncontested forfeiture always requires a judicial determination, even when nobody objects to the forfeiture. *Compare* 19 U.S.C. § 1602–613 (providing for forfeiture by agency declaration) *with* A.R.S. § 13-4314(A) ("If no petitions . . . or claims are timely filed . . . the attorney for the state *shall apply to the court* for an order of forfeiture. . . ." (emphasis added)).

If a forfeiture of property is authorized by law, the attorney for the State may, in his or her discretion, elect to make uncontested forfeiture proceedings available. A.R.S. § 13-4309. He or she must then provide notice to all known owners of and interest holders in the property, thereby giving them an opportunity to enter the proceedings and be heard. *See id.* at § 13-4309(1).[2]

A person who receives notice of an uncontested forfeiture proceeding has the right to pursue three options. He or she may elect to do nothing, in which case the attorney for the State must submit an application for order of forfeiture to a superior court judge. *Id.* at 13-4309(4); 13-4314(A). Alternatively, the person may file a timely claim with the superior court. This terminates the uncontested forfeiture proceeding. *Id.* at § 13-4309(6)(a) ("If a claim has been timely filed . . . it shall be determined in a judicial forfeiture proceeding. . . ."). Finally, the person may submit a timely and statutorily-compliant petition for remission or mitigation to the attorney for the State.

[2] Unlike judicial forfeiture proceedings, uncontested forfeiture proceedings require no submittal or filing fee and require the State to initiate proceedings within thirty days of the seizure for forfeiture, rather than sixty days. *See generally* A.R.S. § 13-4309, 13-4308(B). Thus, the uncontested forfeiture procedures not only provide notice and an opportunity to be heard, they do so on a no-cost, expedited basis.

The attorney for the State must then inquire into the facts and circumstances surrounding the petition, and then provide a written declaration of forfeiture, remission, or mitigation of any or all interest in the property. *Id.* at §§ 13-4309(3)(a), (b).

A written declaration of forfeiture is not a summary adjudication by the State. Any person wishing to challenge the State's declaration in an adversarial judicial forfeiture proceeding has the right to then file a timely claim with the superior court. *Id.* at §§ 13-4309(3)(c), (6)(a). Even if he or she decides not to contest the declaration, the State still must submit an application for order of forfeiture to a superior court judge. *Id.* at § 13-4309(4), 13-4314(A).

The Platts assert that Arizona law "allows the attorney for the state to subject property owners to the uncontested forfeiture process even when they have tried to invoke their right to an adversarial proceeding." (Compl. ¶ 249.) Hardly. The Platts, like anyone else, had the right to file a claim with the superior court, thereby commencing a judicial proceeding and avoiding the uncontested forfeiture procedures altogether.[3] *See* A.R.S. §§ 13-4309(2), (6)(a). There is no legal mechanism for an attorney for the State to force a property owner to enter or stay in an uncontested proceeding over his or her objection.

Alternatively, had they participated in the uncontested forfeiture proceeding by filing a statutorily-compliant petition, the Platts *still* would have had the right to contest any potential forfeiture in a subsequent judicial proceeding. For the purposes of the due process analysis, it is the existence –not the exercise— of these procedural rights that matters. *See United States v. Real Prop.*, 135 F.3d 1312, 1317 (9th Cir. 1998) ("So long as the Government takes the steps mandated by due process to notify the record owner of an impending forfeiture, it is the owner's responsibility to comply with the procedural

[3] The Platts also could have demanded an immediate probable cause hearing before a judge to challenge the sufficiency of the state's seizure, whether they also submitted a petition, filed a claim, or did neither. *See* A.R.S. § 13-4310(B).

requirements for opposing the forfeiture."). *Cf. United States v. Castro*, 78 F.3d 453, 456 (9th Cir. 1996) (concluding that a forfeiture claimant's failure to comply with statutory requirements for a claim "constitute[s] an abandonment of the property as a matter of law."). Due process requires notice and an *opportunity* to be heard. *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Arizona law provides for both. *See Torres v. Goddard*, 793 F.3d 1046, 1052 (9th Cir. 2015) (finding Arizona forfeiture law provides "sufficient procedural safeguards . . . as a means of controlling unconstitutional conduct" such as notice and the right to challenge a proposed forfeiture before an impartial judge). Because they entitle property owners to notice and multiple opportunities to be heard, the Uncontested Forfeiture Statutes afford the process due.

2. The "pecuniary interest" theory fails because all forfeitures in Arizona require a judicial determination.

Forfeited property is used to support statutorily-defined law-enforcement purposes such as gang and substance abuse prevention programs, racketeering investigations, and victim assistance. *See* A.R.S. §§ 13-2314.03, 13-4315. The Platts argue that these statutes give law enforcement a "pecuniary interest" in forfeiture proceedings which they argue offends due process. (Compl. ¶¶ 253, 255.)

In *Tumey v. Ohio*, the U.S. Supreme Court held that a judge's "direct, personal, substantial pecuniary interest" in a proceeding violates due process. 273 U.S. 510, 523 (1927). The First and Third Causes of Action rest on the ill-founded theory that law enforcement's interest in the outcome of a forfeiture therefore violates due process. But *Tumey* is plainly inapplicable because disinterested courts –not prosecutors or law enforcement officials– adjudicate all forfeiture proceedings. *See Torres*, 793 F.3d at 1052 ("In rem civil forfeiture proceedings . . . [in Arizona] carry sufficient procedural safeguards . . . [and] are conducted before an impartial state court judge.").

No Arizona statute permits law enforcement officers or state attorneys to adjudicate a forfeiture matter. Even when no one comes forward to challenge the forfeiture, the State must apply *to a judge* for a forfeiture order and make a showing of jurisdiction, notice, and facts sufficient to demonstrate probable cause for subjecting the property to forfeiture. *See, e.g.*, *Matter of $24,000 U.S. Currency*, 171 P.3d 1240 (Ariz. Ct. App. 2007) (appeal of trial court's denial of State's application for forfeiture of unclaimed property); A.R.S. § 13-4314(A) ("If no petitions . . . or claims are timely filed . . . the attorney for the state shall apply *to the court* for an order of forfeiture . . . ." (emphasis added)). In Arizona, a forfeiture order can only be effected by a judge.

Due process entitles property owners to adequate notice and "an impartial and disinterested tribunal" in which to challenge the State's deprivation of their property interests. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Under A.R.S. §§ 13-4309(2), (3)(c), and (6)(a), property owners have the right to superior court adjudication of an *in rem* forfeiture, even if it was initiated as an uncontested forfeiture proceeding.

The State, as the party initiating the forfeiture proceeding, has an interest in its outcome.[4] But "[t]he rigid requirements of *Tumey* [and its progeny] . . . designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." *Marshall*, 446 U.S. at 248. Stated differently:

> In the statutory and administrative scheme provided here, as in *Marshall*, the official seeking forfeiture is, apart from his or her public status, no different from any other plaintiff seeking an economic recovery. The plaintiff presents the claim and the proofs in support thereof to a detached

[4] The State has a "legitimate interest" in "recovering all forfeitable assets" to support law enforcement efforts. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989). In addition, the government has an unquestionably legitimate interest in diminishing the economic power of criminal enterprises, preventing crime, and compensating victims of racketeering. The use of forfeiture promotes these interests. *See generally* Section III(C), *infra*.

> and independent adjudicator—here, a court . . . . The adjudicator receives those proofs and any countervailing evidence and defenses the adversary may proffer. The evidence from both sides is evaluated in the light of statutory standards, and a fair and impartial assessment is made.

County of Cumberland v. One 1990 Ford Thunderbird, 852 A.2d 1114, 1125 (N.J. Super. Ct. App. Div. 1990) (internal citations omitted).

In *U.S. ex rel. Kelly v. Boeing Co.*, the Ninth Circuit rejected a constitutional challenge to the *qui tam* provisions of the False Claim Act. 9 F.3d 743, 759 (9th Cir. 1993). Those provisions allow private persons to bring civil actions on behalf of the U.S. government to enforce the Act. If successful, the relator receives a percentage – essentially, a bounty— of any recovered damages or settlement. *See id.* The *Kelly* Court rejected the argument that the *qui tam* provisions violated due process, even though the relator had a *direct* financial interest in the outcome of the litigation. *Id.* The court reasoned that in "an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." *Id.* at 759 (citing *Marshall*, 446 U.S. at 248–49). Accordingly, the court concluded that the contention that "the Due Process Clause prohibits civil prosecutions by financially interested prosecutors is exaggerated." *Id.*

Marshall, Kelly, and *One 1990 Ford Thunderbird* reveal the fallacy in Platts' legal theory: due process cannot turn on an agency's financial incentive to act rather than an interested party's meaningful opportunity to challenge the act. Government actors have financial incentives to issue parking tickets, to assess fines for zoning violations, and to take countless actions that put money into public coffers. Merely pursuing such fines, forfeitures, costs and fees does not offend due process. *See Northern Mariana Islands v. Kaipat*, 94 F.3d 574, 575 (9th Cir. 1996) ("Kaipat has not shown a violation of his federal constitutional rights since **the judge** had no pecuniary interest in the fine. . . ." (emphasis added)). Because Arizona forfeiture proceedings are "conducted before . . . impartial state court judge[s]," *Torres*, 793 F.3d at 1052, and those judges have no

pecuniary interest in those proceedings, the Platts' *Tumey*-based argument must be rejected.

3. The First Cause of Action also fails to state a valid claim under the Arizona Constitution.

In addition to the federal due process claims addressed above, the First Cause of Action also argues that the Uncontested Forfeiture Statutes and Expenditure Statutes violate the Arizona Constitution's due process clause. (Compl. ¶ 255.) Arizona courts have held that the federal and state due process clauses are substantially the same. *Stewart v. Carroll*, 214 Ariz. 480, 482 (Ct. App. 2007) ("[T]he federal and state due-process clauses contain nearly identical language and protect the same interests." (internal quotation marks omitted)). Therefore, it is unnecessary to evaluate the claims separately. *See Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098, 1104 (D. Ariz. 2004) ("When state and federal constitutional provisions are 'coextensive,' federal courts decide the federal constitutional claims because doing so will also dispose of the state constitutional claims."). Moreover, Arizona courts have already found that state forfeiture laws comport with due process. *See State ex rel. Napolitano v. Gravano*, 204 Ariz. 106, 115 (Ct. App. 2002) ("[Arizona's] forfeiture laws afford full due process before depriving a person of his or her property . . . . [They] require the State to file an action in court and to prove the underlying racketeering and the connection between the racketeering and the property subject to forfeiture. The burden of proof is on the State, and civil procedural rules are applied.").

As explained above, the Platts' federal due process claims do not rely on a cognizable or plausible legal theory. Because the state and federal due process clauses are essentially coextensive, the state constitutional claims fail for all the same reasons the federal claims do. The First Cause of Action must be dismissed in its entirety.

B. THE SECOND CAUSE OF ACTION SHOULD BE DISMISSED.

The Platts' Second Cause of Action argues that the fee-shifting provision in A.R.S. § 13-4314(F), which requires unsuccessful claimants to pay the State's costs and expenses of investigation and prosecution, violates their right to petition the government and the guarantee of equal protection. (Compl. ¶¶ 262, 265.) The right to petition does not prohibit fee-shifting. Section 13-4314 also does not violate equal protection because its disparate treatment of plaintiffs and defendants is rationally related to a legitimate government interest. For those reasons, the Second Cause of Action states no claim upon which relief may be granted and should be dismissed.

1. Fee-shifting does not violate the right to petition.

The First Amendment secures the right of the people to "petition the Government for a redress of grievances." U.S. Const. amend. I. The right to petition includes the right to access the courts. *GBE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002). But as a general proposition, the notion that "the first amendment . . . prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis." *Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 373 (7th Cir. 1987).

The U.S. Supreme Court's seminal opinion on fee-shifting, *Alyeska Pipeline Service Co. v. Wilderness Society*, mentions neither the Petition Clause nor the First Amendment at all. 421 U.S. 240, 262 (1975) ("[I]t is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for . . . [the Legislative Branch] to determine."). Other courts have rejected First Amendment challenges to fee-shifting statutes. *Legal Aid Soc. of Haw. v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1411 (D. Haw. 1997) (rejecting argument that fee-shifting provisions offend due process or implicate the First

Amendment); *Vargas v. City of Salinas*, 134 Cal. Rptr. 3d 244, 255 (Ct. App. 2011) ("[A]n award of attorney fees in favor of a government defendant does not *per se* violate a plaintiff's constitutional right of petition."). Like the plaintiffs in *Legal Aid Society*, the Platts "do not cite any authority that fee-shifting provisions violate Due Process or implicate the First Amendment." 961 F.Supp. at 1411.

In *In re Workers' Compensation Refund*, the Eighth Circuit found that a statutory provision which assigned the full cost of litigation to one party *–regardless of who prevailed—* violated the First Amendment. 46 F.3d 813, 821–22 (8th Cir. 1995). The Court reasoned that an "unconditional litigation penalty . . . is much harder to justify than a mere assessment of costs upon a losing party." *Id.* at 822. In contrast, A.R.S. § 13-4314(F) only requires an award of investigation and litigation costs where the "claimant . . . fails to establish that his entire interest is exempt from forfeiture." It is a "mere assessment of costs upon a losing party."

The statute books are replete with fee-shifting provisions. As these myriad provisions suggest, and as *Premier Electric* and *Legal Aid Society of Hawaii* make clear, fee and cost shifting statutes do not violate the Constitution; they permissibly assign the risk of liability for fees and costs to the losing party. Consequently, the Platts' First Amendment challenge to A.R.S. § 13-4314(F) must be dismissed.

The Platts also argue that the Fee-Shifting Statutes violate their right to petition under the Arizona Constitution. (Compl. ¶ 262.) There is scant case law regarding this provision. John D. Leshy, *The Arizona State Constitution* 60 (2011) (noting that "Arizona courts have paid little attention" to the Arizona Constitution's right to petition). Ordinarily, Arizona courts interpret state constitutional provisions consistently with their federal counterparts. *State v. Noble*, 171 Ariz. 171, 173 (1992) ("We ordinarily interpret the scope of a clause in the Arizona Constitution similarly to the United States Supreme Court's interpretation of an identical clause in the federal constitution."). The Court

could do so here and conclude that –for all the reasons stated above— A.R.S. § 13-4314(F) does not violate Arizona's right to petition clause. Alternatively, the Court could decline to exercise supplemental jurisdiction over this novel issue of state law, as authorized by 28 U.S.C. § 1367(c)(1). *See Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992) (finding no abuse of discretion where court declined to consider state constitutional law claim on 28 U.S.C. § 1367 grounds). Either way, both the state and federal right to petition claims stated in the Second Cause of Action should be dismissed.

2. A.R.S. § 13-4314 does not violate equal protection.

The Platts' complaint alleges violations of both the federal and state equal protection clauses. (Compl. ¶ 265.) These clauses are coextensive. *Valley Nat. Bank of Phoenix v. Glover*, 62 Ariz. 538, 554 (1945) ("The equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect."). For that reason, the Court need not (and should not) decide the state constitution equal protection claim. *See Seidman*, 327 F. Supp. 2d at 1104 ("When state and federal constitutional provisions are 'coextensive,' federal courts decide the federal constitutional claims because doing so will also dispose of the state constitutional claims.").

A.R.S. § 13-4314(E) provides that a successful forfeiture claimant, under certain circumstances, cannot recover costs or damages from the State.[5] On the other hand, an unsuccessful claimant is liable to the State for certain investigation and litigation costs. A.R.S. § 13-4314(F). According to the Platts, this disparity violates the Equal Protection Clause. (Compl. ¶ 265.) Put differently, the Court is asked to accept the proposition that

[5] The Fee-Shifting Statutes do not preclude an award of fees in favor of the claimant if there is an independent basis for an award. *See In re $15,379 in U.S. Currency*, --- P3d. ---, 2016 WL 7826506 (Ariz. Ct. App. Dec. 22, 2016) (awarding forfeiture claimant fees as a Rule 11 sanction).

asymmetrical fee-shifting statutes are unconstitutional. This argument does not withstand scrutiny.

It is well-established that statutes which provide for asymmetrical fee-shifting do not *per se* violate the Equal Protection Clause. *See Missouri, K. & T. Ry. Co. of Texas v. Cade*, 233 U.S. 642, 650 (1914) ("[T]he mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause."). *Cf. Madrid v. Gomez*, 190 F.3d 990 (9th Cir. 1999) (finding that federal law limiting the amount of fees paid to prisoners' counsel, but not to non-prisoners' counsel, did not violate equal protection).

The allocation of attorney fees is plainly a matter for legislatures to decide. *See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975) ("[I]t is not for us to invade the legislature's province by redistributing litigation costs . . . ."). A statute which does not target a suspect class or burden the exercise of a fundamental right must be upheld if it is rationally related to a legitimate government interest. *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002). *See also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988) (finding statute imposing 15% penalty on parties who unsuccessfully appeal a money judgment does not violate the Equal Protection Clause because it is rationally related to the objectives of discouraging frivolous appeals and conserving judicial resources.)

In *Madrid v. Gomez*, the Ninth Circuit considered the constitutionality of provisions of the Prison Litigation Reform Act (PLRA), which limited the amount of attorney's fees that could be awarded to prisoners' counsel by capping their maximum hourly rate and prohibiting payment of fees not directly incurred in vindicating a prisoner's rights. 190 F.3d at 993–94. Notwithstanding the fact that the PLRA treated prisoners and non-prisoners differently for the purposes of awarding attorney's fees, the court concluded that this disparate treatment did not violate equal protection. In the

context of attorney's fees, the relevant constitutional question is only "whether there is a rational basis for the classification." *Id.* at 996. If there is, the provision is constitutional.

A.R.S. § 13-4314 clearly does not concern a suspect or semi-suspect class. Nor does it implicate any fundamental right.[6] Therefore, it must be upheld if it is rationally related to a legitimate government interest. *Id.* It does. Like the PLRA, § 13-4314 helps "curtail frivolous . . . suits and . . . minimize the costs—which are borne by taxpayers—associated with those suits." *Id.* It is well-recognized that "danger of false claims in [forfeiture] proceedings is substantial." *Baker v. United States*, 722 F.2d 517, 519 (9th Cir. 1983). The State has an unquestionably legitimate interest in limiting the unnecessary costs incurred in litigating false claims. The requirement that losing claimants pay is rationally related to that interest; it discourages the filing of false or non-meritorious claims and defrays the costs caused by those claims.

The gist of the Platts' argument is that § 13-4314 is invalid because it treats the State and claimant differently. But, as explained above, that disparate treatment does not violate the Equal Protection Clause, because it is rationally related to a legitimate government interest. The Constitution requires no more. The Second Cause of Action should be dismissed.

C. THE THIRD CAUSE OF ACTION SHOULD BE DISMISSED.

The Third Cause of Action, though styled as a separate claim, relies on substantially the same legal theory as the First Cause of Action; it argues that the Expenditure Statutes motivate law enforcement to seek forfeiture even in the absence of conduct giving rise to forfeiture. For all the reasons stated in Section II(A) above –

[6] It can scarcely be argued, in light of the well-settled American Rule, that *anybody* has a *right* to collect attorney fees. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 415 (1978) ("It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees.").

namely, that forfeitures in Arizona are entered by impartial state court judges— the Third Cause of Action does not state a cognizable claim and must be dismissed.

The Third Cause of Action also fails because it is based on the false and untenable premise that the pursuit of forfeitures is outside "the proper role of law enforcement" and is antithetical to the pursuit of justice. (Compl. ¶ 240; *see also* ¶ 272.) This notion finds no support in the law. The U.S. Supreme Court has repeatedly and emphatically expressed its approval of civil forfeiture as a law enforcement tool. *See Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014) ("Forfeitures help to ensure that crime does not pay: They at once punish wrongdoing, deter future illegality, and lessen the economic power of criminal enterprises." (internal quotations omitted)); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627 (1989) (holding government's "pecuniary interest in forfeiture" is "legitimate" and "not [to] be discounted" because forfeited assets "are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways."); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) ("Forfeiture . . . fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by . . . rendering illegal behavior unprofitable."). *See also Gravano*, 204 Ariz. at 113 (noting that the purposes of Arizona forfeiture statutes include "removing the economic incentive to engage in racketeering, reducing the financial ability of racketeers to continue to engage in crime, preventing unfair business competition by persons with access to crime proceeds, compensating victims of racketeering, and reimbursing the State for the costs of prosecution.").

The Third Cause of Action states no plausible claim for relief. It relies on the same fallacious theory the First Cause of Action does, and goes on to baselessly claim that forfeiture is not a valuable law enforcement tool, despite numerous Supreme Court pronouncements to the contrary. It must be dismissed.

D. THE FIRST AND THIRD CAUSES OF ACTION FAIL TO STATE A PLAUSIBLE FACIAL CHALLENGE TO THE UNCONTESTED FORFEITURE AND EXPENDITURE STATUES.

In addition to all of the reasons stated above, the First and Third Causes of Action must be dismissed because they are untenable facial challenges. By mounting facial challenges, the Platts necessarily argue that under *no set of circumstances* can Arizona's forfeiture laws be legally enforced. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial attack is an attack, not on a particular application of a statute, but on the statute itself. *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2449 (2015).

The argument that Arizona's forfeiture laws cannot, under any set of circumstances, be legally enforced is simply implausible. The First and Third Causes of Action argue that the Uncontested Forfeiture Laws and Expenditure Statutes create an *incentive* for Arizona law enforcement officials to act improperly. This is little more than a bare allegation that the *potential for abuse* exists. This is not enough to sustain a facial challenge. *Caplin & Drysdale, Chartered v. United States*, a seminal asset forfeiture case, explains why:

> Every criminal law carries with it the potential for abuse, but **a potential for abuse does not require a finding of facial invalidity**. . . . The Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them, *e.g.*, by attempting to impose them on persons who should not be subjected to that punishment. Cases involving particular abuses can be dealt with individually by the lower courts, when (and if) any such cases arise.

491 U.S. at 634–35 (internal quotation marks and citations omitted) (emphasis added). Even assuming *arguendo* that an abuse occurred with respect to the Platts, the First and Third Causes of Action, as stated, do not carry the heavy burden required to sustain a facial challenge. They must be dismissed.

III. CONCLUSION

Uncontested forfeiture is a valuable, constitutionally sound tool which enhances public safety and serves vital law enforcement purposes. The Uncontested Forfeiture Statutes and Expenditures Statutes comport with the strictures of due process; property owners receive notice, an opportunity to be heard, and the right to seek relief in an adversarial judicial proceeding. All forfeitures in Arizona are subject to judicial scrutiny and determination. The Fee-Shifting Statutes do not violate the right to petition; they also do not violate equal protection because they are rationally related to a legitimate government interest. The First, Second, and Third Causes of Action do not rest on any solid legal footing. They must be dismissed.

RESPECTFULLY SUBMITTED this 21st day of February, 2017.

MARK BRNOVICH
Attorney General

By: */s/ Kenneth R. Hughes*
Thomas Rankin
Kenneth R. Hughes
Rusty D. Crandell

Attorneys for Intervenor, State of Arizona

CERTIFICATE OF SERVICE

I certify that on February 21, 2017, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Paul V. Avelar
Keith E. Diggs
Institute for Justice
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
PAVELAR@IJ.ORG
Attorneys for Plaintiffs

James M. Jellison
Jellison Law Offices, PLLC
3101 North Central Avenue
Suite 1090
Phoenix, AZ 85012
jim@jellisonlaw.com
Attorneys for County, Task Force, and City/Town Defendants

/s/Kenneth R. Hughes