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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

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| William Terence Platt, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>Jason Moore, et al.,<br><br>Defendants. | Case No. CV-16-8262-PCT-BSB<br><br>**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO INTERVENOR STATE OF ARIZONA'S MOTION TO DISMISS**<br><br>**(Oral Argument Requested)** |

Plaintiffs William Terence Platt and Maria B. Platt respectfully offer the following points and authorities in opposition to the motion to dismiss filed by Intervenor State of Arizona (ECF No. 44) ("MTD"). For the reasons set forth below, this Court should deny the State's motion.[1]

## I. Standards governing State's motion to dismiss.

The State's Motion argues the First, Second, and Third Causes of Action in the Platts' Amended Complaint should be dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Under Rule 12(b)(6), "allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable

[1] The State also joins and adopts the standing arguments made in Navajo County, Task Force, and City/County Defendants' Motion to Dismiss (ECF 43), *see* MTD 2. Plaintiffs therefore refer the Court to their memorandum of points and authorities in opposition to that motion, which has been filed concurrently with this opposition.

the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Even after *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a court considering a motion to dismiss pursuant to Rule 12(b)(6) is required to credit factual assertions made in the pleadings, though not legal ones, must draw all reasonable factual inferences in favor of the plaintiff, and must use those factual assertions and inferences to determine whether a plaintiff is plausibly entitled to relief. *Tracht Gut, LLC v. L.A. Cty. Treasurer & Tax Collector*, 836 F.3d 1146, 1150–51 (9th Cir. 2016); *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). Dismissal under Rule 12(b)(6) is proper only where there is a "lack of a cognizable legal theory or . . . [an] absence of sufficient facts alleged under a cognizable legal theory." *Tracht Gut*, 836 F.3d at 1151.

The State's motion fails both inquiries and should be denied. The Platts have pled cognizable legal theories for relief. And the State's motion fails to credit the numerous, specific facts the Platts have set forth to support those cognizable legal theories.

## II. The Platts pled sufficient facts to support their first cause of action, that uncontested forfeiture violates due process because it denies them an unbiased adjudicator.

The first cause of action alleges that Arizona's "uncontested forfeiture" laws allow the "attorney for the state" to adjudicate a proceeding in which he has a pecuniary interest in violation of the Platts' due process rights. Am. Compl. ¶¶ 246–57. This cause of action is founded on *Tumey v. Ohio*, 273 U.S. 510, 522 (1927), which holds that an officer violates due process rights when he "act[s] in a judicial or quasi judicial capacity" but has a pecuniary interest "in the controversy to be decided." A *Tumey* violation thus has two elements: (1) an officer acts in a judicial or quasi-judicial capacity, i.e., "adjudicates" an issue; and (2) the officer has a pecuniary interest in the outcome of the controversy to be decided. The State accepts that a *Tumey* violation is a cognizable legal theory, but asserts that the attorney for the state has no adjudicatory power. MTD 5–7.

The State's argument must be rejected. First, Part A recounts the cases demonstrating the breadth of *Tumey*'s application. Second, Part B shows that the State

ignores the numerous facts pled in the Amended Complaint—which must be credited as true—that plausibly show that the attorney for the state—Defendant Jason Moore—did adjudicate the sufficiency of the Platts' opposition to the forfeiture proceeding he filed. Third, just for good measure, Part C sets forth the alleged facts that plausibly show Moore had a pecuniary interest in the outcome of the forfeiture proceeding.

**A. *Tumey* prohibits government officers with a pecuniary interest from acting in a judicial or quasi-judicial capacity in a variety of contexts.**

*Tumey* establishes that an officer violates due process rights when he "act[s] in a judicial or quasi judicial capacity" while having a pecuniary interest "in the controversy to be decided." 273 U.S. at 522. In *Tumey*, the Court held that a $100 fine, imposed by a mayor sitting as a judge, violated the defendant's due process rights because the mayor/judge was entitled by ordinance to collect $12 in costs upon convicting—but not upon acquitting—the defendant. 273 U.S. at 515, 519, 523. Such an arrangement violated due process because the government official acted in a judicial or quasi-judicial capacity and had a pecuniary interest in the controversy to be decided "which might lead him not to hold the balance nice, clear and true between the State and the accused." *Id.* at 532.

The Supreme Court has since applied *Tumey* to invalidate a number of different state procedures under the due process clause. An adjudicator's indirect pecuniary interest—such as when his "executive responsibilities" for a specific fund may make him "partisan to maintain the high level of contribution" to that fund from his adjudications—violates due process. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972). An executive branch officer who makes administrative adjudications violates due process if he has an indirect pecuniary interest in that administrative proceeding. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (state board consisting of self-employed optometrists had an unconstitutional pecuniary interest in judging corporate competitors to be in violation of state optometry law); *see also* MTD 3 (admitting similarities between uncontested forfeiture and administrative proceedings). And an official who makes only "unilateral" probable cause determinations that can later be challenged before a different adjudicator

violates due process if he has even a *de minimis* pecuniary interest in the outcome of his determinations. *Connally v. Georgia*, 429 U.S. 245, 251 (1977). Each of these applications of *Tumey* is implicated by the facts pled by the Platts.

**B. The Amended Complaint alleges facts plausibly demonstrating that Moore did adjudicate the adequacy of the Platts' petition for remission and thereby denied the Platts a meaningful judicial determination; Arizona precedent recognizes the same.**

The State argues that attorneys for the state—here Moore—"do[] not and cannot 'adjudicate' a forfeiture matter" because "uncontested forfeiture always requires a judicial determination, even when nobody objects to the forfeiture." MTD 2–3. But the State is trying to prematurely resolve the merits of this case on a motion to dismiss. This is improper. First, the facts pled in the Amended Complaint, which this Court must accept as true, plausibly show that Moore did in fact adjudicate the legal sufficiency of the Platts' petition for remission so as to deny the Platts a meaningful judicial determination. Second, Arizona precedent recognizes that the judicial determination that followed Moore's actions is not meaningful. Third, under the facts as pled and existing state case law, the cases the State relies on for its argument do not apply.

**1. The facts as pled plausibly show Moore acted in a quasi-judicial capacity.**

Exercising the authority granted to him by A.R.S. § 13-4309(1), Moore filed a Notice of Pending Forfeiture and made uncontested forfeiture available. Am. Compl. ¶¶ 172–73. In response to the Notice, the Platts timely submitted their Petition for Remission. *Id.* ¶¶ 176–77. Because the Platts timely submitted their Petition, Moore had to undertake an investigatory process after which the Platts would have the right to a judicial determination by filing a claim. *Id.* ¶¶ 178–82; A.R.S. § 13-4309(3). But the opportunity to file this claim was illusory. Am. Compl. ¶¶ 246–57. Rather than consider the Petition, Moore rejected it based on his unilateral determination that it "did not meet the legal requirements for a Claim or Petition for Remission, and [was] legally null and void under pursuant to [sic] A.R.S. §§ 13-4311(E) & (F), as well as 13-4309(2)." *Id.* ¶¶ 183–85. But the Platts' Petition was timely, clearly informed Moore of their interest in

the car and their intent to contest the forfeiture, and at least substantially complied with A.R.S. § 13-4311(E)–(F). *Id.* ¶¶ 176–82.[2]

Moore's unilateral rejection of the Petition foreclosed the Platts' standing to file a claim for a judicial proceeding. Based solely on his unilateral determination that the Petition was legally deficient, Moore filed an Application for Forfeiture, demanding the immediate forfeiture of the Platts' car. *Id.* ¶ 183. Moore's Application had the following four critical effects on the Platts' rights:

1. Filing the application denied the Platts a legal forum to object to Moore's actions because the Platts were no longer allowed to be parties to the forfeiture. Am. Compl. ¶ 203; *Norriega v. Machado*, 878 P.2d 1386, 1390 (Ariz. Ct. App. 1994) ("[T]here is no provision in the statutes for anyone to intervene in the proceeding once the state has applied to the court for an order of forfeiture."). Thus, there was only an *ex parte* proceeding to follow.

2. Moore did not provide the court with a copy of the Platts' Petition for consideration in the *ex parte* judicial proceeding . Am. Compl. ¶¶ 185, 187. And neither could the Platts provide it to the court because they were excluded from the *ex parte* proceeding.

3. Because the Platts were no longer allowed to be parties, they could not challenge Moore's determination that their Petition did not meet legal requirements and was legally null and void or correct any alleged technical defects. *Id.* ¶¶ 185–90, 203–04.[3]

4. Unlike a contested forfeiture, where Moore would have to establish a

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[2] As Moore's own much later legal filings demonstrate, the only possible shortcoming of the Platts' *pro se* Petition was that it did not expressly state "signed under penalty of perjury" with the Platts' signatures. Am. Compl. ¶¶213–17.

[3] It is an abuse of discretion for a *judge* to fail to grant a forfeiture claimant time to correct technical defects in a timely claim. *State v. Benson (In re $70,269.91)*, 833 P.2d 32, 37–38 (Ariz. Ct. App. 1991). But even if the Platts' Petition was defective, Moore's determination precluded the Platts from arguing to a court that the same rule applies to *prosecutors* considering petitions. And when they tried anyway, Moore moved to strike their claim because, based on his determination that their Petition was null and void, their claim was not allowed. Am. Compl. ¶¶ 212–27.

preponderance of the evidence, A.R.S. § 13-4311(M), an uncontested proceeding results in a judicial order of forfeiture upon an application stating "facts sufficient to demonstrate probable cause," A.R.S. § 13-4314(A), an even lower standard of proof. Am. Compl. ¶¶ 132–33.[4]

In the face of these facts, the State argues that the judicial "determination" following the Application provides the requisite opportunity to be heard. MTD 5–8. But, as explained below, the Arizona Supreme Court has already recognized that the judicial determination following an application for forfeiture is not meaningful; it "virtually assur[es] a forfeiture." *Wohlstrom v. Buchanan*, 884 P.2d 687, 689 (Ariz. 1994).

**2. The Arizona Supreme Court has recognized the judicial proceedings the State relies on are insufficient to protect property rights.**

As the Arizona Supreme Court has already recognized, the judicial determination provided by A.R.S. § 13-4314(A) following an application for forfeiture "virtually assur[es] a forfeiture" because it establishes an *ex parte* proceeding and reduced burden of proof where "no one [is] present to challenge the state's case" and property owners have "no chance to prove a forfeiture exemption under § 13-4304[]." *Wohlstrom*, 884 P.2d at 689; *see also* Am. Compl. ¶¶ 197–98, 203. Indeed, when the State (as amicus in *Wohlstrom*) argued that "because the state still had to show probable cause" following an application for forfeiture, the property owner "did not really lose anything" by being prevented from challenging the forfeiture before a court, the Court responded that "Few who are familiar with the process would agree." 884 P.2d at 689. And the failure to afford an adversarial hearing is particularly problematic, the Arizona Supreme Court recognized, when government has a direct pecuniary interest in the outcome of the ex parte proceeding, as in forfeiture. *Wohlstrom*, 884 P.2d at 689–90 (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993), for the proposition that "ex parte proceedings offer little protection to owners; adversarial hearings are necessary to bring

[4] There are ample grounds on which to challenge Moore's assertion of probable cause, but the Platts were prohibited from so challenging. Am. Compl. ¶¶ 65–74, 191–98.

about neutral decision-making, especially where government has direct pecuniary interest").

The combination of the lower "probable cause" burden of proof and the *ex parte* proceeding is also particularly problematic. Probable cause is "'a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules.'" *Florida v. Harris*, 133 S. Ct. 1050, 1056 (2013) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). While it rightfully has its place in authorizing searches and seizures, U.S. Const. amend. IV, it is the wrong standard for validating permanent deprivations of property. *E.g.*, *Leonard v. Texas*, No. 16-122, 580 U.S. __, __, 2017 U.S. LEXIS 1573, *8 (2017) (Thomas, J., concurring in denial of certiorari) ("there is some evidence that the government was historically required to prove its [forfeiture] case beyond a reasonable doubt" (citing *United States v. Brig Burdett*, 34 U.S. 682 (1835)); *see* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 2, 114 Stat. 202, 205 (codified as amended at 18 U.S.C. § 983(c)(1)) (abolishing probable cause standard for civil forfeitures under federal law). The lower burden of proof in a judicial proceeding under A.R.S. § 13-4314(A) thus magnifies the constitutional shortcomings of the *ex parte* proceeding. *See Wohlstrom*, 884 P.2d at 689–90.

**3. The State's legal arguments assume—contrary to the Amended Complaint—that Moore and other attorneys for the state do not act in a judicial or quasi-judicial capacity.**

Taking as a given that the attorney for the state does not adjudicate uncontested forfeiture, the State cites to a series of cases discussing due process rights with regard to prosecutors to support its motion. MTD 6–8. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), on which the State relies, is instructive. *Marshall* held that "[t]he rigid requirements of *Tumey* . . . , designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." 446 U.S. at 248. *Marshall* thus rejected a strict *Tumey* challenge to a civil fine levied by an assistant regional administrator under the Fair Labor Standards Act (FLSA) in part because the actions of the assistant regional administrator—who had an interest in the

fine—"resemble[d] those of a prosecutor more closely than those of a judge." *Id.* at 243.[5] But again, the State's argument assumes that Moore, the attorney for the state here, did not act in a judicial or quasi-judicial capacity. This factual assumption is contrary to the facts as pled, and the State's legal arguments are therefore unavailing.

If anything, rather than support the State's argument, *Marshall* demonstrates why *Tumey* must apply to the facts alleged here. In *Marshall*, the administrator "rule[d] on no disputed factual or legal questions." *Id.* at 247. Moreover, the recipient of the fine was entitled to a "*de novo* review of all factual and legal issues" in an adversarial hearing before a disinterested ALJ. *Id.* at 245, 247–48. In fact, the ALJ in *Marshall* had heard witnesses and reduced the disputed fine by over 80%. *Id.* at 240–41, 248 n.9. These facts distinguished the FLSA procedure from *Tumey*, where the interested mayor conducted the trial "without opportunity for retrial, and . . . with no opportunity by the [appellate] court to set aside the judgment on the weighing of evidence." *Tumey*, 273 U.S. at 533.

Here, Moore's rejection of the Platts' Petition and his Application for Forfeiture are markedly different than the "prosecutorial" acts in *Marshall*. Moore did rule on a "disputed factual or legal questions," *i.e.*, the legal sufficiency of the Platts' Petition. Am. Compl. ¶¶ 183–90, 212–17. And there was no meaningful opportunity to be heard by a court on that ruling. *Id.* ¶¶ 189–90, 199–217. Unlike in *Marshall*, there is no *de novo* review of factual or legal issues and there is no adversarial briefing or hearing in the judicial proceeding. *Id.*; *Wohlstrom*, 884 P.2d at 689. Accordingly, the State's protest that the Platts could have obtained an adversarial hearing "by filing a statutorily-compliant petition," MTD 4, ignores the real question here: *who decides* what constitutes a statutorily-compliant petition? In uncontested forfeiture, prosecutors—not courts—decide. That makes them adjudicators, making this case like *Tumey*, *Ward*, *Gibson*, and *Connally*, and quite unlike *Marshall*.

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[5] But, as noted in part IV, below, *Marshall* still recognized that a prosecutor's pecuniary interest in the enforcement process would raise due process concerns.

**C. The amended complaint adequately alleges that forfeiture prosecutors have a disqualifying interest under *Tgumey*.**

Because, based on the facts as pled, Moore plausibly acted in a quasi-judicial capacity when he declared the Platts' Petition to be legally insufficient and filed an application for forfeiture, he plausibly violated the *Tumey* rule if he had a disqualifying "interest in the controversy to be decided." 273 U.S. at 522. The incentive statutes clearly provide that forfeiture proceeds are to be held by county attorneys "for the benefit of" seizing and forfeiting agencies. *See* A.R.S. § 13-2314.03(D). And as alleged in the Amended Complaint, Moore had a pecuniary interest in rejecting the Platts' Petition because both Moore and his employer were to receive, directly or indirectly, the proceeds of the forfeiture of the Platts' car. Am. Compl. ¶¶ 147–56, 164, 232–33. Indeed, the State tacitly concedes that the Platts have stated a claim at least as to this factor. *See* MTD 6, 14 (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989) ("[T]he Government has a pecuniary interest in forfeiture that . . . extends to recovering *all* forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts . . . . The sums of money that can be raised for law-enforcement activities this way are substantial . . . .")).

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The Amended Complaint states a cognizable legal theory—a *Tumey* due process violation—and facts sufficient to plausibly show a *Tumey* due process violation. The State's motion to dismiss the Platts' first cause of action should be denied.

**III. The Platts have adequately pled that reverse attorney's fees violate their rights to petition the courts and to the equal protection of law because they impose liability on successful attempts to contest forfeiture.**

The Platts' second cause of action claims that Arizona's unique-in-all-the-nation "reverse attorney's fees" system violates their rights to petition the courts and to the equal protection of law. Violation of either right is a cognizable legal claim. And both claims are supported by facts to show the Platts are plausibly entitled to relief.

**A. Reverse attorney's fees violate the right to petition because they require property owners to pay the State's cost of investigating and prosecuting the forfeiture even when the property owners substantially prevail.**

As the State concedes, MTD 9, the right to petition is protected by the First Amendment to the U.S. Constitution and Article 2, section 5 of the Arizona Constitution; this right includes the right to access the courts. Am. Compl. ¶ 262; *e.g.*, *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1988).

A.R.S. § 13-4314(F) states:

> The court *shall* order any claimant who fails to establish that his *entire interest* is exempt from forfeiture under § 13-4304 to pay . . . the state's costs and expenses of the investigation and prosecution of the matter, including reasonable attorney fees.

(emphases added). Section 13-4314(F) is alone among the hundreds of American state and federal laws governing forfeiture procedure because it imposes *unlimited* liability for the State's fees and costs on forfeiture claimants *even when they win 99% of their property back*.[6] Am. Compl. ¶¶ 96–97. The award is not reduced in proportion to a judgment denying forfeiture in part, and "[t]he State has no obligation to minimize the attorney's fees allowable" under this provision. *In re 1632 N. Santa Rita*, 801 P.2d 432, 438 (Ariz. Ct. App. 1990). The threat that a property owner will be assessed the State's uncapped and unlimited costs, expenses, and attorney's fees, even if the property owner is almost entirely successful in challenging forfeiture, chills a property owner's willingness to defend their rights in court. Am. Compl. ¶¶ 96–98, 166–70, 234. Indeed, government uses the reverse attorney's fees provision to intimidate and threaten innocent owners into not contesting forfeiture. *Id.* ¶ 99.

Ignoring the facts of its reverse attorney's fees system, the State characterizes the Platts' cause of action as an attack on fee-shifting generally. It is not. The Platts attack A.R.S. § 13-4314(F) because it penalizes a forfeiture claimant for going to court even

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[6] The only remotely similar law, an Illinois bonding requirement, is capped at a value of $1,500 and the bond is awarded to the clerk of court, not the forfeiture prosecutor. *See* 725 Ill. Comp. Stat. 150/6(C)(3).

when the court rules almost completely in the claimant's favor.

The Platts have a cognizable legal theory based on these facts as demonstrated by *In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995). That case involved a provision affecting the Minnesota Workers' Compensation Reinsurance Association (WCRA), a state-created reinsurance entity to which all workers' compensation insurers and self-insured employers doing business in Minnesota were required to pay premiums. 46 F.3d at 816. Facing an unexpectedly large surplus, the legislature required that the surplus be refunded through the WCRA's member insurers to those insurers' policyholders. Anticipating litigation, the legislature also required the WCRA to finance "all of the state's legal costs in the case of a legal challenge to the law." *Id.* at 816–17.

The Eighth Circuit struck down the cost-shifting provision as an "unconditional litigation penalty" in violation of the First Amendment right to petition the courts. *Id.* at 822. "Requiring one party to pay the full cost of an action, regardless of who prevails, is a substantial deterrent to commencing litigation" and cannot be sustained under the Constitution. *Id.* Like the insurers in *Workers' Compensation Refund*, forfeiture claimants in Arizona are on the hook for *both* sides' costs and attorney's fees regardless of whether they substantially prevail.

The State cites dicta from *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n*, 814 F.2d 358, 373 (7th Cir. 1987), for the proposition that First Amendment challenges to fee-shifting provisions are "too farfetched to require extended analysis." But no fee-shifting provision was at issue in *Premier Electrical*, which was instead about litigation costs as damages in an antitrust case. The language quoted by the State, *id.* at 373, *quoted in* MTD 9, was part of a hypothetical discussion about whether the First Amendment limits the award of such costs as damages. And even if *Premier Electrical* were about fee-shifting, it only emphasizes the problem with A.R.S. § 13-4314(F): conventional fee-shifting provisions only "require the loser to pay the winner's fees." *Premier Elec.*, 814 F.2d at 373. But Arizona's forfeiture laws can require the winning property owner to pay the losing State's fees. *Premier Electrical* is no bar to

the facts of the Platts' claim.

The State's other cases are all similarly inapposite. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (saying nothing about the right to petition); *Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997) (concerning a prohibition on recovery of attorney's fees, not an imposition of attorney's fees for bringing successful claims); *Vargas v. City of Salinas*, 134 Cal. Rptr. 3d 244 (Ct. App. 2011) (affirming fee award against plaintiffs who had been found by all three levels of state judiciary to have brought an illegal SLAPP).

As alleged in the Amended Complaint, A.R.S. § 13-4314(F) is not a normal fee-shifting provision. It awards attorney's fees *against* substantially prevailing parties. *Workers' Compensation Refund* is clear: fee-shifting provisions violate the right to petition when they award the full cost of litigation to losing parties. *See* 46 F.3d at 822. This rule also applies to § 13-4314(F), which awards the full cost of litigation (plus "investigation") to a *substantially* losing party. Thus, the Amended Complaint states a cognizable legal theory—A.R.S. § 13-4314(F) unconstitutionally chills the right to petition and access the courts—and alleges facts sufficient to prove such a theory. Am. Compl. ¶¶ 96–99, 166–70, 234. Granting the State's motion to dismiss the Platts' second cause of action is therefore inappropriate.

**B. Reverse attorney's fees violate equal protection because they discriminate against winning property owners and in favor of the State when the State *loses* a forfeiture action.**

The Platts' equal-protection theory rests on fact that A.R.S. § 13-4314(E) & (F) make substantially prevailing forfeiture claimants liable for the *State's* fees and costs, while shielding the State from having to pay entirely successful property owners costs and fees in any but the most abusive of cases. Am. Compl. ¶¶ 97–98 166–70, 234–36, 263–65. Though the State characterizes this as an attack on all asymmetrical fee-shifting statutes, the Platts attack the scheme only to the extent the State has established a one-way winner-pays-loser system to benefit the State at the expense of property owners. This legal regime treats Defendants differently from the Platts, even though they are similarly

situated as parties to the same judicial forfeiture proceeding. *Id.* ¶¶ 236–37; *see Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014) ("The groups need not be similar in all respects, but they must be similar in those respects relevant to the Defendants' policy.").

When a provision burdens the "fundamental right of access to the courts," it is subject to strict scrutiny. *See Madrid v. Gomez*, 190 F.3d 990, 995 (9th Cir. 1999). The State relies heavily on *Madrid*, MTD 12–13, which held that the Prison Litigation Reform Act (PLRA) did not violate equal protection by "limit[ing] the amount of fees paid to prisoners' counsel but not to non-prisoners' counsel" following successful litigation against the state. *See* 190 F.3d at 995–96. *Madrid* determined that PLRA's limits on prisoners' attorney fees did "not restrict access to the courts; at most, it restricts prisoners' access to the most sought-after counsel who insist on their going rate for representation," and applied rational-basis review. *Id.*

But limiting attorney's fees to successful parties is not what the reverse attorneys' fees system does. Rather, it grants a special privilege to the State—it may recover its attorney's fees even when it loses a forfeiture case—even while denying fees to prevailing forfeiture claimants. Am. Compl. ¶¶ 259–65. As explained in Section III.A, this one-way winner-pays-loser system burdens a fundamental right. And because it does burden a fundamental right, it is presumptively unconstitutional, and *the State* has the burden to demonstrate that its discrimination against successful property owners in favor of itself is "narrowly tailored to the achievement of a compelling government interest." *See Madrid*, 190 F.3d at 995. The State has not attempted to meet this burden in its Motion, nor could it; tailoring is a fact-dependent question. *E.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2539–40 (2014) (noting government had failed to build a record to show alternative regulations were incapable of serving interests).

Even if the reverse attorney's fees system implicates no fundamental right (and it does), the Platts have stated a claim that it fails rational-basis review. Under this standard, "legislation is presumed to be valid and will be sustained if the classification drawn by

the statute is rationally related to a legitimate state interest." *Madrid*, 190 F.3d at 996 (quotation marks and citation omitted), *cited in* MTD 13. In *Atchison, Topeka, & Santa Fe Ry. Co. v. Vosburg*, 238 U.S. 56 (1915), the Supreme Court held that a one-way fee provision—which awarded attorney's fees to freight shippers but not railway companies in litigation between the two—could not withstand rational-basis scrutiny where no party bore a "special burden in the litigation" *Id.* at 61–62.[7]

As set forth in the Amended Complaint, it is property owners like the Platts who bear a special burden in forfeiture litigation. The low standard of proof for the government, clear financial incentive for law enforcement to pursue forfeiture, strict procedural hoops for property owners to jump though, presumption of property owners' guilt, and clear financial disincentive for property owners to contest forfeiture all stack the deck to the State's benefit. Am. Compl. ¶¶ 86–100. Yet only the State may recover fees—even if the property owner prevails. A.R.S. § 13-4314(E) & (F). And while the State asserts a "legitimate" (but note, not "compelling,") "interest in limiting the unnecessary costs incurred in litigating false claims," MTD 13, A.R.S. § 13-4314(E) & (F) go far beyond that interest by requiring property owners to pay the State for litigating owners' *true* claims, even though the State never has to pay fees. Am. Compl. ¶¶ 263–65. This creates a special privilege for the State itself at the expense of its own citizens who attempt to use the courts to protect their property rights. *Id*. Given the State's pecuniary interest in imposing forfeiture, and therefore in discouraging valid opposition to forfeiture, the danger of this gross imbalance is particularly suspect. *See id*. ¶¶ 99, 170.

The Amended Complaint states a cognizable legal theory—the combination of A.R.S. § 13-4314(E) & (F) violate the right to equal protection—and alleges facts sufficient to prove such a theory. Granting the State's motion to dismiss the Platts' second cause of action is therefore inappropriate.

* * *

[7] In so ruling, the Court distinguished *Missouri, Kansas & Texas Railway Co. v. Cade*, 233 U.S. 642, 650 (1914), a case on which the State relies. MTD 12.

Arizona's reverse-attorney's fees system is not a garden-variety fee-shifting provision. It is the only system in the country that awards fees to the substantially losing party—but only if the substantially losing party is the government. Because the Platts' second cause of action states a plausible violation of the rights to petition and to the equal protection of law, it cannot be dismissed.

## IV. The incentive statutes violate due process rights because they deny property owners the impartial administration of justice.

The Platts' third cause of action alleges that the incentive statutes, A.R.S. §§ 13-2314.03 and -4315, reward the agencies under Defendants' control with ownership or the proceeds of all property forfeited. These provisions encourage law-enforcement agencies to seize and forfeit property even when doing so has no rational connection to the public health, safety, or welfare. *See* Am. Compl. ¶¶ 268–73. This cause of action states a cognizable legal theory—a due process violation—and sufficient facts to plausibly support that theory. It cannot be dismissed.

Due process protects against law enforcement decisions distorted by a pecuniary interest. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), establishes this legal theory. *Marshall* rejects the notion that due process "imposes no limits on the partisanship of [forfeiture] prosecutors," even if they are acting in a "prosecutorial or plaintiff-like capacity" as opposed to a quasi-judicial one. 446 U.S. at 248–49. As public officials, prosecutors and law-enforcement officers generally have a duty to serve the public interest even at the expense of their partisan interest in winning cases. *See Berger v. United States*, 295 U.S. 78, 88 (1935); *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (*Berger* applies to both criminal and civil proceedings).[8] And while the financial incentive in *Marshall* was "exceptionally remote"—fines assessed by the agency did not pay salaries and accounted for less than 1% of the

[8] *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759–60 (9th Cir. 1993), upon which the State relies, MTD 7, refused to dismiss a *qui tam* case based on the alleged pecuniary interest of the relator on the grounds that the relator was not, in fact, a governmental lawyer, but rather "essentially a[] private plaintiff[]." Thus, the due process concerns noted in *Marshall* were not implicated.

budget—the *Marshall* Court recognized that a "financial or personal interest" *could* violate due process if it were probable that "enforcement decisions would be distorted by some expectation that" they could bring about a substantial increase in the agency's budget. *Marshall*, 446 U.S. at 250–52; *see also Cty. of Santa Clara v. Superior Court*, 235 P.3d 21, 36 (Cal. 2010) (hiring contingent-fee counsel to assist government attorneys in civil litigation creates a pecuniary interest conflict, requiring that "neutral, conflict-free government attorneys retain the power to control and supervise the litigation").

The State does not deny that there is a profit incentive here, it instead argues the incentive here does not impermissibly distort decision-making. MTD at 13–14 (and citing *Caplin & Drysdale*, 491 U.S. at 627). But the extent to which the profit incentive warps Defendants' priorities—especially when those profits are used to pay salaries, Am. Compl. ¶¶ 156, 165, 239—is a factual issue and cannot be resolved on a motion to dismiss. *See Marshall*, 446 U.S. at 241 (resolving claim after discovery); *Sourovelis v. City of Phila.*, 103 F. Supp. 3d 694, 709 (E.D. Pa. 2015) (denying motion to dismiss due process claim challenging police and prosecutors' retention of forfeited property and proceeds because whether the incentive distorts decision making was "inherently a factual issue"); *State ex rel. Cty. of Cumberland v. One 1990 Ford Thunderbird*, 852 A.2d 1114, 1118–19 (N.J. Super. Ct. App. Div. 2004) (summary judgment decision after factual record developed).

The Amended Complaint states a cognizable legal theory: Law enforcement decisions are warped by the profit incentive of forfeiture. This being a fact-intensive inquiry, it suffices at this stage that the Platts have alleged facts showing that significant sums of money flow to the Defendants through the Arizona forfeiture scheme and that these sums do distort enforcement decisions, including in this case. Am. Compl. ¶¶ 7, 142–65, 238–40, 268–75. Accordingly, the State's motion to dismiss the Platts' third cause of action should be denied.

## V. The State's argument for dismissal of "facial challenges" is foreclosed.

The State also argues that the Platts' first and third causes of action raise "facial

challenges" which must be dismissed. MTD 15. But this argument is foreclosed by *Citizens United v. FEC*, which held that "the distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court, *not what must be pleaded in a complaint*." 558 U.S. 310, 331 (2010) (emphasis added). In short, the State's argument is made too early. After the Platts prove that Defendants have violated their constitutional rights, then the State can argue about the breadth of the remedies necessary to address those violations.

## VI. If this Court dismisses Plaintiffs' federal claims, it should remand their state claims to state court.

All three causes of action now before the Court arise under both the U.S. and Arizona Constitutions. The Platts' state and federal claims are not "coextensive," *cf.* MTD 8, 10–11, 14, because the Arizona Constitution protects rights to a greater degree than does the federal constitution.[9] Accordingly, if the Court dismisses the Platts' federal claims (and it should not), it should decline supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) and remand the Platts' state claims to the Navajo County Superior Court pursuant to 28 U.S.C. § 1447(c).

## CONCLUSION

The Platts' claims are based on cognizable legal theories showing violations of their due process, right to petition, and equal protection rights. Each of these claims is supported by an abundance of alleged facts demonstrating how these rights were violated during their experience with the Arizona forfeiture process. For these reasons, the Platts request that this court **DENY** the motions to dismiss.

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[9] *E.g.*, *Montano v. Superior Court*, 719 P.2d 271, 276 n.3 (Ariz.1986) (decisions under the Fourteenth Amendment's Due Process Clause "cannot account for the separate guarantees of the Arizona Constitution"); *Large v. Superior Court*, 714 P.2d 399, 405 (Ariz. 1986) ("In construing the Arizona Constitution we refer to federal constitutional law only as the benchmark of minimum constitutional protection."). *See generally* Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 Ariz. St. L.J. 505 (2012); Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 Ariz. St. L.J. 115 (1988).

RESPECTFULLY SUBMITTED this 23rd day of March, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of March, 2017, I caused the Plaintiffs' Memorandum of Points and Authorities in Opposition to Intervenor State of Arizona's Motion to Dismiss to be filed with the Clerk's Office and served via ECF upon:

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