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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 **REPLY IN SUPPORT OF INTERVENOR STATE OF ARIZONA'S MOTION TO DISMISS**

The State submits this reply in support of its Motion to Dismiss (Doc. No. 44).[1] The Plaintiffs' Response (Doc. No. 49) ("Response") fails to address the legal deficiencies of their claims. For the reasons stated below and in the underlying motion, the Platts' First, Second, and Third Causes of Action must be dismissed.

I. THE FIRST CAUSE OF ACTION IS NOT LEGALLY COGNIZABLE.

In their First Cause of Action, the Platts contend that Arizona's forfeiture laws

[1] The State adopts by this reference the standing arguments made by the various County, Task Force, and City/Town Defendants in their reply. (Doc. No. 54).

violate due process, basing their argument on *Tumey v. Ohio*, 273 U.S. 510 (1927), and its progeny. But this claim grossly overstates the breadth of *Tumey*, mischaracterizes the role of forfeiture prosecutors under Arizona law, and fails to address the cases in which the courts have approved similar forfeiture statutes. The Platts' First Cause of Action lacks a cognizable legal theory, and therefore must be dismissed.

A. *Tumey v. Ohio* and its progeny do not govern prosecutors.

The Platts posit that *Tumey* and its progeny apply to all government officials. But that is not the law. The Supreme Court has unequivocally held that *Tumey* does not apply to prosecutors. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) ("The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity."). *See also Concrete Pipe & Products of Calif. Inc. v. Constr. Laborers Pension Trust for S. Calif.*, 508 U.S. 602, 619 (1993) ("The distinction between adjudication and enforcement disposes of the claim that the assumed bias or appearance of bias in . . . [enforcement] alone violates the Due Process Clause, much as it did the similar claim in *Marshall v. Jerrico*."). The Platts cite no authority to the contrary.

In *Tumey v. Ohio*, the Court analyzed a village ordinance distributing fines imposed by a mayor (presiding as a judge) between the state, village general fund, prosecutor, police, and the mayor himself. 273 U.S. 510, 521–22 (1927). Only the allocation to the mayor-judge violated due process. The portion given to the prosecutor's office drew no criticism at all. In fact, the Court approved of the allocations to law enforcement, stating "the Legislature of a state **may and often ought to** stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people." *Id.* at 535 (emphasis added). That principle animates a host of statutory schemes that the Platts' contrary argument would render invalid. *See, e.g.*, 29 U.S.C. § 216(e)(5)(certain Fair Labor Standards Act (FLSA) penalties "applied toward reimbursement of the costs of

determining the violations and assessing and collecting such penalties"); *U.S. v. Marathon Pipe Line Co.*, 589 F.2d 1305, 1309 (7th Cir. 1978) (finding Federal Water Pollution Control Act's use of civil penalties to fund future enforcement neither novel nor violative of due process, citing civil forfeiture decisions).

Tumey and its progeny require only that *adjudicators* be disinterested in case outcomes. Every case the Platts cite to support their *Tumey* theory, save one, discusses the conduct of a judicial officer or a quasi-judicial body. *See Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57 (1972) (finding due process violation where mayor, **sitting as judge**, adjudicated financial penalties which constituted a significant portion of the village's revenues); *Gibson v. Berryhill*, 411 U.S. 564, 573 n.12 (1973) (applying *Tumey* to hearings conducted before the state Board of Optometry, which were "**adjudicatory in character**" (emphasis added)); *Connally v. Georgia*, 429 U.S. 245 (1977) (invalidating statute which paid **justice of the peace** five dollars for each search warrant he issued, but nothing for those he refused to issue).

The only case cited by the Platts discussing *Tumey* in the context of a prosecution is *Marshall v. Jerrico*, 446 U.S. 238 (1980). But the *Marshall* Court rejected a *Tumey* challenge to an FLSA provision empowering Department of Labor officials to assess fines for violations. The Court reasoned that the officials "simply cannot be equated with the kind of decisionmakers to which the principles of *Tumey* and *Ward* have been held applicable" and recognized that the "distinction between judicial and nonjudicial officers was explicitly made in *Tumey*." *Marshall*, 446 U.S. at 247, 249. In other words, *Marshall* holds that *Tumey* does not apply to prosecutors.

Tumey ensures the impartiality of the judiciary. Its rigid requirements were designed for judges alone. Prosecutors are not judges and aren't expected to be impartial; they are advocates in an adversarial system, "necessarily permitted to be zealous in their enforcement of the law." *Id.* at 248; *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993) (same). Recognizing that prosecutors occupy a different role than do judges,

the Supreme Court has explicitly declined to extend *Tumey* to officials acting in an enforcement capacity. This Court must do the same.

B. Forfeiture prosecutors are not adjudicators.

As set forth above, the Supreme Court has clearly expressed that *Tumey* and its progeny apply only to adjudicators. Perhaps recognizing this, the Platts contend that the uncontested forfeiture process allows state prosecutors to act as adjudicators. The only supposed act of adjudication identified by the Platts is the State's ability to "unilaterally represent to the court . . . that a timely petition (or attempted claim) does not meet the requirements of A.R.S. § 13-4311(E)–(F)." (Amended Compl. 22 ¶ 128.) (Doc No. 20).

Presenting information to the court is not "adjudication." It is merely creating the factual record upon which a court can enter its judgment.[2] It does not effect a forfeiture; only a judge can do that. A prosecutor filing an application for order of forfeiture is no more an adjudicator than a plaintiff filing an application for default.[3] The attorney for the state wields no judicial power, *i.e.*, "the power to make enforceable, binding judgments," in any sense. *Cactus Wren Partners v. Arizona Dep't of Bldg. & Fire Safety*, 177 Ariz. 559, 562 (Ct. App. 1993). The fact that he must apply to a court for an order of forfeiture proves the point.

The touchstone of procedural due process is the requirement that an individual be given an opportunity to be heard.[4] Arizona's laws provide multiple such opportunities. Notably, Arizona law provides that a person can avoid uncontested forfeiture procedures

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[2] The State's attorney's advocacy is circumscribed by state law. *See, e.g.*, Ariz. R. Prof'l Conduct 3.3 (requiring candor to the tribunal); Ariz. R. Civ. Pro. 11(b) (requiring certification by attorney that the submitted papers are warranted by law).

[3] *Cf.* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L. J. 2446, 2515 (2016) ("[A] system that establishes a deadline for contesting the government's assertions of ownership, and that enforces the deadline by giving the government clear title to property that goes unclaimed despite adequate notice, cannot readily be said to vest 'judicial' power in executive officials.").

[4] The opportunity to be heard need not be a full hearing on the merits. *Boddie v. Connecticut*, 401 U.S. 371, 378, (1971) ("Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance . . . .")

altogether by filing a claim with the court in the first instance. A.R.S. § 13-4309(6)(a) ("If a claim has been timely filed . . . it shall be determined in a judicial forfeiture proceeding. . . ."). But ultimately, even where claimants fail to comply with the statutory requirements necessary to challenge a forfeiture, a judge must make the findings and enter the order. A.R.S. § 13- 4314(A).

The Platts contend that the judicial review provided by A.R.S. § 13-4314(A) is insufficient to protect their property rights, citing *Wohlstrom v. Buchanan*, 180 Ariz. 389 (1994).[5] This argument sidesteps the fact that, as outlined above, they could have avoided the uncontested forfeiture proceedings altogether by filing a claim with the court. But beyond that, *Wohlstrom* does not stand for the proposition that § 13-4314(A) is constitutionally infirm. Instead, it holds that a person, having filed a timely, sworn claim, cannot then have his claim struck simply because he invoked his privilege against self-incrimination. *Wohlstrom*, 180 Ariz. at 391 (finding that "'automatic' economic sanctions [like striking a claim] for invoking the privilege . . . are forbidden.").

It is quite a different matter when a person does not comply with the filing requirements in the first place. On this point, *Marshall* is instructive. Under the FLSA regime approved by the Court, Department of Labor officials were empowered to assess the existence of, and impose a penalty for, certain labor law violations. *Marshall*, 446 U.S. 238, 239–40. While it is true that parties assessed a fine *could* seek *de novo* review before an Administrative Law Judge, the Labor Department's determination becomes final if not timely objected to. *Id.* at 244; 29 U.S.C. § 216. Thus, even though a party's ability to contest the fine before a judge was conditioned on strict compliance with statutory requirements, the Supreme Court nevertheless found that the FLSA framework

[5] The Platts intimate that forfeitures based on probable cause are constitutionally suspect, but the Ninth Circuit has approved of such forfeitures. *See United States v. $129,727.00 U.S. Currency*, 129 F.3d 486 (9th Cir. 1997) (rejecting due process challenge to old federal forfeiture procedures allowing for forfeitures where claimant failed to rebut government's initial showing of probable cause). *See also United States v. Castro*, 78 F.3d 453, 456 (9th Cir. 1996) (finding that failure to comply with filing requirements "constitute[s] an abandonment of the property as a matter of law.").

comported with the requirements of due process.[6] So it is with Arizona's uncontested forfeiture statutes. Our laws require strict compliance with certain requirements, but the *availability* of judicial review affords the process due. Nothing in *Wohlstrom* or any other case cited by the Platts suggests otherwise.

Arizona prosecutors must present every forfeiture case, including uncontested cases, to the neutral, detached Arizona Superior Court for review. It is the judge "whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding." *Marshall*, 446 U.S. at 250. Prosecutors cannot "adjudicate" forfeiture cases, and to hold otherwise would strip the word of all meaning.

C. The Platts' arguments run contrary to the pronouncements of the Supreme Court.

The Platts' contention that prosecutors have a disqualifying interest in the outcome of forfeiture cases is incongruent with the large body of case law approving of civil forfeiture as a crime-fighting tool, both when used to diminish the economic power of criminal enterprises directly, and to fund future enforcement. (State's Mot. to Dismiss 14) (Doc No. 44). Nothing in the Platts' response even attempts to rebut these cases.

Forfeiture proceeds can only be 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 applicable case law encourages these uses of forfeiture and forfeited property. *See Kaley v. United States*, 134 S. Ct. 1090, 1094, 188 L. Ed. 2d 46 (2014) ("Forfeitures help to ensure that crime does not pay . . . . Government also uses forfeited property to

[6] Such requirements are commonplace in civil forfeiture statutes. *See United States v. Real Prop.*, 135 F.3d 1312, 1316 (9th Cir. 1998) (finding that many courts "have conditioned a person's standing to contest forfeiture . . . on strict compliance with filing requirements."). *Cf. Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982) "[P]rivate property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law . . .").

recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities. . . ."). *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014). Given this legal backdrop, the Platts' contrary argument must fail.

II. THE SECOND CAUSE OF ACTION IS NOT LEGALLY COGNIZABLE.[7]

A. A.R.S. § 13-4314(F) does not violate the Petition Clause.

The Platts contend that A.R.S. § 13-4314(F) violates the Petition Clause of the First Amendment because it imposes the sort of "unconditional litigation penalty" disapproved of in *In re Workers' Compensation Refund.* 46 F.3d 813, 822 (8th Cir. 1995). This argument profoundly overstates that case's holding, which represents a narrow departure from the general rule that the allocation of litigation costs is a matter of policy for the legislative branch to determine. *See 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. . . ."). It does not control here.

In re Workers' Comp. Refund concerned a state-created entity, the Workers' Compensation Reinsurance Association ("WCRA"), to which certain insurers were required to pay premiums. *In re Workers' Compensation Refund.* 46 F.3d at 816. Over time, the insurance pool generated a substantial surplus. *Id.* at 816–17. Under existing law, the WCRA was obligated to return the surplus to the insurance companies. Instead, the legislature hastily enacted a new statute which instead directed the surplus to be distributed to the insured, rather than the insurers. *Id.* at 817. That statute also contained a provision ("Section Ten") requiring the WCRA to pay all of the state's legal costs in the

[7] The State notes that on April 12, 2017, Governor Douglas Ducey signed HB2477, which will make significant changes to (among other things) A.R.S. § 13-4314(F). Under the new provision, substantially prevailing claimants can recover attorney's fees, expenses, and damages against the State; and claimants who fail to establish their exemptions are no longer liable for the State's costs, expenses, and fees. Although this law will not go into effect until ninety days after the legislature adjourns, *see* Ariz. Const. art IV, part 1, §1, the State felt it important to note this development now. In all likelihood, the Plaintiffs' Second Cause of Action will soon be moot, at least to the extent that it seeks to enjoin enforcement of a soon-to-be-nonexistent provision of Arizona law.

case of a legal challenge to the law, regardless of who prevailed in the litigation. *See id.* The Eighth Circuit struck down that provision as violative of the insurance companies' right to petition.

The difference between A.R.S. § 13-4314(F) and Section Ten is stark. Section Ten was enacted to *punish* the insurance companies for bringing a legal challenge to the new statute. And it did so by depleting the very fund the insurance companies sought to recover. The Constitution does not countenance an "unconditional litigation penalty" like Section Ten. *Id.* at 822. But the liability imposed by Arizona's § 13-4314(F) is neither *unconditional* nor a *litigation penalty*. The State's fees and costs can only be awarded against claimants who fail to establish their entire interest is exempt from forfeiture; liability does not attach unconditionally. Section 13-4314(F) is a "mere assessment of costs upon a losing party," quite unlike Section Ten. *Id.*

The Platts make much of the fact that, in theory, a "substantially prevailing" claimant could nevertheless be liable for the State's attorney's fees under A.R.S. § 13-4314(F). As a threshold matter, the facts alleged in the Amended Complaint, do not support such a claim. The Platts only claimed one item: their car. People claiming a single vehicle cannot prevail on only "99% of their claim" – either they win or they lose. (Amended Compl. 36 ¶ 234.) (Doc No. 20).This claim is not factually plausible (or even possible), at least not as to the Platts. That counsels dismissal of the claim.

Moreover, in the context of most contested, *in rem* forfeiture proceedings, if a claimant cannot show that his entire interest is exempt from forfeiture, that means at least some of his property was proven to be tainted by criminality. *See State ex rel. Napolitano v. Gravano*, 204 Ariz. 106, 115 (Ct. App. 2002); A.R.S. § 13-2314(G). There is nothing unjust, illegal, or even inappropriate about having such a party pay the state's litigation and investigation costs under those circumstances, and the Platts cite no authority to the contrary.

Put simply, "the first amendment does not prevent the government from requiring a person to pay the costs incurred in exercising a right." *Premier Elec. Const. Co. v. Nat'l*

Elec. Contractors Ass'n, Inc., 814 F.2d 358, 373 (7th Cir. 1987). *See also Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014) ("[T]o the extent that patent suits are . . . protected [by the First Amendment] as acts of petitioning, it is not clear why the shifting of fees . . . would diminish that right."). With the exception of *In re Worker's Compensation Refund*, the Platts have not identified a single case in which *any* fee shifting statute has been found to violate the Petition Clause. And that case only prohibits an extreme "unconditional litigation penalty" designed to punish litigants. Section 13-4314(F) only assigns the costs of litigation to a losing party. It is constitutional, plain and simple.

B. A.R.S. § 13-4314(E) & (F) do not violate the Equal Protection Clause.

The Platts argue that A.R.S. §§ 13-4314(E) & (F) (the "Fee-Shifting Statutes") violate the Equal Protection Clause because they treat claimants and the State differently, "even though they are similarly situated as parties to the same judicial forfeiture proceeding." (Response 12–13) (Doc. No. 49). Courts strictly scrutinize such a classification "only if it discriminates based on a suspect criterion or impinges upon a fundamental right." *Madrid v. Gomez*, 190 F.3d 990, 995 (9th Cir. 1999). The Platts do not contend that they are members of a suspect class. Instead, they argue that the Fee-Shifting Statutes burden their fundamental right of access to the courts; accordingly, the statutes must be subjected to strict scrutiny.

But they are wrong. As *Madrid v. Gomez* makes clear, the "scope of the right of access to the courts is quite limited." 190 F.3d at 995. The Constitution requires "only that [people] be able to present their grievances to the courts." *Id.* The Fee-Shifting Statutes do not prevent access in any meaningful way; they only impose *post-judgment* liability for costs and fees on unsuccessful claimants. The notion that this burdens the narrow right of access to the courts is absurd. *Cf. Lumbert v. Illinois Dep't of Corr.*, 827 F.2d 257, 259 (7th Cir. 1987) ("[I]t is not true that placing any cost on the filing of litigation violates the Constitution. . . . The correct principle is that reasonable costs may be imposed on persons who want to sue."). The Platts cite no authority at all supporting

the novel proposition that asymmetrical fee-shifting impermissibly burdens the right of access to the courts. Because the Fee-Shifting Statutes neither target a suspect class nor burden a fundamental right, this Court need only ask whether they can withstand rational-basis review. They can.

The Platts cite *Atchison, Topeka, & Santa Fe Ry. Co. v. Vosburg*, 238 U.S. 56 (1915), for the proposition that a one-way attorney's fee provision cannot "withstand rational-basis scrutiny where no party [bears] a 'special burden in the litigation.'" (Response 14) (Doc. No. 49). They *profoundly* misunderstand this case. The *Atchison* Court recognized that one-way attorney's fee provisions in favor of plaintiffs are generally constitutionally permissible because plaintiffs bear special burdens in litigation. *Atchison*, 238 U.S. at 61 (*citing Missouri, K. & T. Ry. Co. of Texas v. Cade*, 233 U.S. 642, 650 (1914)). But under the Kansas statute at issue, fees could be awarded to a shipper who successfully sued a railroad company, but not to a railroad company who successfully sued a shipper. *Id.* at 58. *Atchison* does not question the notion that plaintiffs bear a special burden; quite to the contrary, it holds that in *light of that recognized burden*, the legislature may not treat one class of *plaintiffs* differently than another similarly-situated class of *plaintiffs*. *Id.* at 61–62.

The State of Arizona, as the plaintiff in every civil forfeiture case, bears the sort of special burdens identified in *Atchison*, and the legislature is free to shift fees and costs in recognition of that fact. The Fee-Shifting Statutes do not concern a suspect or semi-suspect class or burden a fundamental right. And because they are rationally related to the legitimate government interest in limiting the unwarranted costs of defending false claims, it is constitutional. The Second Cause of Action must be dismissed.

III. THE THIRD CAUSE OF ACTION IS NOT LEGALLY COGNIZABLE.

The Platts contend that their Third Cause of Action rests on a cognizable legal theory, but they cite nothing in support of it other than some isolated *dicta* from *Marshall*. They allege that Arizona law "encourages law-enforcement agencies to seize

and forfeit property even when doing so has no rational connection to the public health, safety, or welfare." This is precisely the sort of argument the Supreme Court rejected in *Caplin & Drysdale, Chartered v. United States*:

> 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.

491 U.S. 617, 634–35 (1989).

The Platts state that law enforcement decisions are "warped by the profit incentive of forfeiture," but this argument presupposes that seizing property used in connection with crime and then repurposing that property to fight crime is illegitimate. But that is not the law. The Supreme Court has repeatedly held that civil asset forfeiture *serves* public safety. (State's Mot. to Dismiss 14) (Doc No. 44). The Platts do not even attempt to address, let alone rebut, those cases. Faced with a large body of contrary case law, the Platts have only their *ipse dixit* to rely on. The Third Cause of Action is simply implausible, and it should be dismissed.

IV. CONCLUSION

For the reasons stated above and in the underlying motion, the Platts' First, Second, and Third Causes of Action must be dismissed.

RESPECTFULLY SUBMITTED this 14th day of April, 2017.

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CERTIFICATE OF SERVICE

I certify that on April 14, 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:

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