

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 32 MAP 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

**JUSTEN IRLAND; SMITH AND WESSON 9MM SEMI-AUTOMATIC PISTOL, SERIAL
NUMBER PDW0493,**

Appellees.

**BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN
SUPPORT OF APPELLEE JUSTEN IRLAND**

**Appeal from the Order of the Commonwealth Court of
Pennsylvania Dated January 13, 2017, At No. 448 CD 2015,
Reversing the Order of the Court of Common Pleas of Adams
County Dated March 9, 2015, At No. CP-01-CR-224-2014.**

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INTEREST OF THE *AMICUS CURIAE*

The Institute for Justice respectfully submits this *amicus curiae* brief in support of Appellee Justen Irland to highlight how forfeiture operates in the real world, including in Pennsylvania.

IJ is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of IJ's mission is to protect the rights of individuals to own and enjoy their property, both because an individual's control over his or her property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights.

Consistent with this mission, IJ has launched a nationwide initiative to reform forfeiture laws through strategic litigation and original research. On the litigation front, IJ represents individuals and small businesses whose property has been threatened with civil forfeiture in both state and federal courts across the country.¹ Most relevant here, IJ is challenging the constitutionality of the City of

¹ See *United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars & Fifty-Six Cents*, 838 F.3d 930 (8th Cir. 2016), *additional information available at* <http://ij.org/case/iowa-forfeiture>; *Vocatura's Bakery, Inc. v. Internal Revenue Service*, No. 3:16-mc-147-RNC (D. Conn. dismissed June 16, 2016), *additional information available at* <http://ij.org/case/connecticut-forfeiture>; *United States v. \$11,000 in U.S. Currency*, No. 14-125-WOB-JGW (E.D. Ky. dismissed Nov. 29, 2016), *additional information available at* <http://ij.org/case/kentucky-civil-forfeiture/>; *United States v. \$107,702.66 in U.S. Currency Seized from Lumbee Guar. Bank Account No. 8200295*, No. 7:14-cv-00295-F, 2016 WL 413093 (E.D.N.C. Feb. 2, 2016),

Philadelphia’s civil-forfeiture policies and practices on behalf of a class of property owners.² Also, IJ has filed *amicus* briefs in the U.S. Supreme Court³ and in this Court⁴ on issues related to forfeiture.

Additionally, IJ produces high-quality, original research documenting problems with forfeiture.⁵ In 2015, IJ published the second edition of *Policing for*

additional information available at <http://ij.org/case/north-carolina-forfeiture>; In re Seizure of \$446,651.11, No. 2:14-mc-1288 (E.D.N.Y. dismissed Jan. 20, 2015), *additional information available at <http://ij.org/long-island-forfeiture>; Dehko v. Holder*, No. 13-14085, 2014 WL 2605433 (E.D. Mich. June 11, 2014), *additional information available at <http://ij.org/michigan-forfeiture>; United States v. 434 Main St.*, 961 F. Supp. 2d 298 (D. Mass. 2013), *additional information available at <http://ij.org/case/massachusetts-civil-forfeiture>; United States v. 2601 W. Ball Rd.*, No. SACV 12-1345-AG (MLGx) (C.D. Cal. dismissed Oct. 10, 2013), *additional information available at <http://ij.org/case/caforfeiture>; El-Ali v. State*, 428 S.W.3d 824 (Tex. 2014), *additional information available at <http://ij.org/case/state-of-texas-v-one-2004-chevrolet-silverado>; State ex rel. Cnty. of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. 228 (App. Div. 2004), *additional information available at <http://ij.org/case/state-of-new-jersey-v-one-1990-ford-thunderbird>; California v. Pac. Heights Partners, Inc.*, No. 37-2016-00006958-CU-AF-CTL (Cal. Super. Ct. May 5, 2017) (Minute Order), *additional information available at <http://ij.org/case/san-diego-civil-forfeiture>; Oklahoma v. \$53,234.00 Cash*, No. CV-2016-66 (Okla. Dist. Ct. dismissed Apr. 25, 2016), *additional information available at <http://ij.org/case/muskogee-civil-forfeiture>*. In addition, IJ is litigating pending forfeiture cases in Arizona, Indiana, New Mexico, and Texas.

² See *Sourovelis v. City of Phila.*, 103 F. Supp. 3d 694 (E.D. Pa. 2015) (“*Sourovelis* Class Action”). We provide additional information about the *Sourovelis* Class Action in our “Backgrounder,” which is available at <http://ij.org/case/philadelphia-forfeiture/#backgrounder>.

³ *Nelson v. Colorado*, 137 S. Ct. 1249 (2017); *Henderson v. United States*, 135 S. Ct. 1780 (2015); *Kaley v. United States*, 134 S. Ct. 1090 (2014); *Florida v. Harris*, 133 S. Ct. 1050 (2013); *Alvarez v. Smith*, 558 U.S. 87 (2009); *Bennis v. Michigan*, 516 U.S. 442 (1996); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993).

⁴ *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153 (Pa. 2017).

⁵ See Angela C. Erickson, Jennifer McDonald & Mindy Menjou, Institute for Justice, *Forfeiture Transparency & Accountability* (Jan. 2017), <http://ij.org/report/forfeiture-transparency-accountability>; Dick M. Carpenter & Larry Salzman, Institute for Justice, *Seize First, Question Later: The IRS and Civil Forfeiture* (Feb. 2015), <http://ij.org/wp-content/uploads/2015/03/seize-first-question-later.pdf>; Bart J. Wilson & Michael Preciado, Institute for Justice, *Bad Apples or Bad Laws? Testing the Incentives of Civil Forfeiture* (Sept. 2014), <http://ij.org/wp-content/uploads/2015/03/bad-apples-bad-laws.pdf>; Dick M. Carpenter & Lee McGrath, Institute for Justice, *Rotten Reporting in the Peach State: Civil Forfeiture in Georgia Leaves the*

Profit, its landmark study evaluating each state’s civil-forfeiture laws.⁶ As noted in the study, Pennsylvania earned a grade of D-.⁷

Drawing on both its litigation experience and its original research, IJ files this *amicus* brief to highlight how law-enforcement officials’ ability to retain forfeiture proceeds not only distorts their priorities, but requires that courts narrowly construe forfeiture laws. The Commonwealth Court of Pennsylvania carefully looked at forfeiture history, and concluded that Pennsylvania does not authorize common-law forfeiture. IJ urges this Court to affirm this decision.

SUMMARY OF THE ARGUMENT

Given the inherent conflict of interest posed by law enforcement’s retention of forfeiture proceeds, this Court should safeguard property owners’ rights by

Public in the Dark (Jan. 2013), <http://ij.org/wp-content/uploads/2015/03/rotten-reporting.pdf>; Dick M. Carpenter, Lee McGrath & Angela C. Erickson, Institute for Justice, *A Stacked Deck: How Minnesota’s Civil Forfeiture Laws Put Citizens’ Property at Risk* (Jan. 2013), <http://ij.org/wp-content/uploads/2015/03/stacked-deck.pdf>; Dick M. Carpenter, Tim Keller & Diana Simpson, Institute for Justice, *Arizona’s Profit Incentive in Civil Forfeiture: Dangerous for Law Enforcement; Dangerous for Arizonans* (Dec. 2012), <http://ij.org/wp-content/uploads/2015/03/az-forfeiture-report.pdf>; Dick M. Carpenter, Larry Salzman & Lisa Knepper, Institute for Justice, *Inequitable Justice: How Federal Equitable Sharing Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain* (Oct. 2011), http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf; Scott Bullock & Dick M. Carpenter, Institute for Justice, *Forfeiting Justice: How Texas Police & Prosecutors Cash In on Seized Property* (Nov. 2010), <http://ij.org/wp-content/uploads/2015/03/forfeitingjusticefinal.pdf>.

⁶ Dick M. Carpenter, Lisa Knepper, Angela C. Erickson & Jennifer McDonald, Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. 2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> (“*Policing for Profit*”).

⁷ *Id.* at 122.

closely scrutinizing law enforcement's financial incentives and refusing to enable common-law forfeiture.

Over centuries, forfeiture has expanded dramatically in scope. It has gone from a narrowly-cabined doctrine of admiralty law into a sweeping way for law-enforcement agencies to generate revenue. For example, between 2002 and 2015, Pennsylvania law-enforcement agencies forfeited over \$11 million worth of property per year. Pennsylvania law-enforcement officials now want to extend forfeiture even further—the Appellant seeks to forfeit property even without statutory authority to do so. That innovation would move the law in the wrong direction.

Even for forfeiture authorized by statute—such as forfeiture of property connected to drug crimes—law enforcement's pecuniary incentives result in misconduct. Nationally, and in Pennsylvania, forfeiture laws distort law-enforcement priorities away from the impartial administration of justice and toward the pursuit of revenue. Moreover, statutory forfeiture has facilitated law enforcement's ability to self-finance controversial expenditures in an end run around legislators' appropriation powers.

The authorization of common-law forfeiture could extend these problems to frontiers where law enforcement has an even freer hand. Theoretically, statutory forfeiture is limited by statute. Common-law forfeiture would not face this

constraint. As a result, it would—if allowed—provide law enforcement a loophole it could exploit for financial gain.

In deciding the case at bar, this Court should be mindful of this profit incentive and protect property owners' rights. In a variety of contexts, courts have scrutinized law-enforcement authorities more closely when they stand to financially benefit from their actions. In light of the direct financial stake Pennsylvania law-enforcement officials have in forfeiture proceedings, IJ urges the Court to apply careful scrutiny in this case and to affirm the Commonwealth Court of Pennsylvania.

ARGUMENT

Section I of this *amicus* brief provides background on how forfeiture has strayed from its historical roots. Using statutory drug forfeiture as an example, Section II discusses the unfortunate results of law enforcement's ability to retain forfeiture proceeds. Finally, Section III explains how common-law forfeiture could—if legal—aggravate these outcomes, and urges this Court to refuse to authorize common-law forfeiture in Pennsylvania.

I. FORFEITURE HAS BECOME UNMOORED FROM ITS HISTORICAL JUSTIFICATION.

Modern forfeiture differs from earlier forfeiture in material respects. First, governments have substantially expanded forfeiture's scope, both in the types of

property subject to forfeiture and the types of crimes giving rise to forfeiture.⁸

Second, forfeiture proceeds now go directly back to law-enforcement authorities rather than to general funds controlled by legislators.

A. Forfeiture Has Broadened Dramatically in Scope.

Early laws authorizing forfeiture were based on the unquestioned ability of government to seize contraband, in which no property rights existed. Contraband included not only *per se* illegal goods and stolen goods, but also goods that were concealed to avoid paying required customs duties.⁹

During the Prohibition Era, the federal government expanded the scope of its forfeiture authority to cover automobiles and other vehicles transporting illegal liquor. However, the forfeiture provision of the National Prohibition Act was considered “incidental” to the primary purpose of “destroy[ing] the forbidden liquor in transportation.”¹⁰ Forfeitures were still disfavored.¹¹

⁸ See *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., statement respecting denial of certiorari) (“Historical forfeiture laws were narrower in most respects than modern ones. . . . Most obviously, they were limited to a few specific subject matters, such as customs and piracy. . . . These laws were also narrower with respect to the type of property they encompassed.”).

⁹ Act of July 31, 1789, 1 Stat. 29, 43 (providing that all “goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited”).

¹⁰ *Carroll v. United States*, 267 U.S. 132, 155 (1925).

¹¹ See, e.g., *United States v. One 1936 Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939) (“Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.”).

With the advent of the “War on Drugs” in the 1970s, forfeiture expanded to reach a broader universe of property.¹² For instance, Pennsylvania’s 1972 iteration of its Controlled Substance, Drug, Device and Cosmetic Act—modeled on its federal counterpart—authorized forfeiture for “all property used as a container for controlled substances.”¹³

Today, forfeiture laws in this country cover not only contraband and instrumentalities, but all manner of real and personal property connected to alleged criminal activity. For example, like its federal counterpart,¹⁴ Pennsylvania’s Controlled Substances Forfeiture Act authorizes forfeiture of homes, vehicles, and cash “used or intended to be used” to facilitate any drug violation.¹⁵ In fact, under Pennsylvania law, money merely “found in close proximity” to illegal drugs is “rebuttably presumed to be proceeds derived from the selling of” illegal drugs.¹⁶

As the types of property subject to forfeiture expanded, the list of crimes tethered to forfeiture has also grown. Historically, forfeiture of noncontraband items was justified only by the practical necessities of enforcing admiralty or piracy laws—through forfeiture, courts could obtain jurisdiction over property

¹² See, e.g., Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

¹³ See *Commonwealth v. Landy*, 362 A.2d 999, 1002 (Pa. Super. Ct. 1976) (summarizing the controlled-substances forfeiture provisions in effect at the time of the ruling).

¹⁴ See 21 U.S.C. § 881(a)(7) (subjecting to forfeiture all real property “used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of” a drug crime).

¹⁵ See 42 Pa. Cons. Stat. § 5802(4), (6).

¹⁶ *Id.* § 5802(6)(ii).

when it was virtually impossible to seek justice against that property’s owners, who were overseas or otherwise outside the court’s jurisdiction.¹⁷ Later, Congress and state legislatures expanded forfeiture beyond alleged instances of drug violations to include myriad crimes at the federal and state levels. Today, there are more than 400 federal forfeiture statutes relating to a number of federal crimes, from environmental crimes to the failure to report currency transactions.¹⁸ Further, all states have statutory provisions authorizing forfeiture.¹⁹ Pennsylvania, for example, authorizes forfeiture in connection with at least 30 statutes, including its Controlled Substance, Drug, Device and Cosmetic Act.²⁰

¹⁷ See, e.g., *The Brig Malek Adhel*, 43 U.S. 210, 233 (1844) (justifying forfeiture of owner’s vessel under piracy and admiralty laws because of “the *necessity* of the case, as the *only* adequate means of suppressing the offence or wrong”) (emphasis added).

¹⁸ See Charles Doyle, Cong. Research Serv., *Crime and Forfeiture* 82–94 (Jan. 22, 2015), <http://fas.org/sgp/crs/misc/97-139.pdf>; see also Asset Forfeiture & Money Laundering Section, U.S. Dep’t of Justice Criminal Div., *Asset Forfeiture and Money Laundering Statutes* (2015), <https://www.justice.gov/sites/default/files/criminal-afmls/legacy/2015/04/24/statutes2015.pdf>.

¹⁹ See generally Steven L. Kessler, *Civil and Criminal Forfeiture: Federal and State Practice* (2012) (discussing each state’s civil-forfeiture provisions).

²⁰ See also 3 Pa. Cons. Stat. § 459-211(c) (Dog Law); 4 Pa. Cons. Stat. § 1518(f) (Gaming Act); 18 Pa. Cons. Stat. § 910(c.1) (theft of telecommunications services); 18 Pa. Cons. Stat. § 2506(f) (drug delivery resulting in death); 18 Pa. Cons. Stat. § 2717(b.1) (terrorism forfeiture); 18 Pa. Cons. Stat. § 3021 (human trafficking); 18 Pa. Cons. Stat. § 3141 (sexual offenses); 18 Pa. Cons. Stat. § 4116(i) (unauthorized copying of recorded materials); 18 Pa. Cons. Stat. § 4119(f) (trademark counterfeiting); 18 Pa. Cons. Stat. § 5513(b) (gambling devices); 18 Pa. Cons. Stat. § 5554 (cruelty to animals); 18 Pa. Cons. Stat. § 5707 (Wiretapping and Electronic Surveillance Control Act); 18 Pa. Cons. Stat. § 6110.1(d) (possession of a firearm by minor); 18 Pa. Cons. Stat. § 6314(f) (trafficking drugs to minors); 18 Pa. Cons. Stat. § 6321(e) (transmission of sexually explicit images by minor); 18 Pa. Cons. Stat. § 6501(b)(5) (scattering rubbish); 18 Pa. Cons. Stat. § 7508(e) (drug trafficking sentencing and penalties); 18 Pa. Cons. Stat. § 7707(a) (vehicle chop shop; illegally obtained and altered property); 27 Pa. Cons. Stat. § 6208(f) (waste transportation violation); 35 Pa. Cons. Stat. § 831.1 (forfeiture for storage or transportation of drugs); 35 Pa. Cons. Stat. § 6018.614 (Solid Waste Management Act); 37 Pa. Cons. Stat. § 511 (conducting field investigation of Commonwealth property without permit); 43 Pa. Cons. Stat.

Now, Pennsylvania law enforcement wants to extend forfeiture’s scope a step even further. Through common-law forfeiture, the Appellant in this case seeks to forfeit property without any statutory authority at all. This practice, if authorized, would constitute another stark departure from forfeiture’s historical scope.²¹

B. Law Enforcement Retains Forfeiture Proceeds.

There is another key difference—beyond a change in scope—between modern forfeiture and earlier forfeiture. In contrast to most of American history, in which forfeiture proceeds went to a general fund to benefit the public at large, law-enforcement officials today get to keep most forfeiture proceeds.²² For instance, the laws of 43 states authorize law-enforcement agencies to receive some or all proceeds from forfeited property.²³

Pennsylvania is one of these 43 states. Specifically, Pennsylvania’s Controlled Substances Forfeiture Act permits the state’s prosecutors to retain drug-

§§ 1311-15 *et seq.* (Public Employee Pension Forfeiture Act); 47 Pa. Cons. Stat. § 6-602 (Liquor Code violation); 53 Pa. Cons. Stat. § 4000.1715(a) (Municipal Waste Act); 68 Pa. Cons. Stat. § 46 (restrictions on acquisition of agricultural lands by certain aliens); 72 Pa. Cons. Stat. § 8285(a) (cigarette tax violations); 75 Pa. Cons. Stat. § 4909(c) (transportation of foodstuffs in vehicles used to transport waste); and 75 Pa. Cons. Stat. § 9405 (importing fuels without permit).

²¹ See *Commonwealth v. Irland*, 153 A.3d 469, 471 (Pa. Cmmw. Ct. 2017) (“Based upon our research, the Commonwealth’s organic law . . . denounces and effectively abolishes any notion of common law forfeiture and that the predominate, if not unanimous, weight of the authority has determined that common law forfeiture never made it across the seas to America.”).

²² See, e.g., *Policing for Profit* at 2.

²³ *Id.* at 14 (depicting in Figure 6 the percentage of forfeiture proceeds distributed to law enforcement in each state); see 42 Pa. Cons. Stat. § 5803(f)–(i).

forfeiture proceeds.²⁴ In turn, they are free to share forfeiture proceeds with the police departments that seize property. The Philadelphia District Attorney’s Office, for instance, shares forfeiture proceeds with the Philadelphia Police Department. Under an agreement, after distributing an initial \$927,500, the balance of forfeiture revenue is divided, with 40 percent going to the Philadelphia District Attorney’s Office and 60 percent going to the Philadelphia Police Department.²⁵

Armed with this ability to benefit from forfeiture, Pennsylvania law enforcement forfeits a staggering amount of property. From 2002 to 2015, law-enforcement agencies in Pennsylvania forfeited nearly \$160 million, including nearly \$21 million in real property, over \$12 million in vehicles, and over \$124 million in cash.²⁶ Thanks, in large part, to Pennsylvania law enforcement’s ability

²⁴ Specifically, the Act requires forfeited property to be transferred to the custody of the District Attorney for that county if the law-enforcement authority seizing property has county-wide jurisdiction, and also authorizes District Attorneys to either sell forfeited property or retain it for official use. *Id.* § 5803(f).

²⁵ *See, e.g.*, American Civil Liberties Union of Pennsylvania, *Guilty Property* 3 n.6 (June 2015), https://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf; *Sourovelis* Class Action, 2d Am. Compl., ECF No. 157, ¶ 67.

²⁶ These figures are based on Pennsylvania’s annual asset forfeiture reports, which are publicly available. IJ retains an internal analysis of these reports on file and uses the analysis for, among other things, its *Policing for Profit* study. *See, e.g.*, *Policing for Profit* at 16 (“Pennsylvania law enforcement agencies . . . forfeited more than \$152 million between 2002 and 2013 . . .”).

to keep this property, the state earned a D- grade in *amicus curiae*'s nationwide evaluation of jurisdictions' forfeiture laws.²⁷

As set forth in Section II, law enforcement's statutory authorization to retain drug-forfeiture proceeds—in Pennsylvania and elsewhere—has had unfortunate results.

II. AS STATUTORY FORFEITURE SHOWS, LAW-ENFORCEMENT'S PECUNIARY INCENTIVES RESULT IN MISCONDUCT.

Before extending forfeiture *further* by permitting common-law forfeiture, this Court should consider the problems *already* occurring under statutory drug-forfeiture laws. Agencies' and officials' ability to retain forfeited property has distorted law enforcement's priorities from the pursuit of justice to the pursuit of revenue, both nationally and in Pennsylvania. Moreover, by virtue of this revenue, law enforcement has been able to finance eye-popping expenditures that legislators did not appropriate funds for.

A. Law Enforcement's Ability to Retain Drug-Forfeiture Proceeds Distorts Their Priorities.

By allowing law-enforcement officials to retain drug-forfeiture proceeds, federal and state forfeiture laws—including Pennsylvania's—distort law-

²⁷ *Policing for Profit* at 122. Two years after the publication of *Policing for Profit*, Pennsylvania passed a civil-forfeiture reform bill changing some procedures. *See* Act of June 29, 2017, Pub. L. 247, No. 13, Sec. 9. However, since the new procedures still permit Pennsylvania law-enforcement agencies and officials to retain 100% of forfeiture proceeds, Pennsylvania would still grade poorly on IJ's rubric.

enforcement priorities. Due to these laws, law enforcement has an incentive to maximize forfeiture revenue.²⁸ When law enforcement's purpose is to generate revenue, the neutral administration of justice takes a backseat and, as a result, innocent property owners are hurt.

Across the nation, law enforcement's ability to retain drug-forfeiture proceeds has distorted their priorities toward pursuing revenue. For example, a former New York City Police Commissioner observed that police had an incentive to set up roadblocks on the southbound lanes of Interstate 95, which were heading in to the city, in order to seize cash that was putatively being used to purchase drugs rather than setting up similar roadblocks on the northbound lanes, which were heading out of the city, and that could have been used to seize the drugs themselves.²⁹ Similarly, an investigation in Tennessee revealed that law-enforcement agencies were *ten times* more likely to make stops on the westbound

²⁸ See Bart J. Wilson & Michael Preciado, Institute for Justice, *Bad Apples or Bad Laws? Testing the Incentives of Civil Forfeiture* 23 (Sept. 2014), <http://ij.org/wp-content/uploads/2015/03/bad-apples-bad-laws.pdf> (“[A]llowing law enforcement to take property and keep the proceeds creates incentives for abuse.”). We note that this study received funding from IJ.

²⁹ Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 68 (1998) (“[Police] have a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.”).

lanes of Interstate 40—where money travels—than the eastbound lanes—where drugs come in from Mexico.³⁰

As IJ has seen firsthand in Philadelphia, this distortion of law enforcement’s priorities imperils innocent Americans’ property rights. IJ clients Christos (“Chris”) and Markela Sourovelis are a case in point. After catching the couple’s son selling \$40 worth of drugs, Philadelphia law enforcement evicted the family from its home without any notice or opportunity to be heard.³¹ Simultaneously, even though they never charged Chris or Markela of a crime—let alone convicted them of one—Philadelphia prosecutors filed a petition to forfeit their home.³² To be able to return home while the forfeiture action against his property was pending, Chris had to go to Courtroom 478 in Philadelphia City Hall, a “courtroom” with no judge present and under Philadelphia prosecutors’ control.³³ At Courtroom 478, prosecutors pressured Chris to sign an agreement evicting his son and waiving statutory and constitutional defenses in future forfeiture proceedings in exchange for their withdrawal of their forfeiture petition.³⁴ The Sourovelis family’s ordeal is

³⁰ Phil Williams, *Are Middle Tennessee Police Profiting Off Drug Trade?*, News Channel 5 (Jan. 20, 2016), <http://www.newschannel5.com/news/newschannel-5-investigates/policing-for-profit/are-middle-tennessee-police-profiting-off-drug-trade>.

³¹ *Sourovelis* Class Action, 2d Am. Compl. ¶¶ 162, 167–70.

³² *Id.* ¶ 183.

³³ *Id.* ¶¶ 171, 174.

³⁴ *Id.* ¶ 187. Beginning in January 2016, Philadelphia civil-forfeiture proceedings moved from Courtroom 478 to a successor courtroom staffed with judicial officers. *See Sourovelis v. City of Phila.*, 246 F. Supp. 3d 1058, 1063–64 (E.D. Pa. 2017). However, since Philadelphia’s

a key example of how law enforcement treats innocent Pennsylvanians' people property that it has a pecuniary stake in seizing and forfeiting.³⁵

IJ client Nassir Geiger is another example of law enforcement's drug-forfeiture priorities gone awry. After Philadelphia police officers witnessed Nassir talking to an acquaintance who had been arrested for a drug offense, they searched his car.³⁶ Though police did not find any drugs in the car, they nonetheless seized the car and \$580 Nassir was carrying.³⁷ Later, Philadelphia prosecutors filed petitions to forfeit Nassir's car and cash, even though they never convicted him of any crime.³⁸ Like Chris Sourovelis, Nassir was summoned to Courtroom 478, where he saw prosecutors but no judge.³⁹ At Courtroom 478, prosecutors told Nassir that, in order to get his seized car back, he would have to pay \$1,800 in accrued storage fees.⁴⁰ Nassir's experience is—like the Sourovelises' story—a

forfeiture-administration procedures still have constitutional deficiencies, the *Sourovelis* Class Action continues to challenge them. *See id.* at 1072–76.

³⁵ After a federal district court refused to dismiss the *Sourovelis* Class Action, Philadelphia reformed some of its procedures through a partial settlement. *See Sourovelis v. City of Phila.*, Civ. A. No. 14-4687, 2015 WL 12806512 (E.D. Pa. Nov. 4, 2015). For example, Philadelphia law enforcement agreed to stop seizing homes without warning in cases—like the Sourovelises'—where there are no exigent circumstances. *See id.* at *3. Also, Philadelphia law enforcement agreed to stop conditioning withdrawal of forfeiture petitions on waivers of statutory and constitutional rights. *See id.* at *3–4.

³⁶ *Sourovelis* Class Action, 2d Am. Compl. ¶¶ 249–51.

³⁷ *Id.* ¶ 251.

³⁸ *Id.* ¶ 256.

³⁹ *Id.* ¶ 259.

⁴⁰ *Id.* ¶ 263.

painful illustration of how law enforcement’s ability to retain forfeiture proceeds distorts their priorities from pursuing justice to pursuing revenue.

B. Law Enforcement Uses Drug Forfeiture to Circumvent Legislative Constraints.

In addition to distorting law enforcement’s priorities, law enforcement’s ability to benefit from drug forfeiture also enables its circumvention of legislatures’ appropriation powers. Thanks to drug forfeiture, law enforcement can spend money that legislators did not appropriate for purposes that they did not countenance. Specifically, law enforcement spends forfeiture revenue on itself.

Across the country, law-enforcement agencies are taking advantage of lenient forfeiture statutes—including drug-forfeiture statutes—to pad their budgets.⁴¹ In a survey of more than 1,400 law-enforcement executives, nearly 40 percent of police agencies reported that forfeiture proceeds were a necessary budget supplement.⁴² And as of September 2014, 298 police departments and 210 task forces seized the equivalent of 20 percent or more of their annual budgets since 2008 under a federal program that allows state and local law enforcement to

⁴¹ See, e.g., Jefferson E. Holcomb, Tomislav V. Kovandzic & Marian R. Williams, *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. Crim. Justice 273, 280–83 (2011) (finding that the extent to which officials benefit from forfeiture and the restrictiveness of state forfeiture laws affect how much they pursue federal equitable sharing). We note that this study received funding from IJ.

⁴² See John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. Crim. Justice 171, 179 (2001).

receive forfeiture proceeds in exchange for referring seized property to federal authorities.⁴³

In Pennsylvania too, law enforcement has spent drug-forfeiture proceeds on itself. For example, between 2012 and 2015, Adams County law enforcement did not spend any of its drug forfeiture proceeds on community-based anti-drug and crime-prevention programs. Instead, it spent nearly 17% of its proceeds on the salaries of the very individuals involved in seizing and forfeiting property.

Similarly, between 2002 and 2015, Philadelphia law enforcement spent none of its \$74 million in forfeiture funds on community-based anti-drug and crime-prevention programs. Yet, it spent over \$29 million on salaries, including the salaries of the very individuals involved in seizing and forfeiting property. In fact, Philadelphia's forfeiture revenue has totaled more than one-sixth of the District Attorney Office's general appropriated budget during this time.⁴⁴

In addition to using drug-forfeiture revenue to pay for their salaries, Pennsylvania law-enforcement agencies have used it to finance outlandish expenditures. For example, in Philadelphia, law enforcement used forfeiture proceeds to top off the salary of a campaign manager for a (now-jailed) former

⁴³ Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, *Stop and seize: Aggressive police take hundreds of millions of dollars from motorists not charged with crimes*, Wash. Post (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.79742a047626.

⁴⁴ These figures are based on Pennsylvania's annual asset forfeiture reports, which are publicly available. As noted in note 26, IJ retains an internal analysis of these reports on file.

prosecutor.⁴⁵ In addition, Philadelphia forfeiture funds paid for a construction contract linked to a city detective's company, repaving of a police-department shooting range for \$160,000, and a \$76 parking ticket.⁴⁶ Philadelphia law enforcement also used forfeiture proceeds to buy \$30,000 worth of submachine guns, a \$16,000 website development contract, \$15,000 worth of military-grade laser scopes, \$14,000 worth of money scanners, \$1,000 in raccoon-removal services, and custom uniform embroidery.⁴⁷ In fact, Philadelphia law enforcement has routinely driven vehicles that the city has seized.⁴⁸

Critically, thanks to forfeiture, law-enforcement agencies did not have to ask legislatures for funds to finance these expenditures. In Philadelphia officials' case, they, instead, resorted to a multimillion-dollar slush fund they self-financed through forfeiture of Philadelphia residents' property. If, alternatively, they had to get the city's legislature to appropriate Philadelphia residents' tax dollars for higher salaries—let alone extra vehicles and submachine guns—the legislature may have balked.

Unsurprisingly, Pennsylvania law enforcement has itself admitted that forfeiture enables it to spend money in ways legislatures may not allow. For

⁴⁵ Max Marin & Ryan Briggs, *Uncovering Philly law enforcement's secret bank accounts*, Phila. Weekly (Sept. 20, 2017), http://www.philadelphiaweekly.com/news/uncovering-philly-law-enforcement-s-secret-bank-accounts/article_e451c942-9d73-11e7-af76-3f98de79b735.html.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

example, the Pennsylvania District Attorneys Association claims that it relies on forfeiture to pay law enforcement’s salaries and overtime pay when counties and municipalities would rather “better fund schools.”⁴⁹ Similarly, Pennsylvania’s Chief Deputy Attorney General for Pennsylvania laments that, without access to forfeiture proceeds, “law enforcement agencies would be required to rely on unpredictable state and local funding.”⁵⁰ As these statements show, forfeiture often enables law enforcement’s circumvention of legislatures.

III. COMMON-LAW FORFEITURE—WHICH WOULD LET LAW ENFORCEMENT SELF-FINANCE WITHOUT STATUTORY FORFEITURE’S CONSTRAINTS—SHOULD NOT BE ALLOWED.

Pennsylvania’s experience with statutory drug forfeiture provides a cautionary tale that this Court should heed in deciding whether common-law forfeiture should be legal in the state. Pennsylvania drug forfeiture is, in theory, regulated by statute. Nonetheless, because of law enforcement’s ability to retain drug-forfeiture proceeds, it has still resulted in the misconduct detailed in Section II. Common-law forfeiture is even less restricted than statutory forfeiture.

Accordingly, common-law forfeiture could—if authorized—provide law enforcement a loophole to raise revenue without statutory forfeiture’s constraints.

⁴⁹ *Hearing on S.B. 869 Before the S. Judiciary Comm.*, Reg. Sess. 2015–2016, at 7 (Pa. Oct. 20, 2015) (testimony of the Pennsylvania District Attorneys Association), <http://judiciary.pasenategop.com/wp-content/uploads/sites/42/2015/10/Testimony-of-PDAA.pdf>.

⁵⁰ *Hearing on S.B. 869 Before the S. Judiciary Comm.*, Reg. Sess. 2015–2016, at 4 (Pa. Oct. 20, 2015), (testimony of Letty Kress, Chief Deputy of the Asset Forfeiture and Money Laundering Section, on behalf of the Office of Attorney General), <http://judiciary.pasenategop.com/wp-content/uploads/sites/42/2015/10/Testimony-of-Letty-Kress.pdf>.

This section briefly describes material differences between statutory forfeiture and common-law forfeiture, explains risks a common-law forfeiture loophole would pose, and urges this Court to be mindful of law enforcement’s pecuniary incentives and foreclose this possibility.

In Pennsylvania, statutory forfeiture is subject to three key constraints that common-law forfeiture is unchecked by. First, law enforcement is limited in what crimes it can tether statutory forfeiture to. For example, statutory drug forfeiture must be connected to violations of Pennsylvania’s Controlled Substance, Drug, Device and Cosmetic Act.⁵¹ Second, there is a body of administrative procedures that governs statutory forfeiture. For instance, Philadelphia drug forfeiture must abide by a state-court rule regulating forfeiture petitions, service of process, notice, time requirements, and other procedures.⁵² Third, there are statutory provisions—including reporting requirements—that concern statutory-forfeiture funds. Under Pennsylvania’s Controlled Substances Forfeiture Act, each county must submit an annual report on drug-forfeiture revenues and expenses to the state’s Office of Attorney General.⁵³ Moreover, under the statute, prosecutors are supposed to use

⁵¹ See 42 Pa. Cons. Stat. § 5802.

⁵² See First Judicial Dist., General Court Regulation No. 2 of 2016, *Proceedings Seeking Civil Forfeiture of Real Estate and Seized Property* (July 25, 2016) (“GCR”).

⁵³ 42 Pa. Cons. Stat. § 5803(j).

proceeds “for the enforcement of or prevention of a violation of the provisions of The Controlled Substance, Drug, Device and Cosmetic Act.”⁵⁴

In contrast, common-law forfeiture is not subject to any of these three constraints. Unbound by a statutorily-circumscribed set of crimes, common-law forfeiture could—if legal—give law enforcement a freewheeling ability to forfeit any property connected to a crime. Indeed, in this case, law enforcement is trying to forfeit property that is merely connected to a misdemeanor, rather than a felony.⁵⁵ Also, common-law forfeiture is not subject to the same procedures as statutory forfeiture. For example, Philadelphia’s state-court rule governing drug forfeiture expressly states that “the procedures adopted [t]herein do not apply to nonstatutory or common law forfeitures” to the extent they are permissible in Pennsylvania.⁵⁶ Finally, and most importantly, the public would have little—if any—ability to monitor or control Pennsylvania common-law forfeiture funds. Common-law forfeiture revenues and expenses are not subject to aforementioned transparency requirements, and common-law forfeiture proceeds can be spent on anything.

In light of these differences, the statutory-forfeiture problems detailed in Section II are instructive. In spite of the (limited) statutory constraints imposed on

⁵⁴ *Id.* § 5803(i).

⁵⁵ *Irland*, 153 A.3d at 486.

⁵⁶ GCR at 1.

Pennsylvania drug forfeiture, Philadelphia law enforcement still targeted innocent property owners like the Sourovelises and Nassir Geiger for financial gain, and drug-forfeiture revenues still funded sundry outrageous expenses. It stands to reason that unrestricted common-law forfeiture would be cause for alarm.

Lured by the carrot of common-law forfeiture proceeds, Pennsylvania law enforcement could use this practice as a loophole bypassing limits on statutory forfeiture. Indeed, Philadelphia law enforcement has already tried exploiting this common-law forfeiture loophole, forfeiting over \$300,000 through common-law forfeiture between 2008 and 2015.⁵⁷ This risk is exacerbated by the dynamics of a pending class action—filed by IJ—alleging that Philadelphia law enforcement’s retention of forfeiture proceeds violates the U.S. Constitution’s Due Process Clause.⁵⁸ In this litigation, IJ represents a class of all Philadelphia property owners subject to current (or future) petitions filed under *statutory* drug-forfeiture laws.⁵⁹ If the class prevails, Philadelphia law enforcement could no longer retain drug-forfeiture proceeds. As of now, however, the class does not include common-law forfeiture respondents.⁶⁰ Accordingly, common-law forfeiture—if permitted in Pennsylvania—could provide a loophole for Philadelphia law enforcement that

⁵⁷ *Sourovelis* Class Action, Decl. Robert A. Peccola Supp. Pls.’ Mot. Compel, ECF No. 212-2, ¶ 7 & Ex. 2.

⁵⁸ *Sourovelis* Class Action, 2d Am. Compl. ¶¶ 338–346.

⁵⁹ *Sourovelis v. City of Phila.*, 320 F.R.D. 12, 32 (E.D. Pa. 2017).

⁶⁰ *See id.* at 22–23.

would undermine an eventual victory in this ongoing class-action challenge.

Instead of using drug forfeiture to seize property and raise revenue, police and prosecutors could instead use common-law forfeiture to self-finance.

This Court should close the common-law forfeiture loophole which law enforcement wants to open. As this Court has observed, forfeitures “are not favored” and “should be enforced only when within both [the] letter and spirit of the law.”⁶¹ As forfeiture that is unauthorized by statute, common-law forfeiture is outside the letter of the law. This rationale alone should suffice to prohibit common-law forfeiture, as the Appellee persuasively argues. In addition, however, common-law forfeiture should be especially disfavored where, as here, law enforcement can retain common-law forfeiture proceeds.

This is the case because courts must scrutinize governmental actions more closely when government officials have an incentive to act in their financial self-interest. In order to prevent unwarranted deprivations of property, courts have a long history of scrutinizing governmental action more closely where potential self-dealing is afoot.⁶² For example, in *Tumey v. Ohio*, the U.S. Supreme Court overturned a fine where the mayor also sat as a judge and personally received a

⁶¹ *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 177–78 (Pa. 2017) (quoting *United States v. One 1936 Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939)).

⁶² See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 977 n.9 (1991) (Scalia, J.) (“As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.”).

share of the proceeds.⁶³ Similarly, in *Ward v. Village of Monroeville*, the U.S. Supreme Court held that, where a substantial portion of the town’s revenues came from fines, having the mayor sit as a judge violated due process.⁶⁴

This principle is not limited to adjudicative officers. For instance, in *Marshall v. Jerrico, Inc.*, the U.S. Supreme Court cautioned about the “possibility that [the official’s] judgment will be distorted by the prospect of institutional gain as a result of zealous *enforcement* efforts.”⁶⁵

Consistent with these opinions, in determining whether common-law forfeiture is authorized in Pennsylvania, this Court should pay special heed to the fact that the state’s law-enforcement officials could retain the proceeds of common-law forfeiture. The Commonwealth Court correctly concluded that, “[a]bsent a statute that specifically authorizes the forfeiture of property, the Commonwealth had no authority to seek, and the trial court had no authority to order, forfeiture of [the Appellee’s] property.”⁶⁶ This conclusion was correct for another reason as well: Law enforcement should not be allowed to self-finance without any statutory authorization. Though forfeiture’s problems will remain

⁶³ 273 U.S. 510 (1927).

⁶⁴ 409 U.S. 57 (1972).

⁶⁵ 446 U.S. 238, 250 (1980) (emphasis added); *see also id.* at 249–50 (“A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.”); *see also Sourovelis v. City of Phila.*, 103 F. Supp. 3d 694, 709 (E.D. Pa. 2015).

⁶⁶ *Ireland*, 153 A.3d at 485.

systematic as long as officials can retain proceeds, affirming the Commonwealth Court's ruling will prevent their expansion to new realms.

CONCLUSION

The *amicus curiae* respectfully requests that this Court affirm the Commonwealth Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limitation of Pa. R.A.P. 2135, because it contains 5,965 words, including footnotes, based on the word count of the word processing system used to prepare it.

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