A17-1083

STATE OF MINNESOTA
IN SUPREME COURT

Megan Ashley Olson, et al.,

Respondents,

v.

One 1999 Lexus MN License Plate No. 851LDV
VIN: JT6HF100U6X0079461,

Appellant.

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public interest law firm that litigates against the government to uphold individual rights. IJ has offices in Minnesota and six other states. Over the past decade, IJ has become the nation's leading advocate for ending civil forfeiture. Whereas *criminal* forfeiture allows government to take property only from convicted criminals, *civil* forfeiture allows government to take property from people who have not even been charged with a crime (much less convicted). Using civil forfeiture, government can take citizens' money, vehicles, businesses, or even their homes.

IJ seeks to curtail civil forfeiture, and ultimately to replace it with criminal forfeiture. IJ frequently represents property owners in civil forfeiture proceedings. *E.g., State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), *cert. granted*, 138 S. Ct. 2650 (U.S. June 18, 2018) (No. 17-1091); *Kazazi v. U.S. Customs and Border Protection*, No. 1:18-MC51 (N.D. Ohio, filed May 31, 2018); *In re Seizure of Wells Fargo Bank Accounts*, No. MCR 16-061 (Cal. Super. Ct. filed Oct. 28, 2016). IJ also represents property owners filing constitutional challenges to civil forfeiture programs. *E.g., Harjo v. City of*

[1] The Institute for Justice certifies that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity contributed monetarily towards its preparation or submission.

Albuquerque, No. 16-cv-1113, 2018 WL 3621025 (D.N.M. July 28, 2018); *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694 (E.D. Pa. 2015). And IJ participates as amicus curiae in important forfeiture cases. *E.g.*, *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993); *Alvarez v. Smith*, 558 U.S. 87 (2009).

Beyond litigation, IJ publishes original research quantifying the problems posed by civil forfeiture. *E.g.*, Institute for Justice, Carpenter, II *et. al*, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. 2015);[2] *Forfeiture Transparency & Accountability State-by-State and Federal Report Cards* (Jan. 16, 2017).[3] IJ's research has been cited by courts, including by Justice Thomas in a recent opinion that raised serious questions about civil forfeiture's constitutionality. *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

Finally, IJ has lobbied legislators in Minnesota and other states to enact forfeiture reforms. IJ's efforts played an important role in New Mexico and Nebraska, where legislators ended civil forfeiture and enacted versions on IJ's model criminal forfeiture statute in 2015 and 2016.[4]

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[2] Available at https://iam.ij.org/2Pi8y3Z.
[3] Available at https://iam.ij.org/2waVcxL.
[4] IJ's model statute is available at https://iam.ij.org/2MwD9fD.

Given its mission, IJ has a strong interest in this case. Indeed, IJ is currently litigating the precise issue raised by this case—whether due process requires a prompt post-seizure hearing—on behalf of a putative class of property owners in federal court. *See Serrano v. U.S. Customs and Border Protection*, No. 2:17-cv-00048 (W.D. Tex. filed Sept. 6, 2017). Moreover, IJ's expertise will be valuable to this Court in deciding this case.

INTRODUCTION

Ordinarily, when the government suspects someone of a crime, it must follow an elaborate set of procedures to prove guilt beyond a reasonable doubt. Only then can punishment be imposed. Using civil forfeiture, however, the government can disregard many (even most) of those procedures. The government can take property from people who are not even accused of a crime, simply because the property was allegedly *used* to commit an offense, and then the government can force the property owner to prove her innocence. Because civil forfeiture proceeds against property—rather than a person—governments argue the ordinary rules do not apply. Even worse, governments have discovered that they stand to reap direct financial benefits from civil forfeiture.

The problems with civil forfeiture abound. First, civil forfeiture places the burden on innocent owners to prove a negative: the absence of consent or knowledge of the suspect's alleged crime. Second, seizures lack proper judicial

oversight, in part because property owners are forced to wait months or years for their day in court (while government retains the seized property, giving rise to extraordinary pressure to settle). Third, the proceeds of civil forfeiture go to fund the very law enforcement agencies that seize and forfeit property. This creates a perfect storm of motive and opportunity, as law enforcement has both an incentive and the means to take property from innocent people. As a result, the use of civil forfeiture has risen dramatically. And, as detailed in this brief, there are endless examples of abusive and even shocking civil forfeiture cases.

Minnesota, unfortunately, is no exception. Its vehicle forfeiture laws create a large profit incentive for law enforcement, while, in practice, remaining hostile to the idea that innocent owners should be able to easily recover property seized based on someone else's actions. Innocent property owners are only afforded a hearing if they request one within 60 days of the seizure. If they fail to follow the state's procedure in this short time, their property is automatically forfeited through an administrative process overseen only by prosecutors. Even when an innocent owner does request a hearing, it is delayed until the end of the underlying criminal case—even where the owner's knowledge is irrelevant to the criminal prosecution. And when an innocent owner gets to court, few of the protections that are afforded in criminal cases apply. A property owner who is unable to afford an attorney

will not be provided one. A property owner must respond to civil discovery, and her decision to remain silent can be used against her. Moreover, the burden of proof shifts from the government to the innocent owner, who must prove that she did not consent to or know that her property would be used to commit the alleged crime.

This case presents an important opportunity to address the problems posed by civil forfeiture. When government seeks to forfeit property, one of its most potent weapons is delay. Few can afford to go without their property for months or years—while paying an attorney all the while—even if they are innocent and would ultimately prevail in a forfeiture case. By holding seized property without a hearing, government creates extraordinary pressure for property owners to walk away without a fight. The decision below addressed precisely that concern when it held that government must provide a prompt post-seizure hearing.

Even more to the point, the decision below is compelled by precedent. Numerous courts hold that due process requires a prompt post-seizure hearing when the government seizes vehicles for civil forfeiture. *See infra* p. 22-23 (citing cases). And correctly so. When the government arrests a person, the government is required to provide a prompt post-arrest hearing. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). And the Supreme Court has held that the government must provide a hearing *before* it can

seize a home or other real property. *See United States v. James Daniel Good*, 510 U.S. 43 (1993). It would be odd, given those precedents, if the government could seize vehicles and hold them for months or years with no hearing at all. Because that is exactly what Minnesota forfeiture laws allow, the court below properly found those laws unconstitutional.

BACKGROUND

A. The Rise Of Civil Forfeiture Has Been Fueled By Financial Incentives.

The origins of civil forfeiture can be traced to 17th Century English maritime laws. *See* Institute for Justice, Carpenter *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 10 (2d ed. 2015) ("*Policing for Profit*"); *see also Austin v. United States*, 509 U.S. 602, 612-13 (1993). From those obscure and humble beginnings, civil forfeiture has grown into a pervasive feature of our legal landscape, with state and federal governments forfeiting billions of dollars annually. *See Policing for Profit* at 5.

The remarkable rise of civil forfeiture has been driven by economic incentives. In 1984, Congress first allowed law enforcement agencies to profit directly from civil forfeitures: Congress created the federal Assets Forfeiture Fund and directed the Attorney General to deposit all net forfeiture proceeds into the Fund for use by the Department of Justice and other federal law enforcement agencies. *See* Comprehensive Crime Control Act of 1984, Pub. L.

No. 98-473, 98 Stat. 1837. The 1984 statute limited how law enforcement could use forfeited funds, but subsequent amendments relaxed those restrictions. *E.g.*, 28 U.S.C. § 524(c)(1)(F)(i) (allowing use of Fund to buy or lease vessels, vehicles, or aircraft); *id.* § 524(c)(1)(I) (allowing use of Fund for overtime salaries, travel, fuel, training, and equipment). The introduction of this profit incentive has fueled an extraordinary increase in the use of civil forfeiture, as annual deposits in the federal Assets Forfeiture Fund have grown from $93.7 million in 1986 to $4.5 *billion* in 2014. *Policing for Profit* at 5.

As civil forfeiture has grown, it has come unmoored from its historical justification. *E.g., Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari) ("I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice . . . ."). When civil forfeiture was used against pirates, smugglers, and others who committed crimes on the high seas, the *in rem* nature of the proceeding was justified because the ship's owner might well be on the other side of the ocean—and thus outside the jurisdiction of the court. But that rationale does not apply to modern civil forfeiture cases, where law enforcement normally gains personal jurisdiction over the suspected criminal. Today, civil forfeiture has grown into what amounts to a shadow criminal

justice system, allowing government to punish thousands of alleged criminals without having to convict anyone of a crime.

B. Financial Incentives, Paired With Lax Protections For Innocent Owners, Have Created An Urgent Need For Reform.

News reports are riddled with accounts of property being seized from innocent owners. Take Tyson Morrow, who was pulled over on his way to Dallas for "driving too close to the white line." *See* Sarah Stillman, *Taken*, The New Yorker (Aug. 12, 2013).[5] The arresting officers jailed Morrow overnight, impounded his car, and seized the $3,900 in cash that he had in his car for dental work. *Id*. Morrow pleaded with officers to confirm the recent withdrawal with his bank, but they refused. *Id.* Morrow's release from jail was conditioned on his signing a waiver allowing the police department to keep his property. *Id.* No contraband was found in Morrow's car and he was never charged with a crime, yet the police department was able to keep his car, his belongings, and his life savings. *Id*.

Tyson Morrow's story is hardly unique. Police in Philadelphia sought to forfeit the family home of Markela and Chris Sourovelis because their son allegedly dealt $40 of drugs on the premises. *See* Nick Sibilla, *Philadelphia Earns Millions By Seizing Cash and Homes from People Never Charged With*

[5] Available at https://bit.ly/2z8xsuP.

A Crime, Forbes (Aug. 26, 2014).[6] Customs and Border Protection took $41,000—the life savings of a nurse— that was intended to be used to open a medical clinic in Nigeria. *See* Meagan Flynn, *She saved thousands to open a medical clinic in Nigeria. U.S. Customs took all of it at the airport*, Wash. Post (May 9, 2018).[7] And police in Oklahoma seized $53,000 from the tour manager for a Christian band—money that was intended for an orphanage in Thailand. *See* Christopher Ingraham, *How police took $53,000 from a Christian band, an orphanage and a church*, Wash. Post (Apr. 25, 2016).[8] It seems that "a system that proved successful at wringing profits from drug cartels and white-collar fraudsters has also given rise to corruption and violations of civil liberties." Stillman, *supra* p. 8.

The perverse profit incentive associated with civil forfeiture has led law enforcement agencies to "compete[] to see who can seize the most cash and contraband." Michael Sallah *et al.*, *Stop and Seize*, The Wash. Post (Sept. 6, 2014).[9] Government attorneys in New Mexico were caught on tape referring to forfeited property as "little goodies," and a government attorney in New Jersey admitted that flat screen televisions "are very popular with the police departments." Shaila Dewan, *Police Use Department Wish List When*

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[6] Available at https://bit.ly/2vQCnAT.
[7] Available at https://wapo.st/2wbaqTv.
[8] Available at https://wapo.st/2MVVZKn.
[9] Available at https://wapo.st/2nKUrrq.

Deciding Which Assets to Seize, N.Y. Times (Nov. 9, 2014).[10] The same New Jersey attorney admitted that he is more likely to pursue forfeiture if the property would be useful to law enforcement: "If you want the car, and you really want to put it in your fleet, let me know—I'll fight for it." *Id.*

Stories like these have generated bipartisan support for reform. Conservative organizations such as Americans for Tax Reform and Freedom Works, have joined with liberal organizations such as the American Civil Liberties Union and the Justice Action Network to push for reform. *See* Scott Newman & Jim Knoblach, *It's time to fix the problems of civil forfeiture*, Star Tribune (Mar. 16, 2018).[11]

Courts are also increasingly aware of the need to address the civil forfeiture laws. Numerous decisions hold that forfeiture is "disfavored." *See, e.g.*, *Riley v. 1987 Station Wagon*, 650 N.W.2d 441, 443 (Minn. 2002). A federal court recently held that allowing law enforcement to retain forfeiture proceeds unconstitutionally distorts "officials' judgment" because "the more revenues they raise, the more revenues they can spend. *Harjo v. City of Albuquerque*, No. 16-cv-1113, 2018 WL 3621025, *1 (D.N.M. July 28, 2018) (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 251 (1980)). Elsewhere, courts have allowed similar challenges to survive a motion to dismiss. *See Platt v.*

[10] Available at https://nyti.ms/2Bkntb6.
[11] Available at http://strib.mn/2nJfLxF.

Moore, No. 16-cv-08262, 2018 WL 2058136, *12 (D. Ariz. Mar. 15, 2018); *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694, 709 (E.D. Pa. 2015). And in the upcoming term, the Supreme Court will address civil forfeiture in *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), *cert. granted*, 138 S. Ct. 2650 (U.S. June 18, 2018) (No. 17-1091), where the question presented is whether the Eighth Amendment protects against a state's use of civil forfeiture to impose a grossly disproportionate punishment in response to a fairly minor crime.

C. In Minnesota, As Elsewhere, Law Enforcement Benefits Financially From Civil Forfeiture.

Following the lead of the federal government, states have amended their civil forfeiture laws to give law enforcement agencies a direct share of forfeiture proceeds. In 2001, Minnesota added a profit incentive to its vehicle forfeiture laws, allowing law enforcement agencies to retain 70% of the proceeds from vehicle forfeitures. *See* 2001 Minn. Sess. Law Serv. 1st Sp. Sess., Ch. 8 (S.F. 7) (June 30, 2000). Predictably, the amount of property forfeited increased from $1,448,462 in 2000 to $5,367,197 in 2010. *Policing for Profit* at 92.

A closer look at the data reveals that civil forfeiture is not being reserved—as proponents argue—to recover vast sums of money from people engaged in serious crimes. For example, in 2012, the median value of

property seized in Minnesota was only $451. *Policing for Profit* at 12 n.29. And from 2003–2010, the average value of property forfeited in Minnesota hovered around $1,000. *Id.*

Minnesota, too, has generated stories of wrongful seizures. In 2016, Stephany Walker's vehicle was seized while being driven by her then-boyfriend. Newman & Knoblach, *supra* p. 10. Neither Stephany nor her soon ex-boyfriend were charged with a crime. *Id.* Still, law enforcement kept Stephany's car, and the cost of taking cabs to work forced the single mother to the brink of homelessness. *Id.* Stephany's rent money was also in her car when it was seized, so the government took that too. State Representative John Lesch, *Rep. Lesch hosts victim of broken forfeiture laws as guests at State of the State address*, Press Release (Jan. 23, 2017).[12] Six months after the seizure, a Ramsey County judge demanded that Stephany's car and money be returned, but state patrol refused to release Stephany's car until she paid towing fees and storage costs. *Id.*

D. Minnesota Law Provides Scant Protections For Innocent Property Owners.

Minnesota's civil forfeiture laws—like forfeiture laws elsewhere—provide scant protections for innocent owners. Notably, in detailing this statutory scheme, it is important to distinguish between *seizure* and

[12] Available at https://bit.ly/2nLxHYB.

forfeiture. Seizure occurs when law enforcement takes initial possession of the property, while forfeiture occurs when the government permanently extinguishes the property owner's rights. Minnesota provides scant protection at both stages of the process.

When a driver in Minnesota is arrested on suspicion of committing a designated offense,[13] the arresting agency may, as a matter of course, seize the vehicle being driven. Minn. Stat. § 169A.63, subd. 6. This is true regardless of the vehicle's ownership. *Id.* Shockingly, upon seizure, title in the vehicle is presumed to transfer to the seizing agency. Minn. Stat. § 169A.63, subd. 3 ("All right, title, and interest in a vehicle subject to forfeiture under this sections vests in the appropriate agency upon commission of the conduct resulting in the designated offense or designated license revocation giving rise to the forfeiture."). The government, therefore, obtains title to the property based only on *suspicion* that the property was used in a crime.

The seizing agency has 60 days to notify the vehicle owner if it plans to seek forfeiture. Minn. Stat. § 169A.63, subd. 8. To contest the forfeiture, an owner—either the suspect or the innocent-owner claimant—must make a demand for judicial determination within 60 days of receiving notice from the

[13] Designated offenses are defined in Minn. Stat. § 169.63 subd. 1(e).

seizing agency. *Id.* subd. 8(e). This is the most critical step in this process. A failure to timely request a judicial determination results in automatic, administrative forfeiture—regardless of whether the driver is convicted or even charged with a crime. *Id.* subd. 8(c)(3).[14]

To demand a judicial determination, a property owner must file a full-blown civil lawsuit against her own property. Minn. Stat. § 169A.63, subd. 8. This means a property owner must hire an attorney, file a complaint, and pay court filings fees to have any chance of seeing her vehicle again. *Id.*

Even where an owner takes all the necessary steps, the owner will be afforded a hearing only after the end of the related criminal case. Minn. Stat. § 169A.63, subd. 9(d). Stated otherwise, there is no provision for or guarantee of a prompt post-seizure hearing under Minnesota law. An innocent owner must wait months or possibly years for the underlying criminal prosecution to conclude before she can contest the forfeiture. An owner who would like to possess her vehicle during the criminal proceedings can post a bond for the full amount of the vehicle and take possession "if a disabling device is

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[14] Where an owner fails to demand a judicial determination an administrative forfeiture takes place as long as the seizing agency has: (1) properly notified the driver of the seizure; (2) properly notified the owner of the seizure; and (3) has probable cause to seize the vehicle, *id.* subd. 10(e). One might assume that a judge should determine if probable cause existed to seize the vehicle. Instead, it is the prosecuting authority—which itself stands to gain from the seizure—that reviews the law enforcement agency's compliance with these steps.

attached to the vehicle," *id.* subd. 4, but there is no provision for a hearing where the owner could seek possession on less onerous terms.

When a hearing is finally provided, the law enforcement agency is not required to prove that the property owner is guilty of an offense. Instead, the innocent owner bears the heavy burden of proving that she did not consent to or have actual or constructive knowledge that the vehicle would be used to commit a crime. Minn. Stat. § 169A.63, subd. 7(d).

Finally, after a vehicle has been forfeited, the law enforcement agency can sell it or keep it for official use. Minn. Stat. § 169A.63 subd. 10. If it is sold, 70% of the proceeds are retained by the law enforcement agency and the remaining 30% is remitted to the prosecuting authority. *Id.*

Although Minnesota enacted some modest civil forfeiture reforms in 2010 and 2014, these amendments have failed to change the landscape. *See* 2010 Minn. Sess. Law Serv. Ch. 391 (S.F. 2634) (May 27, 2010); 2014 Minn. Sess. Law. Serv. Ch. 201 (S.F. 874) (May 6, 2014).[15] The number of annual civil forfeitures in Minnesota has remained steady; law enforcement agencies averaged around 6,000 forfeitures annually between 2011 and 2015, and that number increased to over 7,000 in 2016. Greta Kaul, *In spite of reform efforts,*

[15] More comprehensive reforms have been proposed, but they have repeatedly died in the House of Representatives Public Safety and Security Policy and Finance Committee. *E.g.*, HF 3725 (2017–18); SF 3419 (2017–18).

Minnesota law enforcement's use of civil asset forfeiture hasn't gone down, MinnPost (Aug. 25, 2017).[16]

SUMMARY OF ARGUMENT

The question presented by this case is whether law enforcement can seize a vehicle for civil forfeiture and hold it for months or years without providing any kind of hearing. In short, it cannot. Courts have repeatedly found that due process requires a prompt post-seizure hearing, and this Court should find the same.

Part I of this brief addresses civil forfeiture generally, presenting two arguments in favor of providing greater protection for innocent property owners. First, civil forfeiture wrongly presumes that government can evade the usual rules of criminal procedure so long as it proceeds against property. In fact, the right to hold property is fundamental to our society. Second, civil forfeiture raises particular concern because law enforcement stands to benefit financially from forfeitures. Courts repeatedly hold that due process concerns are elevated where the government has a financial interest in the outcome of a proceeding.

Part II of this brief turns to the specific question posed by this case—the requirement for a prompt post-seizure hearing.

[16] *Available at* https://bit.ly/2BmQ4N2.

Part II.A explains that numerous courts have already addressed the question posed by this case and have held that due process requires a prompt post-seizure hearing when the government seizes vehicles for civil forfeiture. *See infra* p. 22-23 (citing cases). This Court should follow that authority.

Part II.B explains that the proper framework to address this question is provided by *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Attorney General argues that the Court should instead apply the speedy-trial test from *Barker v. Wingo*, 407 U.S. 514 (1972), but that confuses the right to a prompt post-seizure hearing with the right to have the ultimate forfeiture case decided without undue delay. Just as the right to a post-arrest hearing is distinct from the right to a speedy criminal trial, the right to a post-seizure hearing is distinct from the right to have the forfeiture case proceed without undue delay. Additionally, the *Mathews* analysis is a facial inquiry to be applied directly to the challenged statute, rendering the underlying facts irrelevant. A statute either guarantees a prompt post-seizure hearing, or it does not.

Part II.C, finally, walks through the *Mathews* analysis and explains that the court below correctly held that *Mathews* requires a prompt post-seizure hearing. First, the private interest at stake is significant, as a person's personal vehicle may be one of her most significant possessions. People rely on their cars to get to work, to church, to medical appointments,

and to visit with family. Second, there is a significant risk of erroneous deprivation, as otherwise vehicles can be held for months or years based only on an arresting officer's probable cause determination. Third, the government's interest is minimal, as the government already provides post-arrest hearings and can fashion a similar procedure for vehicle seizures.

ARGUMENT

I. THIS COURT SHOULD TAKE THE OPPORTUNITY TO REIN IN CIVIL FORFEITURE.

Requiring a prompt post-seizure hearing is one step toward curtailing civil forfeiture. Aside from the obvious practical impact of requiring a prompt post-seizure hearing, such a hearing is necessary for two important reasons. First, civil forfeiture wrongly provides lesser protection when government seeks to take a person's property, notwithstanding that property rights are the foundation of a free society. Second, civil forfeiture deserves particular judicial attention, as the existence of a financial incentive heightens the risk of abuse.

A. Civil Forfeiture Wrongly Treats Private Property As A Second-Class Right.

Ordinarily, individuals accused of crimes are afforded important rights—such as the right to counsel, the right to remain silent, and the right to a post-arrest hearing. Civil forfeiture, however, allows government to take property based on allegations that a crime occurred, without needing to

convict the property owner. In many cases, forfeiture occurs administratively, without any judicial process at all.[17] This shadow criminal justice system wrongly treats property as a second-class right.

The Framers' generation "saw the protection of property as vital to civil society." Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 Marq. L. Rev. 1, 27 (2016). Property was synonymous with freedom, because "[w]here property was concentrated in the hands of the king and aristocracy, only the king and aristocracy would be free." *Id.* at 42 (quotation omitted). Because of the Framers' belief that property existed independent of government, the primary purpose of government is not to define property rights, but instead "to *protect* the natural rights of man, including the right to property." *Id.* at 28 (emphasis added).

The Supreme Court has confirmed that property rights are the foundation of a free society. In 1897, the U.S. Supreme Court declared:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions . . . . It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.

[17] In 2016, 96% of forfeitures in Minnesota were administrative. *See* State of Minnesota Office of the State Auditor, Rebecca Otto, *Criminal Forfeitures in Minnesota For the Year Ended December 31, 2016*, 13 (June 21, 2017).

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897) (citations and quotations omitted). Later, the Court recognized that "[t]he great end for which men entered into society was to secure their property." *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quotation omitted). And then that "the right to own and hold property is necessary to the exercise and preservation of freedom." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Protection*, 560 U.S. 702, 734 (2010) (Kennedy, J., concurring). So, too, has this Court acknowledged that "[t]he entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these [is] . . . the right to acquire, possess, and enjoy property[.]" *Thiede v. Town of Scandia Valley*, 14 N.W. 2d 400, 405 (Minn. 1944). Civil forfeiture cannot be squared with this precedent.

B. Civil Forfeiture's Profit Motive Calls For Heightened Judicial Scrutiny.

Civil forfeiture calls for particular judicial scrutiny because law enforcement agencies retain forfeited property—thus benefitting financially from the forfeiture. As the Supreme Court explained, in *James Daniel Good*, 510 U.S. at 55, the protections of due process are "of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *See also Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991)

(opinion of Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."). Like all humans, government agents are motivated by incentives, and the incentives created by civil forfeiture are an invitation to abuse.

Self-interest is a universal human attribute. This is not a negative comment on society, but an intrinsic part of human nature. Just as the Framers recognized that property rights are the foundation of a free society, they too recognized that government officials would have their own self-interest in mind:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary . . . . A dependence on people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51 (James Madison). As a result, the Framers drafted the Constitution to restrain the unfettered power of government. Indeed, the Constitution exists to "'enable the government to control the governed; and in the next place oblige it to control itself.'" Daniel S. Herzfeld, *Accountability and the Nondelegation of Unfunded Mandates: A Public Choice Analysis of the Supreme Court's Tenth Amendment Federalism Jurisprudence*, 7 Geo. Mason L. Rev. 419 (1999) (quoting The Federalist No. 51 (James Madison)).

The widespread use of civil forfeiture today proves the wisdom of such constitutional checks and balances. There exist, unfortunately, countless

examples of self-interested law enforcement agencies abusing civil forfeiture for their own pecuniary gain. *E.g., Leonard*, 137 S. Ct. at 848 ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses."); *id.* (listing examples); *Policing for Profit* at 10-11. Judicial review is the last safeguard to prevent further abuse.

II. THE LACK OF A PROMPT POST-SEIZURE HEARING VIOLATES DUE PROCESS.

Turning from the general to the specific, numerous courts have ruled that due process requires a prompt hearing following the seizure of a vehicle. At such a hearing, a vehicle owner can argue that the vehicle was seized without probable cause, can argue that she has meritorious defenses to the forfeiture that require the vehicle's return, and can argue that the vehicle should be returned to her possession pending the adjudication of the ultimate forfeiture case. Minnesotans deserve this protection.

A. Numerous Courts Have Addressed This Issue And Have Correctly Held That Due Process Requires A Prompt Post-Seizure Hearing.

Numerous courts have held that due process demands a prompt post-seizure hearing following vehicle seizure. *See Krimstock v. Kelly*, 306 F.3d 40, 50 (2d Cir. 2002); *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008), *vacated as moot*, 558 U.S. 87 (2009); *Washington v. Marion Cty. Prosecutor*,

264 F. Supp. 3d 957, 979 (S.D. Ind. 2017); *Brown v. District of Columbia*, 115 F. Supp. 3d 56, 60 (D.D.C. 2015); *Simms v. Dist. of Columbia*, 872 F. Supp. 2d 90, 92 (D.D.C. 2012); *Cty. of Nassau v. Canavan*, 802 N.E.2d 616, 623 (N.Y. App. 2003); *State ex rel. Schrunk v. Metz*, 867 P.2d 503, 511 (Or. App. 1993). A hearing is considered "prompt" if it occurs within a few days of the seizure. *See e.g.*, *Stypmann v. City and Cty. of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977) (five-day delay in hearing is unconstitutional); *De Franks v. Mayor and City and Council of Ocean City*, 777 F.2d 185, 187-88 (4th Cir. 1985) (hearing within 24 hours of seizure is constitutional). In fact, "[d]ays, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle . . . ." *Stypmann*, 557 F.2d at 1344. In light of the foregoing, the necessity of a prompt post-seizure hearing cannot be overstated.

Supreme Court precedent also confirms that due process requires a prompt post-seizure hearing. In *James Daniel Good*, the Court ruled that a *pre*-seizure hearing is required before government may seize real property. 510 U.S. at 62. The Court reinforced "the general rule that individuals must receive notice and an opportunity to be heard *before* the Government deprives them of property." *Id*. at 48 (emphasis added). In limited, "extraordinary" circumstances the government may seize property without holding a pre-seizure hearing; for instance, the government can seize a car without a pre-

seizure hearing because it might otherwise be taken outside the jurisdiction. *Id.* at 53. But once the vehicle is in custody, the justification for delaying a hearing evaporates, and the continued retention of the vehicle without a hearing violates due process.

Finally, comparisons to criminal procedure also show the necessity of a prompt post-seizure hearing. Just as a bond hearing follows shortly after an arrest, so too must the courts review the basis for property seizures. *Cf. Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *State v. Florence*, 239 N.Wd.2d 892, 902-03 (Minn. 1976) (same). The question to be resolved at a post-seizure hearing is not if an owner will prevail on the merits. Instead, the purpose of a post-seizure hearing is to test the government's probable cause for seizing the vehicle and to determine whether means less drastic than impoundment would protect the government's interest pending the resolution of the case.

B. This Case Is Controlled By *Mathews*, Not *Barker*.

Courts that require a prompt post-seizure hearing do so under the three-factor test set forth by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Attorney General, however, argues that this case is instead controlled by the speedy-trial test set forth in *Barker,* 407 U.S. 514, and as later applied in *United States v. $8,850 in U.S. Currency*, 461 U.S. 555, 564 (1983). Attorney General Br. at 4. That is incorrect.

The Attorney General's argument confuses two distinct issues: (1) whether due process requires a prompt post-seizure hearing; and (2) when a final forfeiture hearing must take place. Just as *Barker*'s speedy-trial test governs delays in holding the actual criminal case, in the forfeiture context *Barker* and *$8,850* apply to delays in providing a hearing on the merits of the forfeiture. *See $8,850*, 461 U.S. at 564. But no court would apply the *Barker* speedy-trial test to the question of whether an arrestee is entitled to a post-arrest hearing. And, similarly, *Barker* and *$8,850* are simply irrelevant to the question of whether the government must provide a prompt post-seizure hearing when it seizes a vehicle for civil forfeiture.

Similar confusion arose in *Krimstock*, where the district court "collapsed the separate issues" into a single inquiry. 306 F.3d at 52. In vacating the decision below, the Second Circuit in *Krimstock* explained that "[t]he Constitution . . . distinguishes between the need for prompt review of the propriety of continued government custody, . . . and delays in rendering final judgment[.]" *Id*. at 68 (footnote omitted). Since this case confronts the first of these questions, the court below correctly applied *Mathews* to determine whether a prompt post-seizure hearing is required.

C. Applying the *Mathews* Factors, The Minnesota Vehicle Forfeiture Statute Does Not Comply With Due Process.

Following the numerous cases that have addressed this same issue, the court below correctly held that *Mathews* requires a prompt post-seizure hearing when the government seizes vehicles for civil forfeiture. In doing so, however, the court mistakenly suggested that the *Mathews* analysis turned on the particular facts of the case. *See Olson v. One 1999 Lexus*, 910 N.W.2d 72, 77 (Minn. App. 2018). Rather, the Court should consider the statutory scheme in the abstract, to determine whether its procedures comport with due process. In *Mathews*, for instance, an individual contested a decision terminating his social security benefits without holding a pre-termination hearing. 424 U.S. at 323. In considering whether the plaintiff was entitled to a pre-termination hearing, the Court reviewed the sufficiency of the challenged termination appeal process as a whole and not just as applied to the individual plaintiff. *Id.* at 336-43. Likewise, the particular facts of this case have no bearing on the question of whether the vehicle forfeiture statute provides the necessary process.

Under *Mathews*, this Court must consider: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. Appling this framework, the challenged statute violates due process because it fails to guarantee that a vehicle owner will receive a prompt post-seizure hearing.

i. The private interest at stake is significant.

The individual interest at stake in any forfeiture case is significant, as property is essential to liberty. *See Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). And that is doubly true when the government seizes vehicles, as for many people their car is their "most valuable possession." *Krimstock*, 306 F.3d at 61. Without a car, many people would be stranded—unable to get to school or work, care for family, attend church, appear in court, or make medical appointments. Furthermore, a vehicle is a depreciating asset that loses value over time. Thus, when a seized vehicle is finally returned, it is almost assuredly worth less than when it was seized. *Id.* at 64. Given the importance of cars, "the hardship posed by the loss of one's means of transportation . . . is hard to calculate." *Smith*, 524 F.3d at 838, *vacated as moot*, 558 U.S. 87.

Appellant cites *Fedziuk v. Commissioner of Public Safety*, 696 N.W.2d 340, 346 n.6 (Minn. 2005), for the proposition that this interest is not so weighty after all, but in fact *Fedziuk* shows the opposite. Appellant's Br. at 7-

9. In *Fedziuk*, this Court considered a law that repealed the requirement that the government provide a hearing shortly after revoking a driver's license. 696 N.W.2d at 345–46. Given the importance of the interest at stake, the Court concluded that "[d]ue process requires a prompt and meaningful postrevocation review" and that the statute was unconstitutional. *Id.* at 346. If individuals are entitled to a prompt hearing when their license is suspended, surely the same is true when their car is seized.

ii. There is a meaningful risk of erroneous deprivation of private property.

The second *Mathews* factor considers the risk of erroneous deprivation of private property. Here, the risk is high. In the absence of a prompt post-seizure hearing, no court or other neutral magistrate reviews the seizure to make sure that it was legal and justified. And "[n]either the arresting officer's unreviewed probable cause determination nor a court's ruling in the distant future on the . . . forfeiture claim can fully protect against an erroneous deprivation of a claimant's possessory interest as his or her vehicle stands idle in a police lot for months of years." *Krimstock*, 306 F.3d at 62.

A prompt post-seizure hearing protects against erroneous deprivations in another way, as well, as it allows the vehicle owner to argue that the vehicle should be returned pending the adjudication of the forfeiture case. As the Second Circuit explained in *Krimstock*, retention of the vehicle is not

necessary in every case, as "claimants could post bonds, or a court could issue a restraining order to prohibit the sale or destruction of the vehicle." 306 F.3d at 65. Without a post-seizure hearing, the property owner has no opportunity to argue for such a remedy.

The risk of erroneous deprivation is further amplified by civil forfeiture's profit incentive. *See Krimstock*, 306 F.3d at 63. For example, the City of Albuquerque's civil forfeiture program was recently held unconstitutional because of the real possibility that the program's financial incentives distorted government action. *Harjo*, 2018 WL 3621025, at *35; *see also Harmelin*, 501 U.S. at 978 n.9 ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."). Given government's financial interest, government should not be allowed to hold property for months or years without a hearing.

iii. The government interest in denying property owners a prompt post-seizure hearing is minimal.

Turning to the final factor—the government's interest in denying a hearing—the government has hardly any justification for denying property owners a prompt post-seizure hearing. Although holding a hearing would impose some cost, all efforts at due process involve some expense, and "these rather ordinary costs cannot outweigh the constitutional rights." *Fuentes v. Shevin*, 407 U.S. 67, 91 n.22 (1972). Moreover, the cost would not be

significant, as the government frequently holds post-arrest hearings and could simply adapt that procedure to the forfeiture context.

In fact, Appellant has not argued that the time or expense of providing a hearing would be overly burdensome. Instead, Appellant feebly cites to *Bendorf v. Comm'r of Public Safety*, 727 N.W.2d 410, 417 (Minn. 2007), presumably for the proposition that law enforcement has an interest in seizing vehicles for "the health and safety of the citizens of Minnesota." Appellant's Br. at 18. But that is beside the point. The government can continue to seize vehicles and enforce the forfeiture laws while also providing property owners with prompt post-seizure hearings.

CONCLUSION

This case provides an important opportunity for this Court to rein in civil forfeiture. By requiring a prompt post-seizure hearing analogous to the post-arrest hearing that is provided in the criminal context, the Court can reduce the disparity between civil forfeiture and ordinary criminal procedure. The Court can reaffirm the importance of property rights, and the Court can limit the authority of self-interested government agents. Just as important, in doing so the Court will follow in the footsteps of numerous other courts that have required a prompt post-seizure hearing. For all these reasons, *amicus curiae* Institute for Justice respectfully requests that this Court affirm the judgment below.

Dated: August 23, 2018

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A17-1083

STATE OF MINNESOTA
IN SUPREME COURT

Megan Ashley Olson, et al.,

Respondents,

v.

One 1999 Lexus
MN License Plate No. 851LDV
VIN: JT6HF100U6X0079461,

Appellant.

CERTIFICATION OF BRIEF LENGTH

1. I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3 for a brief produced with a proportional font.

2. The length of this brief is 6,884 words, excluding the cover, table of contents, table of authorities, signature block, and this certificate.

3. This brief was prepared using Microsoft Word 2016, version 1807 in 13-point Century Schoolbook font.

Respectfully submitted: August 23, 2018

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A17-1083

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MN License Plate No. 851LDV
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Appellant.

STATE OF MINNESOTA)
) ss:
COUNTY OF HENNEPIN)

I hereby certify that the forgoing was filed and served via the Court's E-MACS system on this 23rd day of August, 2018 and two bound copies were mailed vis U.S. First Class Mail, postage pre-paid to the following parties:

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One, unbound copy of the brief was also sent to the Clerk of Court on this day via the United Postal Service, next-day delivery.

I declare under penalty of perjury that everything I have stated in this affidavit is true and correct.

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