No. S23C0701

In the Supreme Court of Georgia

GARRETT SMITH, et al.,

Petitioners,

v.

STATE OF GEORGIA, ex rel. JOSEPH K. MULHOLLAND,

Respondent.

On Appeal from the Superior Court of Decatur County
Case No. 21-CV-00484

MOTION FOR LEAVE TO FILE AMICUS BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Institute for Justice moves under Rule 23(3) for leave to file a friend-of-the-court brief. The proposed brief is attached to this motion as Exhibit 1.

INTEREST OF AMICUS CURIAE

The Institute for Justice ("IJ") is a nonprofit, public interest law firm that litigates to uphold individuals' constitutional rights. Over the past decade, IJ has become the nation's leading advocate against 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 been charged with a crime (much less convicted). Using civil forfeiture, government can take citizens' money, vehicles, businesses, or even homes.

IJ regularly represents property owners in civil-forfeiture proceedings, *e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *In re U.S. Currency ($39,500.00)*, 254 Ariz. 249, 521 P.3d 631 (2022); *United States v. 434 Main Street*, 961 F. Supp. 2d 298 (D. Mass. 2013), and mounts successful constitutional challenges to civil-forfeiture programs, *e.g.*, *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018); *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694 (E.D. Pa. 2015). IJ has also successfully litigated regarding law enforcement compliance with civil forfeiture reporting laws in Georgia. *See* Consent Judgment, *Van Meter v. Turner*, Case No. 2011-CV-198536 (Ga. Super. Ct., Fulton Cnty. June 21, 2011), available at

https://ij.org/wp-content/uploads/2011/03/gaconsentorder.pdf; Consent Judgment, *Van Meter v. Turner*, Case No. 2011-CV-198536 (Ga. Super. Ct., Fulton Cnty. June 16, 2011), available at https://ij.org/wp-content/uploads/2011/03/gaconsent.pdf. IJ also regularly participates as amicus in important civil forfeiture cases, *e.g.*, *United States v. McClellan*, 44 F.4th 200 (4th Cir. 2022), and publishes original research quantifying the problems civil forfeiture poses, *e.g.*, Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* (3d ed. 2020), Institute for Justice, https://ij.org/report/policing-for-profit-3/. IJ's research has been cited by courts, including by Justice Thomas in an opinion that questioned civil forfeiture's constitutionality. *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari). IJ has also represented newsgathering outlets in litigation to ensure civil-forfeiture records are available to the public. *See generally* Inst. for Justice, *Pennsylvania Forfeiture FOIA*, https://ij.org/case/pa-forfeiture-foia/.

IJ is interested in this case because it raises important questions concerning the protections that should be afforded to property owners in civil forfeiture cases. The Court of Appeals decision below, if allowed to stand, severely undermines the already limited safeguards for those whose property is taken by civil forfeiture. This case provides an important opportunity for this Court to affirm that these procedural

safeguards—including adequately pleading the basis for the forfeiture and timely providing a trial to those whose property was seized—actually matter.

ARGUMENT

I. Issues to be Addressed by Amicus

Based on its experience and expertise in civil forfeiture work nationwide, the Institute for Justice wishes to address three issues:

First, the proposed brief discusses the history of problems with civil forfeiture enforcement in the state of Georgia, including a known history of forfeiture abuses and inadequate procedural and substantive protections for property owners seeking to recover their property. These issues and their ramifications for every citizen of—and visitor to—Georgia illustrate the need to safeguard the procedural protections that *are* afforded to forfeiture claimants in the state of Georgia under the Uniform Civil Forfeiture Procedure Act (UCFPA), O.C.G.A. §§ 9-16-1 *et seq.* The brief discusses why review is warranted here because the decision of the Court of Appeals did the opposite, seriously undermining these protections, and emphasizes why there is a need to establish clear precedent protecting these rights.

Second, the brief argues that review is warranted to correct the Court of Appeals' interpretation of the pleading requirements for civil forfeiture complaints under the UCFPA. This requirement is intended to protect property owners by ensuring that they have adequate notice of the basis of the forfeiture claims against

their property. But the Court of Appeals' approach construes the requirement that a complaint allege "all the essential elements of the criminal violation which is claimed to exist," O.C.G.A. § 9-16-12(a), in the light most favorable to the State. This is problematic not only because it conflicts with the intent of the statute and the General Assembly in enacting it but because it does not comport with the basic due process requirement of notice for property owners, leads to increased incentivization for further forfeiture abuse, and decreases public trust in law enforcement.

Third, the brief argues review is also warranted to address the Court of Appeals' construction of the 60-day hearing requirement. The court below disregarded the protection of property owners' rights when it construed the 60-day requirement in the light most favorable to the State, allowing the State to use the statutes to protect its own interest, rather than enforcing the requirement *against* the State to protect the plaintiffs. This approach also undercuts the effectiveness of this protection for property owners and further eviscerates the limited protections afforded by the UCFPA.

II. This Memorandum Will Assist the Court

This case presents a crucial opportunity for this Court to protect the rights of Georgia's citizens whose property is subject to civil forfeiture actions by reaffirming the Court's commitment to and recognition of the need to protect the interests of property owners, as well as by providing clear precedent on the proper interpretation

on the UCFPA and its procedural safeguards. The brief addresses how the decision below undermines these protections and why it is therefore so essential for this Court to grant review and reverse. The brief also provides helpful context for the broader implications of the decision and the current landscape of civil forfeitures in Georgia. IJ's brief will benefit the Court by providing a broader discussion of why the errors of the court below and the need for clear precedent protecting the rights of property owners counsel in favor of a grant of review and, ultimately, reversal.

Because IJ has an interest in this appeal and offers relevant and novel legal analysis and perspective, participation as amicus should be allowed. The court should grant leave to file the attached friend-of-the-court brief.

CONCLUSION

For the foregoing reasons, the Institute for Justice respectfully requests that the Court grant leave to file the Amicus Curiae brief submitted with this Motion.

DATE: April 20, 2023

Respectfully submitted,

/s/ Anna J. Goodman

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2023, I served a copy of the foregoing *Motion for Leave to File Amicus Brief of Institute for Justice in Support of Petitioners* upon all the following counsel of record:

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EXHIBIT 1

Brief of Amicus Curiae Institute for Justice in Support of Petitioners

No. S23C0701

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

It should be axiomatic that the State cannot take private property without a legitimate reason—and that when it does take it, it is responsible for accounting for its reasons and its actions. But all too often, both justification and accountability are absent in civil forfeiture actions. That is why courts and legislatures across the nation, including Georgia, have increasingly recognized the importance of strictly construing civil forfeiture statutes against the government. The decision below does the opposite, adopting a lenient construction of Georgia's Uniform Civil Forfeiture Procedure Act (UCFPA) that favors the State and undermines the protections the General Assembly enacted to protect property owners. It is urgently important that this Court grant certiorari to remedy the errors below.

As Justice Thomas has observed, "[m]odern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes." *Leonard v. Texas*, 137 S. Ct. 847, 847 (2017) (Thomas, J., statement respecting denial of certiorari). But despite their quasi-criminal nature, civil forfeiture proceedings are not accompanied by the safeguards afforded to criminal defendants. Civil forfeiture laws in the majority of states—including Georgia—do not require property owners be convicted (or even prosecuted), involve a lower standard of proof than criminal proceedings, and often deprive individuals of their

property for months or years before a forfeiture determination is even made.[1] They also incentivize law enforcement to pursue civil forfeiture, because the seizing agency almost always receives a cut of the profit, "risk[ing] biasing law enforcement priorities toward the pursuit of property over justice."[2] IJ Report, *supra*, at 34.

This Court has recognized that civil forfeiture actions are, as a general rule, "not favored" for such reasons. *Cisco v. State*, 285 Ga. 656, 663 (2009). Even so, forfeiture continues to be incredibly common—from 2015 to 2018, Georgia law enforcement officers forfeited over $51 million. And when the State takes property through civil forfeiture, property owners have very few protections on their side. Recognizing this problem, Georgia's General Assembly enacted the UCFPA, which codified several bare-minimum safeguards for property owners, including several explicit pleading requirements and the 60-day hearing rule at issue here. These procedural safeguards are one of the few tools available to enable property owners to push back when the State takes their property. After the Court of Appeals' decision, these protections are left in tatters.

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[1] Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 23, 34–41 (3d ed. 2020), Institute for Justice, https://ij-org-re.s3.amazonaws.com/ijdevsitestage/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf ("IJ Report").

[2] IJ Report, *supra*, at 34.

One of the most significant eviscerations of property owners' rights came in the Court of Appeals' treatment of civil forfeiture complaint pleading standards. O.C.G.A. § 9-16-12(a) mandates that a forfeiture complaint "allege the essential elements of the criminal violation which is claimed to exist." This common-sense requirement is rooted in the fundamental principle that "[d]ue process requires that notice be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [forfeiture] action and afford them an opportunity to present their objections.'" *Brewer v. State*, 281 Ga. 283, 284 (2006). Without adequate notice, a property owner cannot meaningfully defend the claims against him. The explicit pleading requirements codified in O.C.G.A. § 9-16-12 are one means of ensuring adequate notice. Under the decision below, this pleading requirement is satisfied if it is possible to identify at least one criminal cause of action by squinting and reading the complaint with all inferences in the State's favor—a conclusion that is, in and of itself, a gymnastic feat based on the complaint in this case.[3] This contradicts the language and intent of the UCFPA. And as here, where the property owners were left at a loss as to how to fully defend against the ambiguous claims against them, it also does not comply with the fundamental

[3] *See* Pet. for Cert. 10–11 (detailing the numerous statutes cited by the State in its forfeiture complaint without adequately identifying subparts and elements of the statutes, their relevance to the claimants, or in the case of the theft claim, any factual allegations supporting their alleged violation, including "which Claimant allegedly did these things, when, where, or how").

requirement of due process. The unfortunate result will be property owners that are inadequately informed about the nature of the forfeiture case against their property, an increased incentive for forfeiture abuse, and decreased public trust.

The Court of Appeals further eviscerated the limited protections available to property owners when it construed the mandatory provision that a forfeiture case go to trial or be continued for good cause "within 60 days after the last claimant was served with the complaint," O.C.G.A. § 9-16-12(f), to protect the State. This requirement also exists to protect property owners whose property is subject to forfeiture. The longer and more expensive the process for property owners seeking to recover their property, the less likely they are to engage in the process. So having a timeframe in which they are entitled to their day in court is essential to ensuring timely return of property and resolution of their claims—and to keeping cost down so that it is actually worthwhile for property owners to challenge forfeiture actions at all. But rather than applying the 60-day rule as written, the court below let the State rely on its failure to serve a forfeiture claimant—and that claimant's subsequent proactivity in filing an answer to the forfeiture complaint—as a reason the *State* should be able to avoid the strictly construed 60-day deadline.

Property owners' rights are seldom more vulnerable than when their property is being subjected to civil forfeiture. Where the General Assembly has taken explicit steps to codify at least some protections for owners facing forfeiture proceedings, it

is imperative that those protections be construed in a way that actually affords protection for property rights. The Court of Appeals' opinion instead further hamstrings these already limited protections and opens the door for greater forfeiture overreach by the State. To protect the rights of property owners, this court should grant certiorari and reverse the Court of Appeals below.

INTEREST OF AMICUS CURIAE

The Institute for Justice ("IJ") is a nonprofit, public interest law firm that litigates to uphold individuals' constitutional rights. Over the past decade, IJ has become the nation's leading advocate against 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 been charged with a crime (much less convicted). Using civil forfeiture, government can take innocent citizens' money, vehicles, businesses, or even homes as punishment for an alleged crime, without ever securing a criminal conviction.

IJ regularly represents property owners in civil-forfeiture proceedings, *e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *In re U.S. Currency ($39,500.00)*, 254 Ariz. 249, 521 P.3d 631 (2022); *United States v. 434 Main Street*, 961 F. Supp. 2d 298 (D. Mass. 2013), and mounts successful constitutional challenges to civil-forfeiture programs, *e.g.*, *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018); *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694 (E.D. Pa. 2015). IJ has also

successfully litigated regarding law enforcement compliance with civil forfeiture reporting laws in Georgia. *See* Consent Judgment, *Van Meter v. Turner*, Case No. 2011-CV-198536 (Ga. Super. Ct., Fulton Cnty. June 21, 2011), available at https://ij.org/wp-content/uploads/2011/03/gaconsentorder.pdf; Consent Judgment, *Van Meter v. Turner*, Case No. 2011-CV-198536 (Ga. Super. Ct., Fulton Cnty. June 16, 2011), available at https://ij.org/wp-content/uploads/2011/03/gaconsent.pdf. IJ also regularly participates as amicus in important civil forfeiture cases, *e.g.*, *United States v. McClellan*, 44 F.4th 200 (4th Cir. 2022), and publishes original research quantifying the problems civil forfeiture poses, *e.g.*, Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* (3d ed. 2020), Institute for Justice, https://ij-org-re.s3.amazonaws.com/ijdevsitestage/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf ("IJ Report"). IJ's research has been cited by courts, including by Justice Thomas in an opinion that questioned civil forfeiture's constitutionality. *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari). IJ has also represented newsgathering outlets in litigation to ensure civil-forfeiture records are available to the public. *See generally* Institute for Justice, *Pennsylvania Forfeiture FOIA*, https://ij.org/case/pa-forfeiture-foia/.

IJ is interested in this case because it raises important questions concerning the protections that should be afforded to property owners in civil forfeiture cases.

The Court of Appeals decision below, if allowed to stand, severely undermines the already limited safeguards for those whose property is taken by civil forfeiture. This case provides an important opportunity for this Court to affirm that the procedural safeguards—including adequately pleading the basis for the forfeiture and timely providing a trial to those whose property was seized—genuinely impose meaningful limitations on government action.

ARGUMENT

Along with the reasons outlined in the Plaintiffs' Petition for Certiorari, IJ urges the Court to accept review to correct the reversible errors below and establish meaningful precedent for three reasons. First, as explained in Part I, the abuse of civil forfeiture in Georgia is a matter of serious public concern, and absent this Court's input, the Court of Appeals' abrogation of the statutory rights provided in the UCFPA will make the situation substantially worse for property owners. Second, Part II focuses on how the Court of Appeals' failure to construe the UCFPA's pleading requirements in the property owners' favor violates not just the statutory language and intent of the UCFPA, but also the basic requirement of due process. And Part III focuses on how failure to strictly construe the 60-day hearing requirement in favor of property owners neuters another important statutorily-authorized safeguard for them.

I. This Court should grant review because civil forfeiture seriously impairs the rights of Georgians and the Court of Appeals decision makes the situation worse.

Civil forfeiture in the state of Georgia poses a serious threat to the property rights of its citizens and visitors. It allows the State to take private property without convicting (or even prosecuting) its owner. The State need only establish by a preponderance of the evidence that the property is connected to a crime. IJ Report, *supra*, at 39 ("This makes it easy for the government to win civil forfeiture cases and very difficult for property owners to fight back"). It also financially incentivizes law enforcement to pursue civil forfeiture—under Georgia law, seizing agencies can keep up to 100% of seized assets. *Id.* at 80. "This arrangement risks biasing law enforcement priorities toward the pursuit of property over justice and enables agencies to self-fund outside normal legislative appropriations." *Id.* at 34; *see also Leonard*, 137 S. Ct. at 848 (Thomas, J., statement regarding the denial of certiorari) ("[The civil forfeiture 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"); *Harjo*, 326 F. Supp. 3d at 1195 (holding forfeiture scheme violated due process where "there is a realistic possibility that the forfeiture program prosecutors' judgment will be distorted, because in effect, the more revenues the prosecutor raises, the more money the forfeiture program can spend"). Moreover, as discussed *infra*, the last few years have brought to light repeated instances of

forfeiture abuse in Georgia that further reinforce the concerns raised by its widespread application. *See generally Cisco*, 285 Ga. at 663 (noting that forfeiture is "not favored" in Georgia).

Recognition of these problems led to the General Assembly's adoption of the Georgia Uniform Civil Forfeiture Procedure Act (UCFPA), O.C.G.A. §§ 9-16-1 *et seq.* in 2015.[4] When the UCFPA was enacted in 2015, it included several bare-minimum procedural safeguards for property owners, among which were detailed pleading requirements and a 60-day hearing deadline. But while an important first step, the UCFPA did not remedy the inadequacy of protection for Georgia's citizens facing forfeiture proceedings.

In May 2020, the Georgia Department of Revenue came under fire for retaining over $5 million dollars in forfeited funds for their own use—much of which they had since spent on everything from dog food to gym equipment to a new F-350 for the supervising official's personal car.[5] In late 2022, the United States

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[4] *See* Erik Randolph & Buzz Brockway, *Civil Asset Forfeitures in Georgia: Procedures, Activity, Reporting, and Recommendations* 3 (2020), Ga. Ctr. for Opportunity, https://foropportunity.org/wp-content/uploads/2020/03/20-011-GCO-Civil-Asset-Forfeit_v3.pdf ("GCO Report").

[5] Bill Rankin & Chris Joyner, *Ga. Revenue agency gives state $2.1M in disputed forfeiture funds*, Atl. J.-Const. (May 18, 2020), https://www.ajc.com/news/local/revenue-agency-gives-state-disputed-fofeiture-funds/68WId2A2r2dpNUXEkBMe1O/amp.html; Chris Joyner & Bill Rankin, *'Like a slush fund': Revenue agents bought pricey perks with seized assets*, Atl. J.-Const.

Commission on Civil Rights released a report documenting how "overutilization of civil asset forfeiture laws" has "damaged" the relationship between law enforcement and the public in Georgia: "the public duty to report suspicions of crime or direct acts of crime further puts the public and their families at risk of property loss . . . fueled by the financial motivation of law enforcement to seize property to the fullest extent permitted by law."[6] The report concluded that "[c]ivil asset forfeiture raises questions regarding multiple fundamental constitutional principles and basic ideas of fairness and justice for all."[7] And earlier this year, a Georgia news station investigated a Georgia police department that was seizing property without

(Mar. 12, 2020), https://www.ajc.com/news/state--regional-govt--politics/like-slush-fund-revenue-agents-bought-pricey-perks-with-seized/a840vZ7JF08hpJIhfUs3gP/ (The department's "spending ranged from the merely curious to the outrageous": dog food, treats, toys; Super Bowl commemorative badges and frames; wireless headphones and other office supplies; a fleet of 31 new vehicles, including a new F-350 for use as the personal car of the deputy overseeing the expenditures; $19,000 in gym equipment, along with an additional $6,660 in Fitbit fitness trackers and 300 specially printed stress balls; golf carts; and $130 sunglasses).

[6] U.S. Commission on Civil Rights, *Civil Asset Forfeiture and its Impact on Communities of Color in Georgia* 11 (Nov. 2022), https://www.usccr.gov/files/2022-11/2022_civil-asset-forfeiture-in-ga_report.pdf ("U.S. Commission Report"); *see also* U.S. Commission on Civil Rights, *Policy Brief: Civil Asset Forfeiture and Its Impact on Communities of Color in Georgia* (Jan. 2023), https://www.usccr.gov/files/2023-01/policy-brief_georgia.pdf ("There are few accountability measures to ensure that agencies do not abuse this financial incentive.").

[7] U.S. Commission Report, *supra*, at 15.

complying with the state's forfeiture requirements and destroying seized vehicles before the property owners even got a hearing on the taking of their vehicles.[8]

Data regarding forfeitures in Georgia in the last few years also shows that civil forfeiture is not being used for the purpose for which it was originally intended—and further raises concerns about its abuse within the State. In just three years (from 2015 to 2018), Georgia law enforcement agents forfeited more than $51 million under state law.[9] *Id.* at 80. More than half of those forfeitures were currency forfeitures; and of those currency forfeitures, the median forfeiture was $540, meaning *half were worth less than $540*. *Id.* at 81. "This suggests that, aside from a few high-profile cases, forfeiture often does not target drug kingpins or big-time financial fraudsters," as intended, but instead is focused on taking what is the most monetarily beneficial to the seizing agency. *Id.* at 9; *see The Need to Reform Asset Forfeiture: Hearing Before the U.S. Senate Committee on the Judiciary*, 114th Cong.

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[8] Justin Gray, *GA police legally seized cars without proving wrongdoing in court, failed to report to state*, WSB-TV (Feb. 13, 2023), https://www.wsbtv.com/news/local/south-fulton-county/ga-police-legally-seized-cars-without-proving-wrongdoing-court-failed-report-state/6WQ72EK2HFA5DDKM6KPUHQRW4U/.

[9] It is also worth noting that these state agencies generated an additional $388 million in revenue from federal equitable sharing during this same time frame. *Id.* Other research also indicates that the forfeited revenue received by the state may be even higher. GCO Report, *supra*, at 43 ("Evidence of underreporting or non-reporting by numerous entities suggests that the total forfeited revenue received and spent might be significantly higher than reported.").

4–5 (2015), available at http://endforfeiture.com/wp-content/uploads/2015/06/DS-SJC-Testimony.pdf (statement of Darpana M. Sheth, Attorney, Institute for Justice) (testifying regarding how modern civil forfeiture laws have become "unmoored" from their original justification and are now treated as primarily revenue generating tools, instead of for meaningful law enforcement purposes). This also shows why it often makes little economic sense for property owners to contest the forfeiture of their property—they could easily spend more litigating the case than the value of the seized property. IJ Report, *supra*, at 11.

As a leading national expert in the fight against civil forfeiture, the Institute for Justice (IJ) investigates and tracks the impact of such forfeitures nationwide. One result of this has been IJ's report *Policing for Profit: The Abuse of Civil Asset Forfeiture*, which analyzes and rates the civil forfeiture laws of states nationwide on an "A" to "F" grading scale. *See* IJ Report, *supra*, at 59–161. During IJ's most recent report update—released five years after the enactment of the UCFPA—Georgia still earned an alarming D-, due in large part to the low bar for forfeiture in the State, which requires only proof by a preponderance of evidence that the property is connected to a crime, and the lack of adequate protections for property owners whose property is taken from them. *Id.* at 80.

This data paints a clear picture that civil forfeiture is not a tool being sparingly used. Rather, it is being utilized against many Georgians to take whatever they may

have—small or large—regardless of whether they have been accused or convicted of a crime. And that is a problem.[10]

It is unsurprising then that an increasing chorus has begun speaking out about the problems with the current civil forfeiture practices in Georgia.[11] Indeed, the outcry over the Georgia police department's misuse of forfeiture funds earlier this year was so great that, within ten days of the release of the investigative journalist's report on the incident, the State General Assembly was considering bills "requir[ing]

[10] *See* U.S. Commission Report, *supra*, at 11 ("Most cases of civil asset forfeiture in Georgia are not targeting high-level, organized criminal activity as intended but are instead impacting low-income individuals who are rarely charged with any crime").

[11] *See, e.g.*, Andrew Wilkins, *Northwest Georgia auction raises money for law enforcement, questions from civil rights advocates*, Chattanooga Times Free Press (Apr. 9, 2023), https://www.timesfreepress.com/news/2023/apr/09/nw-ga-auction-raises-money-for-law-enforcement/#/questions; Benita Dodd, *Highway robbery and civil forfeiture*, The Citizen (May 24, 2021), https://cviog.uga.edu/news/052421-asset.html; C.J. Ciaramella, *Georgia Tax Crimes Unit Illegally Spent Asset Forfeiture Funds on Trinkets and Swag*, Reason (Sept. 29, 2021), https://reason.com/2021/09/29/georgia-tax-crimes-unit-illegally-spent-asset-forfeiture-funds-on-trinkets-and-swag/; Elly Yu, *Why Ga. Police Can Confiscate Property Without a Conviction*, WABE (Apr. 11, 2016), https://www.wabe.org/why-ga-police-can-confiscate-property-without-conviction/; Willoughby Mariano, *Lax forfeiture law loaded with potential for abuse*, Atl. J.-Const. (May 4, 2013), https://www.ajc.com/news/local/lax-forfeiture-law-loaded-with-potential-for-abuse/drqBmnPXAsB7Sk9JxRM28H/.

a lot more data to be made public about the seizures and provide a path to get your car or money back if you aren't charged or convicted of a crime."[12]

The decision below moves the law in the opposite direction, allowing for greater opaqueness in the behavior of law enforcement and weakening the tools available for individuals who want to fight to recover their property. The decision below is not just reversible error but reversible error that has serious implications for the rights of every individual within the state of Georgia. An individual's right to their own property is a fundamental one. *Morgan v. State*, 323 Ga. App. 853, 856–57 (2013). This Court should take up review to ensure that this right is being defended and to make clear that the few protections the General Assembly has implemented to safeguard those property rights in civil forfeiture proceedings remain in full force and effect.

II. Failure to hold the government to a strict pleading standard undermines the rights of property owners and violates the UCFPA.

Among the procedural safeguards included in UCFPA were detailed pleading requirements. One of the mandated pleading requirements is that the complaint

[12] Justin Gray, *Channel 2 investigation prompts proposed bills to curb problems with property seizures by police*, WSB-TV (Feb. 24, 2023), https://www.wsbtv.com/news/local/atlanta/channel-2-investigation-prompts-proposed-bills-curb-problems-with-property-seizures-by-police/YSAZRC6OOVGA3CC7HU2A56QUYI/.

"allege the essential elements of the criminal violation which is claimed to exist." O.C.G.A. § 9-16-12(a).

But as detailed in the Petition for Certiorari (at 14–20), the State did not comply with this, instead sprinkling numerous statutes throughout the complaint, some of which could never support a forfeiture claim, without including or identifying the relevant factual allegations to support any criminal violation against any particular claimant. But instead of holding the State accountable for failing to actually plead the criminal violation it asserted to be the basis of the forfeiture, the Court of Appeals made a conclusory determination that "the second amended complaint alleges the essential elements of at least one criminal violation which is claimed to exist and sufficiently connects the property to be forfeited to the alleged illegal conduct." Op. 7. That all necessary elements of at least one criminal violation might possibly be inferred from all allegations in a complaint taken in the totality with inferences in favor of the State does not amount to "alleging the essential elements of a criminal violation" as it has long been understood both within and outside the civil forfeiture context. And it certainly is not on all fours with this Court's recognition that forfeitures "should be enforced only when within both letter and spirit of the law." *Cisco*, 285 Ga. at 663; *see also Rounsaville v. State*, 345 Ga. App. 899, 903 (2018) ("Before the State may forfeit a defendant's property, it must

comply with rules that afford the requisite procedural safeguards."). Indeed, the Court of Appeals' reading of the pleading requirement is within neither.

First, the State's complaint fails to comply with the statutory pleading requirement because it does not actually allege the elements of a criminal violation justifying the forfeiture against each claimant. As the Plaintiffs explain, the requirement to allege each element of a crime is the same pleading requirement this Court has long mandated regarding any criminal indictment and should be treated accordingly. Pet. for Certiorari 19–20. The Court of Appeals did not do that, instead electing to create a new interpretation of the standard that affords the State as much leeway as possible. *See id.* at 14–19.

Even more concerning, the Court of Appeals' interpretation of the pleading requirements in the State's favor leads to a pleading standard that is insufficient to comport with the notice required by due process. "The right to due process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Hutcheson v. Elizabeth Brennan Antiques & Interiors, Inc.*, 317 Ga. App. 123, 126 (2012).

Such notice is particularly important in the forfeiture context, where individuals face pseudo-criminal consequences without the added protections afforded to criminal defendants. Absent adequate notice, a property owner does not

know if the state will seek to forfeit their property, does not know the basis for any such possible forfeiture proceeding, and cannot effectively contest the forfeiture. *See Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 986 (9th Cir. 2012) ("The Due Process Clause requires the [Government] to disclose the factual bases for seizure and the specific statutory provision allegedly violated." (cleaned up)); *see also Gete v. INS*, 121 F.3d 1285, 1297 (9th Cir. 1997) ("Many of the rights afforded those contesting forfeitures flow from the fundamental principle that due process requires, at a minimum, the 'the opportunity to be heard . . . at a meaningful time and in a meaningful manner.'"). And the pleading requirements for forfeiture complaints after the decision below do not require the State to give property owners actual notice of the basis on which their property is being taken—either factually or legally.

This type of constitutionally insufficient notice is problematic and all too common. For instance, in one of IJ's pending cases, *Snitko v. United States*, Case No. 21-cv-04405 (C.D. Cal.), the federal government obtained a warrant to seize property from United States Private Vaults in Beverly Hills, California, in early 2021. But instead of just seizing USPV's property, they seized the contents of the customers' safety deposit vaults—over $80 million in assets—and kept them without explanation. Months later, the government began to issue forfeiture notices against the individual boxholders. Each notice referred indirectly to hundreds of different

federal laws that might give reason for seizure of the safety deposit boxes, making it impossible for an individual whose property was taken to adequately defend against the claims.[13] The district court in *Snitko* held that the notices issued by the FBI regarding the seized property were "anemic" and sufficiently likely a violation of the property owners right to due process that a temporary restraining order and subsequent preliminary injunction should issue.[14] If an "anemic" administrative notice that throws a variety of statutes at the proverbial wall to see what sticks does not satisfy due process, how much farther short must a formal complaint fall when it takes the same approach—let alone one statutorily required to outline the elements of a criminal violation in a complaint as here? *Cf. Gete*, 121 F.3d at 1298 (finding that the INS had failed to comply with due process by not giving notice of the factual bases of forfeiture claims and the statutory provision violated).

But beyond the clear reality that the Court of Appeals' decision does not align with the letter of the law or the notice required to comport with due process, the Court of Appeals' approach to pleading a criminal violation is problematic as a

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[13] *See, e.g.*, Notice of Seizure, Institute for Justice, available at https://ij.org/wp-content/uploads/2023/03/Ex.-A-Linda-Martin-Notice-June-10-2021_Redacted.pdf.

[14] Order re: Plaintiffs' *Ex Parte* Application for a Temp. Restraining Order, *Snitko v. United States*, Case No. 21-cv-04405-RGK-MAR (C.D. Cal. June 22, 2021), available at https://ij.org/wp-content/uploads/2021/06/USPV-TRO-Granted.pdf; Order Re: Request for Preliminary Injunction, *Snitko v. United States*, Case No. 21-cv-04405 (C.D. Cal. July 16, 2021), available at https://ij.org/wp-content/uploads/2021/05/USPV-PI-Granted.pdf.

matter of policy—and has direct and serious implications for everyone in the state of Georgia.

First, under the Court of Appeals decision, Georgians should no longer expect a forfeiture complaint to give them notice of the legal basis on which the State seeks to forfeit their property. The decision below means the State does not have to actually tell property owners what criminal violation constituted the basis for seeking forfeiture of their property; it can simply list a plethora of statutes, make a few vague factual allegations, and see what sticks. As a practical matter, this means it will be harder for property owners to provide an answer that adequately defends their right to their property and lowers the likelihood that they will be able to successfully challenge a seizure and regain their property—even if they have done nothing wrong.

Second, it further incentivizes and, in effect, authorizes forfeiture abuse by making it even easier to forfeit property for the purpose of keeping the proceeds. As discussed above, one of the most complex and concerning dynamics of civil forfeiture is that the law-enforcement agencies and officials who seize property via the mechanism usually get some or all of the benefit of their takings. And, again, this is particularly true in Georgia, where up to 100% of forfeiture proceeds go to law enforcement. IJ Report, *supra*, at 80. "Giving law enforcement this financial stake in forfeiture can distort priorities, encouraging agencies to pursue financial

gain over public safety or justice, cash over crime or contraband." *Id.* at 9. "And the problem of civil forfeiture is not just a problem of a few bad apples making questionable purchases with an unaccountable stream of revenue. It is fundamentally a problem of a bad law systemically incentivizing bad behavior."[15] As the Georgia Center for Opportunity reported, there is a dire need in the State for *more* accountability for seizing agencies—better ways of ensuring that they are complying with the law, not abusing the system, and engaging in transparency. *See generally* GCO Report, *supra*. The Court of Appeals' lenient approach to pleading is an alarming step in the wrong direction, ensuring that officials need not concern themselves with either transparency or accountability but may forfeit what they wish without expecting to have to account for their actions.

Third, and closely related, the lowering of the pleading requirement threatens to further erode public trust in law enforcement and negatively impact relationships between law enforcement officers and those they serve. Even before this decision, many Georgia residents already viewed civil forfeiture as "illegitimate" and a tool for "theft" by law enforcement.[16] The effective neutering of the UCFPA pleading

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[15] Darpana Sheth, *Incentives Matter: The Not-So-Civil Side of Civil Forfeiture*, The Federal Lawyer, July 2016, at 48, https://www.fedbar.org/wp-content/uploads/2019/12/Civil-Forfeiture-pdf.pdf.

[16] U.S. Commission Report, *supra*, at 4; *see also* Sheth, *supra*, at 47 (civil forfeiture generally "undermines the public's trust in law enforcement and the belief, so vital to our republic, that we are a nation ruled by laws and not by individuals").

requirement makes it open season for officers and officials to manipulate the legal system to seize and forfeit property without being held accountable for their actions. Vague boilerplate forfeiture complaints will keep property owners guessing and unable to meaningfully defend their right to their property. And in a system which requires public trust and engagement, that creation of an appearance of impropriety—or even the opportunity for it—can seriously undermine the effectiveness of relationships between law enforcement and the public—especially in light of the proven reality that civil forfeiture *has* been abused in Georgia. U.S. Commission Report, *supra*, at 9–10. ("Panelists raised concern that when law enforcement activity is experienced as illegitimate in this way, it damages the relationship between the police and the public, thereby making both police officers and the public less safe.").

Not so long ago, the Georgia Court of Appeals recognized: "A trial court . . . has a solemn duty to ensure that before any citizen is deprived of real or personal property that he or she has been afforded due process of law." *Morgan*, 323 Ga. App. at 857. And "when this process has not been provided to a claimant," the Court of Appeals should "not hesitate in remanding that case for further and proper consideration." *Id.* Unfortunately, the Court of Appeals in the decision below not only *did* hesitate but disregarded this principle altogether.

Notice matters. Pleading standards matter. And following the explicit requirements of a governing statute matters, particularly when that statute was explicitly passed by the General Assembly to curb the government conduct at issue. And it is crucial for this Court to take up review to make that clear going forward.

III. Failure to construe the 60-day hearing requirement in favor of Plaintiffs also removes an important procedural protection for those whose property is seized.

The Court of Appeals also undermined another of the limited procedural protections available to property owners in civil forfeiture proceedings when it construed the requirement that a forfeiture case go to trial or be continued for good cause "within 60 days after the last claimant was served with the complaint," O.C.G.A. § 9-16-12(f), in the light most favorable to the *State*, instead of the plaintiffs. *See* Pet. for Cert. 27.

This is a "mandatory" provision intended to provide protection to the property owner deprived of their property. *See Rounsaville*, 345 Ga. App. at 901–02; *see also Goodwin v. State*, 321 Ga. App. 548, 549 (2013) ("The result of a failure to conduct a hearing within 60 days, or to obtain a good-cause continuance, is a dismissal of the State's complaint."). Georgia courts have stressed that the provision's purpose is to provide protection *to the property owners*. *See Turner v. State*, 234 Ga. App. 878, 878 (1998) (noting the 60-day time clock "is a requirement for the benefit and protection of the property owners").

And this Court has recognized, in considering the statutory predecessor to O.C.G.A. § 9-16-12, that the requirements of the forfeiture statute—including the 60-day time frame—must be strictly construed. *State v. Henderson*, 263 Ga. 508, 509–10 (1993). Indeed, Georgia courts have repeatedly affirmed that dismissal of a forfeiture complaint is mandated if the state fails to make sure a hearing is held within 60 days of when service is perfected. *Id.* at 511; *Goodwin*, 321 Ga. App. at 549–50; *Griffin v. State*, 250 Ga. App. 93, 94 (2001). "It is the duty of the state to obtain a continuance if it does not invoke a hearing within the 60-day period or otherwise avoid the necessity of the hearing, e.g., by obtaining a dismissal of an answer." *Henderson*, 263 Ga. at 511 n.7.

Strictly construing and enforcing this procedural protection in favor of property owners is crucial to ensuring that innocent people are not deprived of their property for years, as is often seen in forfeiture cases. All too often, civil forfeiture proceedings are a long and drawn-out process. And even when a property owner is innocent and entitled to the return of their property, the cost of that lengthy deprivation is something that often cannot be quantified—and can never be recovered. For example, in one case in Georgia, Shukree Simmons was stopped by police while driving north from Macon on Interstate 75.[17] He had $3,700 in cash on

[17] Mariano, *supra*; Chloe Cockburn, *Easy Money: Civil Asset Forfeiture Abuse by Police*, ACLU (Feb. 3, 2010), https://www.aclu.org/news/criminal-law-reform/easy-money-civil-asset-forfeiture-abuse-police.

him from sale of his car; the deputies took it. He was never ticketed or charged with any crime. And even though he eventually got the money back (only with the assistance of pro bono counsel), he was evicted in the interim and left homeless. And in the United States Private Vaults case discussed above, the FBI seized the property owners' money and belongings back in March 2021. Yet many of those property owners remain in limbo to this day, over two years later—without their property having been returned *or* formally forfeited. This is all too common in both state and federal forfeiture contexts. *See* IJ Report, *supra*, at 23; *see, e.g.* Settlement Agreement, *United States v. $28,180.00*, Case No. 21-cv-1621 (E.D. Ohio Oct. 28, 2021) (federal government retained $28,180 for two years before returning it to plaintiff upon settlement); *In re $39,500.00 U.S. Currency*, Case No. CV 2020-012190 (Az. Super. Ct. Apr. 4, 2023) (in state forfeiture proceeding, state kept plaintiff's $39,500 for over 2.5 years before being ordered to return it).

The longer and more expensive the process for property owners seeking to recover their property, the less likely they are to engage in the process and the less likely they are to recover their property, even if there is no proper basis for forfeiture. IJ Report, *supra*, at 23 (explaining how the "lengthy and costly process . . . stacks the deck against owners every step of the way"). Even if the property owner ultimately prevails at the civil-forfeiture trial and the property is returned, the interim deprivation works an irreparable injury. *See United States v. James Daniel Good*

Real Prop., 510 U.S. 43, 56 (1993) ("And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, 'would not cure the temporary deprivation that an earlier hearing might have prevented.'"). Moreover, as noted *supra*, property owners are less likely to pursue the process at all if the value of their seized property is comparatively low.

The 60-day time limit acts as an important safeguard, preventing costs and time from spiraling out of control by ensuring that the state cannot keep property for an indefinite time without accounting for its actions. In so doing, it acts as one of the most tangible protections Georgia law affords property owners. But the Court of Appeals' opinion undermines that reasoning altogether by neutering the effectiveness of the 60-day requirement. Under the interpretation adopted below, the State can effectively benefit from its own failure to serve a claimant—and all claimants in a case are punished by a 60-day extension, should an unserved claimant learn of and choose to voluntarily defend a forfeiture action brought against their property. This suggests that the State can avoid the 60-day deadline by playing games and manipulating upon whom and when they perfect service. *See* Pet. for Cert. 27–29. This contradicts Georgia courts' repeated emphasis on construing the UCFPA in favor of the property owners and their interests.

Accordingly, review in this matter is also warranted to correct the Court of Appeals' construction of the 60-day hearing requirement in favor of the State and to establish unambiguous precedent that this provision is designed to protect property owners and should be construed accordingly. The Court should grant review for this reason as well.

CONCLUSION

For all the foregoing reasons, as well as those stated in the Plaintiffs' Petition for Certiorari, this Court should grant review.

Dated: April 20, 2023

Respectfully submitted,

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