No. 22-585

In The
Supreme Court of the United States

HALIMA TARIFFA CULLEY, ET AL.,
Petitioners,

v.

STEVEN T. MARSHALL, ATTORNEY GENERAL OF ALABAMA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE, STEPHANIE WILSON, AND GERARDO SERRANO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit public interest law center. The Institute litigates civil forfeiture cases nationwide, in order to combat the use of the civil forfeiture laws to seize property without respect for due process of law. IJ also publishes original research quantifying the problems posed by civil forfeiture. *E.g.*, LISA KNEPPER ET AL, INSTITUTE FOR JUSTICE, POLICING FOR PROFIT (3d ed. 2020).[2]

Stephanie Wilson is a victim of civil forfeiture who is currently a plaintiff in a lawsuit challenging the constitutionality of civil forfeiture procedures in Detroit, Michigan, including Detroit's failure to provide for prompt post-seizure hearings. *See Ingram v. Wayne County*, No. 22-1262 (6th Cir.). Stephanie's car was seized because of alleged wrongdoing by the father of her child; Stephanie herself was never accused of doing anything wrong. After the car was seized, Stephanie repeatedly asked for a prompt hearing, but these requests were denied, and Stephanie was forced to wait almost two years to see a judge.

Gerardo Serrano is a victim of civil forfeiture who previously sued to challenge federal forfeiture procedures based on their failure to provide for a prompt post-seizure hearing. *See Serrano v. CBP*, 975 F.3d

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or part or made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *Amici* made a monetary contribution to its preparation or submission.

[2] *Available at* https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf.

488, 496 (5th Cir. 2020). Gerardo's truck was seized by federal officials at the border because they found five low-caliber bullets in the center console. The federal government initiated administrative forfeiture proceedings against the truck not long after the seizure and then held the truck for over two years without providing any kind of a hearing.

Amici are interested in this case because it offers an opportunity for the Court to broadly affirm the right to a prompt post-seizure hearing. By doing so, the Court could meaningfully address abuses associated with the civil forfeiture laws.

SUMMARY OF ARGUMENT

The question presented is easily answered. In the criminal context, the multi-factor test of *Barker v. Wingo*, 407 U.S. 514 (1972), determines the timeliness of the ultimate criminal trial, but a separate line of cases requires a prompt post-arrest hearing. *See, e.g.*, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Likewise, in the forfeiture context, the *Barker* factors apply to determine the timeliness of the ultimate forfeiture trial, *see United States v. $8,850*, 461 U.S. 555 (1983), but it would make no sense to apply *Barker* to determine whether due process requires a prompt post-seizure hearing, as the *Barker* factors speak to the timeliness of the ultimate hearing and have nothing to say about whether any other procedure ought to be required. Like any question concerning the adequacy of government procedures, the right to a prompt post-seizure hearing is properly analyzed under *Mathews v. Eldridge*, 424 U.S. 319 (1976). All that is straightforward.

To say that *Mathews* applies is, however, just the first step of the due process analysis. Several courts have applied *Mathews* to hold that due process requires a prompt post-seizure hearing. *See, e.g.*, *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002); *Smith v. City of Chicago*, 524 F.3d 834, 837-38 (7th Cir. 2008), *vacated as moot sub nom. Alvarez v. Smith*, 558 U.S. 87, 89 (2009). But the Fifth Circuit reached the opposite conclusion in *Serrano v. CBP*, 975 F.3d 488 (5th Cir. 2020). When deciding the question presented, the Court should therefore keep an eye on the subsequent question of how the *Mathews* analysis should be resolved. Even if the Court does not itself reach that question, lower courts will scour the Court's opinion for clues about the answer. With that in mind, this brief offers an overview of the problem of delay under the civil forfeiture laws and explains why, under *Mathews*, prompt hearings are required.

The problem of delay under the civil forfeiture laws is a distinctly modern phenomenon. *See* Part I.A. The First Congress enacted a civil forfeiture law that—among other important differences from modern civil forfeiture—was designed to ensure a prompt hearing. The types of pre-filing delays associated with modern civil forfeiture began to emerge later, in the mid-nineteenth century. Now, however, forfeiture procedures are designed to ensure months or (more often) years of delay. *See* Part I.B. That is true in the federal forfeiture system—where it is typically impossible to obtain a decision in less than a year—and it is also true under many state and local forfeiture laws.

Delay in forfeiture cases imposes significant costs on property owners. *See* Part I.C. As in *Amicus*

Gerardo Serrano's case, the government can seize property on the flimsiest of bases and then hold it for years without judicial review. And, as in *Amicus* Stephanie Wilson's case, the government can use that delay to attempt to pressure property owners into settlements—where property owners forfeit a portion of their property to get the remainder back. Many other clients of *Amicus* Institute for Justice have gone without their property for years. Some rearranged their lives, missed school or work, abandoned business plans, and even scaled back charitable support for the needy. All because of forfeiture delays.

The problem of delay is also magnified because law enforcement profits by forfeiting property. *See* Part I.D. In the federal system, and in 32 states, when law enforcement agencies forfeit property, the proceeds go to a special fund where they are available to pay the expenses of the agency. As this Court has already recognized, procedural protections are particularly important against the backdrop of such an incentive.

Ultimately, the Court should apply *Mathews* to affirm the right to a prompt post-seizure hearing. *See* Part II. At a minimum, even if the Court does not reach that issue, the Court should take care not to say anything that might be taken by lower courts as somehow approving the Fifth Circuit's *Serrano* decision, which held that such hearings are not required.

The Fifth Circuit's *Mathews* analysis in *Serrano* was both factually and legally flawed. *See* Part II.A. As a factual matter, the Fifth Circuit appeared to believe that delay is not a problem in the federal civil forfeiture system, which is incorrect. And as a legal

matter, the Fifth Circuit blended the *Mathews* and *Barker* analyses, treating cases applying the *Barker* factors as somehow "pertinent" under *Mathews*. 975 F.3d at 500. Any favorable citation to *Serrano* would cement these errors into the law—signaling to lower courts that states can satisfy due process merely by copying deeply flawed federal civil forfeiture procedures.

In fact, beyond simply avoiding favorable citation to *Serrano*, the Court can and should disapprove the Fifth Circuit's opinion. Even focusing narrowly on the question presented, *Serrano* was wrongly decided: The *Mathews* and *Barker* analyses address separate questions, and the Fifth Circuit erred when it held that cases applying *Barker* are somehow "pertinent" under *Mathews*.

Properly considered, there can be no real question that *Mathews* requires prompt post-seizure hearings. *See* Part II.B. In other contexts, the Court has held that due process requires either a pre-seizure or a prompt post-seizure hearing, and there is no reason a different rule should apply in the forfeiture context. All three *Mathews* factors are in accord: The interest in private property is a significant one; when the government seizes property without *any* hearing, there is a meaningful risk of erroneous deprivation; and the government has no cognizable interest in *not* providing streamlined retention hearings. Such a hearing would protect the rights of property owners who must otherwise wait for their day in court, and it would bring much-needed judicial oversight to the civil forfeiture system.

ARGUMENT

I. As Civil Forfeiture Has Metastasized, Delay Has Become One Of The Government's Most Potent Weapons.

A. As Civil Forfeiture Has Expanded, So Has Delay.

"[H]istorical forfeiture laws were narrower in most respects than modern ones." *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari). Historically, civil forfeiture laws were largely limited to seizures of ships or cargo, where the owner might be located half a world away and thus not personally amenable to suit. *Id.* By contrast, modern civil forfeiture is ubiquitous and extends to a broad variety of alleged criminal offenses. Today, virtually every police officer has the power to seize a person's property for civil forfeiture, and doing so allows the government to effectively circumvent the protections of the criminal law—punishing alleged crimes without any conviction.

As forfeiture has expanded, its procedures have also evolved. The First Congress enacted a relatively straightforward civil forfeiture law, with procedures that were designed to place cases before the courts in a timely way. The law directed government agents to file a complaint directly in "the proper court having cognizance thereof," and then, after a 14-day notice period, provided that the court "shall proceed to hear and determine the cause according to law." Collections Act of 1789 § 36, 1 Stat. 29, 47. Ten years later, Congress amended these procedures to emphasize

that government officials were "enjoined to cause suits for [forfeiture] to be commenced without delay." Collections Act of 1799 § 89, 1 Stat. 627, 695. These procedures "enjoin[ed] the collector, within whose district a seizure shall be made, or forfeiture incurred, to cause suits for the same to be commenced without delay, and prosecuted to effect." *Jones v. Shore's Ex'r*, 14 U.S. (1 Wheat.) 462, 469 (1816).[3]

These procedures began to evolve in 1844, when Congress enacted the nation's first administrative civil forfeiture law. *See* Tariff Act of 1844 § 1, 5 Stat. 653, 653. Under the 1844 law, government agents first published notice of the seizure, and the case proceeded to court only if the property owner filed a claim. In addition to allowing the government to take title to property without any involvement by the Article III courts, these procedures injected a new element of delay into the system. As one court later explained: "Prior to the act of April 2, 1844, it was the duty of the collector, or other principal officer of the revenue, in making a seizure, to cause a suit for forfeiture to be commenced without delay," *McGuire v. Winslow*, 26 F. 304, 306 (C.C.N.D.N.Y. 1886), whereas, after 1844, agents held property for some time before bringing the case to court.

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[3] This post-ratification practice was in keeping with even earlier historical precedents. English common law provided for a prompt hearing following seizures of allegedly stolen property, under which "the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods." *Gerstein v. Pugh*, 420 U.S. 103, 116 n.17 (1975).

Still, even after 1844, administrative civil forfeiture remained a world away from the modern civil forfeiture system. For one thing, civil forfeiture was still largely limited to its historical subject matter of ships and cargo; it had not yet expanded to encompass common drug offenses and countless other alleged crimes committed within the United States by U.S. residents. For another, this early system of administrative civil forfeiture was limited to "cases where the property was of inconsiderable value." *McGuire*, 26 F. at 307. For valuable property, the earlier, more expeditious procedures still applied.

That changed in the 1970s, in the context of the War on Drugs, when modern civil forfeiture emerged. At the same time Congress expanded civil forfeiture to encompass more and more alleged criminal offenses, it subjected more and more seizures to administrative civil forfeiture procedures. In 1978, administrative forfeiture expanded to cover all seizures below $10,000. *See* Pub. L. No. 95-410, § 111, 92 Stat. 888, 897 (1978). From there, the limit for administrative forfeiture increased to $100,000 in 1984 and $500,000 in 1990—where it remains today. *See* Pub. L. No. 98-473, § 311, 98 Stat. 1837, 2053 (1984); Pub. L. No. 101-382, § 122, 104 Stat. 629, 642 (1990). As a result, over 90% of federal civil forfeitures are now subject to lengthy pre-filing administrative delays. POLICING FOR PROFIT, *supra*, at 24.

Following the federal government's lead, forfeiture quickly expanded at the state level. In 1970, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Controlled Substances Act that included forfeiture provisions modeled on federal law, and by 1988 all but three states had enacted that

uniform act "in major part." Nat'l Criminal Justice Ass'n, *A Guide To State Controlled Substances Acts* 1-2, 19 (1988). While specific procedures vary, state civil forfeiture laws, like federal law, often entail significant delay. *See generally* Ana Kellia Ramares, *Delay in Setting Hearing Date or In Holding Hearing as Affecting Forfeitability Under Uniform Controlled Substances Act or Similar Statute*, 6 A.L.R.5th 711 § 2[a] (1992) (hereinafter, "*Delay as Affecting Forfeitability*") (reporting decisions upholding delays that "ranged from 3 months to 3 years").

B. Modern Civil Forfeiture Procedures Often Make It Impossible To Obtain A Prompt Hearing.

Modern federal civil forfeiture laws—and many state and local forfeiture laws—make it all but impossible for property owners to obtain a prompt hearing.

1. At the federal level, most forfeitures are governed by timelines set out by the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"). Although these timelines were intended to limit delay, in fact they establish a lengthy procedural gauntlet that property owners must run before setting foot inside a court.

CAFRA gives the government a full *60 days* to send notice of the forfeiture (although the notice is nothing more than a form letter); the property owner has 35 days to file a claim to the property; and the government then has an additional *90 days* to file a complaint. *See* 18 U.S.C. § 983. Any "supervisory official" within the seizing agency can extend the notice deadline an additional 30 days. *Id.* Even if a property

owner files a claim immediately after receiving notice, CAFRA thus allows the government up to 180 days just to file a complaint.

Then, of course, the filing of the complaint is just the start of a series of additional steps that precede a merits hearing. The government publishes *additional* notice after filing a complaint "for at least 30 consecutive days," and the property owner must file yet another claim. Fed. R. Civ. P. Supp. R. G. The government is then allowed to serve "special interrogatories" demanding information about "the claimant's identity and relationship to the defendant property," and the government need not even *respond* to a motion to dismiss the forfeiture complaint "until 21 days after the claimant has answered these interrogatories." *Id.* Adding up all the various delays, nearly a year may pass before the government is required to make any court filing justifying its seizure. For a property owner to obtain an actual *merits hearing* in less than a year would be effectively impossible.

Moreover, even those prolonged deadlines do not apply to cases in the so-called "customs carve-out." *See* 18 U.S.C. § 983(i)(2)(A). When the federal government seizes property under the customs laws, there is *no* deadline to file a forfeiture complaint, with the result that it is not uncommon to see even lengthier prefiling delays. *See, e.g.*, *LKQ Corp. v. United States*, No. 18-cv-1562, 2019 WL 3304708, at *2 (D.D.C. July 23, 2019) (delay of 24 months between seizure and forfeiture complaint); *United States v. Two Land Rover Defs.*, No. 14-cv-2093, 2015 WL 4603271, at *7 (D.S.C. July 29, 2015) (15 months); *United States v. Thirty-Six (36) 300CC on Rd. Scooters*, No. 11-cv-130, 2012

WL 4483281, at *5 (S.D. Ohio Sept. 27, 2012) (19 months). Property owners may literally have to wait years just to set foot inside a courtroom.

Data obtained through the Freedom of Information Act illustrates the problem. For instance, one report looked at seizures of cash at airports and found that some cases took as long as *15 years* between the time that property was seized and the time that the forfeiture action was finally resolved. JENNIFER MCDONALD, INSTITUTE FOR JUSTICE, JETWAY ROBBERY 18 (2020).[4]

2. Proponents of civil forfeiture sometimes point to additional procedures that they suggest ameliorate these delays, but any relief afforded by these procedures is illusory.

First, forfeiture proponents sometimes point to property owners' option to file a so-called "remission petition" with the seizing agency. However, a remission petition is the civil forfeiture equivalent of a pardon petition and, as such, does not provide *any* opportunity to challenge the seizure; instead, by filing a petition the property owner *concedes* the property is

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[4] *Available at* https://ij.org/wp-content/uploads/2020/07/Jetway-Robbery-July-2020-WEB-FINAL.pdf. Another report analyzed data concerning another subset of federal forfeitures and found that—even including cases where property owners defaulted or settled—the average time from seizure to a judicial forfeiture was 460 days. *See* DICK M. CARPENTER II & LARRY SALZMAN, INSTITUTE FOR JUSTICE, SEIZE FIRST, QUESTION LATER 19 (2015), *available at* https://ij.org/wp-content/uploads/2015/03/seize-first-question-later.pdf. Some cases took far longer, with one case taking 2,390 days to resolve. *Id.*

subject to forfeiture and "seeks relief from forfeiture on fairness grounds." *United States v. German*, 76 F.3d 315, 318 (10th Cir. 1996) (marks and citation omitted); *see also United States v. Morgan*, 84 F.3d 765, 767 n.3 (5th Cir. 1996) ("a petitioner seeking remission or mitigation of a forfeiture does not contest the legitimacy of the forfeiture"). A plea for leniency is not a hearing.

Remission also is not prompt. Precisely because remission is discretionary, this Court has held that the agency need not rule on a remission petition in a timely fashion. *See United States v. Von Neumann*, 474 U.S. 242, 249-50 (1986). As a result, courts hold that a property owner waives any due process right to a timely hearing by filing a remission petition. *See CFMOTO Powersports, Inc. v. United States*, 780 F. Supp. 2d 869, 878 (D. Minn. 2011).

Second, forfeiture proponents sometimes point to the ability to file a motion for return of property pursuant to Federal Rule of Criminal Procedure 41(g). However, courts generally reject attempts to use Rule 41(g) to short-circuit the timelines and procedures established by the civil forfeiture laws. If a property owner files a Rule 41(g) motion promptly after a seizure, courts hold that the government can terminate the motion simply by sending a forfeiture notice letter—as "once the administrative process has begun, the district court loses subject matter jurisdiction to adjudicate the matter." *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 479 (2d Cir. 1992); *see also Ibarra v. United States*, 120 F.3d 472, 475 (4th Cir. 1997) (citing cases). Courts reject efforts to use Rule 41(g) motions to obtain prompt post-seizure

hearings as "improper collateral challenge[s] to the [agency's] appropriately-instituted administrative forfeiture proceeding." *Haltiwanger v. United States*, 494 F. Supp. 2d 927, 930 (N.D. Ill. 2007).[5]

Even in the rare circumstances where courts do entertain Rule 41(g) motions, such motions do not lead to a prompt hearing. For instance, in one case where CBP held seized property for over three years without filing a forfeiture complaint, a district court responded to a Rule 41(g) motion by setting a briefing schedule under which CBP was allowed over two months just to file a written response. *See In re Seizure of Compact Disc Recordable Media*, No. 11-cv-8614, 2012 WL 12130138, at *1 (C.D. Cal. Feb. 1, 2012). In another case, a district court took over two months to grant an *unopposed* motion under Rule

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[5] *See also United States v. Premises of 2nd Amend. Guns, LLC*, 917 F. Supp. 2d 1120, 1122 (D. Or. 2012); *$8,050.00 in U.S. Currency v. United States*, 307 F. Supp. 2d 922, 927 (N.D. Ohio 2004); *Wilson v. United States*, No. 13-mc-11, 2013 WL 1774810, at *1 (M.D. Fla. Apr. 2, 2013). While some courts hold that a Rule 41(g) motion can be filed in the window between the time the property owner files a claim and the government files its complaint, at that point the government can prevent a hearing on the Rule 41(g) motion by filing the forfeiture complaint (which, as noted above, is merely an interim step leading to an eventual hearing potentially years after the complaint is filed). *See United States v. $83,310.78*, 851 F.2d 1231, 1233-35 (9th Cir. 1988). Even a promise to file a complaint in the future may be enough to forestall a hearing on a Rule 41(g) motion. *See, e.g.*, *In re Seizure of Aluminum Pallets*, No. 16-cv-2640, 2017 WL 10581077, at *3 (C.D. Cal. Apr. 21, 2017) (staying Rule 41 proceeding for 90 days to allow government to file complaint). After a forfeiture complaint is filed, the Rule 41(g) mechanism is likewise unavailable. *See United States v. One 1974 Learjet*, 191 F.3d 668, 673 (6th Cir. 1999).

41(g) after the government had already held property for over three years. *See Naylor* v. *United States*, No. 13-cv-2481, 2013 WL 6909521, at *3 (S.D. Cal. Dec. 27, 2013); *see also Abbott* v. *United States*, No. 07-mc-517, 2008 WL 346359 (E.D. Mo. Feb. 6, 2008) (taking four months to order return of property seized over a year and a half previously).

For clients of *Amicus* Institute for Justice, the only way to secure prompt return of property has been to file cases (often class actions) raising constitutional challenges to the civil forfeiture laws. In Gerardo's case, for instance, when he filed a class action challenging CBP's failure to provide a prompt post-seizure hearing, the government voluntarily returned his vehicle about a month after the case was filed, even before the government entered an appearance in the case. *See Serrano*, No. 17-cv-48 (W.D. Tex.). Most property owners, of course, cannot file a major class action to get their property back.

3. Procedures at the state and local level are less uniform, and, as discussed *infra* pp. 29-30, some states do provide for prompt post-seizure hearings (with no apparent adverse effects). However, many state and local laws allow for lengthy delays.

Forfeiture procedures in Detroit—which are the focus of a current challenge by *Amici* Stephanie Wilson and the Institute for Justice—are illustrative. *See* First Am. Compl., *Ingram v. Wayne County*, No. 20-cv-10288, D.E. 12 (E.D. Mich. May 11, 2020). There, once vehicle seizures are referred to prosecutors, property owners must routinely wait months or years for the county to initiate forfeiture proceedings. In the

meantime, property owners are required to attend "pre-trial conferences," where prosecutors offer to return the seized vehicle in exchange for a fixed monetary payment ($900 for a first seizure, $1,800 for a second seizure, and $2,700 for a third). Property owners must attend four in-person pre-trial conferences (scheduled during work hours) before they can see a judge, and if property owners miss even a single conference their vehicle is forfeited by default.[6]

Such delay is hardly limited to Detroit. In Massachusetts, an investigation found that prosecutors sometimes waited *years* after a seizure to send the initial notice to commence civil forfeiture proceedings; in one case, prosecutors ran a newspaper notice four years after the seizure, at which point the property owner had only 20 days to file a claim to avoid forfeiture.[7] In another case, law enforcement in Massachusetts held a woman's car five and a half years without a hearing before returning it.[8] An investigation of just one county in Massachusetts identified more than 500 instances where property was in the possession of law

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[6] The case is currently before the Sixth Circuit, which is expected to issue a decision soon on interlocutory appeal from the district court's ruling that *Mathews* controls the plaintiffs' prompt, post-seizure hearing claim. *See Ingram v. Wayne County*, No. 22-1262 (6th Cir. argued May 4, 2023).

[7] Saurabh Datar & Shannon Dooling, *Massachusetts Police Can Easily Seize Your Money. The DA of One County Makes It Nearly Impossible to Get It Back.*, PROPUBLICA (Aug. 18, 2021), https://bit.ly/3pesprL.

[8] Jacob Sullum, *She Got Her Car Back 6 Years After Police Seized It*, REASON (Dec. 8, 2021), https://bit.ly/43Qyqdc.

enforcement for a decade or more before officials sent the notice to commence forfeiture proceedings.[9]

An investigation in South Carolina identified over 100 cases where prosecutors held property over two years without filing a forfeiture complaint.[10] In Tulsa, Oklahoma, prosecutors sought to forfeit property that had been in possession of law enforcement for ten years or more.[11] A study of Philadelphia's forfeiture system found that people who successfully resisted forfeiture "took an average of nine months to get their property back." JENNIFER MCDONALD & DICK M. CARPENTER II, INSTITUTE FOR JUSTICE, FRUSTRATING, CORRUPT, UNFAIR 3 (2021).[12] And courts in other states have upheld delays ranging "from 3 months to 3 years after commencement of the forfeiture action." *Delay as Affecting Forfeitability* § 2[a] (citing cases).

C. The Government Uses Delay As A Tactic To Pressure Property Owners.

The rise of modern civil forfeiture has led to "egregious and well-chronicled abuses." *Leonard*, 137 S. Ct. at 848 (Thomas, J., respecting the denial of

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[9] Datar, *supra* n.7.

[10] Anna Lee et al., *How Civil Forfeiture Errors, Delays Enrich SC Police, Hurt People*, GREENVILLE NEWS (Jan. 29, 2019), https://bit.ly/3JpWxY1.

[11] Ziva Branstetter et al., *Sheriff's Unclaimed Property Cases Steered to Judge Once Employed By TCSO*, THE FRONTIER (Dec. 19, 2015), https://bit.ly/3qYeXZt.

[12] *Available at* https://ij.org/wp-content/uploads/2021/09/Frustrating-Corrupt-Unfair_Civil-Forfeiture-in-the-Words-of-Its-Victims-2.pdf.

certiorari). Delay is an important part of that phenomenon. Delay allows the government to avoid judicial oversight and to push for coercive settlements.

In numerous cases, government officials have seized property under questionable circumstances and held it for prolonged periods without a hearing. In one case involving an IJ client, federal officials seized a small business's entire bank account because the owners made cash deposits in amounts under $10,000 and held the money over two years without a hearing.[13] In another similar IJ case, the government held the money three years without filing a complaint.[14] And in other IJ cases, CBP seized cash from innocent travelers at the airport and held the funds for six[15] or seven[16] months before returning it. Many of these delays would have been longer if IJ had not filed constitutional challenges on behalf of the property owners, at which point the government promptly turned tail and returned the property.

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[13] Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. TIMES (Oct. 25, 2014), https://nyti.ms/34VsNNF.

[14] Nick Wing, *IRS Returns Baker's Money After 3 Years. Now It Wants to Put the Owners in Prison*, HUFFINGTON POST (May 25, 2016), https://bit.ly/3dnlHWd.

[15] Jeff Patterson, *DEA Agrees to Return $43,000 Seized From Tampa Bay Area Woman*, WFLA (Nov. 16, 2020), https://bit.ly/42RToae.

[16] Christopher Ingraham, *A 64-Year-Old Put His Life Savings in His Carry-On. U.S. Customs Took It Without Charging Him With a Crime.*, WASH. POST (May 31, 2018), https://wapo.st/3lNEsEX.

Amicus Gerardo Serrano's experience illustrates the cost of such delay. Gerardo's truck was seized at the border after agents objected to his taking pictures on his cellphone during the border crossing; agents searched his truck after he refused to provide the passcode to the phone.[17] Agents found five stray bullets in the truck—bullets that Gerardo, who has a valid concealed carry permit, had forgotten were there—and charged Gerardo with smuggling "munitions of war." On that flimsy basis, which never would have survived even a modicum of judicial review, CBP held Gerardo's truck for over two years without a hearing. In the meantime, Gerardo's brand-new Ford pickup truck sat, unused, in a seizure lot in Texas, while Gerardo rented a replacement.

Delay allows government officials to evade accountability—holding property without judicial review—and provides a weapon that officials can use to pressure property owners to settle. In *Amicus* Stephanie Wilson's case, for instance, law enforcement seized her vehicle based on a passenger's alleged drug activity; police did not allege that she did anything wrong. Nonetheless, Stephanie was compelled to attend four pre-trial conferences with prosecutors before prosecutors would even *commence* civil forfeiture proceedings, and at each conference prosecutors offered to return her vehicle only if she would pay $1,800 (plus additional towing and storage fees). Because Stephanie rejected these settlement offers, she was forced to wait for a hearing. When she finally got

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[17] *See* Christopher Ingraham, *Customs Agents Seized a Lawful Gun Owner's Truck Over Five Bullets. Now He's Suing to Get It Back.*, WASH. POST (Sept. 13, 2017), https://wapo.st/4446uTz.

a hearing—nearly two years later—a judge ordered her vehicle returned.[18]

Stephanie's experience is hardly unique. For instance, federal prosecutors seized $295,220 from a dairy farmer in Maryland—money that was needed to run the farm—and extracted a settlement under which the government returned about 90% of the money in exchange for the farmer's agreement to forfeit $29,500.[19] Accounts of similar offers abound:

- Police seized $17,550 from a motorist on I-95 and offered to settle for half; the motorist rejected the settlement and, while he ultimately recovered his money, lost his business because he needed that money for overhead.[20]
- Federal officials seized $8,000 from a woman in Rochester, New York and offered to settle for forfeiture of half that amount.[21]
- Federal officials seized $107,000 from a convenience store in Lumberton, North Carolina and

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[18] The Michigan Supreme Court recently granted review of the state intermediate court's 2-1 decision reversing the trial court's order to return Stephanie's car. *See People v. One 2006 Saturn Ion*, No. 164360 (Mich., rev. granted Sep. 28, 2022). Argument is expected at some point this fall.

[19] Rachel Weiner, *Uncle Sam May Have Picked the Wrong Cash Cow*, WASH. POST (Apr. 14, 2015), https://wapo.st/3CElkUz.

[20] Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), https://wapo.st/3NFETC0.

[21] Gary Craig, *Rochester Woman Fights to Get Back $8K Seized in Raid; She Was Not Charged, No Drugs Found*, ROCHESTER DEMOCRAT & CHRON. (Apr. 6, 2022), https://bit.ly/3NC6bbB.

likewise offered to settle for forfeiture of half of the funds.[22]

- Federal officials extended a similar offer after seizing over $400,000 from a family-owned cigarette distribution business on Long Island.[23]

These are not one-off examples, but, rather, reflect a broad practice of extracting settlements in civil forfeiture cases. *See* DOJ, *Justice Manual* § 9-113.100 ("Settlements to forfeit property are encouraged."); *see also* DAVID SMITH, 1 PROSECUTION AND DEFENSE OF FORFEITURE CASES § 7.01 (2023). A Department of Homeland Security inspector general report surveyed forfeiture settlements and concluded that they "invite perceptions of due process violations." Office of Inspector Gen., Dep't of Homeland Sec., *DHS Inconsistently Implemented Administrative Forfeiture Authorities Under CAFRA* 7 (Aug. 27, 2020).[24] The report describes cases where CBP extracted settlements even after determining that the property owners did nothing wrong, and it concludes that, in such cases, "CBP may be taking a portion of property from innocent property owners." *Id.* at 5.[25]

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[22] Melissa Quinn, *The IRS Seized $107,000 From This North Carolina Man's Bank Account*, DAILY SIGNAL (May 11, 2015), https://dailysign.al/3p4BiEs.

[23] Erin Fuchs, *The IRS Has Been Holding This Guy's $447,000 for 2 Years, and He's Never Been Charged With a Crime*, BUSINESS INSIDER (Nov. 6, 2014), https://bit.ly/3NkDVKp.

[24] Available at https://perma.cc/G2HQ-2DVW.

[25] Reports have also emerged of jurisdictions (including, most infamously, Tenaha, Texas) where law enforcement officers

Even when property is ultimately returned, delay exacts a significant toll. Both Stephanie and Gerardo had to go without their vehicles for years. A musician who had $90,000 seized during a roadside traffic stop had to defer his dream of buying a music studio.[26] Another motorist, who had $75,195 seized, missed out on the opportunity to purchase a restaurant.[27] A nurse, whose cash was seized at the airport, was forced to postpone her plans to use the money to set up a free medical clinic in her birth country.[28] When the government holds property for prolonged periods without a hearing, property owners suffer harm as they put their plans on hold.

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conducting roadside stops routinely use the threat of civil forfeiture to extract settlements. Duane Schrag, *'This Is What It Is Going To Cost You': Chanute Police Seize Vehicles With Remarkable Frequency*, KAN. REFLECTOR (Apr. 2, 2023), https://bit.ly/3Xjn3rG; Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), https://bit.ly/42VDZpn; Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL (June 14, 1992), https://bit.ly/3Ng9ZyQ.

[26] German Lopez, *"It's Been Complete Hell": How Police Used A Traffic Stop to Take $91,800 From An Innocent Man*, VOX (Mar. 20, 2018), https://bit.ly/3Plby16.

[27] Sallah, *supra* n.20.

[28] Meagan Flynn, *She Saved Thousands to Open a Medical Clinic in Nigeria. CBP Took All of It at the Airport.*, WASH. POST (May 9, 2018), https://wapo.st/3Jkouk0.

D. The Problem Of Delay Is Exacerbated By The Profit Incentives Associated With Civil Forfeiture.

The problems of delay are exacerbated by the monetary incentives inherent in civil forfeiture.

Civil forfeiture laws allow law enforcement to retain the proceeds of forfeitures, which are then used to supplement the budget of the seizing agency. *See* POLICING FOR PROFIT, *supra*, at 5. Federal law directs forfeiture revenue to two funds—one for DOJ and another for Treasury—that are used to pay expenses of participating agencies. *Id.* at 162. At the state level, 32 states (as of 2020) directed between 80 and 100% of forfeiture proceeds to funds controlled by law enforcement. *Id.* at 34. The amounts of money involved are massive: Between 2002 and 2018, 20 states and the federal government forfeited a combined total of at least $63 billion. *Id.* at 5.

The impact of this money can be seen in the growth of civil forfeiture. Congress first allowed law enforcement agencies to profit directly from civil forfeitures in 1984, when it created the DOJ's Asset Forfeiture Fund. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. The introduction of this profit incentive has fueled an extraordinary increase in the use of civil forfeiture, as annual deposits in the Asset Forfeiture Fund have grown

from $93.7 million in 1986 to billions annually in more recent years.[29]

Law enforcement officials have openly acknowledged the importance of this incentive. 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 Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014).[30] 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.*; *see also* BRIAN D. KELLY, INSTITUTE FOR JUSTICE, DOES FORFEITURE WORK? 5 (2021) (analyzing budget data and finding that, when police budgets shrunk, forfeiture activity increased).[31]

At least one court has held that the profit incentives associated with civil forfeiture can themselves violate due process. *See Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018). In that case, the court found an "unconstitutional institutional incentive to prosecute forfeiture cases, because, in practice, the forfeiture program sets its own budget and can

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[29] *See* DICK M. CARPENTER II, ET AL., POLICING FOR PROFIT 5 (2d ed. 2015), *available at* https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

[30] *Available at* https://nyti.ms/2Bkntb6.

[31] *Available at* https://ij.org/wp-content/uploads/2021/02/does-forfeiture-work-web.pdf.

spend, without meaningful oversight, all of the excess funds it raises." *Id.* at 1151. This created "a realistic possibility that the forfeiture officials' judgment will be distorted" "by the prospect of institutional gain" because "the more revenues they raise, the more revenues they can spend." *Id.* at 1151, 1193.

In this case, the presence of such an interest underscores the importance of ensuring the availability of appropriate procedures. As the Court recognized in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56 (1993), a case involving the timing of hearings in civil forfeiture cases involving real estate, the protections of due process assume "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 human institutions, government agencies are motivated by incentives, and the incentives created by civil forfeiture magnify the benefit of a prompt hearing—and magnify the cost of delay.

II. Due Process Requires A Prompt Post-Seizure Hearing.

As noted at the outset, the answer to the question presented is straightforward. *See supra* p. 2. As in the criminal procedure context, the *Barker* factors govern the timeliness of the ultimate hearing; the requirement of a prompt initial hearing must be analyzed separately under *Mathews*.

In deciding the question presented, however, the Court should be mindful of the next question that must be answered—namely, whether *Mathews* requires a prompt post-seizure hearing. The Court should take care not to signal any approval of the Fifth Circuit's decision in *Serrano*, which held that prompt hearings are not required. And, if the Court does in fact address the *Mathews* analysis, the Court should hold that prompt hearings are required.

A. The Fifth Circuit's *Mathews* Analysis In *Serrano* Is Factually And Legally Flawed.

The Fifth Circuit's opinion in *Serrano*, which rejected a claim that due process requires prompt post-seizure hearings, was both factually and legally flawed. Indeed, the decision's *Mathews* analysis was so flawed that the Court can expressly disapprove the Fifth Circuit's decision even while confining itself to the question presented by this appeal.

As a factual matter, the Fifth Circuit incorrectly concluded that federal forfeiture law provides "alternative remedial processes" that can somehow substitute for a prompt hearing. 975 F.3d at 497. As explained above, a so-called remission petition is the civil forfeiture equivalent of a pardon petition, not a substitute for impartial judicial review. *See supra* pp. 11-12. And courts generally decline to consider motions for return of property under Federal Rule of Criminal Procedure 41(g) when forfeiture proceedings

are pending. *See supra* pp. 12-14 & n.5.[32] Federal forfeiture laws virtually guarantee lengthy delays after seizure of property, and the Fifth Circuit is wrong to suggest otherwise. If this Court nonetheless cites *Serrano* with approval, the Fifth Circuit's factual error will infect the law, as lower courts will take it as a signal that states can satisfy due process by copying deeply flawed federal procedures.

As a legal matter, moreover, *Serrano* applied the wrong standard. The Fifth Circuit did not conduct its *Mathews* analysis on a blank slate and, instead, held that cases from this Court applying the *Barker* factors were somehow "pertinent" to the *Mathews* analysis. 975 F.3d at 500. Thus, rather than conducting an independent *Mathews* analysis, the Fifth Circuit concluded that "a forfeiture proceeding meeting the *Barker* test satisfies any due process right." *Id.* at 500-01 (marks and citation omitted). That was error. As discussed at length in the briefing on the merits, the *Barker* factors speak to the timeliness of the ultimate hearing, and they are irrelevant to the *Mathews* analysis. *See* Pet. Br. 28-36. There is no sense in which decisions applying *Barker* are "pertinent" under *Mathews*.

Notably, given the nature of the Fifth Circuit's legal error, this Court can (and should) disapprove the *Serrano* decision even if it confines itself to the specific question presented in this appeal. The Court

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[32] If Rule 41(g) were to *become* a route to obtain a prompt post-seizure hearing, that would of course be a welcome development. For that to happen, however, courts would have to change their current approach to such motions, and that likely will not happen without intervention by this Court.

granted certiorari to address whether the availability of a prompt post-seizure hearing is controlled by *Barker* or *Mathews*. The Fifth Circuit, unaccountably, held that the answer is "both." That was wrong, and this Court should say so in its opinion.

B. Properly Applied, *Mathews* Requires Prompt Post-Seizure Hearings.

If the Court says anything about the *Mathews* analysis, beyond holding that *Mathews* applies, the Court should hold that *Mathews* requires a prompt retention hearing.

1. Even without analyzing the *Mathews* factors, the right to a prompt post-seizure hearing is clear from this Court's case law.

The need for a prompt post-seizure hearing emerges from *James Daniel Good*, which held that government must provide a *pre*-seizure hearing when it seeks to forfeit real property. 510 U.S. at 55. That decision explains that government can dispense with a pre-seizure hearing in cases involving moveable property, given the "pressing need for prompt action," *id.* at 56, but those exigencies disappear as soon as the property is seized. At that point, with the property secure, a prompt hearing is required. *See Krimstock*, 306 F.3d at 67-68; *Smith*, 524 F.3d at 836-37.

This Court's decision in *Commissioner v. Shapiro*, 424 U.S. 614, 619 (1976), is in accord. There, the Court held that a taxpayer was entitled to a timely opportunity to challenge a seizure; "to permit the Government to seize and hold property on the mere good-faith allegation . . . would raise serious constitutional problems." *Id.* at 629. "[T]he Due Process Clause

requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing." *Id.*

More broadly, the "fundamental right to notice and a meaningful hearing at a meaningful time has been recognized in many different contexts." *Krimstock*, 306 F.3d at 51. For example, *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972), held that due process requires pre-deprivation notice and hearing before government may seize property as collateral on a debt under a writ of replevin. And *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 341-42 (1969), held that prejudgment garnishment without any opportunity to be heard denied due process. If government must provide a hearing *before* it can seize a refrigerator as collateral on a debt, how can the government possibly seize and hold a person's automobile for years without *any* pre- or post-deprivation hearing?

2. Application of the *Mathews* factors confirms this result, as each factor weighs in favor of requiring a prompt post-seizure hearing.

First, the nature of the private interest weighs in favor of a prompt hearing. *Mathews*, 424 U.S. at 335. Taking a citizen's property is always a serious matter, as "[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) (citation omitted). "Due protection of the rights of property has been regarded as a vital principle of republican institutions," which is "founded in natural equity, and is laid down as a principle of universal law." *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235-36 (1897) (marks omitted); *see also Fuentes*, 407 U.S. at

81 (noting "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference"). This is particularly true of vehicles, as "[a] car or truck is often central to a person's livelihood or daily activities." *Krimstock*, 306 F.3d at 44.

Second, when the government seizes property without a prompt hearing, there is a serious risk of erroneous deprivation. *Mathews*, 424 U.S. at 335. After all, when the government seizes property without a warrant, there is no pre-seizure review of any kind; absent a prompt post-seizure hearing, the government can hold property without any review whatsoever by a neutral judge. Wrongly seized property may be held for prolonged periods before it is ultimately returned, *see supra* pp. 9-16, and, in many cases, the government can use delay to extract settlement agreements under which property owners give up part of their lawful property to get back the remainder, *see supra* pp. 16-21.

This lack of timely judicial review "creates an unacceptable risk of error," as it "affords little or no protection to the innocent owner." *Good*, 510 U.S. at 55. By contrast, "when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes*, 407 U.S. at 81. The ultimate forfeiture hearing, moreover, simply is not sufficient to protect these vital interests. As this Court has acknowledged, even if the property owner prevails at the ultimate hearing, that "determination, coming months after the seizure, 'would not cure the

temporary deprivation that an earlier hearing might have prevented.'" *Good*, 510 U.S. at 56.

Third, the government has no significant countervailing interest. *Mathews*, 424 U.S. at 335.

A number of jurisdictions already provide prompt post-seizure hearings, with no apparent ill effects. In New York, prompt post-seizure hearings are required following vehicle seizures under the Second Circuit's decision in *Krimstock*, 306 F.3d 40. Following a Florida Supreme Court ruling, which held that prompt post-seizure hearings are required as a matter of state law, Florida courts also provide for post-seizure probable cause hearings. Fla. Stat. § 932.703(2)(a), (3)(a); *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 965-66 (Fla. 1991). Other states have statutory provisions authorizing some manner of prompt post-seizure hearing. *See, e.g.*, Kan. Stat. Ann. § 60-4112(c); La. Rev. Stat. Ann. § 40:2611(C). And some states have provisions requiring that the ultimate forfeiture hearing be held within a brief time after the seizure. *See Delay as Affecting Forfeitability* § 5[b]. There is no reason to think these types of procedures could not be expanded to other jurisdictions.

Post-seizure hearings need not be elaborate to confer real benefits. In New York, for instance, a *Krimstock* hearing is "an expedited proceeding featuring brief opening statements, witness examination, and closing arguments." Gregory L. Acquaviva & Kevin M. McDonough, *How to Win a* Krimstock *Hearing Before New York's Office of Administrative Trials and*

Hearings, 18 WIDENER L.J. 23, 81 (2008).[33] Yet, although the hearings are streamlined, they provide an opportunity to raise a variety of issues, including probable cause for the seizure, the availability of possible innocent owner defenses, and whether the vehicle ought to be released pending the ultimate hearing on a bond or other security. *See id.* at 46-80. This procedure imposes little burden on the government, but it can be invaluable for property owners.

3. Requiring a prompt hearing would also bring important sunlight to the civil forfeiture process. Prolonged pre-filing delays, without any prospect of judicial review, mean that forfeiture often occurs entirely behind closed doors—without any publicly-filed case. POLICING FOR PROFIT, *supra*, at 24 (in the federal system over 90% percent of civil forfeitures occur at the administrative level). A prompt post-seizure hearing would ensure greater oversight by the judiciary; and, just as "open criminal proceedings give assurances of fairness to both the public and the accused," *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1, 9 (1986), would open the forfeiture process to greater scrutiny. That is particularly important given the financial incentives at play.

Stephanie's experience illustrates the point. Two years after her vehicle was seized, she finally had a

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[33] *See also* City of New York Office of Administrative Trials and Hearings, *Did the Police Take Your Car? A Guide to Your Trial at the OATH Trials Division*, https://tinyurl.com/y5hg2t5e.

hearing—and a judge ordered the car returned.[34] Still, after years sitting in an impound lot, the car is no longer operable. Nothing would have been lost—and much would have been gained—by providing a prompt and streamlined procedure whereby the government would have been compelled to explain itself to a judge early in that process.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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[34] Ron French, *No Criminal Charge? No Problem! Michigan Police Can Still Take Your Car*, BRIDGE MICH. (Apr. 10, 2023), https://bit.ly/3XiYYRP.