IN THE SUPREME COURT OF THE STATE OF OREGON

YAMHILL COUNTY, a political subdivision of the State of Oregon, on behalf of the Yamhill County Interagency Narcotics Team (TCINT) seizing agency, Plaintiff-Respondent, Petitioner on Review, v. REAL PROPERTY KNOWN AS: 11475 NW PIKE ROAD, YAMHILL, OREGON, YAMHILL COUNTY AND ANY OTHER RESIDENCE, BUILDINGS, OR STORAGE FACILITIES THEREON, Defendant in rem, and SHERYL LYNN SUBLET, Claimant-Appellant, Respondent on Review.	Yamhill County Circuit Court No. 18CV37372 CA A173574 SC S070217

AMICUS BRIEF OF THE INSTITUTE FOR JUSTICE

On review of the decision of the Court of Appeals
dated March 8, 2023

Opinion by Lagesen, C.J., joined by Kamins, P.J. and Jacquot, J.

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Interest of Amicus

The Institute for Justice is a nonprofit public interest law center. IJ litigates civil forfeiture cases nationwide to combat the erosion of constitutional protections for property owners. *See, e.g.*, *Timbs v. Indiana*, 586 US ___, 139 S Ct 682, 203 L Ed 2d 11 (2019). IJ also publishes original research quantifying the impact that contemporary civil forfeiture practices have on policing, law, and society. *See, e.g.*, Lisa Knepper, POLICING FOR PROFIT (3d Ed. 2020).[1]

Summary of Argument

Amicus agrees with the Court of Appeals: Civil forfeiture proceedings against Sheryl Sublet's home were punitive and therefore barred by the Fifth Amendment's prohibition on double jeopardy. This brief demonstrates how the case might be different, and double jeopardy might not apply, had the county sought criminal forfeiture of Sublet's home (as it successfully did for $50,000 of her money) or started civil forfeiture proceedings before criminal proceedings ended. But whatever can be said of other, harder cases,

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[1] *Available at* https://ij.org/report/policing-for-profit-3/. Additional research is available at https://ij.org/report/?pillar=civil-forfeiture.

forfeiture in this case—the attempted forfeiture of Sublet's home for one-time attempted drug possession—is punitive under *Ursery*.

Sublet's lawyers ably explain why Oregon's statutes, constitutional provisions, and unique history and traditions all show that civil forfeiture is generally punitive in character. *See* Claimant's Br. at 11–43. It follows that the Fifth Amendment's protections against successive prosecutions apply to most civil forfeitures in Oregon. *See id.* at 43–53, 58. Amicus likewise agrees with Sublet that *Ursery* is a candidate for reversal at the Supreme Court. *See id.* at 53–57. For their part, the county and its amici read *Ursery* for far more than it says. They seem to envision a constitution-free zone in which no civil forfeiture is ever punitive and double jeopardy protections never apply.

In response, Amicus offers both a narrower path and a paradigm shift. The narrow path is simply to recognize that even if some forfeitures are *not* punitive, other forfeitures *are* punitive. Punitiveness is not an on/off switch. *Ursery* in fact calls for a flexible and fact-specific assessment for determining when civil sanctions are punitive, regardless of what other purposes they might serve. Applying that approach, the subsequent civil forfeiture of Sublet's

home is barred by double jeopardy because, having already prosecuted her, and having criminally forfeited $50,000 of her money, the county does not get another bite at the apple now that it belatedly seeks to forfeit her home. The key distinction is the order in which the proceedings were brought. Even if double jeopardy generally does not apply where—like in *Ursery*—forfeiture proceedings conclude prior to criminal proceedings. By the same token, double jeopardy *does* apply to subsequent civil forfeiture proceedings after criminal proceedings have concluded.

Beyond this case, Amicus proposes a paradigm shift. Within our lifetimes, civil forfeiture has evolved from obscure admiralty procedure into an everyday law enforcement tool. This evolution cries out for judicial engagement. Granted, contemporary practice uses the same name—civil *in rem* forfeiture—but it is a different animal because today virtually every law enforcement agency uses civil forfeiture to raise revenue. Because the complexion of civil forfeiture has changed, so too should the approach taken by courts in determining the scope of constitutional protections for property rights.

Amicus therefore urges this Court to join those that have jettisoned the fiction that civil forfeiture is always civil in character and to announce in its place a real-world approach that accounts for how vastly civil forfeiture has changed. Applied to this case, this approach leads to one obvious conclusion: the county is punishing Sublet by taking her home. Only a lawyer could argue otherwise.

Argument

1. Forfeiture of Sublet's home would be punitive, even if other forfeitures would not be.

The Court of Appeals was right to conclude that citizen-led reforms and the resulting constitutional provisions make civil forfeiture in Oregon generally punitive. *See* Claimant's Br. at 11–43. Even if this Court disagrees, however, it should hold that forfeiture of Sublet's home is punitive and therefore barred by double jeopardy. In doing so, the Court should make clear that not all forfeitures have to be punitive for some forfeitures to be punitive. In these circumstances, the concept of punitiveness is hardly as binary as one might conclude based on reading the other side's briefs.

In *United States v. Ursery* itself, the Supreme Court noted that its decision "do[es] not hold that *in rem* civil forfeiture is *per se* exempt from the scope of the Double Jeopardy Clause." 518 US 267,

289 n.3, 116 S Ct 2135, 135 L Ed 2d 549 (1996). Rather, the only consequence of finding that a statutory framework is generally non-punitive is to "establish[] a presumption that it is not subject to double jeopardy." *Id.* (citing *United States v. One Assortment of 89 Firearms*, 465 US 354, 363, 104 S Ct 1099, 79 L Ed 2d 361 (1984)). This presumption can be overcome, the Court emphasized, "where the 'clearest proof' indicates that an *in rem* civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding . . . ." *Ursery*, 518 US at 289 n.3 (quoting *89 Firearms*, 465 US at 365). In that situation, "forfeiture may be subject to the Double Jeopardy Clause." *Id.*

State v. Selness does not undermine this view; it only underlines it. *Cf.* Petitioner's Br. at 1, 19. In *Selness*, this Court applied the "purpose and effect" test from *Ursery* to hold that a prior civil forfeiture action against a couple's home did not bar their subsequent criminal prosecution for drug crimes related to the marijuana operation there. 334 Or 515, 540–42, 54 P3d 1025 (2002). Like in *Ursery*, *Selness* involved a civil forfeiture case completed *before* criminal proceedings were filed and the issue was whether the prior civil proceedings barred subsequent criminal prosecution. *See*

id. at 540–41 (comparing the facts of *Ursery* and describing them as "not dissimilar to the facts in the present case").

The key distinction—so far ignored by the parties—is the sequence in which civil and criminal proceedings take place. *Ursery* and *Selness* involved criminal defendants arguing that their criminal cases were barred by double jeopardy due to prior civil forfeiture proceedings. *See Selness*, 334 Or at 540–41. The situation here is reversed. Sublet was charged and convicted *before* Yamhill County took any action against her home. The County obtained a guilty plea. It induced Sublet's agreement to criminally forfeit $50,000. Sublet was convicted. Only *then* did the County begin civil forfeiture proceedings. This case walks backward and sideways compared to *Ursery* and *Selness*.

This distinction is dispositive for purposes of this case. Whatever might be said of civil forfeitures generally, subsequent civil forfeiture of Sublet's home would be "so punitive either in purpose or effect as to be equivalent to a criminal proceeding." *Ursery*, 518 US at 289 n.3 (quotation omitted). Civil forfeiture of her home (unlike in *Ursery* or *Selness*) would amount to a second prosecution for the same conduct, in which the County seeks to take a second bite at the

apple, in effect adding additional civil sanctions to Sublet's admission of criminal guilt—sanctions the County did not seek until *after* prosecutors induced Sublet to plead guilty.

The County's backward approach is obviously aimed at punishment, not at remediating some social ill. Maybe the purpose of civil forfeiture proceedings is unclear prior to criminal proceedings. After all, the offender at that point is still on the street, potentially still using their property for criminal purposes. Prosecutors might, in these circumstances, seek civil forfeiture of property to prevent additional crimes or remediate harms from earlier ones. Warrants and injunctions are available to shut down illegal retail drug operations, meth labs, and the like. In such situations, prosecutors might quickly take advantage of the comparatively low burden of proof for civil actions, under which a preponderance of evidence would suffice before making any decisions about criminal charges. The statutes in Oregon, at the federal level, and in virtually every other state certainly allow for civil forfeiture without subsequent criminal prosecution (although Amicus urgently hopes to see that change). As a result, there is nothing preventing prosecutors from seeking civil forfeiture prior to, or entirely without criminal charges.

Yamhill County did the reverse. First, it completed criminal proceedings against Sublet—proceedings in which she was entitled to all the traditional constitutional protections for those charged with crimes—including the right to appointed counsel and proof beyond a reasonable doubt. Only then did prosecutors seek civil forfeiture of Sublet's home.

The very premise of the County's civil forfeiture action was that Sublet had pleaded guilty to attempting to receive illegal drugs at the house. But, unlike the manufacturing operations at issue in *Ursery* and *Selness*, Sublet's home has, at most, an attenuated connection to her crime. The home is nothing more than the location where Sublet tried to receive drugs—something that every drug user does at some point. It seems safe to conclude that Sublet's home was not immediately made the subject of civil action precisely because it never raised the kind of nuisance concerns one might expect from a grow operation, meth lab, or distribution hub. Additionally, Sublet is in prison. There is no suggestion that her home is, to this day, being used in connection to drugs, as there was prior to the criminal proceedings in *Ursery* and *Selness*.

By contrast, it isn't hard to imagine circumstances where the opposite would be true—where civil forfeiture of Sublet's home might arguably be purely remedial in nature. The homes in *Ursery* and *Selness* were used to manufacture drugs. Drug manufacturing is dangerous. Marijuana production involves noxious chemicals. It can cause electrical problems and related fires. Methamphetamine production can render a home uninhabitable and even toxic to surrounding life and property. The same rationale could apply to a house used for the large-scale storage or distribution of drugs.

None of this can be said of Sublet's home. She was not selling drugs from her doorstep. She was not operating a meth lab. The drugs in question never even arrived. It should come as no surprise that someone—by her own admission a drug addict—might attempt to receive drugs at their home. Presumably everyone who is addicted to drugs, at one time or another, has drugs at home. That fact hardly provides a freestanding justification for the forfeiture of all such homes.

When deciding cases similar this case—where the property owner isn't trying to prevent a criminal prosecution, only to enforce his or her rights in the context of civil forfeiture, and where small

amounts of drugs are at issue—the Supreme Court has consistently questioned the constitutionality of additional civil sanctions. *See, e.g.*, *Timbs v. Indiana*, 586 US ___, 139 S Ct 682, 686–87, 203 L Ed 2d 11 (2019) (holding that the Excessive Fines Clause could apply to bar civil forfeiture of a vehicle based on a minor dealing offense); *United States v. James Daniel Good Real Property*, 510 US 43, 48–63, 114 S Ct 492, 126 L Ed 2d 490 (1993) (holding that the attempted seizure of a home without prior notice to its owner violated procedural due process where the owner had previously pleaded guilty to minor drug possession in the home); *Austin v. United States*, 509 US 602, 622, 113 S Ct 2801, 125 L Ed 2d 488 (1993) (holding that the Excessive Fines Clause applied to the civil forfeiture of a business and mobile home from which small amounts of drugs were sold because the purpose was at least partly punitive). In sum, *Ursery* quite possible would have come out differently had the government done what the County did here—complete criminal proceedings only to turn around and begin civil forfeiture proceedings seeking additional sanctions equally available prior to or in conjunction with the criminal process.

* * *

Civil forfeiture in this case cannot fairly be called remedial or preventative. It is punitive. Amicus firmly agrees with the Court of Appeals and with Sublet: civil forfeiture in Oregon is always punitive and therefore subsequent civil forfeiture proceedings are always barred by double jeopardy. But, if this Court reverses on the basis that perhaps not all civil forfeitures are punitive, it should nevertheless hold that *this* forfeiture is punitive and, therefore, subsequent civil forfeiture proceedings are barred by the Fifth Amendment's double jeopardy protections.

2. Constitutional protections in forfeiture proceedings should not be determined based on labels alone.

Looking beyond this case, this Court should join the other high courts that have looked beyond "civil" and "remedial" labels in deciding when modern civil forfeiture practices warrant additional, traditionally criminal protections.

"[H]istorical forfeiture laws were narrower in most respects than modern ones." *Leonard v. Texas*, 580 US 1178, __, 137 S Ct 847, 849, 197 L Ed 2d 474 (2017) (Thomas, J., respecting the denial of certiorari). Until recently, the 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. 137 S Ct at 847–48. By

contrast, modern civil forfeiture is ubiquitous and extends to a broad variety of alleged criminal offenses. *Id.* Now, virtually every police officer has the power to seize a person's property for civil forfeiture, and doing so allows law enforcement to self-fund its operations.

"Partially as a result of this distinct legal regime, civil forfeiture has in recent decades become widespread and highly profitable." 137 S Ct at 848. It has also "led to egregious and well-chronicled abuses," which "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Id.*[2]

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[2] *See, e.g.*, *Policing for Profit* (n.1 above) at 20–21, 29, 38, available at https://ij.org/report/policing-for-profit-3/; Michael Sallah, *Stop and Seize*, WASH. POST (Sept. 6, 2014), available at https://wapo.st/3yk3uVG (series documenting forfeiture abuses); William Ramsey, *Taken*, GREENVILLE NEWS (Jan. 17, 2020), available at https://bit.ly/2RTwksl (series from USA Today Network documenting forfeiture abuses); *see also* Michael Levenson, *Former Shoe Shiner Wins Back Nearly $30,000 Seized by Federal Agents*, N.Y. TIMES (Oct. 31, 2021), available at https://nyti.ms/3NkNoiK (federal agents took $28,180 in cash and then returned it after a "yearlong ordeal"); Meagan Flynn, *She Saved Thousands to Open a Medical Clinic in Nigeria. U.S. Customs Took All of It at the Airport.*, WASH. POST (May 9, 2018), available at https://wapo.st/2wbaqTv (federal agents took $41,000 that was intended to open a medical clinic in Nigeria); German Lopez, *Wyoming Police Took an Innocent Man's $91,800. After a Vox Report, He Will Get It Back.*, VOX (Dec. 1, 2017), available at https://bit.ly/3s1HGss (police seized over $91,000 from a touring musician who was planning to use the money to

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In light of these departures from historic practice, other state high courts have reevaluated their state's civil forfeiture regimes. *See, e.g.*, *State v. $2,435 in U.S. Currency*, 194 NE3d 1227 (Ind. App. 2022), *rev'd* __ NE3d ___ (Ind. Oct. 31, 2023) (holding that civil jury trials must be provided in civil forfeiture cases);[3] *State v. Timbs*, 134 N.E.3d 12, 24–39 (Ind. 2019) (holding that the Excessive Fines Clause barred the forfeiture of a vehicle twice used for the delivery of drugs); *Cty. of Nassau v. Canavan*, 802 NE2d 616, 622 (N.Y. 2003) (striking down civil forfeiture procedures on their face because they allowed for the punishment of innocent people).

Additionally, the Supreme Court is poised to weigh in again on the constitutionality of modern civil forfeiture practices sometime before the end of the current Term. *See Culley v. Marshall*, No. 22-585 (U.S. argued Oct. 30, 2023);[4] *see also Ingram v. Wayne Cty.*, 81 F4th 603, 620 (6th Cir. 2023) (holding that vehicle owners were

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purchase a music studio); Christopher Ingraham, *How Police Took $53,000 from a Christian Band, an Orphanage and a Church*, WASH. POST (Apr. 25, 2016), available at https://wapo.st/2MVVZKn (police seized $53,000 from the tour manager for a Christian band, which was intended for an orphanage in Thailand).

[3] The Indiana Supreme Court's slip opinion is available at https://public.courts.in.gov/Appellate/Document?id=b61b41d1-5e32-4053-bfc8-6cf2c17c071b.

[4] Oral argument available at www.oyez.org/cases/2023/22-585.

entitled to post-seizure hearings within 14 days of seizure in part because it seemed "more interested in the money than in remedying a public nuisance"); *id.* at 623 (Thapar, J. concurring) (observing that "the County's scheme is simply a money-making venture—one most often used to extort money from those who can least afford it").

The trend line is clear. Courts are beginning to appreciate how both the scope, intensity, and frequency of civil forfeiture activity have increased in such a way that new boundaries are needed while old boundaries bear repeating. This case provides a rare opportunity to weigh in on that national debate. In doing so, this Court should come down on the side of curtailing civil forfeiture and protecting property rights using a real-world approach.

Conclusion

The judgment of the Court of Appeals should be affirmed based on the reasoning below: All civil forfeitures in Oregon are punitive. However, if this Court disagrees, it should affirm on the alternative ground that civil forfeiture of Sublet's home is punitive, regardless of whether other forfeitures are somehow non-punitive.

Respectfully Submitted,

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