

No. 08-351

In The
Supreme Court of the United States

ANITA ALVAREZ
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ,
TYHESHA BRUNSTON, MICHELLE WALDO,
KIRK YUNKER and TONY WILLIAMS,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

RESPONDENTS' BRIEF

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QUESTION PRESENTED

Whether Due Process requires at the very least a prompt, informal check against self-interested decisions that result in the impoundment of valuable personal property for months at a time, without review by an objective decision maker?

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STATEMENT OF THE CASE

The Illinois Drug Asset Forfeiture Procedure Act (DAFPA, 725 ILCS 150\1 et seq.) created a forfeiture scheme that gives financial incentives to municipal police departments and local prosecutors to seize and impound property for forfeiture. 720 ILCS 570\505(g)(1)-(3). The owners of the property in question are sometimes the target of a criminal prosecution, but the DAFPA imposes the same procedures on innocent owners, including most of the Respondents in this case. In all forfeiture cases, 65 percent of the forfeited funds go to the law enforcement agency that seized the property; 25 percent go to the prosecutor's office; and 10 percent are assessed as court costs. *Id.*

Despite the pecuniary incentives given to police and prosecutors, the DAFPA fails to provide private property owners with an opportunity for a hearing before an objective decision maker for at least six months. The time table is as follows. The DAFPA initially allows the Chicago Police Department fifty-two days after the seizure of property to decide whether to recommend that Petitioner file a forfeiture action. 725 ILCS 150\5. Petitioner then has an additional forty-five days to review the forfeiture recommendation. 725 ILCS 150\6(A). Only after the Petitioner decides to file for forfeiture is notice sent to the owner, who then has forty-five days to file a verified claim and post a cost bond. 725 ILCS 150\6(C)(2). The cost bond is set at 10 percent of the value assigned to the property by Petitioner or \$100

dollars, whichever is greater. *Id.* Posting bond does not result in release of the seized property and functions, in effect, as a filing fee. 725 ILCS 150\6(C)(3).

After a property owner posts the cost bond, Petitioner Alvarez still has another forty-five days to “institute judicial in rem forfeiture proceedings.” 725 ILCS 150\6(C)(2). These benchmark steps allow one hundred and eighty-seven days (52+45+45+45=187) to elapse between the initial seizure and filing of the forfeiture complaint. 725 ILCS 150\9(C)(2). During that time criminal court judges, who preside over related criminal proceedings, may not order the return of the property. 725 ILCS 150\9(J). Nor may owners bring an action to recover the property by way of replevin. 720 ILCS 570\505(d). After a forfeiture action is filed by Petitioner, another sixty days may pass for “good cause shown” (725 ILCS 150\9(F)) and, after that, the forfeiture trial may be stayed indefinitely, when a related criminal proceeding is pending. 725 ILCS 150\9(J).

The DAFPA preempts most attempts to secure the return of impounded property during the first one hundred and eighty-seven days before the forfeiture complaint is filed. 725 ILCS 150\9; 720 ILCS 570\505(d). The Act allows for interim remedies similar to those in the federal system, but leaves application of those interim remedies to the discretion of government officials, including Petitioner. 725 ILCS 150\2. In the federal system, during the first one hundred and eighty-seven days, property owners

(even those who are not subject to prosecution) can: (1) post bond to secure the return of their property; (2) win the prompt return of their property based on a showing of hardship; (3) pursue published remission and mitigation procedures; (4) file a motion pursuant to Federal Rule 41(g) for return of property; and (5) file a common law motion to compel the government to initiate the forfeiture action. *See United States v. Eight Thousand, Eight Hundred and Fifty Dollars* (\$8,850), 401 U.S. 555 (1983) and 18 U.S.C. 983(f)(1). As the DAFPA was applied to Respondents, none of these interim federal remedies were available. (J.A. 32a at 16, 21-23).

Three of the Respondents (Smith, Perez, and Brunston) had their cars seized by Chicago police officers acting without warrants, but pursuant to the DAFPA. (J.A. 32a, 33a at 24-30). None of these Respondents was charged with a criminal offense. *Id.* Each of them was forced to wait more than a year without a judicial hearing and without the opportunity to secure the release of their property by posting a bond. *Id.* The other Respondents (Yunker, Waldo, and Williams) had cash seized. (J.A. 32a, 33a at 28-30). Their money was held for months without judicial review of the lawfulness of the original seizure or of its continued detention. *Id.* All of the Respondents had a statutory right to assert an innocent owner defense,¹ which was deferred pending

¹ Illinois law provides that private property may not be forfeited if owners show that they lack actual or constructive
(Continued on following page)

the filing of the forfeiture action and then stayed for months after that. (J.A. 32a-33a at 24-31, 33).

Respondents filed their Section 1983 (42 U.S.C. 1983) Complaint against the Cook County State's Attorney, the City of Chicago, and the Superintendent of the Chicago Police Department, and Respondents alleged that they were entitled to a prompt hearing or the opportunity to secure the release of their cars by posting bond. (J.A. 31a-33a). Respondents requested class certification and an injunction, but they did not demand damages or seek dismissal of the then pending state forfeiture cases. *Id.* Before discovery commenced, Petitioner and the City of Chicago moved to dismiss based on res judicata, collateral estoppel, and *Jones v. Takaki*, 38 F.3d 321, 324, 325 (7th Cir. 1994); (J.A. 41a-56a and 66a, 67a) *Jones* held that the only process that is due is the forfeiture trial. (J.A. 67a at 2).

In their Response to the motions to dismiss, Respondents acknowledged that *Jones* was the then controlling precedent, but cited *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) as casting doubt on the continued validity of *Jones*. (J.A. 75a). Respondents maintained that *Mathews v. Eldridge*, 424 U.S. 319 (1976) set out the correct due process standard, which entitled them to a prompt, post-seizure hearing or the opportunity to secure the release of their cars by

knowledge that their property was used in the commission of an offense. 725 ILCS 150\8(A).

posting bond. (J.A. 75a). Respondents did not ask the court to declare the DAFPA unconstitutional on its face. (J.A. 75a, at para. 3). The District Court granted the motions to dismiss based solely on *Jones*. (J.A. 27a at 38).

Respondents then filed a timely Notice of Appeal, after which the case proceeded to briefing and argument before the Seventh Circuit. (Pet. App., 1-11). The primary issues before the Seventh Circuit were whether *Mathews* or *Barker v. Wingo*, 407 U.S. 514 (1972) set the applicable due process standard and whether the forfeiture trial was all the process that was owed to property owners under the Due Process Clause. (Pet. App., at 5-10). The Seventh Circuit overruled *Jones*, and held that *Mathews* rather than *Barker* set the due process standard, so the forfeiture trial was not the only process due to the Respondents. (Pet. App., at 10, 11).

The Seventh Circuit explained that, “In short, our fresh look at this issue causes us to conclude that given the length of time . . . between the seizure of property and the opportunity for an owner to contest the seizure under DAFPA, some sort of mechanism to test the validity of the retention of the property is required.” (Pet. App., at 10). The court noted that the hearing “should be prompt but need not be formal,” and left “it to the district court to determine the notice requirement and what a claimant must do to activate the process.” *Id.* The remand order did not “envision lengthy evidentiary battles which would duplicate the final forfeiture hearing.” *Id.* The details

were left to the district court to consider “whether a bond or order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending.” (Pet. App., at 10).

The case was then remanded for discovery and to allow the District Court to “fashion appropriate relief consistent with this opinion.” (Pet. App., at 10). The Seventh Circuit did not set a deadline for post-seizure hearings nor did that Court attempt to describe the scope of the hearing, other than as informal. (Pet. App., at 10,11). Because *Smith* overruled *Jones*, the *Smith* panel circulated its opinion among all active members of the Seventh Circuit, except Judge Rovner who did not participate. (Pet. App., at 11). None of the active members of the Seventh Circuit voted to rehear the matter en banc. *Id.*

Petitioner then filed a petition with this Court and identified the “Question Presented” as whether the Due Process Clause requires a “probable cause” hearing in advance of a forfeiture trial and, if so, whether due process is measured by *Mathews* or *Barker*. The Seventh Circuit, however, did not order a “probable cause” hearing in advance of the forfeiture trial. (Pet. App., at 10,11).



SUMMARY OF THE ARGUMENT

Nemo iudex in sua causa – No one shall be a judge in his own cause. Fundamental principles of law that long antedate our constitutional democracy

regard protection against official bias as a simple, but necessary precaution. Unchecked self-interest breeds government overreaching, produces unnecessary constitutional injuries, and destroys faith in the government. Our constitutional democracy correctly presumes that self-interest cannot go unchecked. *The Federalist No. 51*. Every branch of government is checked by another, and every reasonable precaution is taken to avoid self-interested decision making. The most common and effective check against government overreaching and abuse of power is a hearing before a disinterested, objective decision maker, who is obliged to hear both sides of a case before making a decision. *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972) Without this essential check, citizens suffer unnecessary harm, and the public loses confidence in a system that stacks the deck.

Despite these principles and despite their powerful pecuniary interest, the police and prosecutor served as the sole judges over Respondents' private property for more than a year. Indeed, as a result of Petitioner's application of Illinois's asset forfeiture scheme, Petitioner held Respondents' (Smith, Brunston, and Perez) primary means of transportation for more than a year without any check on the validity of the impoundment.

Forfeiture proceeds add millions of dollars annually to the Petitioner's budgetary coffers. The City of Chicago (City), whose officers seize property for forfeiture, takes an even larger bite of the forfeiture pie. The Chicago Police Department

recently boasted that it netted more than \$13.5 million dollars in cash from asset forfeitures in 2008, a \$7 million dollar increase from the previous year.² In difficult economic times when other revenue sources dry up, forfeiture revenues are needed to fill holes in municipal budgets.

Petitioner blinks at this indisputable fact and says, “Trust me, I won’t make mistakes, and the officers who seize property will not overreach.” But “Trust me” is a feeble check; our Constitution demands far more. *Harmelin v. Michigan*, 501 U.S. 957, 979 n. 9 (1991) (Scalia, J.).

The dangers of bias, moreover, are compounded by the protracted delays that are routinely inflicted on innocent property owners. To protect against these risks, objective review of all decisions must occur promptly, especially official decisions that are infected with the risk of bias. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

Interim hearings or the opportunity to post bond supply essential constitutional checks on the Petitioner’s power to impound private property for months, perhaps years. These checks are needed all the more when the agencies that impound the property act out of their own self-interest. Our

² Press Release, Chicago Police Dep’t, *Chicago Committed to Reducing Violent Crime and Strengthening Community Partnerships in 2009* (Jan. 16, 2009), available at <http://www.chicagopolice.org/MailingList/PressAttachment/2008crimestats.pdf>.

founding fathers were keenly aware that, “[t]he great end, for which men entered into society, was to secure their property.” *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P.1765) as quoted in *Good*, 510 U.S. at 81 (Thomas, J., concurring in part and dissenting in part). Personal property, however, is not secure, when local police officers and a state prosecutor, with significant pecuniary interests in the forfeiture of private property, can seize and hold that property for months on end.

At a minimum due process means the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Whenever possible that protection should be conferred *before* the deprivation occurs. Only in “extraordinary situations” may the hearing be postponed. And even then, due process still provides that a prompt, post-seizure hearing must be held. *Good*, 510 U.S. at 53.

For decades the Court has applied a cost-benefit analysis, now known as the *Mathews* standard, to determine when and how citizens will have the opportunity to “speak up” in their defense, and when and how an otherwise unchecked government action will be reviewed by an objective decision maker. *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* offers a time-tested, due process methodology that directs lower courts to balance all the relevant factors to reach a clear rule that then can be uniformly applied by lower courts across the country. It is no wonder that the *Mathews* framework is now standard

in evaluating the procedures required in all sorts of settings, whether they deal with the seizure of private property or the operation of complex schemes of modern administrative law. *See e.g., Good*, 510 U.S. at 52-62; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Evidence of the power of the *Mathews* formulation is apparent from the key role it played when the Court last addressed this issue in the forfeiture context. The Court held that citizens are constitutionally entitled to an informal hearing that precedes the forfeiture trial. *Good*, 510 U.S. at 62. That conclusion seems inescapable given that crowded dockets usually delay civil trials for years. An interim hearing avoids the harm that results from delay between seizure and trial. Without an interim hearing, the “meaningful time” component of all due process equations goes unsatisfied. As a result, this Court has made it crystal clear that: (1) *Mathews* applies to all types of property interests; (2) *Mathews* applies to forfeiture proceedings; and (3) a forfeiture trial is not all the process that is due. *Id.*

That holding finds additional support in the common law and in the early colonial statutes, which allowed for a right to compel a prompt forfeiture hearing and the opportunity to post bond. *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1 (1817). The need for these protections is even more acute now that local police departments and prosecutors have enormous pecuniary interests in the outcome of all forfeiture proceedings.

The Court's decisions in *United States v. \$8,850*, 401 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986) did not cavalierly brush aside the obvious and compelling need for prompt, objective review to check self-interested decisions. Those two cases raised issues that are vastly different from the one now before the Court. As Judge Sotomayor made plain in *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), and the Seventh Circuit understood here, *\$8,850* and *Von Neumann* did not address whether Due Process requires some interim mechanism to promptly test the validity of a seizure. In *\$8,850* and *Von Neumann*, the Court's focus was carefully limited to the claimants' demands that the Court dismiss entirely the forfeiture complaint, even though both claimants were guilty of criminal conduct and had ready access to effective interim remedies. Because the issue was dismissal of the forfeiture charges, the Court chose *Barker* as the most apt standard of review. Respondents, on the other hand, never requested dismissal of the forfeiture charges. Their only demand – consistent with their constitutional rights – was for an opportunity to state their cases before an objective decision maker promptly after their property was impounded.

Respondents' case does not mount a collateral attack on the federal forfeiture scheme, nor do Respondents question the government's right to impound and forfeit property. Respondents only insist they are entitled to a prompt, interim hearing before an objective decision maker to check against potential

bias and overreaching. On that point, which is the only one before the Court, the weakness of *Barker's* inadequate methodology is exposed by its refusal to allow for any interim relief. *Barker* only contemplates dismissal of the forfeiture charges. *Mathews* does not place the Court in this straightjacket because *Mathews* opens up the opportunity for an interim hearing that does not fixate on the ultimate outcome of the case.

Mathews, of course, can only be applied after first learning the relevant facts, which are still unknown. To fill that void, the Seventh Circuit wisely remanded the case to the District Court to develop the applicable standards within the *Mathews* framework.

The Seventh Circuit's remand order was a cautious and incremental step. The federal government, the City of New York, and the City of Chicago supply working models that prove prompt, interim hearings are feasible. They give confidence to the view that interim hearings or a bond posting procedure can work as a substitute for indefinite impoundment. Nonetheless, the Seventh Circuit left these matters for further development, saying only that the hearing "should be prompt but need not be formal." Thereafter it left "it to the district court to determine the notice requirement and what a claimant must do to activate the process. . . ." *Id.* The Seventh Circuit did not "envision lengthy evidentiary battles which would duplicate the final forfeiture hearing." (Pet. App., at 10). Details were properly left to the district court to consider "whether a bond or order can be

fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending.” *Id.*

The remedy the Seventh Circuit generally described is not an expedited forfeiture trial or a final ruling of any sort. To the extent that court described the interim hearing, the court envisioned an early opportunity for innocent owners to set out the equities that favored a temporary release of their cars, perhaps after posting a security bond, pending a final forfeiture trial. The court did not order interim “probable cause” hearings. Because a timely hearing is both feasible and constitutionally necessary, the Court should affirm, and the case should be sent back for full development of the facts.



ARGUMENT

The Seventh Circuit Correctly Held That Due Process Requires A Prompt And Independent Check Against The Self-Interested Decisions By Government Officials That Result In The Impoundment Of Valuable Personal Property For Months At A Time.

Respondents’ property was seized without warrants and then detained by Petitioner for many months, in some cases more than a year, without providing an opportunity for Respondents to either post bond or tell their side of the story to a neutral decision maker. (J.A. 32a, 33a). In the face of this manifest injustice, the Petitioner blithely claims the

only process that is owed to Respondents is the forfeiture trial, perhaps after a year or more has passed. (Pet. Brf. 29-32). That harsh result cannot be correct. A favorable verdict that comes a year after a car is impounded cannot “cure the temporary deprivation that an earlier hearing might have prevented.” *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991). The Seventh Circuit, therefore, was correct in holding that due process entitles Respondents to some form of prompt, interim process, and the court was correct in holding that *Mathews v. Eldridge*, 424 U.S. 319 (1976), not the earlier case of *Barker v. Wingo*, 407 U.S. 514 (1972), offers the due process framework for deciding when that interim hearing should occur and what the scope of the hearing will be.

I. Due Process Is A Constitutionally Conferred Right That Demands A Hearing At A “Meaningful Time.” A Delay Of Six Months Or More Is Not A Meaningful Time.

A check on the government’s power to impound property is essential because “Individual freedom finds tangible expression in property rights.” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61, 81 (1993). The founders of our government experienced firsthand the “hated writs of assistance” – that were “denounced as the worst instrument of arbitrary power . . . because they placed the liberty of every man in the hands of every petty officer.” *Stanford v. Texas*, 379 U.S. 476, 481, 482 (1965). The

same concerns with government abuse animate the Due Process Clause of the Fifth and Fourteenth Amendments, which are intended to secure private property against the ravages of self-interested or mistaken government officials. For that reason due process “is conferred, not by legislative grace, but by constitutional guarantee.” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). Due process does not accept protracted constitutional harm, when a prompt hearing can alleviate the harm. Instead, due process demands a hearing “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

With rare exceptions, the “meaningful time” for notice and an opportunity to be heard is *before* the deprivation occurs. *Good*, 510 U.S. at 53 (1993). In “extraordinary situations,” the government’s interest in prompt seizure “justifies postponing the hearing until after the event.” *Good*, 510 U.S. at 53 citing *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). However, when those exceptional circumstances occur, a prompt, post-deprivation hearing is essential to offset the additional risks that are necessarily created by government action. *See e.g., C.I.R. v. Shapiro*, 424 U.S. 614, 629 (1976). “For 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.

A prompt hearing is especially necessary when the action under review is, or could be, shrouded in self-interest. Petitioner is not a neutral decision

maker (*Tumey v. Ohio*, 273 U.S. 510, 522 (1927)), and a police officer's assessment of probable cause is not infallible. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Petitioner's substantial pecuniary interest raises doubt about her objectivity. *Ward v. Monroeville*, 409 U.S. 57, 60 (1972). A financial interest "may bring irrelevant or impermissible factors into the prosecutorial decision." *Marshall v. Jericho*, 446 U.S. 238, 249 (1980). Self-interest skews decision making, a peril that is best checked by prompt, objective review. *Harmelin v. Michigan*, 501 U.S. 957, 979 n. 9 (1991) (Scalia, J.).

Nor does it make sense to defer review of a police officer's assessment of probable cause beyond the time when it is possible to do so. *Gerstein*, 420 U.S. at 112-114. Police officers are not the final arbiters of probable cause, even when they, and their departments, have no pecuniary stake. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). This Court should not ignore the obvious – the Chicago Police Department has an enormous financial interest in pursuing forfeitures in times of ever tightening municipal belts. On-the-street decisions of police officers engaged "in the often competitive enterprise of ferreting out crime" (*Johnson v. United States*, 333 U.S. 10, 14 (1948)) are trusted only long enough to allow for independent judicial review, even when the department is not taking a 65 percent cut of the forfeiture action.

Respondents do not claim that their property interests must be considered on the same expedited

schedule as a liberty interest. Nor do Respondents challenge the government's right to lawfully seize property and aggressively pursue forfeiture. However, once Respondents' property was seized, a prompt, hearing was a necessary and a constitutionally required check. When the hearing will be held and what the scope of the hearing will be are the only questions now up for review. Those questions are best answered by applying the same due process methodology the Court has employed since *Mathews* was decided in 1976.

II. *Mathews* Is A Time-Tested And Pragmatic Methodology For Assessing What Process Is Due Between Seizure and Trial.

1. *Mathews* Applies to All Types of Property Interests.

Mathews is, and has been for decades, the Court's preferred due process methodology whenever a right to private property clashes with a government interest. The Court has applied *Mathews*, or a *Mathews*-like process, to the impoundment of wages, (*Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969)), license suspension proceedings (*Bell v. Burson*, 402 U.S. 535, 539 (1971)), filing fees in divorce proceedings (*Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)), termination of public assistance benefits (*Goldberg v. Kelly*, 397 U.S. 254, 263-271 (1970)), pre-judgment attachment of household appliances (*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)),

prejudgment attachment of personal property (*Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)), termination of unemployment benefits (*Fusari v. Steinberg*, 419 U.S. 379, 383, 389 (1975)), termination of public utility service (*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978)), temporary suspension of an employee for-cause (*Barry v. Barchi*, 443 U.S. 55, 66-67 (1979)), termination of a public employee with a for-cause employment right (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)), a banker's right to a post-suspension hearing (*Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230 (1988)), prejudgment attachment of real property (*Connecticut v. Doehr*, 501 U.S. 1, 19, 20 (1991)), a public employee's right to pre-suspension hearing (*Gilbert v. Homar*, 520 U.S. 924 (1997)), and seizure of a car for parking violations. *City of Los Angeles v. David*, 538 U.S. 715 (2003).

The property interests in these cases vary by context, so too the competing government interest and the timing and scope of judicial relief. But in every case *Mathews* guided the Court's inquiry. In every case, the Court held that pre-seizure notice and a hearing is necessary, unless exigent circumstances outweighed the citizen's right to uninterrupted enjoyment of her property. In those exceptional circumstances where pre-seizure notice was not feasible, the Court consistently held that either a prompt, post-seizure hearing or the opportunity to post bond was constitutionally required.

In *North Georgia Finishing*, for example, the Court struck down a statute that permitted prejudgment, impoundment of a bank account because the account was “put totally beyond use during the pendency of the litigation.” *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 608 (1975). The Court reached the same conclusion in *Sniadach*, where a state statute that allowed wage impoundments without an interim hearing was deemed unconstitutional. *Sniadach*, 395 U.S. at 338-340. The wage earner had to wait for the trial on the merits, which meant that “in the interim the wage earner [was] deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have . . .” *Sniadach*, 395 U.S. at 339. In *North Georgia Finishing* and *Sniadach*, the Court applied a *Mathews*-like due process analysis and held that a long delayed trial is not the only process that is due, which is all the Seventh Circuit held in Respondents’ case.

Trial delays are still a serious problem everywhere. “Given the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until months after the seizure.” *Good*, 510 U.S. at 56. The Court continues to address those delays by applying *Mathews*, and by requiring interim hearings. See e.g., *Barry v. Barchi*, 443 U.S. 55, 60 (1979); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 536-538 (1985); *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 241, 242 (1988); *Connecticut v. Doehr*, 501 U.S. 1, 19,

20 (1991); *City of Los Angeles v. David*, 538 U.S. 715, 716, 717 (2003). Whether the property interest is in real estate, statutorily created benefits, or cash, *Mathews* controls, because, as the Court has explained, “[w]e are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause.” *North Georgia Finishing*, 419 U.S. at 608.

Mathews has withstood the test of time, and its methodology is particularly apt to the seizure of cars. Circuit courts across the country already apply *Mathews* to car impoundment cases similar to the scheme at issue here. *See e.g.*, *Coleman v. Watt*, 40 F. 3d 255, 261 (8th Cir. 1994); *Goichman v. Rhueban Motors Inc.*, 682 F. 2d 1320, 1323-24 (9th Cir. 1982); *Breath v. Cronvich*, 729 F. 2d 1006, 1011 (5th Cir. 1984); *De Franks v. Mayor of Ocean City*, 777 F. 2d 185 (4th Cir. 1985). In *Krimstock v. Kelly*, 306 F. 3d 40 (2nd Cir. 2002), the Second Circuit applied *Mathews* after an exhaustive review of the Court’s due process concerns in car impoundments settings. Consistent with Respondent’s position, it held that a prompt, post-seizure hearing was necessary and feasible. *Krimstock*, 306 F. 3d at 58-60. A predictable process of evaluation, like an established precedent, “fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Mathews* meets that well-established standard.

2. *Mathews* Applies To Forfeiture Proceedings.

Mathews also establishes the Court's due process methodology in forfeiture cases and calls for interim remedies. In *Good*, the Court considered what due process standard governed the seizure of real property. *Good*, 510 U.S. at 48-54. The Court sought to identify the most apt textual source to guide its inquiry. The Court chose the Due Process Clause, as construed in *Mathews*, over the Fourth Amendment, even though the property was seized pursuant to a warrant. *Id.* Neither *Barker* nor the Sixth Amendment's Speedy Trial Clause entered the Court's text-oriented analysis. *Good*, 510 U.S. at 46-55. Indeed, even if the Speedy Trial Clause were implicated, "the proper question is not which Amendment controls but whether either Amendment [was] violated." *Good*, 510 U.S. at 50.³

Furthermore, Respondents' request for a prompt, post-seizure hearing is more compelling than was the case for a pre-seizure notice and a hearing in *Good*, where eighty nine pounds of marijuana, vials of hashish, and drug paraphernalia were found on the property. *Good*, 510 U.S. at 46-48. The owner of the

³ Fourth Amendment jurisprudence also requires a prompt, post-seizure hearing. See *Gerstein v. Pugh*, 420 U.S. 103 (1975). The Women's Criminal Defense Bar Association develops this point in greater detail in its amicus brief.

property was charged and eventually convicted. *Id.* After his conviction, a warrant was issued authorizing seizure of the land for forfeiture. *Id.* The property was seized and the rental income was held by the government pending the outcome of the forfeiture proceeding. *Id.* The owner claimed he had a constitutional right to notice and a pre-seizure hearing, and the Court agreed. *Good*, 510 U.S. at 62. The Court held that in addition to the warrant authorizing seizure of property and in addition to the forfeiture trial, the owner was entitled to pre-seizure notice and an opportunity to be heard. *Id.*

Respondents (Smith, Bruntson, and Perez) are not charged with, let alone convicted of, any criminal offenses. Their property was not seized pursuant to a warrant, and they are not seeking a pre-seizure hearing. In all of these respects, their case is superior to the property owner's right to a pre-seizure hearing in *Good*. The only significant difference is that real property was seized in *Good*, but personal property was seized from Respondents. However, the type of property at stake only affects how the *Mathews* factors play out, not the antecedent question of whether the *Mathews* framework applies. The Solicitor General's brief makes precisely this point when it explains that *Mathews* "is fully consistent with . . . the Court's traditional analysis. . . . [of] the timing of proceedings to forfeit personal property." (S.G. Brf., at 9).

The Solicitor General's point is on target. Once personal property is in police custody, the due process

analysis tracks that for real property in *Good*. After the police impound personal property, “the reasons that justify dispensing with the magistrate’s neutral judgment evaporate.” *Gerstein*, 420 U.S. at 114. At that point, “the State’s reasons for taking summary action (decrease) . . . (while the) need for a neutral determination of probable cause increases significantly.” *Id.* Informal judicial or administrative review is feasible and necessary, particularly when the trial itself is likely many months away. *Krimstock*, 306 F. 3d at 44-48.

Nonetheless, Petitioner and amici cite *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) and maintain that the forfeiture trial is all the process that is due following a forfeiture related impoundment. However, *Calero-Toledo*, which involved the government’s seizure of a yacht, merely represents an example of an “extraordinary situation” that justifies postponing notice and a hearing until after the seizure. The Court did not address the Constitutional right to prompt post-seizure notice and hearing. *Id.* at 679, n.15 (“No challenge [was] made to the District Court’s determining that the form of post-seizure notice satisfied due process requirements.”) And the Court’s justification for dispensing with the usual pre-seizure hearing, the impracticality of such a hearing, does not apply after the government has seized control of the property.

Only post-seizure process is at issue now, and the post-seizure process that was offered in *Calero-Toledo* far exceeded what was offered to Respondents, who

also are entitled to raise a statutory innocent owner defense that was not present in *Calero-Toledo*. The statutory, post-seizure process in *Calero-Toledo* required the government to notify owners within 10 days of the seizure. *Calero-Toledo*, 416 U.S. at 668, n.2, citing P.R. Laws Ann., Title 34, §1722. An owner then had the right to file a complaint within 15 days, and the case was to be “conducted as in an ordinary civil action.” *Id.* Once the complaint was filed, the owner had the right to post bond and secure the return of the seized property pending the outcome of the trial. *Calero-Toledo*, 416 U.S. at 668, n.2. *See also United States v. Mack*, 295 U.S. 480, 483 (1935) – Prohibition Act forfeiture statute allowed property owners to post bond and secure the return of their property pending trial. Thus, post-seizure process in *Calero-Toledo* is consistent with Respondents’ request for similar post-seizure remedies, but *Calero-Toledo* is irreconcilable with Petitioner’s assertion that the forfeiture trial, whenever it is finally held, is all the process that is due.

Nor are Petitioner and amici correct when they imply that Respondents’ case is governed by *Bennis v. Michigan*, 516 U.S. 442 (1996). The issue in *Bennis* was whether the defendant’s wife, a co-owner of a car, that was unquestionably used to commit a crime, was entitled to an innocent owner defense as a matter of constitutional law. *Bennis*, 516 U.S. at 445, 446. The issue in *Bennis* was whether as a matter of substantive due process the innocent co-owner’s interest in the car was forfeitable. *Id.* The Court held

that substantive due process did not protect the co-owner's interest in the car, but the court did not address the issue of post-impoundment, procedural due process. *Id.*

Illinois, like at least 48 other states, has an innocent owner defense as a matter of state law.⁴

⁴ Alabama (Ala. Code 1975 § 20-2-93); Alaska (AS § 17.30.116.); Arizona (A.R.S. § 6-1043); Arkansas (A.C.A. § 5-64-505); California (West's Ann. Cal. Health & Safety Code § 11470); Colorado (C.R.S.A. § 16-13-504); Connecticut (C.G.S.A. § 54-36h); Delaware (11 Del. C. § 2323); Florida (Florida Contraband Forfeiture Act, West's F.S.A. § 932.701); Georgia (Ga. Code Ann., § 16-13-49); Hawaii (HRS § 712A-5); Idaho (Idaho Code Ann. § 37-2744); Illinois (725 ILCS 150\1 et seq.); Indiana (IC 34-24-1-1); Iowa (I.C.A. § 809A.5); Kansas (K.S.A. 60-4101 et seq.); Kentucky (KRS § 218A.415); Louisiana (LSA-R.S. 40:2608); Maine (15 M.R.S.A. § 5822); Maryland (MD Code, Criminal Procedure, § 12-201 et seq.); Massachusetts (M.G.L.A. 94C § 47); Michigan (M.C.L.A. 333.7521); Minnesota (M.S.A. § 609.5314); Mississippi (Miss. Code Ann. § 41-29-153.); Missouri (V.A.M.S. 513.607(6)(2)); Montana (MT ST 44-12-101 through -206); Nebraska (Neb. Rev. Stat. § 28-431); Nevada (Nev. Rev. Stat. 179.1171.); New Hampshire (N.H. Rev. Stat. § 318-B:17-b); New Mexico (N.M. Stat. Ann. § 30-31-34 et seq.); New York (delegated to municipal authority, *e.g.*, 38 RCNY § 12-32); North Carolina (NCGSA § 90-112); Ohio (Ohio Rev. Code Ann. § 2933.43); Oklahoma (63 Okl. St. Ann. § 2-506); Oregon (OR Const. Art. XV, § 10); Pennsylvania (42 Pa. C.S.A. § 6801); Rhode Island (R.I. Gen. Laws 1956 § 21-28-5.042); South Carolina (S.C. Code Ann. § 44-53-530); South Dakota (N.D.C.C. § 19-03.1-36); Tennessee (T.C.A. § 40-33-206); Texas (Vernon's Ann. Texas C.C.P. Art. 59.02); Utah (U.C.A. 1953 § 24-1-2); Vermont (VT ST T. 18 § 4241); Virginia (Va. Code Ann. § 19.2-386); Washington (Wash. Rev. Code 69.50.505); West Virginia (W. Va. Code, § 60A-7-703); Wisconsin (W.S.A. 961.555); Wyoming (W.S. 1977 § 35-1049).

Private property owners who are unaware of an illicit use of their property cannot be divested of their property under Illinois law. 725 ILCS 150\8(A). Respondents (Smith, Perez, and Brunston) are innocent owners who had no reason to believe that their property was used for illegal purposes. As such, Petitioner and her amici do not question Respondents' interest in the seized property or their right to contest the forfeiture on grounds that were not present in *Bennis*. In any event, the right to procedural due process is "absolute," regardless of any substantive due process right. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Procedural due process focuses on the opportunity "to protect persons . . . from mistaken or unjustified deprivations," rather than the ultimate outcome of the hearing. *Id.* Respondents raise a procedural due process claim that asks merely for an opportunity to state their cases at a meaningful time, an issue that was never considered in *Bennis*.

Furthermore, neither interim remedies nor the lawfulness of the impoundment were at issue in *Bennis*, and the innocent co-owner (wife) was the spouse of the driver, so the driver's right to use the car was not disputed. Respondents, on the other hand, have a statutory right to an innocent owner defense, the drivers of their cars were not co-owners or spouses, and Respondents maintain that the original seizure was unlawful as to them. An exigent circumstance might have justified the decision to seize and impound the car, at first, but once the exigency

was removed and the car was impounded, Respondents were entitled to a hearing to prove the officer's spontaneous judgments were mistaken and the impoundment was unlawful. *Good*, 510 U.S. at 58-62.

III. Common-Law Tradition Supports Respondents' Right To Interim Relief.

Petitioner attempts to sidestep the Solicitor General's concession – that *Mathews* can be applied to determine the timing of a post-impoundment hearing – by insisting that the common law did not provide for interim remedies in forfeiture cases. (Pet. Brf. at 29-35). However, Petitioner first misstates the issue and then misidentifies the relevant common law and early colonial practices. In *Slocum v. Mayberry*, 15 U.S. (2 Wheat) 1 (1817), the Court found that, at common law, property owners were allowed to initiate actions to compel the government to act. Chief Justice Marshall, writing for a unanimous Court, specifically noted that when personal property is seized by the government for forfeiture, the owner has a common law right to demand immediate judicial review. *Slocum*, 15 U.S. at 4. As the Court explained, “[i]f the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure.” *Slocum*, 15 U.S. at 4.

The same common law right was affirmed in *Murray's Lessee*. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855). There, a distress warrant was issued ex parte, and personal property was seized. As soon as the distress warrant was executed, the owner had the right to “bring before a district court the question, whether he is indebted as recited in the warrant . . . ” *Murray's Lessee*, 59 U.S. at 284. Neither the executive nor the legislative branch could delay the owner's right to judicial review. *Id.* at 285. “The [owner] had the right to file a complaint seeking the return of his property, and all that was required was for him to file his bill [complaint] and give security.” *Id.* Colonial statutes also allowed citizens to post bond and reclaim their property. “Ships and goods were often released upon bail, pending the issue's determination.” Lawrence A. Harper, The English Navigation Laws (1939) at 200. Likewise, the Magna Carta suggests that the king could not seize land or chattels before trial, as long as the debtor had sufficient pledges. *Murray's Lessee*, 59 U.S. at 276,277.

At common law, property owners were not left at the mercy of government whim and indecision for one hundred and eighty-seven days following a seizure. If the owner believed that the government was taking too long, he had the right to compel the government to act, and any harm caused by protracted pretrial delays also was offset by letting owners post bond.

Petitioner and amici ignore the relevant common law and colonial practices, and they then compound

their error with the mistaken assertion that the forfeiture trial was the only process that was due. According to Petitioner, “The Court . . . has long recognized that a separate proceeding, prior to the forfeiture hearing itself [is] unnecessary to determine the reasonableness of the initial seizure.” (Pet. Brf. 35). Petitioner, albeit mistakenly, claims that an unbroken line of common law cases holds that the forfeiture trial, and only the forfeiture trial, is required by due process. (Pet. Brf. 33-35). That assertion is unquestionably false, and none of the cases cited by Petitioner address the issue of post-seizure process.

The cited cases stand only for the propositions that: (1) possession of the res usually is necessary to establish in rem jurisdiction (*United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796); *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818); *United States v. Stowell*, 133 U.S. 1 (1890)); (2) neither the common law nor the Due Process Clause mandate an innocent owner defense (*Harmony v. United States*, 42 U.S. (2 How.) 210 (1844); *Dobbins Distillery v. United States*, 96 U.S. 395 (1877); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 508 (1921); *Philips v. Commissioner of Internal Revenue*, 283 U.S. 589 (1931)), and (3) a previous criminal prosecution for related offenses does not bar a forfeiture proceeding under the Double Jeopardy Clause (*Various Items of Personal Property v. United States*, 282 U.S. 577 (1931)).

The relevant common law and early colonial statutory practices – the ones identified in *Slocum* and *Murray’s Lessee* – included checks on the government’s power to impound personal property. Those ancient remedies are all the more necessary now that forfeiture proceedings are a major budgetary source for many police departments and prosecutors’ offices. See Katherine Barker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. of Pub. Econ. 2113 (2007). Forfeiture proceeds are now so entrenched in the budgets of police departments and local prosecutors that they are “addicted” to them. John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J.Crim. Justice 171, 182 (2001). As self-interest increases, so too does the need for due process checks by objective decision makers. *The Federalist No. 51*.

IV. Von Neumann And \$8,850 Are Consistent With The Seventh Circuit’s Use Of *Mathews*.

1. In Von Neumann and \$8,850 Interim Remedies Were Available.

Petitioner and amici also rely on *United States v. Eight Thousand, Eight Hundred and Fifty Dollars (\$8,850)*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986) and mistakenly conclude that the forfeiture trial is all the process that is due under the *Barker* framework. (Pet. Brf., at 36-40). However, the issue in *Von Neumann* and

\$8,850 was very different from the one presented here. The distinction is critical, given that due process is a flexible concept whose requirements necessarily respond to the property interests at issue and the relief requested. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *Von Neumann* and *\$8,850* dealt with the speed with which a forfeiture trial must begin, not whether Due Process requires a mechanism to promptly test the validity of a seizure. As a result, *Von Neumann* and *\$8,850* are inapposite as applied to Respondents' case.

The essential facts of *\$8,850* and *Von Neumann* are that: (1) the property owners were, unlike here, also the accused; (2) they, unlike Respondents, had access to a variety of prompt, post-seizure remedies, and; (3) after taking advantage of those administrative remedies they nonetheless demanded dismissal of the forfeiture charges, a remedy Respondents eschewed.

The claimant in *\$8,850* filed a false customs report when she entered the country, so her money was seized. *\$8,850*, 461 U.S. at 557. Within eight days, she received written notice of her right to request remission and mitigation review, and she immediately opted to pursue that remedy. *Id.* at 558, 559. She did not seek to establish a right to post-seizure process in the form of interim remedies. Because the federal forfeiture system provided interim remedies that effectively checked any government overreaching, the only relief she

requested was dismissal of the forfeiture charges. *Id.* at 569.

An analogous analysis applies to *Von Neumann*. There, the claimant entered the country without declaring that he was driving a newly purchased car. *Von Neumann*, 474 U.S. at 245. The car was seized and “the same day . . . Von Neumann prepared a Petition for Remission or Mitigation of Forfeitures and Penalties Incurred. . . .” *Id.* Within two weeks he posted bond, and his car was returned to him. *Id.* Thirty-six days after the car was seized, customs offered to reduce the penalty from \$24,500 dollars (the value of the car) to \$3,600 dollars. *Von Neumann*, 474 U.S. at 246. An administrative appeal was taken and a final decision, upholding that remission, was rendered less than ninety days after the seizure. *Id.* Thus, Von Neumann had a final and very favorable administrative result within three months of the seizure.

Neither *\$8,850* nor *Von Neumann* addressed the use of interim remedies. In both cases the claimants had ready access to prompt, interim remedies of which they successfully availed themselves. The absence of any interim check is the issue in this case, and that issue was not considered in *\$8850* or in *Von Neumann*.

Instead, the Court’s focus in *\$8,850* and *Von Neumann* was on dismissal as the only remedy that was requested. The claimants insisted they were entitled to dismissal of the forfeiture complaints, even

though interim remedies were available and they had successfully employed those interim remedies. The Court borrowed *Barker* from the Sixth Amendment context because *Barker* applies when the dispute is limited to dismissal of the charges. Respondents, in contrast, never requested dismissal of the forfeiture charges or any other relief that would affect the speedy disposition of the forfeiture proceedings. The Seventh Circuit in Respondents' case and the Second Circuit in *Krimstock* correctly noted that the claimants' demands for dismissal in *\$8,850* and *Von Neumann* pose "a different question from whether there should be some mechanism to promptly test the validity of the seizure." (Pet. App., at 78). That different question is now before the Court, and that question is answered, as it always is, by applying *Mathews*, not *Barker*.

2. *Mathews* is the Preferred Standard to Address Interim Remedies.

Mathews directs the Court's attention to four factors: (1) the private interest that is affected by the official action; (2) the risk of an erroneous deprivation of the private interest; (3) the probable value of additional or substitute safeguards; and (4) the government's interest in retaining the property. *Mathews*, 424 U.S. at 340-344. A *Barker* inquiry proceeds along an entirely separate path. The relevant *Barker* factors are: (1) the length of delay; (2) the cause of the delay; (3) whether the accused asserted his right to a speedy trial; and (4) whether and to

what degree the accused suffered any prejudice. *Barker*, 407 U.S. at 530-32. *Mathews* and *Barker* do not overlap, so the choice of due process standard is a stark one.

Borrowing *Barker's* speedy trial test from the Sixth Amendment makes sense when the issue is whether the forfeiture charges should be dismissed. But *Barker* is inapposite here because: (1) the *Barker* factors are a bad fit in that they only take into account the interests of the criminal defendant and the state, and not those of innocent property owners or creditors; (2) *Barker* focuses on the dismissal remedy, which is irrelevant to the question presented in this case; (3) the application of *Barker* in this context would upset Supreme Court precedent; and (4) *Barker's* case-by-case approach is inefficient and uncertain, depriving all stakeholders of clear rules. The *Mathews* factors, in contrast, have been consistently and effectively applied by courts in similar circumstances, and those factors balance all relevant interests involved in an efficient, categorical way that provides clear guidelines to all interest holders.

3. *Barker* Cannot be Applied Effectively to Innocent Owners.

Barker's Sixth Amendment methodology does not carry over, fairly, to innocent owners, who are not themselves the accused and are not seeking dismissal of the forfeiture complaint. The Sixth Amendment

only applies to *criminal prosecutions* and only to the *accused*. See *United States v. Marion*, 404 U.S. 307, 312 (1971). “On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been ‘accused’ . . .” *Marion*, 404 U.S. at 312. For that reason, the Sixth Amendment “would seem to afford no protection to those not yet accused.” *Marion*, 404 U.S. at 313. Even when limited to the accused, the Court has described the right to speedy trial as “amorphous,” “vague,” “slippery,” and “unique in its uncertainty.” *Barker*, 407 U.S. at 521, 522, and 529. When *Barker*’s speedy trial concerns are extended to persons who are not the accused, *Barker* plunges from “vague” to unworkable.

The first *Barker* factor is the length of the delay. The general consensus today is that the delay must be a year or more to trigger a *Barker* inquiry. *Doggett v. United States*, 505 U.S. 647, 651, 652 (1992); *United States v. Munoz-Franco*, 487 F. 3d 25 (1st Cir. 2007); *United States v. Armeda-Saemiento*, 545 F. 2d 785 (2nd Cir. 1976); *Hakeem v. Beyer*, 990 F. 2d 750, 759-60 (3rd Cir. 1993); *Cowart v. Hargett*, 16 F. 3d 642, 646 (5th Cir. 1994); *United States v. Brown*, 498 F. 3d 523, 530 (6th Cir. 2007); *United States v. Arceo*, 535 F. 3d 679, 684 (7th Cir. 2008); *United States v. McGhee*, 532 F. 3d 733, 739 (8th Cir. 2008); *United States v. Santanna*, 526 F. 3d 1257, 1261 (9th Cir. 2008); *United States v. Ingram*, 446 F. 3d 1332, 1336 (11th Cir. 2006); and *United States v. Taylor*, 497 F. 3d 673, 677 (D.C. Cir. 2007). The Framers of the

Constitution certainly did not countenance that law enforcement agencies hungry for forfeiture revenue would take private property without any neutral and objective check for a year or more. *Connecticut v. Doebr*, 501 U.S. at 15.

The second *Barker* factor, the reason for the delay, also undercuts any attempt to extend *Barker* to innocent owners. *United States v. Loud Hawk*, 474 U.S. 302, 315 (1985). When the accused chooses to delay the criminal proceedings, the forfeiture trial is routinely delayed for months or even years. See 725 ILCS 150\9 (J) – allowing for good cause continuances while the criminal case is pending. Those delays, however, do not redound to the disadvantage of the government for purposes of the civil forfeiture proceeding, because the government did not cause the delay. *Loud Hawk*, 474 U.S. at 315, 316. Yet, in this context, the innocent owner is denied any prompt check on the government’s seizure of her property through no fault of her own.

The final *Barker* factor is prejudice to the accused. *Barker*, 407 U.S. at 532, 533. This factor has three sub-factors, the most important of which asks whether the delay caused by the government has impaired the defense. This consideration bears no relationship to the fate of innocent owners. In contrast, *Mathews* accounts for and balances the rights of private property owners and the interests of the state – the very interests at stake in this case.

Suppose an innocent owner (unrelated to the accused and not a co-owner, as in this case) has a witness who heard the owner tell the owner's boyfriend not to use her car. The boyfriend borrows the car anyway, and is arrested and charged with a narcotics offense. The car is seized and held for forfeiture, but the witness dies while the criminal case is pending. Neither the prosecution nor the accused is harmed by the witness' death, but the innocent owner loses her best witness. The accused is responsible for all of the delay in the criminal proceeding and in the forfeiture proceeding, so any prejudice suffered by the innocent owner cannot be assigned to the government. Using *Barker* as intended, the innocent owner is not entitled to dismissal of the forfeiture case. Why disregard the clear teachings of *Mathews* to impose such an inequitable result?

4. *Barker's* Focus is too Narrow to be Applied Here.

Mathews and *Barker* also serve different functions, for *Barker* does not allow for any remedy other than dismissal of the charges. *Strunk v. United States*, 412 U.S. 434, 440 (1973). As such, *Barker* offers little guidance in this setting, where the issue is not whether Petitioner's forfeiture actions must be dismissed, but rather what process is due between impoundment and trial. *Barker* throws up its hands at this inquiry, and thus leaves unchecked the self-interested decisions of public figures acting in a

quasi-judicial capacity. *Barker* looks backward and asks only whether the delay was so long that the charges must be dismissed. *Strunk*, 412 U.S. at 440. *Barker* never asks what intermediate relief can fix the problem.

In contrast, *Mathews* allows for interim remedies, like those already well-entrenched in the federal forfeiture system. Those interim remedies are constitutionally essential when the government impounds property without affording the owner – often an innocent owner, accused of no crime – prior notice and the opportunity to be heard. Prompt interim remedies reflect “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.” *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). *Mathews* offers a tested framework that protects that “high value” by allowing for interim remedies that *Barker* overlooks.

5. *Barker* is Irreconcilable with Established Precedent.

Furthermore, *Barker*’s narrow focus makes it unwise to use it as an all-purpose standard in place of *Mathews*. For example, tested by *Barker*, the wage garnishment that was found unconstitutional in *North Georgia Finishing* would pass muster. *Barker* would allow the bank account to be frozen for a year or more, unless the wage earner could show actual prejudice to the merits of his defense. For the same

reasons, the harness racing trainer who was entitled to a post-suspension hearing within 30 days in *Barry v. Barchi*, 443 U.S. 55 (1979) would be told to wait 360 days or more, had the Court applied *Barker* rather than *Mathews*.

Given the Court's extensive reliance on *Mathews* over so many years, there is no sound reason to suddenly veer off course by adopting a cramped due process standard that undermines previously well-established holdings. See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) – counseling against such changes. Neither *\$8,850* nor *Von Neumann* command such a change in course, since those cases were not concerned with interim remedies. *Mathews*, on the other hand, has decades of thoughtful and consistent history standing behind it. It also has the flexibility to carry forward with predictable results.

6. *Barker's* Case-by-Case Approach is Inefficient.

Mathews' categorical balancing is also far more efficient than *Barker's* case-by-case approach in assessing the need for interim relief. *Mathews* itself held that a person who is denied disability benefits under the social security system is not entitled to a hearing prior to that termination. The categorical judgment of the Court was that the system would work much better with post-deprivation hearings. The implicit assumption behind that judgment was

that neutral parties had no strong incentive to unfairly deny individuals their appropriate benefits, so that it would be costly to run hearings which would prove to be unnecessary in many cases.

The situation here is quite different in every relevant regard. When parties who are not charged with crimes seek to recover their property, they are likely to have a strong case in favor of its return. In addition, the current schemes, unlike *Mathews*, do not allow for an award of monetary compensation to offset the loss of use and the depreciation in value that are inevitable consequences when a car is impounded for months at a time. Nor does the government have any strong reason to delay the hearing, whose outcome only becomes more unreliable with the passage of time. The odds of success in these forfeiture cases are far greater than in *Mathews*: the dangers of abuse are far more apparent; and the obvious risk of bias compounds the problem. This situation does not call for the wishy-washy, case-by-case approach that *Barker* offers. It calls for the clear articulation of a rule that can be applied accurately and fairly across a huge number of cases.

V. Petitioner’s New Assertion – That Respondents Had Access To Interim Remedies – Was Not Raised In The Lower Courts, And The DAFPA Preempts The Remedies Petitioner Now Cites.

In a complete reversal of course, Petitioner now suggests that interim remedies are available after all. (Pet. Brf. 60-64). This about-face is both too little and too late. Until her brief in this Court, Petitioner never suggested that any interim remedies were open to Respondent. Petitioner should not be allowed to raise new arguments that were neither raised nor considered in the lower courts, particularly when her new argument depends on questions of fact that cannot be resolved on the current record. And even if her last-ditch argument were in the record, the remedies cited by Petitioner are nonetheless preempted by the DAFPA.

At the eleventh hour, Petitioner claims that the Law Enforcement Disposition of Unclaimed Property Act (LEDPA, 765 ILCS 1030\1 et seq.) provides Respondents with a remedy. The argument carries no weight because the LEDPA is limited to property that comes into a police department’s possession “under circumstances supporting a reasonable belief that such property was abandoned. . . .” 765 ILCS 1030\1. Respondents’ property was not “lost or abandoned.” It was seized by the government. Petitioner does not explain how seizure incident to an arrest suggests abandonment. Even if Petitioner could concoct a plausible explanation, the DAFPA preempts this

remedy. 720 ILCS 570\505(d). Nor does it make sense to invoke “unlawfully possessed” provision of the LEDPA throughout since the owner is asserting that she “lawfully possessed” the property.

Petitioner’s tortured search for new remedies then leads to Section 108 of the Illinois Criminal Code. 725 ILCS 5\108-1 et seq. Petitioner boldly insists that “Section 108-11 authorizes criminal court judges “to release seized property” and allows property owners to “recover possession of such property at any time.” (Pet. Brf. 64, 65). That is plainly wrong. Section 108-11 is restricted to items that have been seized by the police and then returned to the criminal court. 725 ILCS 5\108-11. The DAFPA, however, expressly precludes criminal court judges from ordering the return of forfeitable property. 725 ILCS 150\9(J).

The cases cited by Petitioner – apparently for the proposition that a common law right to seek return of seized property exists – are equally implausible. Petitioner attempts to skirt the DAFPA’s unambiguous preemption terms by citing *People v. Moore*, 410 Ill. 241, 102 N.E.2d 146 (1951) as evidence that property is returnable pursuant to a motion for return of seized property. (Pet. Brf. 61, 62). *Moore*, however, was decided in 1951, almost four decades before the DAFPA was enacted, and could not countermand an act that was not yet in effect. The same fate awaits *People v. Kapande*, 23 Ill.2d 230, 177 N.E.2d 825 (1961), another case cited by Petitioner. (Pet. Brf. 62). Preemption was not at issue

in *Kapande*, which was also decided long before the DAFPA was enacted. Furthermore, *Kapande* involved the return of gambling proceedings, not forfeiture based on an alleged narcotics offense. Nor is there reason to believe Illinois courts will order Petitioner to return impounded property or file a forfeiture action in advance of the timetable set by the DAFPA. *People ex rel. Devine v. Murphy*, 181 Ill.2d 522, 693 N.E.2d 349 (1998); *People ex rel McCarthy v. Firek*, 5 Ill.2d 317, 125 N.E.2d 637 (1955) – a motion to compel, like a mandamus action, is not available to force discretionary acts by a prosecutor.

Petitioner concedes that “the equitable powers of a court may not be exercised to direct a remedy in contradiction to the plain requirements of a statute.” (Pet. Brf., at 62). Since Section 150\9(J) prohibits criminal court judges from ordering the return of property that is subject to forfeiture (725 ILCS 150\9(J) (2009)), an order to return forfeitable property would be in “contradiction of the plain requirements” of the DAFPA. Neither *Moore* nor *Kapande* hold otherwise. 725 ILCS 150\9(J). And it is revealing that Petitioner has not cited a single post-DAFPA case that circumvents the preemption provisions of the DAFPA.

Finally, Petitioner now claims she provides remission and mitigation opportunities in advance of the forfeiture trial. (Pet. Brf., At 64, n.6). Her new argument is not supported by the Record. First, Respondents alleged that Petitioner fails to offer any interim relief, and those allegations must be accepted

as true for now. *Conley v. Gibson*, 355 U.S. 41 (1957). Second, Petitioner failed to raise this issue in the lower courts. Third, neither Petitioner nor the DAFPA supply any notice of Petitioners recently alleged, in-house procedures for remission. Due process, however, requires public notice of in-house, administrative procedures. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 12-15 (1978). By all accounts no such notice is offered, so Petitioner's in-house remission procedures, if they exist, do not meet the constitutional baseline for adequate notice. At best, Petitioner's recently proclaimed in-house procedures are another example of Petitioner acting as a judge in her own case. Therefore, the interim remedies Petitioner belatedly cites were not available to Respondents.

VI. Although The Seventh Circuit Prudently Remanded The Case For Development Of The Facts, An Informal Interim Hearing Or The Opportunity To Post Bond Is Feasible And Constitutionally Required.

1. The Seventh Circuit Prudently Remanded to Develop the Facts.

The Seventh Circuit's remand order left key matters open for consideration by the District Court. The court did not impose a deadline for the interim hearing, did not attempt to identify who was entitled to the hearing, did not indicate whether the owner must request the hearing, and did not attempt to assign the burdens of production and persuasion at

the hearing. (Pet. App. 10, 11). The Seventh Circuit explained that the hearing “should be prompt but need not be formal,” and left “it to the district court to determine the notice requirement and what a claimant must do to activate the process.” (Pet. App. 10). Whether a hearing must be offered in ten days, thirty days or sixty days was not decided, and could not be decided, without a fully developed record. *Id.* Nor did the Seventh Circuit decree that all property owners were entitled to a hearing. *Id.* Perhaps only innocent, car owners (those who are not themselves charged with any criminal conduct) will be entitled to a hearing, and even their right to a hearing might be regarded as waived, if they do not request the hearing.

Petitioner’s claim that the hearing must be “adversarial” (Pet. Brf. 28, 46-48) also is contradicted by the Record. What the Seventh Circuit actually said was, “In short, our fresh look at this issue causes us to conclude that given the length of time . . . between the seizure of property and the opportunity for an owner to contest the seizure under DAFPA, some sort of mechanism to test the validity of the retention of the property is required.” (Pet. App. 10). The court then reversed and remanded for discovery and to allow the District Court to “fashion appropriate procedural relief consistent with this opinion.” *Id.* The Seventh Circuit did not “envision lengthy evidentiary battles which would duplicate the final forfeiture hearing.” (Pet. App. 10). The district court was merely directed to consider “whether a bond or an order can be fashioned to allow the legitimate use

of the property while the forfeiture proceeding is pending.” (Pet. App. 10). Thus, the Seventh Circuit contemplated interim, not final, relief. When, for example, the balance of the hardships favor releasing a car to an innocent owner who posts a security bond, an interim order returning the car to her pending the forfeiture trial should at least be considered. The interim hearing need not be adversarial. (Pet. App. 10,11). The burden might be assigned to the owner to present enough evidence to allow the court to conclude: (1) she has a good chance of prevailing on the merits, when the trial is held; (2) bond or other assurances are sufficient to protect Petitioner’s interests; and (3) the hardship the owner will suffer without the car pending trial outweighs Petitioner’s interest in retaining custody. The Seventh Circuit’s order, therefore, was measured and incremental, but allowed an opportunity for early, objective review of the balance of the hardships.

2. A Valuable Property Right is at Stake

Although *Mathews* cannot be applied with precision until the facts are fully developed, a review of the *Mathews* factors proves that interim hearings are not only feasible, but that they will also benefit all concerned parties. The first *Mathews* factor addresses the private interest that is affected by the government’s action. *Mathews*, 424 U.S. at 335. All property rights are important because the right to protect property from arbitrary seizure is a central component of personal liberty. Property rights are not

constitutional afterthoughts. See James W. Ely, *The Guardian of Every Other Right, A Constitutional History of Property Rights* (3 ed. 2007). Nor should they “be relegated to the status of a poor relation.” *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Property provides personal security, allows for mobility, gives people the resources to order their own lives, and engenders an abiding respect for law.

In today’s world, the automobile ranks among a family’s most important possessions. *Krimstock*, 306 F. 3d at 61. A car certainly is as valuable, most likely much more valuable, than a stove, toaster or refrigerator, all of which have been classified important property interests that receive constitutional protection before the state may impound them. *Fuentes*, 407 U.S. at 70-71. The family car occupies a more “central place in the lives of most Americans, providing access to jobs, schools and recreation as well as to the necessities of life.” *Coleman v. Wolf*, 40 F. 3d 255, 260-261 (8th Cir. 1994). As Justice Jackson once explained, the “right to drive an automobile . . . concerns . . . personal freedom as well.” *Krimstock*, 306 F. 3d at 61, quoting Justice Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 ABA J. 961, 963 (1953). Loss of use of the family car for even a few days represents a significant impairment of a constitutionally protected right. *Krimstock*, 306 F. 3d at 61-63. That loss demands a prompt, post-seizure remedy that will effectively check the government’s pecuniary interest in seizing as many cars as possible. *Id.*

The car owner, however, is not the only party whose welfare is affected by the months of delay between impoundment and a forfeiture trial. *Ford Motor Credit Co. v. New York City Police Department*, 503 F.3d 186, 191, 192 (2nd Cir. 2007). Most cars are financed, and a bank or credit company holds a note, with the car as collateral. *Id.* Once the car is seized, the owner is less likely to continue paying on the note. Prolonged impoundments increase the risk of loan default by the debtor/owner. They also leave the creditor with a lien on rapidly depreciating collateral, which after a year sitting outside might well be less than the note owed to the lien holder. A prompt hearing that helps innocent owners also protects innocent lien holders from unnecessary losses.

3. The Risk of an Erroneous Deprivation Is Substantial.

Every exercise of the forfeiture power involves a risk of error. The question is: what is an acceptable risk, as compared to the probable costs of reducing the risk. A straight-forward decision, made with ample time to consider all options, by a disinterested decision maker reduces the risk of error. A decision made on the spur of the moment, by a party with a vested pecuniary interest increases the risk of error. Any decision to file a forfeiture action is thus infected with risk at every stage.

Respondents' (Smith, Perez, and Brunston) cars were impounded based on the officers' assessment of

probable cause to believe: (1) the drivers were involved in criminal activity; (2) the cars were used to facilitate the crimes; and (3) the owners, who were not present, knew about or approved of, the unlawful use of their cars. Not every police officer is an altar boy with a badge; some are willing to break the law or testify falsely to benefit themselves. Chicago Appleseed Fund for Justice, *A Report on Chicago's Felony Courts*, (2007) 76-78, http://www.chicagojustice.org/foi/documents/criminal_justice_full_report.pdf. Most, of course, are well-intentioned and strive to make correct decisions. Yet even the best-intentioned police officers must make three key determinations based on quickly evolving events.

Officers sometimes are mistaken in their belief that the driver of a car is engaged in criminal activity. In one of the very few studies of local narcotics case dispositions, a Northwestern University research team found that 58 percent were either dismissed or resulted in a finding of no probable cause at the preliminary hearing. Peter Manikus, Mindy S. Trossman & Jack C. Coppelt, *Crime and Justice in Cook County: A Report of the Criminal Justice Project*, Center for Urban Affairs Policy Research, Northwestern University (November 1989). In car impoundment cases, the police must not only observe actual criminal activity, they must also accurately conclude that the car was used to facilitate that crime. Assuming the officer gets both of those judgments right, the officer must then decide whether the owner of the car was aware of the unlawful use.

Probable cause to believe a car was used to facilitate a narcotics offense provides no useful information about innocent owners, who are neither on the scene nor involved in criminal activity in any observable way. So, putting aside the police officer's pecuniary motives, an officer's on-the-scene assessment of probable cause to impound a car is fraught with risk.

Factor in the police agency's pecuniary interest and the risk of error increases exponentially. Money is always in short supply in all police departments. Richard Minter, *Ill-Gotten Gains*, 25 Reason 32, 34 (Aug. Sept. 1983). Police departments ratchet up forfeiture seizures to fill budget holes, when other revenue sources shrink, Donald J. Boudreaux and Adam C. Pritchard, *Civil Forfeiture and The War on Drugs: Lessons from Economics and History*, 33 San Diego L. Rev. 79, 91 (1996); Brent D. Most, Bruce L. Benson, and David Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 Pub. Choice 285 (2000). Objectivity, always difficult to maintain, is skewed by self-interest, (Eric Blumenson and Eva Nilson, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U.Ch. L. Rev. 35, 68 (1998) that now affects a substantial majority of municipal police departments. John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. Crim. Justice 171, 182 (2001).

Nor are prosecutors immune to budget concerns or to the opportunity to generate revenues through forfeiture proceedings. Executive Office for the

United States Attorneys, U.S. Dept. of Justice, 38 United States Attorney's Bulletin 180 (1990) – (“Every effort must be made to increase forfeiture income . . .”). Petitioner, moreover, relies on the police officer's investigation to assess whether forfeiture is warranted, so Petitioner's primary source of information does not come from a disinterested civil servant. Combined, the pecuniary interests of the local police and Petitioner equal 90 percent of all forfeiture proceeds. 720 ILCS 570\505(g)(1)-(3). That means the initial decision to impound followed by the months of delay before a first court appearance is made by officials whose need to replenish their budgets tugs hard against their duty to be objective.⁵ With so much at stake, the risk of error is too high to postpone objective review for many months. Therefore, the second *Mathews* factor likewise weighs heavily in favor of prompt, independent review of the impoundment decision.

4. Petitioner's Interest Can be Accommodated.

Petitioner and amici nonetheless, cite a litany of horrors, hoping to persuade the Court that any remedy, no matter how informal and limited in scope is bound to wreak untold havoc on an otherwise fair system. (Pet. Brf., 47-52; S.G. Brf., 20-25). The

⁵ See the Institute of Justice's amicus brief for a more in-depth discussion.

current system, however, is far from fair, and Petitioner's fears are overstated and self-serving.

Petitioner and the Solicitor General claim months are needed before a hearing can be held since they must notify every owner of the proposed forfeiture. (S.G. Brf., at 20-22). This argument presupposes that every person whose property is seized is entitled to a hearing – an issue that the Seventh Circuit did not resolve. Petitioner's overbroad claim further assumes that the hearing must be held within some fixed time, another issue the Seventh Circuit did not resolve. In so doing the Petitioner and the Solicitor General prejudice the issue of what kind of notice is needed. Reasonable notice must be given, but also note that in most cases notice to the driver is sufficient, given that the driver either owns the car or knows who that owner is, and can pass that notice on. *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999). In most cases, moreover, a routine computer check of state records will identify the registered owner. *Id.* After that, written notice can be mailed to the registered owner. The City of Chicago already mails written notice to registered owners within ten days for car impoundments involving city ordinance violations. *City of Chicago, Illinois, Chicago Municipal Code 2-14-132(2)*. Nothing prevents Petitioner and the City from adopting a similar process in DAFPA cases.

Furthermore, innocent owners with legitimate claims will often come forward on their own. Very few people are willing to acquiesce in the loss of their car

for more than a day, let alone a year or more. Petitioner and the Solicitor General thus have unduly exaggerated a legitimate concern.

With property other than cars, the interim hearing might have to proceed less expeditiously because the notice problem is likely to be more acute. However, when notice is a problem, Petitioner can alert the judge and let an objective decision maker decide on the best course of action. An occasional risk, moreover, offers no reason to delay *all* cases for months on end.

Nor is it necessary for any judge or hearing officer to routinely postpone informal but objective review for months to allow prosecutors to “coordinate” the criminal trial and the forfeiture proceeding. (S.G. at 24-26). Accused owners have a hard choice to make – assert their right to an interim forfeiture hearing and risk cross examination or delay the interim forfeiture hearing. While the data are not known, common sense suggests that most accused owners will opt for delay. Innocent owners will take the opposite course of action and demand a hearing. In the event a hearing is demanded and Petitioner is not ready to proceed, scheduling adjustments and continuances are left within the sound discretion of the trial judge or administrative hearing officer.

Petitioner and the Solicitor General also mistakenly portray the Petitioner as a party who is put to unnecessary risk, if personal property is returned to the owner pending the forfeiture trial. Respondents

acknowledge some risk exists. A similar, perhaps greater, risk exists every time a bail bond is posted in a criminal case, but bail is not denied as a matter of course solely to avoid the possibility that a few bad apples will abscond. Federal judges and administrative personnel already make bond determinations daily regarding forfeitable property. State judges or administrative hearing officers can be trusted to make the same determinations.

Finally, Petitioner maintains that the Seventh Circuit's order amounts to an expedited forfeiture trial. But in fact the court's order neither contemplates nor orders such relief. The court remanded this case to permit discovery, develop the facts, and then fashion an appropriate informal remedy. *Id.* The Seventh Circuit did not "envision lengthy evidentiary battles which would duplicate the forfeiture trial." (Pet. App., at 10). The form the hearing will take was not ordered and cannot be ascertained with specificity, until the facts are developed.

5. Existing Models Prove the Hearings are Feasible.

The district court's inquiry will profit from looking at models of effective interim remedies now available that do not require impounding cars for one hundred and eighty-seven days or more. The federal system allows for release of impounded property on bond. It also allows claimants to file motions for

return of the property with the criminal court, an interim remedy that the DAFPA preempts.

The Civil Asset Forfeiture Reform Act (CAFRA) added a hardship provision to the federal system's already ample interim procedures. *See* 18 U.S.C. 983(f). This provision allows owners to immediately file for release of impounded property. 18 U.S.C. 983(f)(1). The claimant initiates the process by requesting release and submitting a claim that establishes her ownership interest, her ties to the community, and the circumstances that demonstrate her need for the car. 18 U.S.C. 983(f)(1)(A)-(D). The request is submitted to the appropriate agency or official, who must decide whether the owner's need outweighs the government's interest in retaining the property. 18 U.S.C. 983(f)(2). That official has fifteen days to render a decision. 18 U.S.C. 983(f)(3). If the seized property is not returned within fifteen days, the owner has the right to initiate an action in court. 18 U.S.C. 983(f)(3). And the district court must render a decision on any request for return of the property pending the trial within thirty days, unless the owner consents to more time. 18 U.S.C. 983(f)(3). Thus, the total elapsed time from seizure to ruling on the hardship release request is forty-five days.

A similar result evolved from the *Krimstock* cases in the Second Circuit, and for the past several years New York has held hearings like those contemplated by the Seventh Circuit. Respondents are not suggesting that the ultimate determination in their case will be a mirror image of New York's *Krimstock*

hearings, but New York's experience with those hearings strongly suggests that some form of timely post-seizure relief is entirely feasible. In fact, the promptness of the hearings often results in early settlement, which benefits all involved parties. See Gregory L. Acquaviva & Kevin M. McDonough, *How to Win a Krimstock Hearing: Litigating Vehicle Retention Proceedings Before New York's Office of Administrative Trials and Hearings*, 18 *Widener L.J.* 23, 80-82 (2008).

The City of Chicago also employs car impoundment procedures that afford owners the opportunity for final rulings in fifty-five days. City of Chicago Ordinance, 2-14-132. When a car is impounded by the City of Chicago for an ordinance violation, notice is given to the driver of the car, who often is the owner. *Id.* It is presumed that non-owners who are driving when the car is seized will notify the actual owner. Computerized records then enable the City to identify the registered owner, after which written notice is sent to the owner of record within ten days. *Id.* Anyone who desires a hearing has fifteen days to file a request for a hearing and a hearing is scheduled within thirty days of the request. *Id.* Thus, the maximum elapsed time between seizure and hearing is fifty-five days.

Even though these real world examples prove that prompt hearings are feasible, the Seventh Circuit left the timing and scope of the interim hearing as well as any bond procedures unresolved, pending discovery and development of the facts. On

the current undeveloped Record, it is not possible to determine precisely what form the interim hearings will take. But the federal system, New York's *Krimstock* hearings, and the City of Chicago's ordinance impound procedures prove that interim remedies are feasible.

6. Due Process Requires a Prompt Hearing Before a Neutral Decision Maker or the Opportunity to Post Bond.

The constitutional right to undisturbed use of one's property is no small matter. Respondents recognize that a wise, well-contained forfeiture system can serve the public good, so Respondents do not question the need to temporarily impound property that is deemed forfeitable. But that is just part of the story, and it is not the chapter that is now before the Court. Local authorities, with enormous pecuniary interests affecting their decisions, cannot be the sole arbiters of what property is impounded, during the months that elapse between impoundment and a long delayed forfeiture trial. Petitioner may not be the sole judge of her own cause.

In Respondents' cases more than a year passed without an objective determination of the facts. During all of that time, Respondents never had the opportunity to tell their side of the story to a judge or administrative hearing officer. These delays, without

objective review, institutionalize a system that is tainted by bias.

The burdens placed on personal property rights by the DAFFPA, as it currently is applied, are too onerous and fail to provide the constitutionally necessary hearing at a “meaningful time.” When that hearing should be held and what the scope of the hearing must be are questions that are best answered by *Mathews*, the Court’s standard due process methodology. The Seventh Circuit properly chose *Mathews* as the due process framework and then adopted an incremental approach that directed the District Court to fashion a suitable remedy. The remedy, however, must await a full development of the facts.



CONCLUSION

For all of these reasons as well as those as well set forth in the Seventh Circuit’s opinion and judgment, the Court should affirm.

Respectfully submitted,

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