No. 08-351

In the Supreme Court of the United States

ANITA ALVAREZ, COOK COUNTY STATE'S ATTORNEY, PETITIONER

v.

CHERMANE SMITH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether courts should apply the "speedy trial" test employed in *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983), and *Barker* v. *Wingo,* 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), in determining whether the Due Process Clause requires a state or local government to provide owners of property seized for civil forfeiture with a post-seizure probable cause hearing before the actual forfeiture proceeding.

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INTEREST OF THE UNITED STATES

This case concerns the constitutional standard for evaluating the process that is due after property is taken into custody as being subject to forfeiture. Because the United States conducts civil and criminal forfeiture proceedings against seized property, it has a direct interest in that constitutional standard. See, *e.g.*, *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983); *United States* v. *Von Neumann*, 474 U.S. 242 (1986). The United States has participated as *amicus curiae* in other cases involving due process challenges to forfeiture procedures. See, *e.g.*, *Bennis* v. *Michigan*, 516 U.S. 442 (1996).

STATEMENT

1. This case involves a facial challenge to provisions of Illinois's Drug Asset Forfeiture Procedure Act (Illinois DAFPA), 725 Ill. Comp. Stat. Ann. 150/1 *et seq.* (West 2008). Under Illinois law, illegal drugs, property used to carry out or facilitate drug crimes, and the proceeds of drug crimes are all subject to civil forfeiture. *E.g.*, 720 Ill. Comp. Stat. Ann. 570/505(a) (West Supp. 2009). The Illinois DAFPA sets out procedures for effecting that forfeiture.

Certain categories of personal property—conveyances of any value and other personalty worth $20,000 or less—may be forfeited through a non-judicial, administrative procedure if no one with a property interest demands a judicial proceeding. See 725 Ill. Comp. Stat. Ann. 150/6. Under that non-judicial procedure, within 45 days after the State's Attorney is notified that property has been seized, she provides notice to "all known interest holders of the property." *Id.* 150/6(A). Interest holders then have 45 additional days to demand a judicial forfeiture proceeding, which they can trigger by filing a claim and cost bond with the State's Attorney. If a claim is filed, the State's Attorney must either initiate a judicial forfeiture proceeding within 45 days or return the property. *Id.* 150/6(C), 150/9(A). If no claim is filed, the property is forfeited. *Id.* 150/6(D).

Absent "good cause," a civil judicial forfeiture proceeding is to be heard within 60 days after the claimant answers the complaint. 725 Ill. Comp. Stat. Ann. 150/9(F). The court may stay the civil forfeiture proceeding, however, if a "related" criminal prosecution is pending in a trial court. *Id.* 150/9(J).

2. Respondents brought this action under 42 U.S.C. 1983 against petitioner's predecessor as State's Attor-

ney for Cook County; the City of Chicago; and the Superintendent of the Chicago Police Department. J.A. 30a-31a. The named respondents have had property seized by Chicago police officers and seek to represent a class of similarly situated individuals. Respondents' seized property included currency and automobiles (but their class definition is not limited to specified forms of property). J.A. 34a-35a, 38a.

Respondents did not challenge the initial seizure of their property without an adversary hearing. And respondents acknowledged that petitioner had commenced forfeiture actions against the property of respondents Smith, Perez, Brunston, and Waldo within the time set by the Illinois DAFPA. J.A. 34a-35a. At the time respondents filed their complaint, the period within which to bring a forfeiture action had not yet run with respect to the cash seized from respondents Yunker and Williams. See J.A. 29a, 30a, 35a; 725 Ill. Comp. Stat. Ann. 150/6(C)(2).

Respondents contended instead that due process requires a prompt "probable cause" hearing "within ten business days of any seizure," separate from and prior to the forfeiture proceeding itself. J.A. 36a. Respondents sought declaratory and injunctive relief ordering that such hearings be held. *Ibid.*

The defendants moved to dismiss based on the controlling authority of *Jones* v. *Takaki*, 38 F.3d 321 (7th Cir. 1994). J.A. 53a-55a. In *Jones*, the plaintiffs had brought a putative class action virtually identical to this one. 38 F.3d at 323. Applying this Court's decisions in *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983) (*$8,850*), and *United States* v. *Von Neumann*, 474 U.S. 242 (1986), the court of appeals explained in *Jones* that "the Constitution does not require any procedure

prior to the actual forfeiture proceeding," which "is the only hearing to which [claimants] are constitutionally entitled." 38 F.3d at 324. The plaintiffs in *Jones* contended that a forfeiture proceeding was inadequate because it would occur too long after the seizure. The resolution of that claim, the court of appeals held, was controlled by this Court's decision in *$8,850*, which held that claims of unconstitutional delay in the initiation of a forfeiture proceeding are to be analyzed according to a "flexible" and fact-specific analysis of the reasons for a particular delay and any prejudice to the claimant. *Id.* at 323-324 (citation omitted).

In this case, respondents conceded in the district court that *Jones* was controlling. J.A. 75a. The court accordingly dismissed the action. Pet. App. 12a.

3. The court of appeals reversed, overruling *Jones* and holding that due process requires a separate hearing before even a timely forfeiture proceeding.

The court stated that a post-seizure hearing is required before forfeiture and that "[t]he question is the timing of that hearing." Pet. App. 4a. The court concluded that "given the length of time that may result" between seizure and forfeiture, due process requires "some sort of mechanism to test the validity of the retention of the property." *Id.* at 10a. The court noted that the Second Circuit had reached a similar conclusion in a due process challenge to New York City's procedures for maintaining custody of vehicles that may be subject to civil forfeiture. *Id.* at 4a (citing *Krimstock* v. *Kelly*, 306 F.3d 40 (2d Cir. 2002), cert. denied, 539 U.S. 969 (2003)).

While the court in *Jones* had concluded that this Court's decisions in *$8,850* and *Von Neumann* governed the analysis of a claim for speedier post-seizure process,

the court of appeals in this case thought that "there are significant reasons to doubt whether [*$8,850* and *Von Neumann*] should be controlling in the situation [here]." Pet. App. 5a. The court noted that *$8,850* had considered "the speed with which the civil forfeiture proceeding itself is begun," and it deemed that issue to be "a different question from whether there should be some mechanism to promptly test the validity of the seizure." *Id.* at 7a.

The court sided with respondents on the latter question, applying the balancing test articulated in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), and applied to seizures of *real* property in *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993). See Pet. App. 6a-8a. The court thought that "[t]he private interest involved, particularly in the seizure of an automobile, is great," because "[o]ur society is * * * highly dependent on the automobile." *Id.* at 8a. And while "some administrative burden" on the government would result, "due process always imposes some burden on a governing entity." *Id.* at 9a. The court thought that the required process—"notice to the owner of the property and a chance, perhaps rather informal, to show that the property should be released"—would not be onerous. *Ibid.*

The court ordered "appropriate procedural relief," leaving the substance of that relief open on remand. Pet. App. 10a.

SUMMARY OF ARGUMENT

Property may be seized for forfeiture without an advance hearing, so long as a hearing is provided before the property is actually forfeited. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Illinois provides such a hearing. The only question in this case

is whether that hearing is offered too late to satisfy due process.

The resolution of that question appropriately turns on the facts of a particular case. It depends not just on the length of time that the statute permits to elapse between seizure and hearing, but also on why any actual delay occurred and whether the government had a valid justification for the time it used. That fact-specific analysis follows from the holding in *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983). If respondents can show that the proceedings to forfeit their money or other property have been delayed beyond valid justification, they can secure the dismissal of the forfeiture proceeding and the return of their property. But respondents have not attempted to make that individualized showing in the state courts.

Rather, respondents contended, and the court of appeals agreed, that the Illinois DAFPA procedure is *facially* inadequate because a judicial proceeding may not commence until 187 days after a seizure, and that Illinois must provide a separate hearing at an earlier stage of the forfeiture process. That holding was erroneous. Illinois has provided a multi-step process for seeking forfeiture, and at each step, it has imposed a short but reasonable time limit that is amply justified by valid administrative and enforcement interests—*e.g.*, in adjudicating all challenges in a single proceeding; in coordinating that proceeding with related criminal matters; and in maintaining interim control over property that is highly susceptible to criminal misuse.

The court of appeals dismissed these weighty interests based on generalized notions of the hardship that some vehicle owners might face during the period before a forfeiture hearing is convened. Those generalizations

do not support the court of appeals' facial holding, which applies to all forfeitures of personal property, from cash to yachts.

Regardless whether the due process question is analyzed under the general rubric of *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), or under the forfeiture-specific analysis of *$8,850*, a statute that provides for a forfeiture hearing within a reasonable time limit is facially constitutional. When, on the facts of a particular case, an individual claimant faces genuine hardship from delay, she may be entitled, under *$8,850*, to additional redress. But respondents have disclaimed any ability to make such an individualized showing in this case. The Illinois forfeiture statute is facially valid, and the Constitution does not require that it be supplemented with the additional preliminary procedure that the court of appeals imposed.

ARGUMENT

A FORFEITURE HEARING PROVIDES ADEQUATE PRE-FORFEITURE PROCESS UNLESS IT IS DELAYED BEYOND THE TIME THAT THE GOVERNMENT'S VALID ADMINISTRATIVE INTERESTS REASONABLY REQUIRE

A. Due Process Requires That Valid Government Interests Support The Timing Of A Forfeiture Hearing

The question presented asks whether the Court should examine the Illinois DAFPA's facial validity using the framework of *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), or instead the analysis in *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983). But the choice between the two is in large measure immaterial. As this Court's forfeiture cases show, the outcome of a due process challenge in this context turns not on whether *Eldridge* applies as a formal matter, but on the extent to

which the forfeiture process gives claimants a timely and adequate opportunity to be heard before a forfeiture is decreed.

A claim that a forfeiture proceeding is facially unconstitutional purely because of its timeline requires examination of the government interests that justify the timeline. This Court has considered that question in a number of cases, including *$8,850*. But even if the same question were considered afresh under *Eldridge,* the outcome would be no different.

Eldridge outlined a three-factor test that incorporates consideration of "the private and governmental interests at stake * * * and the nature of the existing procedures." 424 U.S. at 340. For two reasons, however, in this context that test collapses into a single question: Is the timing of the forfeiture hearing adequately supported by valid government interests?

First, in this case no one disputes "the fairness and reliability of the existing [forfeiture] procedures," *Eldridge*, 424 U.S. at 343. Under the Illinois DAFPA, anyone with a known interest in seized goods is entitled to receive notice of the pending forfeiture and to demand a judicial proceeding, with adversary presentations before an impartial factfinder. 725 Ill. Comp. Stat. Ann. 150/6(C)(1) and (2).[1] Respondents assert only that those

[1] Although the State's showing of probable cause to forfeit the property shifts the burden to the claimant to establish by a preponderance that the property is not subject to forfeiture, 725 Ill. Comp. Stat. Ann. 150/9(G), respondents do not contend that this procedure violates due process; indeed, at the additional, preliminary hearings that respondents seek, the State's burden (probable cause) would be precisely the same. J.A. 36a. Moreover, many federal courts have previously upheld an equivalent burden-shifting standard against due process challenges. See, *e.g.*, *United States* v. *$129,727.00 U.S. Currency*, 129 F.3d 486, 491-494 (9th Cir. 1997) (citing cases), cert. denied, 523 U.S. 1065 (1998). In

procedures come too late. J.A. 34a, 36a. If the judicial hearing took place within the ten-day period on which respondents insisted in their complaint, they would apparently have no constitutional objection.

Second, the private interest at issue here concerns only the length of the deprivation, not the nature of the seizure. Respondents recognize that the seizure of their property pending forfeiture did not violate due process. Br. in Opp. 7, 10; see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (*Pearson Yacht*). They contest, and assert an interest in modifying, only the length of time of the forfeiture process.

When a due process challenge concerns only the *timing* of forfeiture proceedings, this Court's cases—both before and after *Eldridge*—have focused principally on the strength of the governmental interests at stake. Although the Court has not expressly applied *Eldridge* to forfeitures of personal property, *Eldridge* is fully consistent with, and would not require any material changes in, the Court's traditional analysis of whether these interests justify the timing of proceedings to forfeit personal property.

B. The Timeliness Of A Forfeiture Action Depends On A Fact-Specific Inquiry That Gives Proper Weight To The Government Interests At Stake

This Court has found the government interests at stake in forfeitures of personal property to be sufficiently weighty as to permit an interim seizure of the for-

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2000, however, Congress decided to impose a higher standard than the Constitution requires; most federal forfeiture statutes now require the government to establish forfeitability by a preponderance of the evidence. 18 U.S.C. 983(c)(1); see 18 U.S.C. 983(i)(2) (exceptions); H.R. Rep. No. 192, 106th Cong., 1st Sess. 11-13 (1999).

feitable property prior to the forfeiture hearing. That holding is consistent with the Court's recognition in other contexts, both before and after *Eldridge*, that important government interests can justify using postdeprivation procedures to satisfy due process. *E.g.*, *Gilbert* v. *Homar*, 520 U.S. 924, 930-931 (1997) (citing cases). To be sure, the Court has applied *Eldridge* to reach a different conclusion with respect to real property, in which the private rights are stronger and the government interests may be protected by other means. But where personal property is at issue, the Court has consistently concluded that the Due Process Clause permits the government to take a reasonable amount of time, in the service of its valid interests, before holding the forfeiture hearing.

1. In *Pearson Yacht*, the Court gave three crucial reasons why a forfeiture hearing may be held after the initial seizure of personal property. First, "the property seized * * * will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed." 416 U.S. at 679. Accordingly, requiring "advance warning of confiscation" might well "frustrate the interests" that forfeiture statutes are intended to serve, such as "preventing continued illicit use" of the instrumentalities of crime and "enforcing criminal sanctions." *Ibid.* Second, the furtherance of those important public purposes is entrusted to public officials, whereas the Court had previously struck down replevin statutes giving "self-interested private parties" the authority to seize private property without a hearing. *Ibid.* (citing *Fuentes* v. *Shevin*, 407 U.S. 67 (1972)). Finally, the seizure asserts a court's *in rem* jurisdiction over the property and permits a single proceeding to adjudicate any competing interests in the property. *Ibid.*

2. Where real property is involved, by contrast, different considerations apply, and the Court accordingly has held that the government must establish *before* an initial seizure that the property is subject to forfeiture. In *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) (*Good Real Property*), the Court acknowledged the holding of *Pearson Yacht* that the government's interest in forfeiture proceedings was sufficient to dispense with any requirement of pre-seizure notice or hearing. But the Court concluded that "when the target of forfeiture is real property," the "essential considerations" underlying *Pearson Yacht* were no longer operative. *Id.* at 57. "[R]eal property cannot abscond," *ibid.*, so the government's legitimate interests in preserving the property and preventing it from being used for further illegal activity can be served without actually seizing the property, *id.* at 58; similarly, the court will maintain jurisdiction over the *in rem* proceeding without the necessity of a seizure, *id.* at 57. The Court also noted that home ownership has "historic and continuing importance" and that seizing a home causes "far greater deprivation" than seizing personal property. *Id.* at 53-54.

The Second Circuit has read *Good Real Property* as supporting the proposition that "enforcement of the drug forfeiture laws did not present 'a plausible claim of urgency' strong enough to dispense with normal due process guarantees" even in the context of personal property. *Krimstock* v. *Kelly*, 306 F.3d 40, 66 (2002), cert. denied, 539 U.S. 969 (2003). The court below agreed. But that reading is incorrect.

As in *Pearson Yacht*, the Court recognized in *Good Real Property* that there *is*, in fact, a valid and "special need for very prompt action" when the owner of prop-

erty subject to forfeiture can easily "frustrate the government's interests in the forfeitable property" before a hearing can be brought. 510 U.S. at 52 (quoting *Pearson Yacht*, 416 U.S. at 678). Considering "whether the same considerations apply *to the forfeiture of real property*," *ibid.* (emphasis added), the Court explained in detail why real property requires a different rule: because of practical considerations, *id.* at 52-53, 57 (real property "can be neither moved nor concealed"), principles of *in rem* jurisdiction, *id.* at 57-58 (real property may be brought within the court's jurisdiction without being seized), and available alternatives to seizure, *id.* at 58-59 (a notice of *lis pendens* may be effective to prevent an owner from disposing of real property).

Good Real Property, therefore, established that the heightened interests of *real property* owners justify requiring a pre-seizure hearing. The Court in that case did not dispute that significant governmental interests underlie proceedings to forfeit the instrumentalities of crime. And the Court did not address whether, when those interests *do* justify a seizure without a hearing, they also support taking more than ten days before a hearing is convened.

3. This Court considered that timing question in *$8,850,* in which it set out a framework for analyzing whether valid government interests justify the length of time between a valid seizure and the hearing. As the Court explained, the Due Process Clause requires "a hearing 'at a meaningful time'" before property may be permanently forfeited. 461 U.S. at 562 (quoting *Fuentes*, 407 U.S. at 80). And the Court confirmed that "a postseizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time." *Id.* at 562-563.

But identifying such unconstitutional delay requires a "flexible approach" that "depends * * * heavily on the context of the particular situation." *Id.* at 564, 565 n.14.

The defendant currency in *$8,850* was identified as subject to forfeiture and seized by the former United States Customs Service when the owner, Mary Vasquez, arriving from Canada, falsely understated the amount of currency she was bringing into the country, in violation of a reporting statute. Shortly after the seizure, Vasquez filed a petition for remission or mitigation of the forfeiture.[2] For approximately seven months thereafter, Customs investigated whether the seized currency was connected to drug trafficking, which would compound the offense; Customs concluded that it was not. Vasquez was then indicted for the reporting offense and for making a false statement to Customs; the indictment also sought criminal forfeiture of the currency. Criminal proceedings in the case lasted six months. Vasquez was acquitted of the reporting violation on which the criminal forfeiture allegation was based. Customs then referred the case to the United States Attorney to pursue civil forfeiture, denying the remission petition at about the same time. A civil forfeiture action was ultimately filed 18 months after the original seizure. See 461 U.S. at 558-560 & n.7.

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[2] Petitions for remission or mitigation are common in civil forfeiture enforcement, see *$8,850*, 461 U.S. at 558. The relevant statute vests discretionary authority in the appropriate official to remit (*i.e.,* forgive) or mitigate (*i.e.,* reduce) a forfeiture upon finding that the forfeiture was "incurred without willful negligence or without any intention" by the owner to violate the law, or that other mitigating circumstances exist. 19 U.S.C. 1618. That provision is incorporated by reference in nearly all federal civil forfeiture statutes. See, *e.g.*, 18 U.S.C. 981(d); 21 U.S.C. 881(d).

Vasquez conceded that the seizure was constitutional, see 461 U.S. at 562 & n.12, but asserted that the "dilatory" commencement of the forfeiture action and the "dilatory processing" of the remission petition violated due process and warranted dismissal of the forfeiture proceeding. The Ninth Circuit agreed, *id.* at 560-561, but this Court reversed.

This Court acknowledged that "a claimant whose property has been seized * * * has been entirely deprived of the use of the property." 461 U.S. at 564. But the Court also recognized the "value of allowing the Government time to pursue its investigation." *Ibid.* To balance these competing considerations, the Court adopted a framework "analog[ous]" to the one used in *Barker* v. *Wingo*, 407 U.S. 514 (1972), to determine when a defendant's right to speedy trial is violated.[3] (The Court acknowledged that a criminal defendant's loss of liberty while awaiting trial "may well be more grievous" than the deprivation of particular items of personal property, and accordingly that "the balance of the interests * * * may differ" in the forfeiture context. *$8,850*, 461 U.S. at 565 n.14.) The *Barker* analysis uses four fact-laden considerations as "guides in balancing the interests of the claimant and the Government," *id.* at 564-565:

a. *Length of the delay:* The Court stated that no bright constitutional line can be drawn as to the length of the delay, and that the point at which a delay becomes unconstitutional "necessarily depends on the facts of the particular case." 461 U.S. at 565; see *id.* at 564. The 18-month delay in *$8,850* itself was "quite significant,"

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[3] The Court did not discuss *Eldridge*, though Vasquez had cited it. Br. for Resp. (Claimant) at 26, *$8,850*, *supra* (No. 81-1062).

though the Court ultimately found it reasonable. *Id.* at 565.

b. *Reasons for the delay:* The Court confirmed that the government has valid reasons for not making an immediate forfeiture determination, and cited three in particular: the need to investigate the circumstances, to handle remission petitions, and to coordinate with criminal proceedings. First, a seizure decision at the border is "of necessity a hasty one," and the government must be permitted "some time to investigate the situation" beyond that initial assessment to decide whether to pursue forfeiture or return the asset. 461 U.S. at 565. Second, if the government seeks to postpone formal forfeiture proceedings while investigating a pending remission petition, that is a "weighty factor" in the government's favor, because the vast majority of remission petitions result in at least partial relief, and remission thus can spare both parties the burdens of formal litigation. *Id.* at 558, 566-567.[4] Third, the parties often have good reason to postpone civil proceedings while related criminal proceedings are pending—for instance, to avoid issue preclusion, to prevent the other party from exploiting broad civil discovery to gain an advantage otherwise unavailable in the criminal prosecution, or to preserve the defendant's ability to raise inconsistent arguments in the two proceedings. *Id.* at 567. Thus, the need to await a verdict in the criminal trial may slow down the civil proceeding through no fault of the parties. See *id.* at 568.

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[4] Some federal agencies follow this course and seek to consider remission petitions before a claimant triggers a judicial forfeiture proceeding. See *$8,850*, 461 U.S. at 566 nn.15-16. Agencies within the Department of Justice consider remission petitions after forfeiture is decreed.

c. *The defendant's assertion of the right:* When a defendant has the ability to trigger an early judicial forfeiture proceeding, but does not do so, she provides "some indication" of acquiescence in the timing of the civil proceeding. 461 U.S. at 569. For example, under the federal framework, Vasquez had multiple ways of compelling the forfeiture process to move forward: (1) filing an equitable action seeking an order compelling commencement of a civil judicial action or return of the seized property; (2) informally requesting the seizing agency to refer the matter to the United States Attorney; and (3) filing a motion under then-Rule 41(e) of the Federal Rules of Criminal Procedure—now Rule 41(g)—challenging the validity of the seizure and seeking return of the property. Vasquez did not avail herself of any of these options, which rebutted her subsequent claim of unconstitutional delay. *Ibid.*

d. *Prejudice to the defendant:* An actual impact on the defendant's ability to mount her defense, such as "the loss of witnesses" due to the government's delay in filing, "could be a weighty factor indicating that the delay was unreasonable." 461 U.S. at 569. Vasquez had shown no prejudice and, indeed, had conceded that her cash met the requirements for forfeiture. *Ibid.*

4. The Court confirmed in *United States* v. *Von Neumann*, 474 U.S. 242 (1986), that "the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect [a] property interest" in forfeitable property. *Id.* at 249. The Court rejected the notion that due process requires a separate, speedier proceeding.

John Von Neumann attempted, unsuccessfully, to bring a car across the U.S. border without declaring it. Customs seized the car for forfeiture. Von Neumann

filed a petition for remission or mitigation, which Customs partially granted 36 days later by reducing the forfeiture to a $3600 penalty. (In the interim, Von Neumann had gotten his car back by posting a bond for its value.) Von Neumann then challenged the mitigated penalty on the ground that the government had taken an unconstitutionally long time to rule on his remission petition. The Ninth Circuit initially held that Customs must resolve such petitions within 24 hours. See 474 U.S. at 245-247. After *$8,850*, it discarded that per se rule but concluded that the *$8,850* balancing test for timeliness must be applied not only to the forfeiture proceeding, but also to the handling of the remission petition. The court opined that "the special hardships imposed on persons deprived of the use of their automobiles" meant that even "'[a] five-day delay in justifying detention of a private vehicle is too long.'" *Von Neumann* v. *United States*, 729 F.2d 657, 661 (9th Cir. 1984) (citation omitted).

This Court reversed. It rejected Von Neumann's argument that remission was an essential first step in the process by which the government forfeits property and that it accordingly is subject to the same analysis under the Due Process Clause as the underlying forfeiture proceeding. See 474 U.S. at 249. Rather, the Court explained, the remission procedure simply grants the government the discretion not to pursue a complete forfeiture even when it is entitled to one; it is not *necessary* to a forfeiture determination, and the Constitution does not entitle claimants to "a speedy disposition * * * without awaiting a forfeiture proceeding." *Ibid.*; see *id.* at 250. The Constitution mandates a timely forfeiture proceeding before property may be permanently forfeited, but no more. See *id.* at 249 ("Implicit in this

Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car."). In particular, the Constitution does not require a preliminary, near-immediate proceeding before the commencement of a timely forfeiture hearing.

C. The Court Of Appeals' Facial Holding Overlooked Valid Government Interests In Forfeiture Proceedings That Were Dispositive In *$8,850*

The court of appeals in this case incorrectly concluded that *$8,850* can be "properly * * * distinguished" and that respondents' entitlement to speedier process can be ascertained as a facial matter—potentially on a class-wide scale. Pet. App. 7a. The court thought that "the speed with which the civil forfeiture proceeding itself is begun" was "a different question from whether there should be some mechanism to promptly test the validity of the seizure." *Ibid.* But the court erred by not crediting the forfeiture proceeding itself with being such a mechanism. See *Von Neumann*, 474 U.S. at 249. The forfeiture hearing plainly permits claimants to "test the validity of the seizure," as respondents concede and the court of appeals did not dispute. The only question is whether the forfeiture hearing does so sufficiently "promptly," and that question is properly answered in each case by the analysis in *$8,850*.

The court of appeals therefore did not fully analyze the question when it hypothesized that "it could be a maximum of 187 days" from seizure until a forfeiture proceeding is filed, and concluded that that period is necessarily too long. Pet. App. 3a; see *id.* at 8a. Half a year indeed may be too long in some cases, but the hold-

ing of *$8,850* is that the length of time before proceedings begin cannot by itself establish a due process violation. See 461 U.S. at 565-568. Indeed, the Court in *$8,850* held constitutionally adequate a procedure that did not commence until *18 months* after seizure—three times as long as the hypothetical maximum here—because there were valid reasons for the timing.

The court of appeals should have considered whether the particular time limits that apply to each step of the forfeiture procedure are justified on their face by valid government interests. The mere fact that forfeiture proceedings *may* not be initiated for approximately six months is not a basis for the facial invalidation of the statute without any analysis of how the statute has been applied and whether the time taken serves valid interests. Cf. *FDIC* v. *Mallen*, 486 U.S. 230, 242 (1988) (the mere "danger of an interminable delay by the agency" is insufficient to show that post-deprivation process is facially inadequate).

In examining whether a time period is facially justifiable, this Court has the benefit not only of its own previous examinations in *$8,850* and *Von Neumann*, but also of the extensive time and study that Congress has devoted to the question. Between 1992 and 2000, Congress held a lengthy series of hearings on forfeiture reforms, culminating in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202. CAFRA set out enforceable time limits for several steps in most federal forfeiture proceedings,[5] reflecting Con-

[5] The deadlines in 18 U.S.C. 983(a) apply to forfeitures that begin as administrative proceedings, with exceptions noted in 18 U.S.C. 983(i)(2). Some classes of property are ineligible for administrative, non-judicial forfeiture and can only be forfeited through judicial proceedings. See 18 U.S.C. 985(a) (real property ineligible); 19 U.S.C. 1607(a)(1)-(4) (list-

gress's careful examination of how much time law enforcement officials realistically need to publish notice, process claims, and decide whether to pursue forfeiture. Significantly, each time limit is notably longer than the truncated period that respondents favor, and many permit extensions for good cause. As petitioner notes (Br. 65-66), CAFRA's deadlines are comparable in many respects to the Illinois DAFPA's time periods.

1. The government has valid interests in identifying and contacting potential claimants before initiating a judicial proceeding

The first step in the forfeiture procedure allows the State's Attorney to review the facts gathered by the law enforcement agency that seized the property and to notify all interest holders that the property is subject to forfeiture. The court of appeals' remedy disregarded the several valid reasons for that step.

First, any proceeding to protect claimants' due process rights must first seek to identify those claimants. The court of appeals appeared to contemplate that the persons entitled to demand a hearing will be readily identifiable at the time of seizure. That is not so in all or even most cases. Each piece of property may have many potential claimants, each with a right to contest forfei-

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ing categories of personal property eligible for administrative forfeiture); see also, *e.g.*, 18 U.S.C. 981(d) (incorporating 19 U.S.C. 1607). And the government sometimes initiates judicial forfeiture even when it could first seek administrative forfeiture. Although CAFRA's deadlines do not apply in that circumstance, Department of Justice policy encourages initiation of civil judicial forfeiture actions within 150 days of seizure or, if the property is ineligible for administrative forfeiture, within 90 days of receipt of a claimant's written request for release of the property.

ture.[6] The person from whom the property is seized may not even be one of them.[7] Ascertaining their identities takes time and care, particularly when the property is personalty. Ownership and other interests in various kinds of personal property are not publicly recorded. A prime example is cash: ownership is not apparent from the face of a bill, and the money may belong to someone other than the person found with it. See, *e.g.*, *United States* v. *Alcaraz-Garcia*, 79 F.3d 769, 776 (9th Cir. 1996) (claimants gave money to defendant to deliver to others; claimants were bailors under state law and could contest forfeiture). And even where alternatives to personal notice are permissible, they take time. See 725 Ill. Comp. Stat. Ann. 150/4(A)(3) (publication notice requires three weeks); cf. Supp. R. for Admiralty or Mar. Cl. & Asset Forfeiture Actions G(4)(a)(iii) (publication notice of a civil forfeiture action requires between three weeks and 30 days).

For these reasons, Congress decided that under the framework that applies to most federal forfeitures, see note 5, *supra*, the government must notify an interested party within 60 days after seizure *or* after learning of the party's interest (with a slightly longer period when the initial seizure was made by state or local authorities). By that date, the federal law enforcement agency must either: (1) commence the administrative forfeiture process by sending notice to potential claimants; (2) ini-

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[6] *E.g.*, 18 U.S.C. 983(d)(1) and (6)(A) (cognizable "ownership interest[s]" for the innocent-owner defense include "a leasehold, lien, mortgage, recorded security interest, or valid assignment").

[7] See, *e.g.*, *United States* v. *$515,060.42 in U.S. Currency*, 152 F.3d 491, 498 (6th Cir. 1998) (explaining that a possessor must offer "factual allegations" regarding her "relationship to" or "control of the property" to establish a cognizable interest).

tiate a civil or criminal forfeiture proceeding by filing a complaint or obtaining an indictment; or (3) return the property. 18 U.S.C. 983(a)(1)(A) and (F). This deadline may be extended only under limited circumstances, first by a supervisory official at agency headquarters (once only) and thereafter by the courts. 18 U.S.C. 983(a)(1)(B)-(D).[8] The Illinois DAFPA has a comparable framework, with a longer initial period but fewer provisions for tolling or extending the period.[9]

Second, identifying and notifying potential claimants before conducting a forfeiture hearing also serves the government's interest in efficiency. When many claimants all seek to contest the same forfeiture, requiring the government to litigate seriatim hearings would not only be administratively burdensome, but also would give subsequent claimants the benefit of a preview of the government's case. Thus, forfeiture cases customarily resolve all claims in a single *in rem* proceeding. See, *e.g.*, *Good Real Property*, 510 U.S. at 57-58. The court of appeals appeared to contemplate that each claimant would be entitled to a separate preliminary hearing; any such holding would unjustifiably disrupt Illinois's valid efforts to resolve ownership in a single proceeding accessible to all potential claimants.

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[8] Petitioner's statement (Br. 66) that the deadline may be extended "[i]f the federal government did not have adequate evidence at the time the complaint was filed" is incorrect. See 18 U.S.C. 983(a)(1)(B) and (D).

[9] Petitioner suggests (Br. 64 n.6) that some portion of that initial period may be used to discuss with potential claimants whether to return the property, akin to the time for consideration of remission petitions under many federal forfeiture statutes. There is an additional, equally valid governmental interest in postponing proceedings during efforts at informal resolution. *$8,850*, 461 U.S. at 566.

Third, the notice procedure allows the government to separate uncontested forfeitures (which, by definition, do not violate due process) from contested forfeitures. That consideration is highly important, because only a small minority of forfeitures are actually contested, even after the government identifies and notifies potentially interested parties. See Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 4-1, at 132 n.2 (2007). In those cases, the forfeiture is resolved without "unnecessary and burdensome court proceedings." *$8,850*, 461 U.S. at 566.

Accordingly, if the court of appeals' remedy were taken to require a probable-cause hearing shortly after *every* seizure of personal property, it would far exceed the requirements of the Due Process Clause and burden the judicial system with hearings even in uncontested cases. Cf. *$8,850*, 461 U.S. at 564, 568-569 (in evaluating the timeliness of a forfeiture hearing, weighing the claimant's invocation of her rights to prompt process). The court of appeals left the scope of its holding unclear, leaving it to the district court to consider "what a claimant must do to activate" the newly required procedure. Pet. App. 10a. But, of course, Illinois already provides a hearing on demand, and its procedure—unlike that contemplated by the court of appeals—gives appropriate weight to the State's interest in resolving all competing interests in a single proceeding, including interests that are not ascertainable at the time of seizure. See pp. 20-22, *supra*. As in the federal system, Illinois allows claimants a specified period within which to file a claim. The filing of one or more claims requires the State's Attorney to begin forfeiture proceedings within 45 days. 725 Ill. Comp. Stat. Ann. 150/6(C)(1) and (2). By comparison, in the federal system, the U.S. Attorney must

commence a civil or criminal forfeiture action within 90 days of receiving a claim. If he does not, and if the time is not extended by a court "for good cause shown," the government must return the property and is forever barred from reinitiating civil forfeiture proceedings against that property based on the same underlying offense. 18 U.S.C. 983(a)(3)(A) and (B).

2. The government has valid interests in coordinating forfeiture proceedings with related matters

The timing of forfeiture proceedings is often affected by the valid interest in coordinating with the prosecution of a crime that makes property forfeitable. Respondent Yunker, for instance, was indicted after his cash was seized. J.A. 35a. As this Court recognized in *$8,850*, coordination with criminal proceedings is "an element to be considered in determining whether delay is unreasonable." 461 U.S. at 567. An adversary hearing on the forfeitability of cash may require the State to present precisely the same evidence that will inculpate the claimant in a criminal proceeding, or it may jeopardize an ongoing criminal investigation that the government is not yet prepared to announce publicly. See 18 U.S.C. 981(g)(1) (providing for a stay of civil proceedings to protect related criminal investigations that have not yet resulted in formal charges); S. Rep. No. 225, 98th Cong., 1st Sess. 215-216 (1983) (explaining the need for an earlier provision that permitted a stay while a related criminal proceeding was pending); 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 10.02[2], at 10-17 (June 2005) (Smith) (Section 981(g)(1) "recognizes that the need for confidentiality is at least as great during the investigatory stage of a criminal case.").

Conversely, as Congress has recognized, a claimant will often prefer that the forfeiture action be stayed while a related criminal proceeding is ongoing, because litigating both proceedings simultaneously might put the claimant in a difficult position. See 18 U.S.C. 981(g)(2); see also, *e.g.*, *United States* v. *4003-4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995) (claimant in civil forfeiture case faces the dilemma of remaining silent and allowing the forfeiture or testifying against the forfeiture and exposing himself to incriminating admissions); cf. *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1290 (2009) (in the speedy-trial context, "delay caused by the defense weighs against the defendant"). A preliminary hearing that involves the claimant's assertion of an innocent-owner defense (see Pet. App. 9a, 10a) would create tension with the claimant's right against compelled self-incrimination in any related criminal case because the government would be entitled to test that defense through discovery and cross-examination. See, *e.g.*, 1 Smith § 10.01, at 10-3 to 10-4 (Dec. 2007).[10]

Even absent that consideration, the necessary discovery and witness preparation would consume time that either side may decide is more productively spent preparing for the criminal proceeding. Respondents have demanded that the probable-cause hearing be held within ten days, but far from solving the problem, that

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[10] The court of appeals left open the scope of the preliminary hearing it would require. The hearing required by *Krimstock* examines considerably more than just a prima facie showing of probable cause. See *Krimstock* v. *Kelly*, 506 F. Supp. 2d 249, 252 (S.D.N.Y. 2007) (city must show probable cause for arrest, likelihood that forfeiture will be decreed, and "necess[ity] that the vehicle remain impounded in order to ensure its availability in the eventual civil forfeiture action").

would only make it more difficult for each side to marshal its own evidence and test the other side's.

3. The government has valid interests in maintaining interim custody of personal property

In addition to having a facially valid interest in devoting adequate time to the orderly investigation, processing, and (if necessary) litigation of forfeitures, the government generally has strong reasons to maintain custody of forfeitable personal property during that time.

Personal property, unlike real property, can easily be moved, transferred, concealed, or destroyed. As the Court recognized in *Good Real Property*, the government has "legitimate interests * * * [in] ensur[ing] that the property not be sold, destroyed, or used for further illegal activity prior to the forfeiture judgment." 510 U.S. at 58.[11] And whereas real property will stay put if released from custody pending the forfeiture proceeding, that is not true of cash, conveyances, or other personal property subject to the Illinois DAFPA.

Because of the essential differences between real property and personal property, the legal mechanisms other than custody that can protect the government's interest in the former will not adequately secure the latter pending a forfeiture determination. Real property changes ownership by recorded transaction, and purchasers of real property are on inquiry notice of any claims recorded against the title. Thus, a notice of *lis pendens* will prevent any bona fide sale of real property

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[11] Indeed, some contraband subject to forfeiture may pose a direct threat to public health and safety if left in public circulation pending the judicial proceeding. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950) (misbranded pharmaceuticals).

that could frustrate the government's interest in forfeiture. See *Good Real Property*, 510 U.S. at 58. No such tool exists to prevent the transfer of cash or cars; even a perfected security interest recorded against a vehicle title will not prevent the car from being concealed or transferred unlawfully. Similarly, a restraining order of the kind the Court suggested in *Good Real Property* (see *ibid.*) may not fully protect the government's interests once the instrumentalities or proceeds of crime are released from custody pending forfeiture. In the case of currency, no such relief appears possible; the cash either is in custody or may be spent freely, with no middle ground.[12]

4. The court of appeals' focus on vehicles does not overcome the valid government interests at stake

The court below sought to justify its demand for a preliminary hearing by citing the centrality of automobiles to modern society. The importance of automobiles is well established, but irrelevant here, for two reasons.

First, this case is a facial challenge, brought by a putative class, to the Illinois forfeiture procedure that applies to all conveyances and to other non-real property worth less than $20,000. Not all putative class members even have automobiles at issue. See J.A. 38a. Three named respondents are contesting only the seizure of cash; as this Court's due process cases recognize, the temporary deprivation of money may be a less severe hardship than the seizure of an automobile. *City of Los Angeles* v. *David*, 538 U.S. 715, 717-718 (2003) (per curiam). And drug forfeiture statutes are commonly used against forms of personal property that are neither

[12] Restraining orders also may not adequately guarantee that an owner facing forfeiture will actively preserve the value of the property.

cash nor cars, including other conveyances. See, *e.g.*, *Pearson Yacht*, 416 U.S. at 669; *United States* v. *One 1974 Learjet 24D*, 191 F.3d 668, 670-671 (6th Cir. 1999); *United States* v. *Indoor Cultivation Equip.*, 55 F.3d 1311, 1312 (7th Cir. 1995). A reason that would apply, at most, to only one sub-category of claimants cannot support invalidation of the entire statute at the pleading stage. But that is what the court of appeals did; indeed, it devoted only a single sentence to analyzing forfeiture of property *other* than automobiles. See Pet. App. 8a-9a ("The person from whom cash is seized also has a strong interest in a hearing, although obviously the posting of a cash bond for cash is an absurdity.").[13]

Second, this Court already has rebuffed the suggestion that automobiles deserve special protection in the forfeiture context. In *Von Neumann*, the claimant "urge[d] the importance of automobiles to citizens in this society" in contending that the 14-day deprivation of his car before he posted bond amounted to a due process violation. 474 U.S. at 250-251. The Ninth Circuit agreed, observing that "special hardships [are] imposed on persons deprived of the use of their automobiles" and suggesting that the detention of Von Neumann's car had violated due process. *Von Neumann*, 729 F.2d at 661. This Court held, however, that the "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to [both] the car and the money [that Von Neumann posted as bond to redeem the car]." 474 U.S. at 250-251. In so holding, the Court drew no distinction at all between automobiles and money.

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[13] The plaintiffs in *Krimstock* sought relief specific to vehicles. 306 F.3d at 47.

Nor would a categorical rule affording greater protection to automobiles make sense. As important as automobiles may be, they are also—and for precisely the same reasons—among the most essential instrumentalities of crime. Many forfeiture laws, including the one here, target contraband that is moved surreptitiously around (or into) the country. Motor vehicles are crucial to those operations. Forfeiture serves the "significant government purpose[]," *Pearson Yacht*, 416 U.S. at 679, of preventing the vehicles from continuing to facilitate crime. See 19 U.S.C. 1595a(a) (specifically identifying conveyances that facilitate smuggling as subject to forfeiture); see also, *e.g.*, 8 U.S.C. 1324(b)(1) (same, for vehicles used in alien smuggling); 21 U.S.C. 881(a)(4) (same, for conveyances that facilitate drug transactions). Thus, even if it were appropriate to look categorically at claimants' interest in regaining use of their automobiles, the court of appeals erred by not recognizing the government's converse and equally strong interest in keeping seized automobiles from being returned to criminal use.

5. Courts hearing forfeiture proceedings can consider whether government interests validly justify delay

Respondents suggest (Br. in Opp. 13) that the *$8,850* analysis is relevant only to whether to dismiss a forfeiture proceeding, and that it has no bearing on whether due process requires a *different* proceeding at a preliminary stage. That contention lacks merit. As the Court explained in both *$8,850* and *Von Neumann*, the timing considerations that the Court set forth determine whether the forfeiture hearing is a constitutionally adequate, suitably prompt form of process.

To be sure, an unconstitutional delay under *$8,850* may result in dismissal of a forfeiture proceeding and

return of property, where the claimant has shown that she has not received (and will not receive) timely process. The possibility that further delay may violate due process can influence a court's decision to set deadlines or grant continuances, see, *e.g.*, 18 U.S.C. 983(a)(1)(C) and (3)(A); cf. *Brillon*, 129 S. Ct. at 1292, and will certainly encourage the government to act diligently, cf. *Zedner* v. *United States*, 547 U.S. 489, 499 (2006). When notwithstanding this inventive, the government takes unreasonable time in proceeding to a forfeiture hearing, a dismissal and return of the seized property are appropriate.

That remedial approach properly considers in each case whether the government has taken an unreasonably long time to proceed to a forfeiture hearing. By contrast, respondents' argument would impose a new layer of procedure in *all* cases, regardless whether the forfeiture proceeding would have commenced in a timely way. The addition of this novel hearing, even when the government is acting expeditiously and in accordance with all previously recognized due process requirements, would undermine the government's significant interests in conducting sound and effective forfeiture proceedings.

D. Interim Remedies Mitigate Genuine Hardship Without Imposing A New Layer Of Forfeiture Procedure

The Court in *$8,850* listed several interim measures available to claimants seeking to avoid delay under the pre-CAFRA federal framework. Most significantly, if a civil forfeiture action has not yet been filed, a claimant can bring an equitable action to compel the government to initiate the civil proceeding, or he can seek return of the seized property under what is now Rule 41(g) of the

Federal Rules of Criminal Procedure. 461 U.S. at 569. The Court also noted that the federal government has voluntarily adopted nonjudicial discretionary procedures to afford relief, such as remission and mitigation petitions. See *id.* at 558, 566-567; accord *Von Neumann*, 474 U.S. at 246, 249-250.[14]

Petitioner and respondents dispute whether those options exist under the Illinois framework. Compare Br. in Opp. 19-20, Pet. App. 7a, and J.A. 32a, with Pet. Br. 60-65. The current record does not clearly establish whether they do. In the federal system, these remedies allow some forfeiture decisions and proceedings to be placed on a fast track, without also requiring the government to preview its case in an adversarial proceeding shortly after seizure. Thus, if such remedies are available in Illinois, they further ameliorate any hardship that claimants may suffer, and they make even less likely the court of appeals' hypothesis that many cases will involve unjustified, prejudicial delay.

In CAFRA, Congress also crafted an interim remedy that addresses genuine hardship while respecting the government interests discussed above. CAFRA added a new federal provision that, in carefully delimited circumstances (unlike the court of appeals' blanket remedy), permits an owner who suffers genuine hardship from the interim deprivation of her property to secure its release. 18 U.S.C. 983(f). The hardship must be gen-

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[14] Respondents assert that federal law permits release of property upon posting a 10% bond. Br. in Opp. 20. That is inaccurate. A 10% "cost bond" covers the cost of a civil judicial forfeiture action and does not secure release of the property. CAFRA largely eliminated those cost bonds. See 18 U.S.C. 983(a)(2)(E) and (i). Under 19 U.S.C. 1614, a claimant may seek discretionary release of seized property upon offering a bond for the *full value* of the property.

uine and individualized, not merely based on generalizations about the importance of a particular type of asset. See 18 U.S.C. 983(f)(1)(C). The government can obtain security against the property's disappearance or loss of value. See 18 U.S.C. 983(f)(1)(B) and (7) (claimant must show by her ties to the community that the property will be available at trial, and court may order measures to preserve the property's value). And some property is generally ineligible, such as currency. 18 U.S.C. 983(f)(8). CAFRA's hardship provision illustrates that a remedy may appropriately balance claimants' interests and the government's without requiring any change to the timing of the forfeiture proceeding or an early rehearsal of the government's case.

The hardship provision and other measures for interim relief illustrate the care with which Congress and many state legislatures have crafted protections for forfeiture claimants over and above what the Constitution requires. Compare, *e.g.*, 18 U.S.C. 983(d) (innocent-owner defense), and 725 Ill. Comp. Stat. Ann. 150/8 (same), with *Bennis* v. *Michigan*, 516 U.S. 442 (1996) (the Due Process Clause does not require an innocent-owner defense). Those protections strike a workable balance between the public interest in forfeiture enforcement and the individual interests of property owners. The federal and state legislatures, not the federal courts, are best suited to determine whether to modify that balance by adding another hearing requirement.

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By providing for a single, unified forfeiture proceeding with enforceable time limits, Illinois has committed itself to expeditious resolution of contested forfeiture matters while providing sufficient time to accommodate significant administrative interests. That time-limited

procedure is a facially valid means of resolving challenges when a forfeiture of cash, vehicles, or other personal property is contested.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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