No. 97-1230

In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF WEST COVINA, PETITIONER

v.

LAWRENCE PERKINS, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause requires a law enforcement agency that seizes property pursuant to a search warrant to provide written notice to property owners of the procedure for seeking return of the property taken, along with any additional information required for initiating that procedure in the appropriate court.

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INTEREST OF THE UNITED STATES

The court of appeals held that a law enforcement agency that seizes property pursuant to a warrant must provide written notice to the property owner of the procedure for seeking return of the property taken, along with any additional information required for initiating that procedure in the appropriate court. Pursuant to Federal Rule of Criminal Procedure 41, the Federal Bureau of Investigation and other federal law enforcement agencies seize property pursuant to search warrants in full compliance with federal law but without giving the notice required by the court of appeals. Because the decision in this case, if upheld

by this Court, would require substantial modification of the practices of federal law enforcement agencies, the United States has an interest in the Court's resolution of the question presented.

STATEMENT

1. On May 8, 1993, Julio Alberto Clark was shot to death in the City of West Covina, California. Pet. App. A3. The City of West Covina Police Department uncovered evidence linking Marcus Marsh to the murder and learned that Marsh had rented a room in the home of respondent Lawrence Perkins. *Ibid.* Citrus Municipal Court Judge Dan Thomas Oki issued a search warrant that authorized the search of respondent's house for "evidence of street gang membership or affiliation with a street gang," and "any and all firearms for which the person in possession of said firearms cannot tender proof of ownership at the time of service." *Ibid.*

Detectives David Melnyk, Michael Ferrari, Dan Nalian, and Lieutenant John Schimanski executed the search warrant. Pet. App. A4. No one was home, and the detectives did not know in which room Marsh lived. *Ibid.* During the search, the detectives seized gang photos depicting Marsh, an address book, a twelve-gage shotgun, a starter pistol, ammunition, and $2,469 in cash. *Ibid.* The house was left in disarray, and the doors and some personal items were damaged. *Ibid.*

After the search, the officers left a form entitled "Search Warrant: Notice of Service." J.A. 76-77; Pet. App. A4. The notice stated:

To Whom it May Concern:

1. These premises have been searched by peace officers of the West Covina Police Department pursuant to a search warrant issued on 5-20-93, by the Honorable Dan Oki, judge of the Municipal Court, Citrus Judicial District.
2. The search was conducted on 5-21-93. A list of the property seized pursuant to the search warrant is attached.
3. If you wish further information, you may contact Det. Ferrari or Det. Melnyk at [telephone number].

Id. at A4-A5. The form also provided Lieutenant Schimanski's name and telephone number. *Id.* at A5.

Respondent spoke to Detective Ferrari about obtaining the return of the $2,469 that had been seized. Pet. App. A5. Ferrari told respondent that he had no objection to the return of the money, but that respondent would have to obtain a court order. *Ibid.* Respondent went to the Citrus Municipal Court and asked to see Judge Oki, but was told by a member of the clerk's office that Judge Oki was on vacation. *Ibid.* When respondent attempted to obtain the return of his money from another judge, he was told that he could not do so without the number of the search warrant or a case number. *Ibid.* The warrant, however, was sealed, and there was no case number for Marsh's case because charges had not yet been filed against him. *Ibid.* A public document in the clerk's office listed the warrant and the warrant number under the address where the search occurred. *Id.* at A6. No one informed respondent about that

method for obtaining the warrant number, however, and respondent did not make any additional inquiry about how to obtain that number. *Ibid.*

Respondent filed suit in the United States District Court for the Central District of California against the City of West Covina (petitioner) and the officers involved in the search of his house, alleging that they had violated his rights under the Fourth and Fourteenth Amendments. Pet. App. A6. In particular, respondent alleged that the officers had conducted the search without probable cause and that the scope of the search exceeded the scope of the warrant. J.A. 7-9. Respondent also alleged that petitioner had a policy of permitting such unlawful searches. J.A. 10. Respondent sought compensatory and punitive damages and attorneys' fees. J.A. 11. After respondent's suit was filed, petitioner filed a motion in Citrus Municipal Court for return of respondent's property (J.A. 81-82), and, on order of the court (J.A. 85), returned all of respondent's property except the starter pistol (which someone else had reported stolen). Pet. App. A7.

2. The district court entered summary judgment against respondent on the claims that he made, Pet. App. B1-B11, but invited supplemental briefing on an issue not raised by respondent—whether the remedies available to respondent for the return of seized property were sufficient to satisfy the Due Process Clause of the Fourteenth Amendment, *id.* at B7. Although the parties submitted such briefs, the district court did not resolve the due process issue. *Id.* at D1-D2. The court of appeals remanded to the district court so that it could resolve that issue. *Id.* at D1-D3.

On remand, the district court granted summary judgment in favor of petitioner, holding that the remedy provided by California law for the return of seized property satisfied the Due Process Clause. Pet. App. E1-E8. The court rejected respondent's claim that he had received inadequate notice of the procedure for seeking the return of his property. *Id.* at E7. The court noted that respondent was told that he needed a court order, he was told which court and judge had authority to issue such an order, and he was given the date of the warrant and of the search. *Ibid.* That information, the court concluded, was all that respondent needed "in order to submit an informal written request to the court having jurisdiction over his property." *Ibid.*

3. The court of appeals reversed in relevant part. Pet. App. A1-A25. The court held that the remedies provided by California law for the return of seized property satisfy the Due Process Clause. *Id.* at A16-A17. Relying on *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978), the court held, however, that respondent did not receive constitutionally adequate notice of his remedies because the notice left at his home did not inform him of the availability of a judicial procedure to seek the return of his property or provide him with any guidance for invoking that remedy. Pet. App. A17-A22. After applying a balancing test under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court held that, in cases where property is taken under California law, the notice left with the owner of the property should include all the information included in the notice left at respondent's house—"the fact of the search, its date, and the searching agency; the date of the warrant, the issuing judge, and the court in which he or she serves; and the

persons to be contacted for further information." Pet. App. A22. The court also concluded that the Due Process Clause requires the following additional elements of notice:

> In addition, the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned.

Ibid.

Judge Leavy dissented in relevant part. Pet. App. A23-A25. He concluded that the notice requirements mandated by the majority would be appropriate only in cases in which due process demands the opportunity for a predeprivation hearing. *Id.* at A24. Since property may be lawfully seized pursuant to a warrant without a predeprivation hearing and because California law affords an adequate post-deprivation remedy, Judge Leavy concluded that the Due Process Clause did not require petitioner "to advise [respondent] of his remedies." *Id.* at A25.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the Due Process Clause requires a law enforcement agency that seizes property under a warrant to provide written notice to property owners of the judicial pro-

cedure for seeking return of the property and the information required to initiate that procedure. The due process "notice" requirement is satisfied when law enforcement officers give individualized notice that property has been seized. The government may then rely on the public availability of applicable laws and rules of procedure to inform persons of their legal remedies and how to invoke them.

Individualized notice that property has been taken under a court-ordered warrant is the traditional form of notification provided to property owners. That is the kind of notice required by Federal Rule of Criminal Procedure 41(d) and by the vast majority of States. Neither Rule 41(d) nor the laws of any State require individualized notice of legal remedies and how to invoke them. That traditional practice is strong evidence that the court of appeals' notice obligations exceed what the Due Process Clause requires.

Decisions of this Court make clear that Rule 41(d) and comparable state rules provide all the notice of legal remedies that due process requires. In a variety of contexts, this Court has held that, once the government adequately notifies a property owner that his property has been taken, the government may rely on its published laws to provide the owner with notice of his legal remedies and the procedures for invoking them. Those cases recognize that it is generally fair to entrust persons who are directly affected by government action with the responsibility to take the initiative to learn about their legal remedies, because "[t]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular

policies that affect his destiny." *Atkins* v. *Parker*, 472 U.S. 115, 131 (1985).

Compliance with the court of appeals' notice requirements would impose substantial new burdens on the government without providing a significant benefit to property owners. It would require the government to make difficult legal judgments about which of several possible legal remedies are available in particular circumstances; it could readily result in notice that is so complex that it loses its value as a guide to action; and it would invite years of litigation over what kind of notice is sufficient and the appropriate remedies for a notice violation. Since an assessment of the propriety of actual notice must take into account "the practicalities of the situation and the effect that requiring actual notice would have on important state interests," *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 489 (1988), the court of appeals' notice requirements cannot be justified as elements of due process.

The court of appeals' reliance on *Memphis Light, Gas & Water, Div.* v. *Craft*, 436 U.S. 1 (1977), as support for its notice obligations, is misplaced. That case addressed the question of when an agency must give individualized notice of predeprivation procedures administered by the agency itself. It does not suggest that a law enforcement agency must inform persons about postdeprivation legal remedies administered and interpreted by courts.

ARGUMENT

THE NOTICE COMPONENT OF DUE PROCESS IS SATISFIED WHEN LAW ENFORCEMENT OFFICERS INFORM PERSONS THAT THEIR PROPERTY HAS BEEN SEIZED UNDER WARRANT AND PUBLICLY AVAILABLE LAWS INFORM PERSONS ABOUT THE PROCEDURES FOR SEEKING RETURN OF THEIR PROPERTY

The minimum requirement of due process is notice and an opportunity for a hearing before a person is finally deprived of a liberty or property interest. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This case involves the "notice" aspect of due process. In the context of a seizure of property pursuant to a warrant, the notice component of due process is satisfied when law enforcement officers give individualized notice that property has been seized under warrant and publicly available laws and procedures inform persons of their legal remedies and how to pursue them. The court of appeals erred in imposing more extensive notice requirements.

A. California Provides Adequate Postdeprivation Procedures For The Return Of Property, And The Only Question Is Whether Property Owners Have Adequate Notice Of Those Procedures

1. The court of appeals correctly held in this case that California complies with the due process requirement of an opportunity for a hearing by providing for a post-deprivation procedure to request the return of property seized under warrant. Although due process sometimes requires the government to provide an opportunity for a hearing before the initial

deprivation of a property interest, "where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert* v. *Homar*, 117 S. Ct. 1807, 1812 (1997). The seizure of property under a search warrant is one of the those situations in which a predeprivation hearing is not required. *Fuentes* v. *Shevin*, 407 U.S. 67, 93-94 n.30 (1972). In *Fuentes*, the Court explained the reasons:

> First, a search warrant is generally issued to serve a highly important governmental need—*e.g.*, the apprehension and conviction of criminals * * *. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause.

Ibid. That does not mean that the State may retain custody of property seized pursuant to a warrant for an indeterminate period without providing any opportunity for a hearing. Under general due process norms, the State must make available "some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." *Parratt* v. *Taylor*, 451 U.S. 527, 540-541 (1981).

As the court of appeals in this case concluded (Pet. App. A15-A17), California law provides post-deprivation remedies that satisfy that requirement. In particular, California Penal Code Section 1536 authorizes a court to entertain a "nonstatutory" motion for the release of property seized under a search warrant, Pet. App. A15-A16 (citing cases construing Section 1536), and California Penal Code Section 1540 authorizes a motion for return of property when the property is not the same as that described in the warrant or when the warrant was not supported by probable cause, Pet. App. A16-A17 (quoting code provision). Those remedies parallel the remedy provided by Rule 41(e) of the Federal Rules of Criminal Procedure, which states that "[a] person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property." The California remedies, like Rule 41(e), provide persons whose property has been seized pursuant to a warrant with a meaningful opportunity for a determination of their right to the property. Those remedies therefore satisfy the due process hearing requirement.

2. The question in this case is whether the State gave adequate "notice" of its procedures. The Due Process Clause requires notice that is sufficient to make the opportunity for a hearing meaningful. *Mullane*, 339 U.S. at 314. The court of appeals held that the notice provided to respondent did not satisfy that requirement, because it did not inform respondent of the availability of a judicial remedy or provide him with any guidance for invoking that remedy. Pet. App. A17-A22. The court then set forth what amounts

to a detailed code prescribing the notice that must be provided in cases in which property is seized pursuant to a warrant. The court held that notice should include all the information included in the notice left at respondent's house—"the fact of the search, its date, and the searching agency; the date of the warrant, the issuing judge, and the court in which he or she serves; and the persons to be contacted for further information." *Id.* at A22. The court also established the following additional requirements for constitutionally sufficient notice:

> In addition, the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned.

Ibid.

The notice requirements devised by the court of appeals far exceed what the Due Process Clause requires. When law enforcement officers seize property under a warrant, due process is satisfied by the form of notification to property owners traditionally provided: individualized notice that government officers have seized property under authority of a court-issued warrant. The government may then rely on the public availability of applicable laws and rules of

procedure to inform persons of their legal remedies and how to invoke them.

B. The Traditional Form Of Notice That Law Enforcement Officers Provide To Property Owners Is Notice That Identified Property Has Been Seized

1. Federal Rule of Criminal Procedure 41(d) sets forth the information that federal law enforcement agents must provide when they seize property pursuant to a warrant. It provides that "[t]he officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken." Fed. R. Crim. P. 41(d). Rule 41 therefore requires individualized notice that a law enforcement agency has seized identified property pursuant to a court-issued warrant. The warrant and receipt left by the Federal Bureau of Investigation also contain some of the additional information required by the court of appeals, such as the name of the issuing magistrate, and the date of the search. They do not, however, "inform the recipient of the procedure for contesting the seizure or retention of the property taken," or with "any additional information required for initiating that procedure in the appropriate court." Pet. App. A22. Notice of that information is provided by Rule 41 itself and other applicable laws, including the local rules of district courts. By requiring the government to provide owners with individualized notice of the procedure for seeking the return of property and with all information required for initiating that procedure, the decision below effectively concludes that the notice provided by the

federal government when it seizes property pursuant to a warrant is constitutionally inadequate.

The court's ruling breaks sharply from the traditions and practice in this country. Rule 41(d) simply restates federal statutory requirements that have existed since 1917. Act of June 15, 1917, ch. 30, Tit. XI, § 12, 40 Stat. 229. The American Law Institute's Model Code of Pre-Arraignment Procedure contains provisions that track Rule 41(d) in the relevant respects. American Law Institute, *A Model Code of Pre-Arraignment Procedure*, Pt. II, § SS 220.3(4) and (5). And while the vast majority of States statutorily require individualized notice that property has been seized, no State requires individualized notice of the procedures for seeking return of property or how to invoke them.[1] That history and practice is important

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[1] See Ala. Code § 15-5-11 (1995); Ala. R. Crim. P. 3.11; Alaska Stat. § 12.35.030 (Michie 1996); Alaska R. Crim. P. 37; Ariz. Rev. Stat. Ann. §§ 13-3919 to 13-3922 (West 1989); Ark. R. Crim. P. 13.3; Cal. Penal Code § 1535 (West 1982); Colo. Rev. Stat. § 16-3-305 (1997); Colo. R. Crim. P. 41; Conn. Gen. Stat. Ann. §§ 54-33c, 54-36f (West Supp. 1998); Del. Ct. C.P. Crim. R. 41; Del. Super. Ct. Crim. R. 41; D.C. Code Ann. § 23-524 (1996); D.C. Super. Ct. R. Crim. P. 41; Fla. Stat. Ann. § 933.11 (West 1996); Ga. Code. Ann. §§ 17-5-25, 17-5-29 (1997); Haw. R. Penal P. 41; Idaho Code §§ 19-4413, 19-4415, 19-4416 (1997); Idaho Crim. R. 41; 725 Ill. Comp. Stat. Ann. 5/108-6, 5/108-10 (West 1992) (effective Jan. 1, 1993); Ind. Code Ann. §§ 35-33-5-2 to 35-33-5-7 (Michie 1998); Iowa Code Ann. § 808.8 (West 1994); Kan. Stat. Ann. §§ 22-2506, 22-2512 (1995 & Supp. 1997); Ky. R. Cr. P. 13.10; La. Code Crim. Proc. Ann. art. 166 (West 1991); Me. R. Crim. P. 41; Md. R. Crim. P. 4-601; Mass. Ann. Laws ch. 276, §§ 1 to 4 (Law. Co-op. 1992 & Supp. 1998); Mich. Comp. Laws § 780.655 (West 1982); Minn. Stat. Ann. §§ 626.16, 626.17 (West Supp. 1998); Miss. Code Ann. §§ 41-29-157(a)(3), 99-27-15 (1994); Mo. Ann. Stat. § 542. 291 (West Supp. 1998); Mont. Code Ann. §§ 46-5-227, 46-5-301 (1997); Neb. Rev. Stat. Ann. § 29-815

evidence that, when property is seized pursuant to a warrant, notice that property has been seized is sufficient to satisfy due process. See *Medina* v. *California*, 505 U.S. 437, 446-448 (1992); *id.* at 453-454 (O'Connor, J., concurring in the judgment); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 619-622 (1990) (plurality opinion); *id.* at 628 (White, J., concurring in the judgment); *id.* at 629 (Brennan, J., concurring in the judgment).

C. Decisions Of This Court Establish That The Government May Generally Rely On The Applicable Law To Inform Property Owners Of Their Legal Remedies And How To Invoke Them

Decisions of this Court make clear that Rule 41(d) and comparable state rules provide all the notice of available legal remedies that is required by the Due Process Clause. In a variety of contexts, the Court has held that where the government adequately notifies a property owner that his property has been or is

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(Michie 1995); Nev. Rev. Stat. Ann. § 179.075 (Michie 1997); N.H. Rev. Stat. Ann. § 595-A:5 (1986); N.J. Stat. Ann. § 33:1-61 (West 1994); N.J. R. Crim. Prac. 3:5-5; N.M. R. Crim. P. - Dist. Ct. 5-211; N.M. R. Crim. P. - Mag. Ct. 6-208; N.Y. Crim. Proc. Law § 690.50 (McKinney 1995); N.C. Gen. Stat. §§ 15A-252, 15A-254 (1997); N.D. R. Crim. P. 41; Ohio Rev. Code Ann. § 2933.24.1 (Anderson 1996); Ohio R. Crim. P. 41; Okla. Stat. Ann. tit. 22, §§ 1229 to 1234 (West 1986); Or. Rev. Stat. §§ 133.575, 133.595 (1995); Pa. R. Crim. P. 2008, 2009; R.I. Super. Ct. R. Crim. P. 41; S.C. Code Ann. § 17-13-150 (Law. Co-op. 1985); S.D. Codified Laws § 23A-35-10 (Rule 41(d)) (Michie 1988); Tenn. R. Crim. P. 41; Tex. Crim. P. Code Ann. § 18.06 (West 1977 & Supp. 1998); Utah Code Ann. § 77-23-206 (1995); Vt. R. Crim. P. 41; Va. Code Ann. 19.2-57 (Michie 1995); Wash. R. Crim. P. 2.3 (Super. Ct.); W. Va. Code § 62-1A-4 (1997); W. Va. R. Crim. P. 41; Wisc. Stat. Ann. § 968.17 (West 1985); Wyo. Stat. Ann. § 7-7-102 (Michie 1997); Wyo. R. Crim. P. 41.

about to be taken, the government may rely on its published laws to provide the owner with notice of his legal remedies and the procedures for invoking them.

1. In *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 280 (1925), a Board of County Commissioners notified land owners through newspaper publication about its decision to take land to establish a road. A state statute provided that landowners had 30 days from the date of that decision to file a claim for damages. *Id.* at 283-284. The Court held that the notice of the initiation of the proceedings to establish the road was adequate, *id.* at 285, and that the state statute gave landowners adequate notice of the procedure for filing a claim for damages. The Court explained that "[a]ll persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them," *id.* at 283, and it viewed that principle as having special force in the context of tax or condemnation proceedings affecting road property, *ibid.*

Similarly, in *Reetz* v. *Michigan*, 188 U.S. 505, 509 (1903), a board of registration for the practice of medicine notified an applicant that it had rejected his application, and a state statute required the board to meet at specified times during which time an applicant could have a hearing on his application. *Ibid.* The Court held that the state statute provided adequate notice to applicants of the procedure for obtaining a hearing concerning their qualifications. *Ibid.* The Court explained that "[w]hen a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice." *Ibid.*

And in *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 237 (1944), a state statute required notice to be posted at a courthouse that certain unused bank accounts were presumed abandoned and would be turned over to the State. The statute also set forth the circumstances in which property would be presumed abandoned, specified the procedure that persons should follow if they wished to make a claim on the deposits, and defined the time periods for making such claims. *Id.* at 237-238. The Court held that the "statute itself" provided adequate notice of the procedural rights afforded to bank depositors and that this was sufficient to satisfy due process. *Id.* at 242. The Court explained that "[a]ll persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes." *Ibid.*; see *id.* at 244 (posted notice, "when read in the light of the knowledge of the statute, with which all persons having such bank accounts within the state are chargeable," adequately informed depositors of their opportunity to be heard and the procedures for invoking their rights).

North Laramie Land Co., *Reetz*, and *Anderson Nat'l Bank* involved different methods for notifying persons that their interest in property was affected or about to be affected: in *North Laramie*, the government relied on newspaper publication; in *Reetz*, the government gave individualized notice; and in *Anderson Nat'l Bank*, the government posted notice at the courthouse. The key point is that in all three cases, the Court held that, once an individual was provided notice that his property was subject to some potential government action, the statute at issue

supplied adequate notice of the procedure for challenging the deprivation of property. That principle is controlling here. See also *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532 (1982) ("It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.").

2. The principle that property owners are charged with knowledge of the law recognizes that it is generally fair to entrust persons who are directly affected by government action with the responsibility to take the initiative to learn about their legal rights and remedies. Individuals may acquire the necessary information about their legal remedies by consulting available materials at a library or courthouse, by making informal inquiries to government officials, by talking with persons they know who have relevant experience, by seeking free legal advice, or by hiring a lawyer if necessary. The apparent starting point for the court of appeals' decision—that individuals are incapable of asserting their legal rights unless the government provides individualized notice of the remedies that are available and how to assert them—is not consistent with the experience in this country. "The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular polices that affect his destiny." *Atkins* v. *Parker*, 472 U.S. 115, 131 (1985). The court of appeals' holding in this case necessarily and incorrectly "reject[s] that premise." *Ibid.*

The situation of someone whose property has been seized is analogous to that of a potential plaintiff who has been injured by a potential defendant. Due process does not require a potential defendant to alert

the potential plaintiff to his possible legal remedies. See *Short*, 454 U.S. at 536. The law fairly imposes the burden on the plaintiff to obtain information concerning his possible legal remedies, because "[h]aving suffered the triggering event of an injury, a potential plaintiff is likely to possess a heightened alertness to the * * * requirements of law bearing on his claim." *Id.* at 549 (Marshall, J., dissenting). That is true even when state action may threaten personal or property interests.[2] A person whose property has been seized pursuant to a warrant is in a similar position. A "direct attack" upon property rights "may reasonably be expected to convey a warning," making individualized notice of hearing rights set forth in public statutes and rules, unnecessary. *Mullane*, 339 U.S. at 316.

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[2] For example, in *Ingraham* v. *Wright*, 430 U.S. 651, 674-682 (1977), the Court held that legal tort remedies against teachers who subject children to excessive corporal punishment satisfy due process requirements and that teachers may therefore impose corporal punishment without a prior hearing. Similarly, in *Parratt*, 451 U.S. at 542, the Court held that a tort remedy for unjustified destruction of property by prison officials satisfies due process. School systems that impose corporal punishment, however, need not inform children who have been subjected to corporal punishment that they have a right to file a tort suit alleging excessive punishment, or provide the children with information required to file such a suit in the appropriate court. Nor must prison institutions inform prison inmates who complain to them about the destruction of their property that they have the right to file a tort suit, or give the inmates any information that is required to file such a suit.

D. The Court Of Appeals' Notice Obligations Would Impose Substantial New Burdens On The Government Without Providing A Significant Benefit To Property Owners

1. Compliance with the court of appeals' notice requirements would impose substantial new burdens on the government. Providing an individual with accurate and complete information about his potential legal remedies for an unlawful seizure or retention of property under a warrant is by no means simple. For example, a federal notice of remedies could begin with a statement that "[a] person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property," Fed. R. Crim. P. 41(e), but unless such a notice were significantly qualified and expanded, it would be affirmatively misleading. A person who has an indictment or information filed against him may be limited to a motion to suppress that must be filed in the district court in which the criminal case against him is pending. Charles A. Wright, 3 *Federal Practice and Procedure* § 673, at 761 (2d ed. 1982). Once a criminal case is completed, a person may have to file an independent civil action, rather than a Rule 41 motion. *Id.* at 764-765. An independent civil action may also be an alternative remedy before indictment. *Ibid.* A Rule 41 motion may not be available when an administrative agency begins an administrative forfeiture process. *Id.* (Supp. 1998), at 247. And when the property is in the possession of state rather than federal officials, Rule 41 may not apply. *Ibid.* As those examples illustrate,

the appropriate remedy depends on the facts of a particular case; there is no universal answer.

Compliance with the court of appeals' ruling would therefore require the government to make difficult legal judgments about what remedies are available in particular circumstances as well how much information to provide about each remedy. It could readily result in notice that is so complex and so qualified that it loses its value as a guide to action. And it would invite years of litigation over the adequacy of the government's notice and the appropriate remedy for any "notice" violation. Those problems could be alleviated by reducing the required notice to a simple statement that persons who are aggrieved may have a legal remedy. But such a notice merely provides information that most persons in this country already know or could easily discover.

2. The court's requirement that the government must inform the recipient of any information required for initiating an action in the appropriate court (the necessary information requirement) raises equally substantial concerns. The scope of the information that falls within that duty is not entirely clear. The specific information to which the court referred—the warrant number and notice of the need to file a written motion setting forth the basis for relief—is the kind of information that is normally provided by a clerk's office through local rules and other means. If the necessary information requirement were read to include all the information someone would need to know in order to file a document that complies with local rules, the notice supplied by law enforcement officers would have to duplicate large sections of the local rules. For example, such a notice would have to include all format requirements, such as whether

the motion must be typewritten, whether it must appear on a certain kind of paper, whether it must be paginated, whether it must be prepunched, whether it must be double-spaced, and so forth. See *e.g*, Local Rules for the United States District Court of California, Rule 3.4. It would also have to include all the substantive information that must be included in the motion, such as whether the motion must contain a memorandum of points and authorities or the evidence upon which the movant intends to rely. See *e.g.*, *id.*, Rule 7.5.1. Since district courts throughout the country have adopted a wide variety of format and substantive requirements for motions, under a broad reading of the court's necessary information requirement, the government would have to devise district-specific notices, monitor changes in the local rules, and revise notices any time there is a change in local practice. Such an obligation would impose an extraordinary burden on the government.

The court's necessary information requirement could conceivably be read more narrowly to include only the specific information to which the court of appeals referred. Such a notice, however, would leave property owners unequipped to file a motion without substantial independent research or substantial assistance from someone familiar with the local rules, such as a member of the bar or a representative of the clerk's office. And once a person conducts such independent research or seeks out such assistance, he could be expected to learn about the specific information to which the court of appeals referred as well.

"In assessing the propriety of actual notice * * * consideration should be given to the practicalities of the situation and the effect that requiring actual

notice may have on important state interests." *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 489 (1988). The court of appeals' notice obligations are either extremely burdensome to administer or so general as to lack significant value. In either event, they cannot be justified as elements of due process.[3]

E. The Court Of Appeals' Reasons For Imposing Its Notice Requirements Are Unpersuasive

1. The court of appeals sought to derive support for its notice requirements from *Memphis Light, Gas & Water, Div.* v. *Craft*, 436 U.S. 1 (1978). See Pet. App. A18-A19. The court's reliance on *Memphis Light* is misplaced. In *Memphis Light*, a municipal utility gave its customers a written notice stating that payment was overdue and that service would be discontinued if payment was not made by a particular date. 436 U.S. at 13. The notice did not inform customers that they could challenge the proposed discontinuation of service through an internal dispute resolution procedure. *Ibid.* The Court held that the Due Process Clause required the municipal utility to inform its customers of that internal procedure. *Id.* at 14-15.

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[3] Congress and state legislatures, of course, are free to require more than the constitutional minimum and to specify that law enforcement personnel must provide individualized notice of the procedure for contesting particular kinds of seizures. For example, Congress has required individualized notice of the procedure for contesting a seizure of a conveyance for a drug-related offense. 21 U.S.C. 888(b). Congress and the state legislatures are equally free, however, to decide as a matter of policy that individualized notice is not necessary. The Due Process Clause leaves such policy choices to the legislative branches of government.

Memphis Light involved the question of what notice an agency must give about predeprivation procedures. In the predeprivation hearing context, individualized notice about the procedure for challenging government action may often be necessary to make the opportunity for a hearing a meaningful one. In *Memphis Light*, for example, customers were threatened with an immediate termination of a service, the "continuity of which [was] essential to health and safety." 436 U.S. at 15 n.16. Without individualized notice, customers may have been unable to learn about their opportunity for an informal hearing in time to prevent that "uniquely final deprivation." *Id.* at 20. In contrast, in the present context, the required hearing is a postdeprivation hearing, and persons whose property has been seized will have sufficient time to learn about their remedies through appropriate inquiries or research without suffering a final deprivation of property.

Equally important, *Memphis Light* involved the question whether an agency has a responsibility to inform persons about the agency's own internal procedures for contesting proposed agency action. An agency is often the most logical source for such information; indeed, in some cases, it may be the only available source. Moreover, the task of informing persons of internal agency procedures is often a manageable one. In contrast, in the present context, the relevant procedures are legal procedures administered by the courts. Information about such procedures is widely available in public sources, and requiring a law enforcement agency to inform persons about the diverse legal remedies administered and interpreted by the courts would create an undue administrative burden.

Thus, *Memphis Light* addressed the question of when an agency must give notice of predeprivation procedures administered by the agency itself. It does not suggest that a law enforcement agency must notify persons about postdeprivation legal remedies administered by the courts. See *Memphis Light*, 436 U.S. at 26 (Stevens, J., dissenting) (noting that the Court "wisely avoids" holding that customers must receive "an explanation of the legal remedies that are available if a wrongful termination should occur").

2. The court of appeals also sought to support its holding through application of the balancing process set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), which weighs (1) the private interest affected; (2) the risk of an erroneous deprivation without the proposed additional procedures; and (3) the government's interests in avoiding the proposed procedures. See Pet. App. A21-A22. The *Mathews* balancing process, however, is the method the Court uses in deciding what kind of hearing is required. The Court has not applied the *Mathews* balancing process in deciding what kind of notice must be provided. Instead, it has applied the standard derived from *Mullane*, which asks whether the notice given is sufficient to make the opportunity for a hearing meaningful. In *Memphis Light*, for example, the Court applied the *Mullane* standard in holding that a municipal utility must notify customers of the procedure for contesting a discontinuation of service. It did not apply *Mathews* balancing in that part of the opinion. 436 U.S. at 13-14. In contrast, the Court did conduct a balancing analysis under *Mathews* in deciding the kind of hearing that the municipality was required to provide. *Id.* at 15-17.

Moreover, whatever the applicability of *Mathews* balancing to notice questions generally, the principle that the law itself supplies adequate notice of legal remedies and the procedures for invoking them has not been subject to ad hoc balancing. Instead, that principle has been applied categorically, subject to a limited exception (not applicable here) for cases in which the law does not allow a sufficient period of time for a person to become familiar with its provisions before a final deprivation of property occurs. See *Short*, 454 U.S. at 532; *North Laramie*, 268 U.S. at 283-284; see also *Atkins*, 472 U.S. at 130. The court of appeals therefore erred in invoking *Mathews* balancing in support of its new notice requirements.

3. Finally, the court of appeals cited (Pet. App. A19-A20) the confusing and inaccurate advice that respondent may have received in this case as support for its new notice obligations. The possibility of occasionally receiving confusing or inaccurate advice from individual government officials, however, is inherent in any procedural system. Such random and isolated conduct on the part of government officials does not implicate the Due Process Clause. *Daniels* v. *Williams*, 474 U.S. 327, 330-332 (1986); *Parratt*, 451 U.S. at 541. Thus, while respondent may have received confusing or inaccurate advice from one or more government officials, that does not provide a basis for holding unconstitutional the general practice followed for many years in both the federal and state systems.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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