No. 19-1056

United States Court of Appeals for the Sixth Circuit

STEPHEN NICHOLS,

Plaintiff–Appellant,

v.

WAYNE COUNTY, MICHIGAN; WAYNE COUNTY, MICHIGAN PROSECUTOR'S OFFICE; CITY OF LINCOLN PARK, MICHIGAN; KYM L. WORTHY,

Defendants–Appellees.

On Appeal from the
United States District Court for the Eastern District of Michigan

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. SUPPORTING APPELLANTS' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

In accordance with the requirements of Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that *amicus curiae* Restore the Fourth, Inc. is a nonprofit organization that does not have a parent corporation or shareholders who are subject to disclosure.

BEST & FLANAGAN LLP

Dated: October 8, 2020

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AMICUS IDENTITY, INTEREST, & AUTHORITY TO FILE

I. Identity of Restore the Fourth, Inc.

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects. Restore the Fourth also believes that modern changes to technology, governance, and law should foster the protection of privacy and property rights.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities to bolster political support for Fourth Amendment rights. Restore the Fourth also files amicus briefs in key Fourth Amendment cases.

II. Interest Statement

Restore the Fourth supports rehearing en banc because the panel's decision denies litigants a meaningful opportunity to timely challenge the seizure of their property by a local government—via a continued detention or retention hearing—when that governmental entity is attempting to

obtain ownership of that property through civil asset forfeiture. Restore the Fourth cares about this case because it affects the due process rights of Americans in maintaining their papers and other property. When the government claims a right to seize a person's property, close judicial oversight and meaningful process through which the property owner can challenge the seizure is required, especially since "unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

Restore the Fourth believes the panel majority in this case incorrectly concluded that Mr. Nichols failed to plead a constitutional violation. Restore the Fourth agrees with the well-reasoned dissent that Defendants' failure to provide Nichols the opportunity to be heard at a continued retention hearing for three years—where he could argue for his own continued use of his automobile while civil asset forfeiture proceedings were resolved—violated his due process rights. Compelling historical evidence demonstrates that the architects of our Constitution were concerned about government seizure without due process and viewed the Fourth Amendment's due process protections as extending to civil asset

forfeiture actions. Therefore, to the extent that this Court finds a historical lens compelling, Restore the Fourth argues that colonial and early American views on civil asset forfeiture provide another basis for the en banc Court to adopt the rule of law in *Krimstock v. Kelly*, 306 F.3d 40, 68 (2d Cir. 2002), and allow Nichols' constitutional claims to proceed to the merits.

III. Authority to File

Restore the Fourth moves for leave to file this brief under Federal Rule of Appellate Procedure 29(a). Restore the Fourth certifies under Federal Rule of Appellate Procedure 29(c)(5) that no party nor counsel for any party in this case: (1) wrote this brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief.

ARGUMENT

> [W]hat reason can there be, that a free people should be expos'd to all the insult and abuse, . . . and even the fatal consequences, which may arise from the execution of a writ of assistance, only to put fortunes into private pockets. . . . [C]an a community be safe with an uncontroul'd power lodg'd in the hands of such officers . . . ?

Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 36 (1998) (quoting James Otis, Boston Gazette (Jan 4, 1762)).

The history of civil asset forfeiture in the United States provides important context that supports Nichols' constitutional claims and this rehearing petition. The Supreme Court "has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Justice Thomas writing separately) (citing *Bennis v. Michigan*, 516 U.S. 442, 446-48 (1996)). These historical practices were regarded with deep suspicion by the colonists and Founders and were widely considered to have stoked the flames of the American Revolution. Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 FORDHAM L. REV. 287, 291-92 (1993). While the First

Congress enacted forfeiture legislation, the founders viewed the United States power of forfeiture as necessarily limited and, in practice, civil forfeiture was used sparingly. Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1482-91 (2019). Modern day civil asset forfeiture proceedings have largely diverged from the procedural safeguards the framers deemed necessary to apply. The panel's decision in *Nichols* runs contrary to Founders' concerns about government seizure of private property and the need for a timely process for challenging seizures.

I. The Founders had meaningful concerns about civil asset forfeiture in colonial and early America.

Modern day civil asset forfeiture traces its lineage to English common law, with roots extending at least as far back as the 14th century.[1] Elizabeth B. Cain, *The Absurdity of Civil Forfeiture Law Exposed: Supreme Court Upholds Punishment of Innocent in Bennis v. Michigan and Highlights the Need for Reform*, 47 DEPAUL L. REV. 667, 669 (1998). Civil asset forfeiture via in rem

[1] In fact, the lineage can be traced back even further. "Most scholars agree that the practice of forfeiture found in English common law grew out of Biblical traditions." Christine A. Budasoff, *Modern Civil Forfeiture Is Unconstitutional*, 23 TEX. REV. L. & POL. 467, 487 (2019) (citing Schwarcz, *supra* at 290).

jurisdiction was developed as a practical means for the Crown to acquire property belonging to individuals over which a court did not have in personam jurisdiction. An attempt to balance governmental need for effective revenue collection on the one hand with concerns over process and protecting innocent parties from forfeiture's harshest effects on the other, has been inherent to civil asset forfeiture from the beginning.

In its earliest applications, civil asset forfeiture was used by the British Crown as a "principal means of tax enforcement." *Id* at 669-70 (quoting James R. Maxeiner, *Bane of American Forfeiture Law – Banished at Last?*, 62 CORNELL L. REV. 768, 773 (1977)). An innocent owner defense was established by law in 1353 under the Statute of Staples. *Id*. at 670 (citing *Mitchell v. Torup*, 145 Eng. Rep. 764 (Ex. 1766)). "'English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws.'" *Leonard*, 137 S. Ct. 847, 848 (2017) (Justice Thomas writing separately) (internal citation omitted).

Starting in the 1660s, the British Parliament passed a series of Navigation Acts that required all goods imported and exported to the American colonies to be carried by a ship flying under the British flag. *Id*. Ships violating these requirements could be seized and forfeited in

common-law courts. Despite the fact that the Navigation Acts no longer permitted an innocent owner defense, colonial juries resurrected the defense in practice through their hesitance to enforce the Acts in the absence of evidence that vessel owner could have discovered the illegality. Cain, *supra* at 670; Stefan B. Herpel, *Toward A Constitutional Kleptocracy: Civil Forfeiture in Americ*a, 96 MICH. L. REV. 1910, 1946 n.22 (1998).

Frustrated by the colonial juries' resistance to rending verdicts for the British Crown, the 1696 Parliament eliminated the right to trial by jury in the colonies (but retained it in Great Britain) over civil asset forfeiture cases, and established eleven vice-admiralty courts in the American colonies, which would operate without juries. Herpel, *supra* at 1946 n.22 (citing *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 139–43 (1943)). However, their judges and attorneys were typically local men, and over time these courts evolved to still afford aggrieved parties a meaningful and timely opportunity to seek redress. Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 23 (1960) (describing vice-admiralty court procedures, and specifying that the party whose property was seized was given no fewer than three opportunities to appear and answer).

Following the Seven Years' War, which ended in 1762, the Crown was anxious to recoup the war's enormous expense, and to have the colonies pay their way for their own defense. The new Revenue Act of 1764, which became known in the colonies as the "Black Act," attempted to bypass the vice-admiralty courts, which had come to afford more due process to those whose property was seized than met the Crown's revenue needs, and too often turned a blind eye to contraband cargoes. *Id*. at 37. The remedy was a new super-admiralty court, which did not use juries or allow an innocent owner defense, created in the remote outpost of Halifax, Nova Scotia, and staffed by a British-trained judge. *Id*. at 47-54.

The Halifax court allowed forfeitures by default based on the customs officer's assessment of probable cause for the seizure. It was given jurisdiction not only over cargoes seized in the open seas or at large ports, but also over any goods landed from any waterway. *Id*. at 60. At the same time, it became common for the British Crown to issue writs of assistance permitting customs officials—who received a portion of the proceeds they generated and who colonists commonly viewed as corrupt—to enter homes or vessels and seize whatever they deemed contraband. Blumenson, *supra* at 75.

The result of this massive expansion of jurisdiction was that colonists had goods seized from them by Crown agents that would not have been seized before, using writs that were general and arbitrary in nature, which the colonists deeply resented. Resulting disputes were referred to a court that, for a shipowner in Georgia, was two weeks' journey to the northeast in the best of seasons.[2] Ubbelohde, *supra* at 61. It is no wonder that many colonists came to view these searches and seizures as a deprivation of life, liberty, and property, without due process. Blumenson, *supra* at 76; *accord* William Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791*, 589 (2009).

While the Halifax court's existence as a single super-court was unsuccessful and short-lived—by 1770 it had been replaced by four courts in Halifax, Boston, Charleston, and Philadelphia—colonial concerns over process and corruption continued. A complaint to King George III was

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[2] "[M]any persons, however legally their goods may have been imported … [would] lose their property, merely from an inability of following after it, and making that defence which they might do if the trial had been in the Colony where the goods were seized." Ubbelohde, *supra* at 61 (quoting Petition from the Massachusetts House of Representatives to the House of Commons (Nov. 3, 1764).

drafted during the Continental Congress proceedings of September 1774. Petition of Congress to the King George III (1774), *available at*: http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=154. In the complaint, the Continental Congress expressed its concerns that:

> The judges of the admiralty and vice-admiralty courts are empowered to receive their salaries and fees from the effects condemned by themselves.[3] The officers of the customs are employed to break open and enter houses without the authority of any civil magistrate, founded on legal information.

Id.

The government's seizure of private property without a meaningful opportunity for redress was a source of considerable tension between the original colonies and the British Crown, and is widely viewed as a leading cause of the Revolutionary War. Schwarcz, *supra* at 291-92; Herpel, *supra* at 1946 n.22.

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[3] While there is evidence to suggest this assertion was incorrect (Ubbelohde, *supra* at 62), the complaint nonetheless reflects mounting concerns over civil asset forfeiture proceedings.

II. While the Founders enacted civil asset forfeiture legislation, they were concerned with limiting the government's right and providing citizens with a meaningful process for redress.

Until recently, the use of civil asset forfeiture under American law was infrequently used and largely disfavored. Schwarcz, *supra* at 291-92. In many respects, early American forfeitures laws were far narrower than those existing under modern law. *Leonard*, 137 S. Ct. at 849 (Justice Thomas writing separately).

Pre-revolutionary concerns over process and limits to the forfeiture actions carried into America's founding. The first statute adopted by Congress authorizing the use of forfeiture was enacted in 1789. Arlyck, *supra* at 1482. Within in a matter of months of the 1789 Collection Act going into effect, Alexander Hamilton called upon Congress to curtail the inevitable harsh effects of the government's extensive authority to seize private property, which he noted raised the prospect of "heavy and ruinous forfeitures" for mere "inadvertence and want of information." *Id*. (quoting Alexander Hamilton, Report on the Petition of Christopher Saddler (Jan. 19, 1790), *available at* https://founders.archives.gov/documents/Hamilton/01-06-02-0089). Hamilton called upon Congress to

follow "the usual policy of Commercial Nations" and vest "discretionary power of granting relief" somewhere within the government. *Id*. at 1483.

Fisher Ames—a prominent Federalist—joined Hamilton's concerns, and argued before Congress that it was "'necessary' to provide some mode of redress for forfeitures that 'bear hard upon individuals.'" *Id*. So too did his colleagues, who concurred "no person ought to be liable who is not guilty of a violation of the laws intentionally or willfully." *Id*.

"Hamilton and Congress agreed that the threat of 'heavy and ruinous forfeitures' under the revenue laws rendered it a 'necessity' that the government create—and continuously exercise—'some power capable of affording relief.'" *Id*. at 1506.

To limit forfeiture's harshest effects, while balancing the need for "safe and effectual" revenue collection, Congress passed the 1790 Remissions Act, which granted the Treasury Secretary the discretionary power of remission. *Id*. at 1483-84. Under the act, aggrieved parties could petition the Secretary through the district court for remission. *Id*. at 1484.

While the power of remission was discretionary and the petitioner's eligibility for remission in theory depended solely on whether the petitioner's violation was unintentional, in practice, remissions were

liberally granted. *Id*. at 1486-90. Full or partial remission was granted in 91 percent of all petitions between 1790 and 1807. *Id*. at 1486. "The Secretaries accepted a broad range of excuses as justification for lawbreaking conduct," including difficulty or inconvenience in complying with customs regulations. *Id*. at 1489. In Hamilton's view, so long as there "appears to be reasonable ground for a presumption" that the violation "proceeded from ignorance of the law," remission was proper. Letter from Alexander Hamilton to Jeremiah Olney (Sept. 24, 1791), *available at* https://founders.archives.gov/documents/Hamilton/01-09-02-0191); Arlyck, *supra* at 1490.

In examining remissions actions of the first three Treasury Secretaries, Kevin Arlyck concludes that "there is good reason to think that the Treasury Secretaries' generous remission practices were motivated by widespread Founding Era agreement that it was fundamentally unjust to seize private property in response to unintentional violations of the law." Arlyck, *supra* at 1506. Arlyck further concludes that "remission in such circumstances was not discretionary; it was required—possibly by the Constitution itself." *Id*.

The modern trend of eroding procedural protections and unchecked governmental authority over civil asset forfeiture parallels the British Crown's expansion of forfeiture proceedings in the colonies. Founding-era concerns over forfeiture's harshest effects are at their most acute in *Nichols*. A careful historical examination of early American forfeiture and remission proceedings supports the conclusions that the Founders would have required a prompt hearing before a neutral judge to address continued municipal detention of Nichols' vehicle while the County and City's mutual effort to forfeit Nichols' vehicle was pending.

CONCLUSION

Nichols was denied the procedural protections the Founders would have considered necessary. An examination of colonial and early American views on forfeiture proceedings supports granting Nichols a meaningful opportunity to challenge the three-year retention of his vehicle. The Court should grant en banc review.

Respectfully submitted,

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Dated: October 8, 2020

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CERTIFICATE OF COMPLIANCE

Counsel certifies under Fed. R. App. P. 32(g) that the foregoing motion meets the formatting and type-volume requirements set under Fed. R. App. P. 27(d) and Fed. R. App. P. 32(a). The motion is printed in 14-point, proportionately-spaced typeface utilizing Microsoft Word 2010 and contains 2,600 words, including headings, footnotes, and quotations, and excluding all items identified under Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2020, I electronically filed the foregoing motion with the Clerk of Court using the CM/ECF System, which will send notice of such filing to counsel for all parties to this case. I further certify that counsel for all parties to this case are registered as ECF Filers and that they will be served by the CM/ECF system.

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