Nos. 21-13805, 21-13484

United States Court of Appeals for the Eleventh Circuit

HALIMA TARIFFA CULLEY, for herself and those similarly situated,
Plaintiff–Appellant,

v.

ATTORNEY GENERAL, STATE OF ALABAMA; DISTRICT ATTORNEY OF THE 13TH JUDICIAL CIRCUIT (MOBILE COUNTY); CITY OF SATSUMA, ALABAMA,
Defendants–Appellees.

LENA SUTTON, for herself and those similarly situated,
Plaintiff–Appellant,

v.

LEESBURG (TOWN OF), ALABAMA,
Defendant–Appellee,

STATE OF ALABAMA,
Intervenor–Appellee.

Appeals from the U.S. District Courts for the Southern District of Alabama (No. 1:19-cv-701) & Northern District of Alabama (No. 4:20-cv-91)

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

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Interested Persons & Corporate Disclosure Statement

First, as required by 11th Cir. R. 26.1-1, 1-2(a), the undersigned counsel hereby certifies that in addition to the persons and entities listed in Appellants' Certificate of Interested Persons and Corporate Disclosure Statement (as filed with Appellants' July 25, 2022 Petition for Panel Rehearing or Rehearing En Banc), the following persons and entities also have or may have an interest in the outcome of the appeals (collectively, *Culley*) that comprise this matter:

1. Restore the Fourth, Inc.—*Amicus Curiae*

2. Subbaraman, Mahesha P., Esq.—Counsel for *Amicus Curiae*

3. Subbaraman PLLC—Mahesha P. Subbaraman's law firm.

Second, the undersigned counsel certifies under FRAP 26.1(a) and 11th Cir. R. 26.1-2(a) that *amicus curiae* Restore the Fourth, Inc. is a nonprofit organization that is incorporated under Massachusetts law and is further registered under Section 501(c)(4) of the Internal Revenue Code. Restore the Fourth has no parent corporation and no shareholders (including any publicly-held corporations).

Finally, the undersigned counsel certifies under 11th Cir. 26.1-3(b) that to the best of his knowledge, no publicly-traded company or corporation has an interest in the outcome of this matter.

Respectfully submitted,

Dated: August 1, 2022

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Rule 35 Statement of Counsel

I express a belief, based on a reasoned and studied professional judgment, that the panel decision here is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

- *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993)
- *Mathews v. Eldridge*, 424 U.S. 319 (1976)
- *Morrissey v. Brewer*, 408 U.S. 471 (1972)

I also express a belief, based on a reasoned and studied professional judgment, that the present appeals (collectively, *Culley*) involve the following questions of exceptional importance:

1. Whether *Mathews v. Eldridge*, 424 U.S. 335 (1976) provides the correct test for determining whether due process entitles vehicle owners to a prompt continued-detention hearing for a seized vehicle—and if so, does *Mathews* support this right?

2. Whether the original meaning of due process, as defined by English common-law tradition, independently supports a right to a prompt continued-detention hearing for a seized vehicle.

/s/Mahesha P. Subbaraman

ATTORNEY OF RECORD FOR

Restore the Fourth, Inc. (*Amicus Curiae*)

Amicus Identity, Interest, & Authority to File

A. Identity of the Amicus

Restore the Fourth, Inc. is a non-partisan nonprofit dedicated to robust enforcement of the Fourth Amendment and associated due process guarantees. Restore the Fourth oversees a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Restore the Fourth also files amicus briefs in significant cases that concern Fourth Amendment or due process rights. *See, e.g.,* Brief of *Amici Curiae* Restore the Fourth, Inc., et al. in Support of Petitioner, *Lombardo v. City of St. Louis*, 141 S. Ct. 2239 (2021); Brief of *Amicus Curiae* Restore the Fourth, Inc., in Support of Petitioner, *Torres v. Madrid*, 141 S. Ct. 989 (2021); Brief of *Amici Curiae* Restore the Fourth, Inc., et al. in Support of Reh'g En Banc, *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019).

B. Interest of the Amicus

Restore the Fourth is interested in *Culley* because the panel decision here ultimately leaves vehicle owners "less secure against governmental invasion than they were at common law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring-in-part). Both the *Mathews* due-process test and common-law tradition affirm that vehicle owners have the right to a prompt hearing over whether they may retain a seized vehicle while civil forfeiture of the vehicle

is litigated. Yet, the panel held that a timely forfeiture trial affords a vehicle owner "all the process to which he is due." (Op.9.)

On this basis, the panel affirmed the dismissal of Appellants' due-process claims, which asserted Appellants' right to a prompt continued-detention hearing while awaiting a timely forfeiture trial. Writ large, the panel's conclusion leaves vehicle owners across the Eleventh Circuit subject to "the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Restore the Fourth believes this outcome merits en banc review—especially given the "egregious and well-chronicled abuses" that civil forfeiture enables. *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

C. Authority of the Amicus to File

Restore the Fourth files this brief under FRAP 29(b)(2) and 11th Cir. R. 29-3. Both rules allow—with court permission—amicus briefs in support of petitions for rehearing en banc.

Restore the Fourth also further affirms under FRAP 29(a)(4)(E) that no party, nor counsel for any party, in this case: (1) wrote this amicus brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief. Only Restore the Fourth, including their members and counsel, have contributed any money to fund the preparation and submission of this brief.

Issues Meriting En Banc Review

1. Whether *Mathews v. Eldridge*, 424 U.S. 335 (1976) provides the correct test for determining whether due process entitles vehicle owners to a prompt continued-detention hearing for a seized vehicle—and if so, does *Mathews* support this right?

The panel deemed itself bound by *Gonzales v. Rivkind*, 858 F.2d 657 (11th Cir. 1988) to reject *Mathews* for gauging due-process rights related to seized vehicles. (Op.9.) But in the 34 years since *Gonzales*, the Second, Fifth, Seventh, and Eighth Circuits have all recognized that *Mathews* is the correct test.[1] These cases support en banc review, as do the many decisions that have found *Mathews* requires prompt continued-detention hearings for seized vehicles.[2]

2. Whether the original meaning of due process supports prompt continued-detention hearings for seized vehicles?

Members of the Supreme Court and this Court have stressed the importance of recovering the Constitution's "original meaning" *Laufer v. Arpan, LLC*, 29 F. 4th 1268, 1288 (11th Cir. 2022) (Newsom, J., concurring). The original meaning of due process supports a right to prompt continued-detention hearings for seized vehicles.

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[1] *Krimstock v. Kelly,* 306 F.3d 40, 60 (2d Cir. 2002); *Serrano v. CBP*, 975 F.3d 488, 497 (5th Cir. 2020); *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), *vacated-as-moot by Alvarez v. Smith,* 558 U.S. 87 (2009); *Booker v. City of St. Paul,* 762 F.3d 730, 734–37 (8th Cir. 2014).

[2] *See Washington v. Marion County Prosecutor*, 264 F. Supp. 3d 957, 978-79 (S.D. Ind. 2017)*; Brown v. D.C.,* 115 F. Supp. 3d 56, 67 (D.D.C. 2015); *Simms v. D.C.,* 872 F. Supp. 2d 90, 104 (D.D.C. 2012).

Argument

Continuous government detention of a vehicle pending the government's initiation and prosecution of forfeiture proceedings is no small matter. "Cars extend us. Cars manifest liberty. A person released on bond, retaining a presumption of innocence, might suffer virtual imprisonment if he cannot regain his vehicle in time to drive to work." *Washington v. Marion County Prosecutor*, 916 F.3d 676, 679 (7th Cir. 2019) (Manion, J.). The Court should thus grant en banc review to consider the standards that govern whether due process entitles vehicle owners to continued-detention hearings[3]—i.e., a prompt judicial hearing to address whether the government may detain a vehicle while forfeiture litigation is pending.

I. En banc review should be granted to reaffirm the paramount nature of the *Mathews* due-process test.

Time and again, the Supreme Court has emphasized that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The point has been "said so often by th[e] Court and others as not to require citation of authority." *Id.* To cement this point, in 1976, the Court held in *Mathews v. Eldridge* that "identification of the

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[3] This amicus brief specifically uses the phrase "continued-detention hearing" rather than "post-seizure hearing" or "post-deprivation hearing" so as to emphasize *what the hearing is about* (continued vehicle detention), as opposed to when the hearing happens to occur (i.e., after seizure of a vehicle).

specific dictates of due process generally requires consideration of three distinct factors." 424 U.S. 319, 334-35 (1976).

These three distinct factors are: (1) the "private interest affected by [an] official action"; (2) the "risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards"; and (3) the Government's interest. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). Put together, these factors—or *Mathews* test—is the Supreme Court's paramount rule for the way courts should gauge what due process requires "under **any** given set of circumstances." *Morrissey*, 408 U.S. at 481 (bold added). That includes vehicle forfeitures.

A recent Minnesota Supreme Court decision confirms this. Addressing whether the *Mathews* test should be applied to evaluate the due process "need" for "prompt post-seizure judicial review of the substantive legal basis for the State's seizure of [a] vehicle," the court did not hesitate: "[t]he *Mathews* framework is well suited to answering this question." *Olson v. One 1999 Lexus*, 924 N.W.2d 594, 603 (Minn. 2019). The court explained it had "consistently applied *Mathews* to procedural due process claims over the years" and such application in *Olson* fit "with other courts that have considered … whether *Mathews* … applies." *Id.* at 603-04 & n.7.

The *Olson* court also recognized that "the *urgency* of a prompt post-deprivation hearing" in the vehicle-forfeiture context made application of the *Mathews* test of "paramount" importance. *Id.* at

602-03 (italics-in-original). Other courts have recognized the same: loss of a vehicle threatens "fundamental life activities such as transit to a job or school, visits to health care professionals, and caretaking for children or other family members." *Washington v. Marion County Prosecutor*, 264 F. Supp. 3d 957, 976 (S.D. Ind. 2017). And this is true even if forfeiture is a foregone conclusion, because a vehicle owner may still deserve interim relief (e.g., to prevent hardship), even if the owner is bound to lose on the merits. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 87 (1972) ("The right to be heard does not depend upon an advance showing that one will surely prevail.").

A helpful way to appreciate this point is to consider the similar role of pre-trial release in criminal cases. A person may be entitled to such release even if they are later convicted or are certain to face conviction at trial. *See State v. Brooks*, 604 N.W.2d 345, 350-51 (Minn. 2000). Pre-trial release thus concerns a liberty interest that is separate and distinct from liberty after acquittal. It cannot then be said that sufficient protection against erroneous deprivation of this interest may be found in a defendant's right obtain a speedy trial.

The same goes for seized vehicles awaiting a forfeiture trial. The function of a forfeiture trial is to minimize the risk of wrongful *forfeiture*—not wrongful *detention* as forfeiture litigation is ongoing. Hence, "[i]n the language of procedural due process," the possibility of a timely forfeiture trial—which may still entail being deprived of one's vehicle for months on end—does not afford a vehicle owner

an "opportunity to be heard" on why the owner should be able to keep their vehicle while forfeiture litigation is pending. *Rutherford v. United States*, 702 F.2d 580, 584 (5th Cir. 1983).

Only the *Mathews* test respects this critical point—and also the host of benefits that continued-detention hearings afford. The most important benefit is **early error correction**. "Some risk of erroneous seizure exists in all cases, and in the absence of prompt review by a neutral fact-finder … an inquiry into probable cause … must wait months or sometimes years before a … forfeiture proceeding takes place." *Krimstock*, 306 F.3d at 50-51. "An early [judicial] hearing, on the other hand … provide[s] vehicle owners the opportunity to test the factual basis of [a car seizure] and thus protect[s] them against erroneous deprivation of the use of their vehicles." *Stypmann v. City & Cnty. of S.F.*, 557 F.2d 1338, 1344 (9th Cir. 1977).

Continued-detention hearings also enable **probable cause disaggregation**. The probable cause that supports initial seizure of a vehicle may not support detention pending a forfeiture trial. *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017) ("The exigency that justified … the seizure vanished once … [the owner] showed up …."). Continued-detention hearings finally serve the essential function of **hardship prevention**, making it possible for a court to assess and mitigate the "onerous burdens" that "[d]ays, even hours, of unnecessary" of vehicle detention "may impose … upon a person deprived of his vehicle." *Stypmann*, 557 F.2d at 1344.

It is no surprise then that other courts have opted to "take another run at the issue" of continued-detention hearings for seized vehicles when faced with past decisions that disregarded *Mathews*. *Smith v. City of Chicago*, 524 F.3d 834, 836 (7th Cir. 2008), *vacated-as-moot by Alvarez v. Smith,* 558 U.S. 87 (2009). This Court should do the same. After all, "[i]ndividual freedom finds tangible expression in property rights." *James Daniel Good*, 510 U.S. at 61. And it is "[i]t is hard to see any reason why" persons like Appellants should lose their vehicles "for months or years without a means to contest the seizure or even to post a bond." *Smith*, 524 F.3d at 838.

II. En banc review should be granted to recover the original meaning of due process.

The Fourteenth Amendment's guarantee of due process is not limited to modern due-process precedents like *Mathews*. Due process also includes the "original understanding" of this concept, the judicial enforcement of which ensures "the people's rights are never any less secure against governmental invasion than they were at common law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224-25 (2018) (Gorsuch, J., concurring-in-part and in the judgment).

The original meaning of due process is rooted in Magna Carta, which provided no free person could be deprived of life, liberty, or property except "by the law of the land." *Twining v. New Jersey,* 211 U.S. 78, 100 (1908). In this regard, English law regarded "private property" so highly that it would "not authorize the least violation

of it." 1 W. BLACKSTONE, COMMENTARIES *135 (1st ed. 1765). British statutes forbade the King from "dispos[ing] of the lands or goods of any subjects of this kingdom" in any "arbitrary way whatsoever." *Id.* at *138. And under Chapter 30, Magna Carta itself forbade the arbitrary disposition of private vehicles: "[n]o sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman."[4]

Applied today, these due-process principles dictate that "the government generally may not deprive a person" of life, liberty, or property "without affording him the benefit of (at least) **those customary procedures to which freemen were entitled by the old law of England**." *Sessions*, 138 S. Ct. at 1224 (Gorsuch, J., concurring-in-part) (cleaned up) (bold added). The key question then becomes: what customary procedures were freemen entitled to under the old law of England when the Crown seized and tried to forfeit private property—including vehicles like ships and carts?

"English law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-83 (1974). The Court of Exchequer adjudicated these statutory forfeitures. *See id*. The Exchequer's history subsequently reveals that Crown seizures had to be supported by an early showing of probable cause—a rule that the common law enabled property owners to enforce.

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[4] MAGNA CARTA (1215), *available online* https://bit.ly/3stFqtb.

The common law provided that: "[i]f there be a seizure made, the Officer must in the next Term, or sooner, at the Discretion of the Court, return the Cause of Seizure and take out a Writ of Appraisement."[5] If the Crown did not timely return a cause-of-seizure or take out a writ-of-appraisement,[6] then the owner of the seized property was "entitled to move for a Writ of Delivery" that would require the Crown to return the seized property.[7]

The common law observed a similar due-process limit even after filing of a cause-of-seizure and writ-of-appraisement. At this point, the Crown had to file "an [i]nformation … to condemn"[8] the seized property.[9] But if the "information [was] not filed in a month" after a property owner asserted his claim to the seized property, the owner could again "move for a writ of delivery, which he might … have as a matter of course, upon giving security."[10]

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5 SIR GEOFFREY GILBERT, A TREATISE ON THE COURT OF EXCHEQUER 182 (London, H. Lintot 1758).

6 A writ-of-appraisement was "a writ issued out of court for the valuation of goods seized as forfeited to the crown." 38 ABRAHAM REES, CYCLOPAEDIA (London, Rivington et al. 1819).

7 GILBERT, *supra* note 5, at 182; *see* JAMES MANNING, THE PRACTICE OF THE COURT OF EXCHEQUER 143-44 (London, A. Strahan 1827).

8 An "information in the Exchequer" was "a statement … to the Court" asserting the King's right "to an adjudication in his favor" as to seized property. MANNING, *supra* note 7, at 142.

9 B.Y., MODERN PRACTICE OF THE COURT OF EXCHEQUER 141 (London, E. & R. Nutt & R. Gosling 1730).

10 MANNING, *supra* note 7, at 162-63.

American courts readily assimilated this English tradition. If a "seizing officer … refuse[d] to institute proceedings to ascertain [a] forfeiture," a federal court could "upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure." *Slocum v. Mayberry*, 15 U.S. 1, 10 (1817). This original understanding of due process then supports en banc review here, for the rights of vehicle owners in the Eleventh Circuit should not be "any less secure … than they were at common law." *Sessions*, 138 S. Ct. at 1224-25 (Gorsuch, J., concurring-in-part).

Conclusion

The Court should grant Appellants' petition for en banc review.

Respectfully submitted,

Dated: August 1, 2022

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Certificate of Compliance

The undersigned counsel certifies under FRAP 32(g) that the foregoing *amicus curiae* brief in support of Appellants' petition for rehearing en banc meets the applicable formatting and type-volume requirements established by FRAP 32(a) and 11th Cir. R. 29-3.

This amicus brief is printed in 14-point, proportionately-spaced typeface using Microsoft Word 2010 and contains **2,590 words**, including headings, footnotes, and quotations, and excluding all items identified under FRAP 32(f) and 11th Cir. R. 29-3.

Dated: August 1, 2022

SUBBARAMAN PLLC

By: /s/Mahesha P. Subbaraman

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Certificate of Service

The undersigned counsel certifies that on August 1, 2022, he electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit via the CM/ECF system. The undersigned counsel further certifies that all participants in the case are represented by CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 1, 2022

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