SUPREME COURT OF THE UNITED STATES

No. 22–585

HALIMA TARIFFA CULLEY, ET AL., PETITIONERS *v.* STEVEN T. MARSHALL, ATTORNEY GENERAL OF ALABAMA, ET AL.

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

[May 9, 2024]

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring.

I agree with the Court that, at a minimum, the Due Process Clause requires a prompt hearing in civil forfeiture cases. *Ante*, at 5. I agree that no legal authority presented to us indicates a prompt hearing must necessarily take the form Ms. Culley and Ms. Sutton suppose. *Ante*, at 6. I agree, too, that *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), does not teach otherwise. *Ante*, at 9. Under its terms, judges balance "the private and governmental interests at stake," *Mathews*, 424 U. S., at 340, to determine "what procedures the government must observe" when it seeks to withhold "benefits" "such as welfare or Social Security," *Nelson* v. *Colorado*, 581 U. S. 128, 141 (2017) (ALITO, J., concurring in judgment). That test does not control—and we do not afford any particular solicitude to "governmental interests"—in cases like this one where the government seeks to deprive an individual of her private property. But if all that leads me to join today's decision, I also agree with the dissent that this case leaves many larger questions unresolved about whether, and to what extent, contemporary civil forfeiture practices can be squared with the Constitution's promise of due process. I write separately to highlight some of them.

I

The facts of this case are worth pausing over because they are typical of many. Halima Culley, a Georgia resident, bought a 2015 Nissan Altima for her son to use while he was away studying at the University of South Alabama. App. 58, ¶¶22–24. The car belongs to her and she pays for its registration and insurance. *Ibid.*, ¶¶25–26. The plan was for her son to bring the car home during the summer for the family to share. *Id.*, at 60, ¶37. But before that could happen, a police officer in Alabama pulled her son over and arrested him for possessing marijuana and drug paraphernalia. *Id.*, at 59, ¶27. The officer also took the car. *Ibid.*, ¶28. Eventually, law enforcement officials learned that the Nissan belonged to Ms. Culley, not her son. But instead of returning it, they initiated civil forfeiture proceedings in the hope of keeping the vehicle permanently. *Ibid.*, ¶¶30–33. It took a lawsuit and a 20-month wait for the car to make its way back to her. App. to Pet. for Cert. 3a.

For Alabama, this was business as usual. Often, the State's law enforcement agencies may take and keep private property without a warrant or any other form of prior process. Ala. Code §20–2–93(d) (2023 Cum. Supp.). Instead, only after taking the property must the agency file a civil forfeiture action in court. Once there, the agency need present only a "prima facie" case that the property in question represents proceeds "traceable" to a drug crime or property used to "facilitate" one. §§20–2–93(b)(3), (b)(5); *Ex parte McConathy*, 911 So. 2d 677, 681 (Ala. 2005). If the agency proves just that much, the burden sometimes shifts to the property's owner to prove she was an "innocent owner" who did not know about or consent to the conduct that caused the property to be taken. §§20–2–93(w), (a)(4). Should the agency prevail in the end, it may keep the property for its own use or sell it and keep the money. §20–2–93(s).

Laws like Alabama's exist in many States and at the federal level. But as commonplace as these civil forfeiture laws may be, most are pretty new. As part of the War on Drugs, in the 1970s and 1980s Congress began enacting sweeping new civil forfeiture statutes allowing the government to seize and keep the proceeds of drug crimes and the personal property used to facilitate them. See S. Cassella, Asset Forfeiture Law in the United States §2–4, p. 48 (3d ed. 2022). Since then, the federal government has extended similar civil forfeiture rules to most federal offenses. *Id.*, at 49. Today, it appears, "[w]hite-collar and firearms crimes" now "accoun[t] for larger shares of all [federal] forfeitures than drug crimes." L. Knepper, J. McDonald, K. Sanchez, & E. Pohl, Policing for Profit: The Abuse of Civil Asset Forfeiture 26 (3d ed. 2020) (Knepper). Following the federal government's lead, many States have adopted similar laws of their own. See *id.*, at 170–185.

These new laws have altered law enforcement practices across the Nation in profound ways. My dissenting colleagues catalogue a number of examples, see *post*, at 3–6 (opinion of SOTOMAYOR, J.), but consider just a few here. To secure a criminal penalty like a fine, disgorgement of illegal profits, or restitution, the government must comply with strict procedural rules and prove the defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U. S. 358, 363 (1970). In civil forfeiture, however, the government can simply take the property and later proceed to court to earn the right to keep it under a far more forgiving burden of proof. See Knepper 39. In part thanks to this asymmetry, civil forfeiture has become a booming business. In 2018, federal forfeitures alone brought in $2.5 billion. *Id.*, at 15. Meanwhile, according to some reports, these days "up to 80% of civil forfeitures are not accompanied by a criminal conviction." Brief for Buckeye Institute as *Amicus Curiae* 14 (Buckeye Brief).

Law enforcement agencies have become increasingly dependent on the money they raise from civil forfeitures. The federal government shares a large portion of what it receives with state and local law enforcement agencies that aid its forfeiture efforts. Dept. of Justice & Dept. of Treasury, Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies 3, 12 (Mar. 2024). At one time or another, "[o]ver 90% of the agencies serving jurisdictions with populations" above 250,000 have participated in this "equitable sharing" scheme. E. Jensen & J. Gerber, The Civil Forfeiture of Assets and the War on Drugs: Expanding Criminal Sanctions While Reducing Due Process Protections, 42 Crime & Delinquency 421, 425 (1996). And it seems that, when local law enforcement budgets tighten, forfeiture activity often increases. B. Kelly, Fighting Crime or Raising Revenue? Testing Opposing Views of Forfeiture 15 (2019).

Not only do law enforcement agencies have strong financial incentives to pursue forfeitures, those incentives also appear to influence how they conduct them. Some agencies, for example, reportedly place special emphasis on seizing low-value items and relatively small amounts of cash, hopeful their actions won't be contested because the cost of litigating to retrieve the property may cost more than the value of the property itself. See Knepper 9. Other agencies seem to prioritize seizures they can monetize rather than those they cannot, posing for example as drug dealers rather than buyers so they can seize the buyer's cash rather than illicit drugs that hold no value for law enforcement. See Buckeye Brief 7–8.

Delay can work to these agencies' advantage as well. See Brief for Institute for Justice et al. as *Amici Curiae* 16. Faced with the prospect of waiting months or years to secure the return of a car or some other valuable piece of property they need to work and live, even innocent owners sometimes "settle" by "paying a fee to get it back." Knepper 36.

Contributing to the inducement to settle is how little proof the agencies must produce to win forfeiture, the cost of litigation, and the need to appear in court—sometimes, as Ms. Culley learned, in a different State. And if these tactics and burdens work against all affected individuals, can it be any surprise "the poor and other groups least able to defend their interests" often suffer most? *Leonard* v. *Texas*, 580 U. S. 1178, 1180 (2017) (statement of THOMAS, J., respecting denial of certiorari); see *post*, at 4–5.

II

To my mind, the due process questions surrounding these relatively new civil forfeiture practices are many. Start with the most fundamental one. The Fifth and Fourteenth Amendments guarantee that no government in this country may take "life, liberty, or property, without due process of law." As originally understood, this promise usually meant that a government seeking to deprive an individual of her property could do so only *after* a trial before a jury in which it (not the individual) bore the burden of proof. See, *e.g.*, 1 W. Blackstone, Commentaries on the Laws of England 134–135 (1765) (Blackstone); *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 304, 315 (CC Pa. 1795) (Patterson, J.); *Wilkinson* v. *Leland*, 2 Pet. 627, 657 (1829) (Story, J.). So how is it that, in civil forfeiture, the government may confiscate property first and provide process later?

The answer, if there is one, turns on history. If, as a rule, the Due Process Clauses require governments to conduct a trial before taking property, some exceptions are just as deeply rooted. And for just that reason, these exceptions, too, may be consistent with the original meaning of the Fifth and Fourteenth Amendments. As this Court has put it, "a process of law . . . must be taken to be due process of law" if it enjoys "the sanction of settled usage both in England and in this country." *Hurtado* v. *California*, 110 U. S. 516, 528 (1884); see, *e.g.*, *Murray's Lessee* v. *Hoboken Land*

& Improvement Co., 18 How. 272, 278–280 (1856).

But can contemporary civil forfeiture practices boast that kind of pedigree? In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974), this Court noted that English and early American admiralty laws allowed the government to seize a vessel involved in "piratical" or other maritime offenses and later initiate postdeprivation civil forfeiture proceedings. *Id.*, at 684. The Court observed that similar legal rules existed for cases involving "objects used in violation of the customs and revenue laws." *Id.*, at 682; see also K. Arlyck, The Founders' Forfeiture, 119 Colum. L. Rev. 1449, 1466 (2019). After emphasizing the existence of those traditions, the Court proceeded to uphold the civil forfeiture of a boat. *Calero-Toledo*, 416 U. S., at 682, 690. Later and proceeding on much the same basis, the Court approved various aspects of civil forfeiture practice in the context of customs enforcement actions. See *United States* v. *$8,850*, 461 U. S. 555, 562, n. 12 (1983); *United States* v. *Von Neumann*, 474 U. S. 242, 249, n. 7 (1986).

These historical traditions suggest that postdeprivation civil forfeiture processes in the discrete arenas of admiralty, customs, and revenue law may satisfy the Constitution. But as the Court stressed in *Von Neumann*, "the general rule" remains that the government cannot "'seize a person's property without a *prior* judicial determination that the seizure is justified.'" *Id.*, at 249, n. 7. And it is far from clear to me whether the postdeprivation practices historically tolerated inside the admiralty, customs, and revenue contexts enjoy "the sanction of settled usage" outside them. *Hurtado*, 110 U. S., at 528.

The reasons for the law's traditionally permissive attitude toward civil forfeiture in those three contexts may merit exploration, too. From a brief look, it seems they were sometimes justified for reasons particular to their fields. In the early Republic, for example, once a ship involved in violations of the Nation's piracy or customs laws slipped port

for a foreign destination, American courts often could not exercise jurisdiction over it or its crew, let alone its owners. See R. Waples, Proceedings in Rem §19, p. 22 (1882) (Waples). In many instances, the law recognized that seizing the ship, subject to postdeprivation procedures, represented "the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *Harmony* v. *United States*, 2 How. 210, 233 (1844) (Story, J.); see also 3 Blackstone 262 (1768) (justifying civil forfeiture in customs cases as necessary "to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice"). But if history sanctions that line of thinking, it's hard not to wonder: How does any of that support the use of civil forfeiture in so many cases today, where the government *can* secure personal jurisdiction over the wrongdoer? And where seizing his property is *not* the only adequate means of addressing his offense?

Even supposing some modern civil forfeiture regimes are able to claim the sanction of history, I wonder whether all their particulars might. In the past, it seems the government could confiscate only certain classes of property. So, for example, admiralty statutes regularly authorized the government to seize and pursue the civil forfeiture of "the instrument[s] of the offence," say, a ship used to engage in piracy. *Smith* v. *Maryland*, 18 How. 71, 75 (1855); see *Harmony*, 2 How., at 233. But statutes like that did not necessarily mean forfeiture extended to the vessel's cargo, and courts were loath to assume they did. *Id.*, at 235. Today, by contrast, civil forfeiture statutes routinely permit governments to confiscate not just instruments used in an offense, but other "facilitating" property as well. See *supra*, at 3. (In this respect, Alabama's statute is again illustrative.) And if that difference seems a small one, it is anything but: It is the difference between being able to confiscate the materials and equipment used to produce an illicit drug and being able to confiscate someone's car after he

used it as the site to conduct a single drug transaction as either buyer or seller. See *Austin* v. *United States*, 509 U. S. 602, 627–628 (1993) (Scalia, J., concurring in part and concurring in judgment).

Even in the areas where the law tolerated civil forfeiture, earlier generations tempered some of its harshest features. Courts, for example, ordinarily entertained "overwhelming necessity" as a defense to "the violation of revenue laws" that might otherwise justify forfeiture. 1 J. Bishop, Commentaries on the Criminal Law §697, p. 575 (1856) (Bishop); see *Peisch* v. *Ware*, 4 Cranch 347, 363 (1808) (Marshall, C. J.) ("[A] forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed"). Some statutes permitted the owner to avoid forfeiture by proving that the violation "proceeded from accident or mistake." 1 Stat. 677; see *United States* v. *Nine Packages of Linen*, 27 F. Cas. 154, 157 (No. 15,884) (CC NY 1818); Bishop §697, at 575; cf. 3 Stat. 183 (no forfeiture of goods from "bona fide purchaser"). Others empowered the Treasury Secretary himself to afford the same remedy—and evidence suggests officials "were exceedingly liberal in their use of the . . . power, granting relief in the overwhelming majority of cases presented to them." Arlyck, 119 Colum. L. Rev., at 1487; see also *The Laura*, 114 U. S. 411, 414–415 (1885). These days, meanwhile, many civil forfeiture statutes lack some or all of these mitigating features. I acknowledge that this Court has suggested an innocent owner defense is not always constitutionally required. *Bennis* v. *Michigan*, 516 U. S. 442, 443 (1996); see *id.*, at 455–457 (THOMAS, J., concurring) (discussing limits to the Court's holding); *id.*, at 457–458 (Ginsburg, J., concurring) (same). But even putting that debate aside, what of early forfeiture's other ameliorative attributes?

It appears, too, that time was often of the essence in traditional civil forfeiture practice. So, for example, an early

federal statute permitting forfeiture for nonpayment of internal duties "enjoined" the "collector" "to cause suits for [forfeiture] to be commenced without delay, and prosecuted to effect." 3 Stat. 242. In an admiralty case, Chief Justice Marshall remarked, "If the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure." *Slocum* v. *Mayberry*, 2 Wheat. 1, 10 (1817). And in many instances owners could recover their property while the forfeiture proceedings were ongoing by posting a bond. See, *e.g.*, 3 Stat. 242; *United States* v. *Ames*, 99 U. S. 35, 36 (1879); Waples §81, at 112; *ante*, at 12. It's another feature of historic practice that raises questions about current ones in which even innocent owners can wait for months or years for forfeiture proceedings to play out.

III

Why does a Nation so jealous of its liberties tolerate expansive new civil forfeiture practices that have "led to egregious and well-chronicled abuses"? *Leonard*, 580 U. S., at 1180 (statement of THOMAS, J.). Perhaps it has something to do with the relative lack of power of those on whom the system preys. Perhaps government agencies' increasing dependence on forfeiture as a source of revenue is an important piece of the puzzle. Cf. *Calero-Toledo*, 416 U. S., at 679 (indicating, over 50 years ago and before the rise of many modern innovations, that "self-interes[t]" did not motivate the forfeiture of the vessel at issue). But maybe, too, part of the reason lies closer to home. In this Nation, the right to a jury trial before the government may take life, liberty, or property has always been the rule. Yes, some exceptions exist. But perhaps it is past time for this Court to examine more fully whether and to what degree contemporary civil forfeiture practices align with that rule and those exceptions.

Really, it's hard not to wonder whether some current civil forfeiture practices represent much less than a revival of the archaic common-law deodand. The deodand required the forfeiture of any object responsible for a death—say, a knife, cart, or horse—to the Crown. See 1 Blackstone 290. Today, the idea seems much the same even if the practice now sweeps more broadly, requiring almost any object involved in almost any serious offense to be surrendered to the government in amends.

The hardships deodands often imposed seem more than faintly familiar, too. Deodands required forfeiture regardless of the fault of the owner, himself sometimes the deceased. Not infrequently, the practice left impoverished families without the means to support themselves, faced not only with the loss of a loved one but also with the loss of a horse or perhaps a cart essential to their livelihoods. See 2 F. Pollock & F. Maitland, The History of English Law 472 (1895); E. Burke, Deodand—A Legal Antiquity That May Still Exist, 8 Chi.-Kent L. Rev. 15, 17, 19–20 (1930). Sometimes grieving families could persuade authorities or juries to forgo a deodand, but often not, and generally the burden to avoid a deodand was on them. See M. Foster, Crown Law 266 (1762).

As time went on, too, curiously familiar financial incentives wormed their way into the system. Originally, the Crown was supposed to pass the deodand (literally, a thing given to God) onto the church "as an expiation for the sou[l]" of the deceased. 1 Blackstone 290. Over time, though, the Crown increasingly chose instead to sell off its rights to deodands to local lords and others. These recipients inevitably wound up with a strong interest in the perpetuation of the enterprise. See *id.*, at 292. Ultimately, the deodand's appeal faded in England, and this Court has held that it "did not become part of the common-law tradition of this country." *Calero-Toledo*, 416 U. S., at 682; see *id.*, at 681, n. 19. But has something not wholly unlike it gradually

reemerged in our own lifetimes?

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In asking the questions I do today, I do not profess a comprehensive list, let alone any firm answers. Nor does the way the parties have chosen to litigate this case give cause to supply them. But in future cases, with the benefit of full briefing, I hope we might begin the task of assessing how well the profound changes in civil forfeiture practices we have witnessed in recent decades comport with the Constitution's enduring guarantee that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."