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IN THE SUPREME COURT OF THE UNITED STATES
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HALIMA TARIFFA CULLEY, ET AL.,)
Petitioners,)
v.) No. 22-585
STEVEN T. MARSHALL, ATTORNEY)
GENERAL OF ALABAMA, ET AL.,)
Respondents.)
- - - - -

Washington, D.C.
Monday, October 30, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

1 APPEARANCES:
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3 of the Petitioners.
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9 Respondents.
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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-585, Culley versus Marshall.

Mr. Dvoretzky.

ORAL ARGUMENT OF SHAY DVORETZKY

ON BEHALF OF THE PETITIONERS

MR. DVORETZKY: Mr. Chief Justice, and may it please the Court:

The question presented is narrow: Should courts apply Mathews or Barker to assess the sufficiency of process in civil forfeiture proceedings? The answer is Mathews.

Mathews is the default due process standard for civil cases and for good reason. It assesses both the private and governmental interests to guard against unreasonable risks of error. And the Court has consistently applied it to determine whether more process is due, including in Good, another civil forfeiture case.

Respondents prefer Barker because Barker's answer is always no additional process. But Respondents' primary argument is just that

1 \$8,850 and Von Neumann already decided the
2 question, not that Barker makes sense and
3 Mathews doesn't.

4 Respondents are wrong. As the Second
5 and Sixth Circuits have explained in adopting
6 Mathews over Barker, \$8,850 and Von Neumann
7 concern the length of time for a final
8 disposition rather than the need for an interim
9 hearing. The litigants in \$8,850 and Von
10 Neumann also were not claiming innocence, so
11 they were not seeking and the Court did not
12 address retention hearings.

13 Only Mathews can answer the
14 sufficiency-of-process question. The courts of
15 appeals and state supreme courts that have
16 addressed the question presented have
17 overwhelmingly chosen Mathews over Barker.

18 Although the Court need not go beyond
19 the methodological question presented and apply
20 the Mathews factors, the point of Mathews is to
21 -- is to ensure that laws adequately protect the
22 Constitution's fundamental due process
23 guarantee, taking into account the private and
24 governmental interests at stake. It's not to
25 micromanage state legislatures.

1 The easiest way for a jurisdiction to
2 ensure its laws comport with due process, as the
3 Second and Sixth Circuits have explained, is
4 generally to offer a reasonably prompt
5 post-seizure hearing to allow claimants to raise
6 an innocent owner argument. Indeed, numerous
7 states have done just that, and their experience
8 makes clear, contrary to Respondents'
9 contentions, that retention hearings are
10 workable and effective.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Before we get to the
13 choice between Barker and Mathews, isn't there
14 the -- an antecedent question as to whether or
15 not there's any constitutional requirement for
16 additional hearings in the context of
17 forfeiture?

18 MR. DVORETZKY: Justice Thomas, I
19 think that that question is what Barker or
20 Mathews, depending on which test this Court were
21 to choose as the answer --

22 JUSTICE THOMAS: Well, the reason I
23 ask that is because you seem to assume that a --
24 an additional hearing is required.

25 MR. DVORETZKY: We're not assuming

1 that an additional hearing is required. We're
2 saying that Mathews is the way to analyze
3 whether an additional hearing is required.
4 Mathews is the test that the Court has applied
5 in cases like Good, where a litigant comes
6 forward and says the process being provided in
7 this case, as in Good, no hearing, is
8 insufficient. And the way to think of that
9 under Mathews is to say, well, what are the
10 private interests in a hearing, what are the
11 governmental interests on the other side, and
12 what would be the value of additional process?

13 JUSTICE THOMAS: Well, let me ask you
14 this. In your case, if you had filed a motion
15 for summary judgment a week after the property
16 had been taken or the process had begun,
17 forfeiture proceedings began, would -- would you
18 be here?

19 MR. DVORETZKY: I think -- I think we
20 would be here.

21 JUSTICE THOMAS: Why? You would have
22 your property back because you -- you won on
23 summary judgment, right?

24 MR. DVORETZKY: We -- we won on
25 summary judgment after going through discovery

1 with the state, which, by the way, the state
2 took five months to respond to our discovery
3 requests.

4 Summary judgment, we -- we would have
5 won, but due process is an affirmative guarantee
6 that requires more than the possibility that a
7 judge would expedite summary judgment. There's
8 no --

9 JUSTICE THOMAS: But what would be
10 your -- if you got your property back, what
11 would be the constitutional problem? What would
12 be the due process problem?

13 MR. DVORETZKY: If we had promptly
14 gotten our property back in -- in a -- measured
15 by days or weeks rather than months or years,
16 then, in that situation, I think we probably
17 would not have a constitutional claim.

18 JUSTICE THOMAS: So --

19 MR. DVORETZKY: But the due --

20 JUSTICE THOMAS: -- here's my problem:
21 You say that you could have -- under Alabama's
22 proceed -- procedures, you could have gotten
23 your property back in a reasonable time.

24 MR. DVORETZKY: I -- I -- I dis- --

25 JUSTICE THOMAS: You could have.

1 MR. DVORETZKY: Hypothetically, we
2 could have, just as somebody could come to this
3 Court and -- and ask it for extraordinary relief
4 that the Court is under no obligation to
5 provide.

6 Due process doesn't depend on whether
7 a court is going to exercise its discretion to
8 expedite a case. Realistically, courts rarely
9 do that. And, moreover, the summary judgment
10 standard, that's about proving your ultimate
11 entitlement on the merits definitively.

12 CHIEF JUSTICE ROBERTS: Well, you say
13 courts rarely do that. Do we have any evidence
14 about how long or how often courts in Alabama
15 grant motions to expedite in this context?

16 MR. DVORETZKY: So, Mr. Chief Justice,
17 there -- there is not a record on that. I
18 think, as -- as a practical matter, not in the
19 record, it's not very common, but in terms of
20 applying the Mathews factors, that is something
21 that could be considered and that could be
22 developed on remand in assessing what is the
23 value of additional procedures.

24 Again, the methodological question
25 here in determining whether an additional

1 hearing is required is just, how do we think
2 about that? Do we think about that by applying
3 the Mathews factors, which is the -- that's the
4 traditional test for determining whether
5 additional process is due in the civil context,
6 or do we --

7 JUSTICE SOTOMAYOR: Can we go back to
8 your answer to Justice Thomas? The purpose of
9 summary judgment is to decide the ultimate
10 question, who owns the car, correct?

11 MR. DVORETZKY: Yes.

12 JUSTICE SOTOMAYOR: The purpose of a
13 -- a post-seizure hearing is to determine who
14 keeps custody of the car, correct?

15 MR. DVORETZKY: Yes.

16 JUSTICE SOTOMAYOR: And the focus is,
17 therefore, different? The focus in the post- --
18 in the -- in the hearing would be is -- there
19 might be a disputed issue of fact with respect
20 to ownership. The government might claim it
21 needs discovery. A government might claim it
22 has some facts that would lead to a judgment
23 that it needs to explore. But the court would
24 then weigh whether or not that is sufficient not
25 to give custody to the car owner pending the

1 hearing, correct?

2 MR. DVORETZKY: Yes, Justice
3 Sotomayor.

4 JUSTICE SOTOMAYOR: So summary
5 judgment doesn't answer this question or the
6 isolated question of who keeps custody of the
7 car pending the ultimate judgment, correct?

8 MR. DVORETZKY: That's right.

9 JUSTICE KAVANAUGH: You referred --

10 JUSTICE KAGAN: Well, may I ask about
11 that --

12 JUSTICE SOTOMAYOR: Now the -- sorry.

13 JUSTICE KAGAN: I'm sorry, please.

14 JUSTICE SOTOMAYOR: No. I was just
15 going to say, whether or not summary judgment is
16 adequate given that difference in the focus of
17 the hearings, I'm presuming that's why you're
18 saying that's not the issue before us. The
19 issue before us is, what of the two tests do we
20 apply to determine whether that's enough or not?

21 MR. DVORETZKY: That -- that --

22 JUSTICE SOTOMAYOR: Correct?

23 MR. DVORETZKY: That's right, Justice
24 Sotomayor.

25 JUSTICE KAGAN: I mean, if I could ask

1 about that same kind of thing, what the
2 difference is between the retention hearing and
3 the final forfeiture determination, I mean, take
4 a case like this, where your client is raising
5 an innocent owner defense, and I would think
6 that the questions about whether she was an
7 innocent owner are pretty much the same in the
8 retention hearing and in the final forfeiture
9 determination, isn't that correct?

10 MR. DVORETZKY: I think the
11 substantive question is -- is the same, yes.

12 JUSTICE KAGAN: Now there is a
13 different burden, but if she can prove at the
14 retention hearing under a probable cause
15 standard that she is entitled to the car back, I
16 mean, there's no way the government is going to
17 lose on the final determination, right? I mean,
18 she's proved that she's entitled to the car?

19 MR. DVORETZKY: I -- I think that's
20 most likely correct. In theory, by the time of
21 the final determination, there could be some
22 additional discovery or investigation that
23 happens that would change the calculus.

24 JUSTICE KAGAN: Yeah, I suppose --

25 MR. DVORETZKY: But most likely --

1 JUSTICE KAGAN: -- in an individual
2 case, but most likely --

3 MR. DVORETZKY: Most likely.

4 JUSTICE KAGAN: -- the government
5 probably would just give up at that point,
6 right? Under this, you know, very generous
7 standard to the government they've lost, they're
8 not going to keep on pursuing the thing, so
9 she's gotten her car back and the case is over.

10 And I guess what this suggests is that
11 in both cases, you're really adjudicating the
12 same thing, which is like am I entitled to my
13 car back right now? So how is it really
14 different? I understand saying this is interim,
15 this is final, but in the end, it's just am I
16 entitled to my car back now.

17 MR. DVORETZKY: Justice Kagan, I think
18 that the substantive question is the same, but
19 there are a few key differences between the
20 retention hearing and the later merits
21 determination.

22 For one thing, I don't know that the
23 premise is correct that the government would
24 just give up if it loses at the retention
25 hearing. Again, there's a -- a different

1 procedural standard later. The government has
2 the opportunity to conduct more discovery. The
3 government also has, in -- in -- in Alabama, as
4 well as 25 other states, a financial incentive
5 to keep pursuing the forfeiture proceedings
6 because they get to keep the proceeds.

7 And so I don't know that it's
8 empirically correct that the government would
9 simply give up if it loses at the -- the
10 retention hearing. In addition to that --

11 JUSTICE KAGAN: I guess what I'm --
12 what I'm asking is, if -- if -- if we had a case
13 that says, you know, the constitutional rule
14 about forcing a determination about what --
15 about -- about who's entitled to the car is the
16 Barker rule, you know, why it is that we can
17 say: Well, we have that rule, but, in fact,
18 there's -- there's another constitutional rule
19 which is much more beneficial to the claimant
20 that's meant to address exactly the same
21 question that we held in \$8,850 was addressed by
22 Parker?

23 MR. DVORETZKY: So I think they're
24 different -- for one thing, I think they are
25 different questions, as the Second and the Sixth

1 Circuit have explained.

2 In Barker -- in Barker, the only
3 question -- it was essentially a case where
4 the -- the claimant was trying to argue a
5 gotcha. There was no argument in got -- in
6 Barker -- I'm sorry, in \$8,850 or Von Neumann
7 that the government was not ultimately entitled
8 to forfeit the property. There was no innocent
9 owner defense.

10 The claimant's argument there was,
11 well, but you waited too long in order to
12 actually complete the proceedings and,
13 therefore, I get my car back. And in that
14 situation, this -- this Court said the Barker
15 test applies.

16 There's a different argument where you
17 have an innocent owner defense, where you have
18 somebody coming forward and saying: I should be
19 entitled as a matter of Alabama state law, the
20 rights that Alabama state law gives to me, I
21 should be entitled to keep my car. And the
22 state can't effect a de facto forfeiture of that
23 car for months or years during the pendency of
24 proceedings.

25 JUSTICE KAVANAUGH: But, in both --

1 MR. DVORETZKY: That's a --

2 JUSTICE KAVANAUGH: -- cases, the
3 claimant wants the property back in the -- in
4 the interim. And the court, I mean, couldn't
5 have been much clearer in its language.

6 "The forfeiture proceeding without
7 more provides the -- the hearing required by due
8 process to protect Von Neumann's property
9 interest in the car," and then repeated it two
10 pages later, "the right to a forfeiture
11 hearing here -- proceeding meeting the Barker
12 test satisfies any due process right with
13 respect to the car and the money."

14 And those, to me, didn't seem to be
15 accidental comments. I went back to the oral
16 argument transcript where exactly this question
17 was posed about is that all the process that's
18 -- that's due, and the court was very
19 definitive.

20 So you've -- you've referred a few
21 times to a methodological question.
22 Methodologically, how can we get around from
23 your perspective that seemingly clear statement?
24 I know you have factual distinctions, but those
25 are broad, clear statements that have guided

1 courts since.

2 MR. DVORETZKY: Justice Kavanaugh, I
3 think those statements have broad language that
4 has to be understood in context.

5 With respect to the first sentence
6 that you quoted -- the forfeiture proceeding
7 without more provides the post-seizure hearing
8 that due process requires -- that was in part 2
9 of Von Neumann.

10 Part 2 of Von Neumann was the section
11 of that opinion holding that the claimant had no
12 due process interest in the first place. That
13 sentence can't reasonably be understood to say
14 anything about due process where, as here, the
15 substantive Alabama law confers an additional
16 interest that then gives rise to new due process
17 requirements.

18 With respect to the second sentence
19 that you quoted, first of all, that was just
20 referring back to the first sentence from part
21 2, which, again, doesn't apply here. In that
22 second -- in the third part of the Von Neumann
23 opinion where that sentence comes from, the
24 Court assumed that a protected due process
25 interest existed.

1 That assumption doesn't really make a
2 lot of sense doctrinally. You can't have a due
3 process interest in a remission proceeding,
4 which is essentially a -- like a discretionary
5 pardon.

6 And, in any event --

7 JUSTICE KAVANAUGH: That was the
8 argument, though, wasn't it?

9 MR. DVORETZKY: I'm sorry?

10 JUSTICE KAVANAUGH: That was the
11 argument, right?

12 MR. DVORETZKY: The -- the court
13 assumed there that there was a due process
14 interest. But I'm saying the -- the assumption
15 doesn't even really hold because you can't have
16 a due process interest in that kind of a
17 discretionary proceeding.

18 And, beyond that, again, the -- the
19 argument that the Court actually addressed in
20 the Von Neumann opinion was about a final
21 determination. It was about the speed to final
22 determination in a context where there was no
23 substantive right to avoid the forfeiture.

24 JUSTICE BARRETT: So, Mr. Dvoretzky --

25 MR. DVORETZKY: That's --

1 JUSTICE BARRETT: -- just to be sure I
2 understand what your -- your answer is to
3 Justice Kavanaugh, is it that the due process
4 right to the hearing is tied to the innocent
5 owner defense, and if there were no innocent
6 owner defense, there wouldn't be a right to a
7 retention hearing?

8 MR. DVORETZKY: I think, if there were
9 no innocent owner defense -- first of all,
10 we're -- we're not asking the Court to go beyond
11 holding that there is a due process right in a
12 -- where there's an innocent owner defense.
13 And, in fact, we're not even asking the Court to
14 go that far because we're only asking for the
15 methodological holding about whether to apply --

16 JUSTICE BARRETT: Because the
17 methodological --

18 MR. DVORETZKY: -- Mathews or Barker.

19 JUSTICE BARRETT: I understand that,
20 but does the methodological question -- I mean,
21 because I -- I -- I think you have kind of a
22 hard row to hoe, as Justice Kavanaugh is
23 pointing out, when you look at the language in
24 Von Neumann and \$8,850, so my question is,
25 methodologically, does a court even -- in your

1 view, does a court even need to ask the question
2 whether a retention hearing is due if there's no
3 innocent owner defense?

4 MR. DVORETZKY: I -- I think it does
5 because, even in that context, I think there is
6 a difference between the claim about a final
7 determination and the speed of the final
8 determination in Von Neumann and \$8,850 versus
9 the interim deprivation that's at issue here.

10 But I think it's a lot clearer that
11 Von Neumann and \$8,850 don't speak to the
12 question presented when, as here, you have an
13 additional substantive right created by state
14 law that wasn't at issue in those earlier cases.

15 And as this Court's due process
16 jurisprudence makes clear, when states create
17 substantive rights, that can also give rise to
18 additional due process protections --

19 JUSTICE BARRETT: But does it even --

20 MR. DVORETZKY: -- that are required.

21 JUSTICE BARRETT: -- make sense to ask
22 this question? I mean, you -- you point out
23 that Gerstein, rather than Barker, is the more
24 apt analogy. But you don't get a hearing on the
25 probable cause determination.

1 So you're asking, you know, as the
2 state points out, for more process, more robust
3 process in this context of civil forfeiture than
4 a criminal defendant gets.

5 MR. DVORETZKY: A couple points on
6 that, Justice Barrett.

7 First of all, the point of our
8 reliance on Gerstein is simply to show that even
9 in the criminal context, Barker is not the --
10 the overarching test that applies in all
11 circumstances.

12 So, even in the criminal context,
13 Barker doesn't speak to every constitutional
14 issue that could come up having to do even with
15 timing. And just so here, Von Neumann and
16 \$8,850 don't speak to any potential due process
17 claim that could be raised.

18 With respect to the argument that --
19 that under our view, the argument that the state
20 makes that property is somehow getting greater
21 protection than persons, there's a panoply of
22 protections under criminal law that defendants
23 get.

24 In this case and particularly where
25 you have an innocent owner defense, there has

1 not even been any sort of a probable cause
2 determination made by the police at the time of
3 the seizure about the innocent owner defense.

4 The -- the police here are seizing the
5 car incident to arrest. They're not even making
6 a determination in their own minds at that
7 point, well, who owns the car and does that
8 person have a -- a probable claim of innocence?

9 JUSTICE ALITO: Do you think --

10 MR. DVORETZKY: And to all --

11 JUSTICE ALITO: -- that the -- the
12 innocent owner defense is required by the
13 Constitution?

14 MR. DVORETZKY: This Court has held
15 that it's not in Bennis versus Michigan, so no.

16 JUSTICE ALITO: All right. If the
17 state creates that, could it allocate the burden
18 of proof to the defendant -- to the owner of the
19 car?

20 MR. DVORETZKY: I -- I think it could,
21 and if you look at Alabama law, under the
22 pre-2022 version, the burden of proof was
23 allocated to the owner of the car, and under the
24 current version, the burden of proof is
25 allocated to the government.

1 JUSTICE ALITO: And could it say that
2 the owner of the car must prove innocence by
3 clear and convincing evidence?

4 MR. DVORETZKY: I think it could if
5 that were the -- I think it could.

6 JUSTICE ALITO: If -- the retention
7 hearing has to occur within 48 hours of the
8 seizure. You didn't -- in your argument this
9 morning, you didn't mention a time. You said
10 reasonably prompt.

11 How -- is it practical to expect the
12 police to be able to prove within a short period
13 of time that the owner of the car did not know
14 that the person driving the car was going to
15 have drugs in the car?

16 MR. DVORETZKY: So, Justice Alito,
17 first, I do think that reasonably prompt is the
18 standard. The way that the lower courts have
19 interpreted that is generally a few weeks.
20 We're not asking for the 48-hour standard under
21 Gerstein, although that is -- to Justice
22 Barrett's question, that is another example of
23 where we are not actually asking for more
24 protection for property than for people --

25 JUSTICE ALITO: What does "a few" --

1 MR. DVORETZKY: -- and the Gerstein --

2 JUSTICE ALITO: -- what does "a few
3 weeks" mean? I'm sorry to interrupt. What does
4 "a few weeks" mean?

5 MR. DVORETZKY: So the Sixth Circuit
6 in the Ingram case recently said two weeks. In
7 New York, for Krimstock hearings, they have to
8 happen within 10 business days, so that's two
9 weeks as well.

10 I don't know that it is a rigid line
11 at two weeks. I don't think this Court needs to
12 decide a particular day at which it needs to
13 happen, but it needs to happen reasonably
14 promptly on a scale measured by weeks rather
15 than -- rather than months or years, which is
16 how civil litigation ordinarily happens.

17 JUSTICE JACKSON: Are you asking us --

18 JUSTICE ALITO: What about --

19 JUSTICE JACKSON: -- to decide that in
20 this case, though? I mean, I guess I'm confused
21 because I thought we were doing just Barker
22 versus Mathews in terms of figuring out whether
23 or not there is a procedural due process claim
24 here. I didn't understand us to be answering
25 the question how many weeks are necessary, but

1 maybe I'm confused.

2 MR. DVORETZKY: No, you understood
3 correctly, Justice Jackson. The question
4 presented is simply about which methodology,
5 which test applies to determine whether a
6 hearing is due.

7 JUSTICE JACKSON: And whichever one we
8 decide, we could remand it for the lower court
9 to actually apply it in this case to determine
10 whether or not there was a procedural due
11 process violation, correct?

12 MR. DVORETZKY: Absolutely.

13 JUSTICE JACKSON: All right. So
14 getting back to Justice Kagan's question about
15 the Barker test, I guess I -- I'm -- I thought
16 that Barker was about timing and that there
17 were, in fact, various species of due process
18 claims that could be made, one of which is about
19 how quickly or slowly the government has acted
20 to give the procedure that it has said it's
21 going to give you. And that's one kind of
22 thing.

23 And then, say, another is I'm
24 contesting the procedures that the government is
25 offering. I think more things need to be done

1 with respect to this particular set of
2 circumstances. That's another kind of claim.

3 And so I had understood that Barker
4 applies to the former when you're complaining
5 about timing, and I saw \$8,850 and Von Neumann
6 to be in that bucket. And Mathews v. Eldridge
7 traditionally applies in the other scenario,
8 which is what I thought the claimants were
9 making here today.

10 Am I looking at this in sort of too
11 simplistic a way or -- I guess I'm concerned
12 about the suggestion that Barker be applied in a
13 situation in which the claim is not about the
14 timing.

15 MR. DVORETZKY: I think you're looking
16 at it correctly, Justice Jackson. And maybe as
17 to the timing question in \$8,850, that tracks
18 the Barker test, but we're asserting a different
19 kind of claim here for --

20 JUSTICE JACKSON: So why is it
21 different?

22 JUSTICE KAGAN: I definitely didn't
23 understand that. Maybe you could explain.

24 JUSTICE JACKSON: Yes. Why is it
25 different?

1 JUSTICE KAGAN: The only reason you're
2 asking for a retention hearing is to get the car
3 back sooner. That's a question about timing.
4 They're both questions about timing. Barker set
5 one timing rule. The claimants here want
6 another timing rule, which is a more generous to
7 the claimant timing rule.

8 I mean, it's no -- it's not process
9 for process's sake. It's process because people
10 are without a car and they think that they're
11 entitled to the car and they want the car back
12 sooner. So that too is a timing rule, isn't it?

13 MR. DVORETZKY: You can look at it as
14 a timing question at a general level. That
15 still doesn't mean that these are the same
16 questions. Take the criminal context for -- as
17 -- as an analogy. You could say that the Barker
18 speedy trial right is all about getting to a
19 final determination quickly. You also have a
20 separate right under Gerstein to a probable
21 cause determination within 48 hours.

22 I suppose, in a hypothetical
23 situation, where we went from an indictment to a
24 trial and a verdict within 48 hours, you would
25 say: Well, there's no need in that situation

1 for a Gerstein hearing because the superfast
2 trial in that situation mooted the separate
3 interest in the probable cause determination
4 under Gerstein. That doesn't mean that they
5 aren't separate interests.

6 So too here. There may -- there's one
7 interest in getting to a timely ultimate
8 determination. That's what was at issue in Von
9 Neumann and \$8,850 and for which the Court
10 analogized to Barker. There's a separate
11 interest in retaining your property during the
12 time that it takes to reach that final
13 determination.

14 And, again, hypothetically, if you had
15 a trial within 48 hours, you wouldn't even have
16 to worry about the interim determination.

17 JUSTICE GORSUCH: Counsel --

18 MR. DVORETZKY: But, in the real
19 world, you do.

20 JUSTICE GORSUCH: -- it seems very
21 strange that we're asking which of two
22 precedents apply rather than what the Due
23 Process Clause commands. I mean, it's just a
24 weird question presented as far as I'm
25 concerned. And I guess I'm -- my head's still

1 stuck back at -- at that and some of the
2 questions that you heard early on, which is
3 whatever test you apply, clearly, there are some
4 jurisdictions that are using civil forfeiture as
5 funding mechanisms and say: Ah, you can get
6 your car back if you call between 3 and 5 p.m.
7 on a Tuesday and -- and -- and speak with
8 someone who is never available, right? I mean,
9 there are -- that is happening out there.

10 But it didn't look to me -- I'll be
11 honest and put my cards on the table -- that
12 that was the case in Alabama. And -- and I
13 understand your client filed for summary
14 judgment 13 or 18 months later, whatever, but
15 what would have impaired them from -- from
16 filing a summary judgment motion on day one?
17 It's an innocent owner defense. They know the
18 facts of their ownership of their car and how it
19 was misused.

20 I'm not sure I understood the reason
21 for the delay and how it might be fairly
22 attributable to the state. So, while I'm very
23 sympathetic with the problem that you've
24 identified, I'm just wondering, is this the case
25 that presents the due process problem that we

1 should be worried about?

2 MR. DVORETZKY: So, for one thing, I
3 think this is the case, and the Court granted
4 cert on this question, to --

5 JUSTICE GORSUCH: Oh, I know we
6 granted cert. It's all our fault. I -- I hear
7 you.

8 (Laughter.)

9 MR. DVORETZKY: Not blaming you. I
10 appreciate it.

11 (Laughter.)

12 JUSTICE GORSUCH: Both can be true.

13 MR. DVORETZKY: But -- but I think --
14 I think this is the case in which to decide how
15 to think about that question. Whether the
16 underlying facts involve the facts here in
17 Alabama or the facts in Wayne County in the
18 Ingram case or the hypothetical that you gave,
19 the -- the methodological question about how we
20 think about whether a hearing is required,
21 whether or not a hearing is ultimately required
22 on particular facts, is the same.

23 JUSTICE GORSUCH: But even --

24 MR. DVORETZKY: But --

25 JUSTICE GORSUCH: -- even if one were,

1 couldn't you have gotten one by filing for a
2 summary judgment motion with your innocent owner
3 defense on day one? And if that's true, then
4 what are we doing here?

5 MR. DVORETZKY: I don't know that we
6 could have. There is no guarantee that if that
7 summary judgment motion had been filed on day
8 one that it would have been considered on an
9 expedited basis. There's no -- there's no
10 evidence that the court would have --

11 JUSTICE GORSUCH: Either way?

12 MR. DVORETZKY: -- moved that quickly.

13 JUSTICE GORSUCH: But there's no
14 evidence either way, is there, on that?

15 MR. DVORETZKY: And -- and I think
16 that under Mathews, that goes to the question of
17 what would have been the value of additional
18 process. If, on remand, the state could show
19 under Mathews that, in fact, additional process
20 would have done no good because a summary
21 judgment motion is routinely granted in a matter
22 of days in Alabama, then perhaps, under this
23 scheme, there would not be a need for --

24 JUSTICE GORSUCH: Okay.

25 MR. DVORETZKY: -- for -- for an

1 additional hearing.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 I'd like to give you an opportunity to
6 respond to the arguments raised I think
7 primarily in the brief for the Solicitor General
8 that requiring retention hearings at the early
9 period that -- that you would will prejudice
10 procedures under the civil forfeiture regime.

11 MR. DVORETZKY: So, Mr. Chief Justice,
12 I think that the civil forfeiture -- the federal
13 civil forfeiture regime presents different
14 issues than the Alabama scheme, and in some
15 ways, the federal forfeiture regime is actually
16 quite protective of -- of vehicle owners.

17 And the -- the principal example that
18 I would give of that is that the federal scheme
19 has -- under the federal scheme, a claimant is
20 entitled to immediate release of the seized
21 property if they can show substantial hardship.
22 That substantial hardship inquiry is essentially
23 tracking the Mathews factors. It's asking in a
24 particular case what --

25 CHIEF JUSTICE ROBERTS: Yeah, but the

1 -- the Solicitor General elaborates that there
2 are all sorts of procedures necessary to support
3 forfeiture that will be compromised by a
4 somewhat repetitive hearing or not -- whatever
5 the precursor to make the other one repetitive
6 is -- that will require either ignoring those
7 interests or compromising them, including such
8 basic things as preservation of the property
9 itself.

10 MR. DVORETZKY: So I think those
11 interests are ones that can be addressed in
12 connection with the sort of retention hearing
13 that a Mathews analysis might lead to.

14 If the government is concerned about
15 preservation of the property, that is something
16 that a judge can deal with either potentially by
17 requiring a bond in a particular case, by
18 entering an order prohibiting the disposition of
19 the -- of the property. If the government
20 believes that the property is actually evidence
21 relevant to the underlying crime, that's
22 something that can be addressed in an ex parte
23 hearing with the court, and the court can either
24 allow the government to retain the property or
25 can otherwise take measures in order to preserve

1 it.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 MR. DVORETZKY: And so --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas, anything further?

7 JUSTICE THOMAS: The -- in -- in
8 Neumann, a -- there was a petition for
9 remission. How similar is your retention to
10 that?

11 MR. DVORETZKY: It -- it -- it is
12 fundamentally different because the petition for
13 remission is essentially -- it's like a request
14 for a pardon. The petition for remission, the
15 premise of that is that the government has the
16 right to keep the -- the property, but the
17 claimant is -- is asking for -- for mercy, for
18 forgiveness, essentially.

19 At a retention hearing, what would be
20 assessed is, first, as we were discussing
21 earlier, what is the government's probable --
22 what is the probable validity of the
23 government's right to retain the car, and then,
24 second, apart from that, and -- and along the
25 lines of what I was discussing with the Chief

1 Justice, what -- what might be the government's
2 interest in retaining the property anyway?

3 Or what might be the government's
4 interest in otherwise ensuring that the
5 property, even if the -- the owner gets it back,
6 is still available at the end of the forfeiture
7 proceeding should it be needed?

8 JUSTICE THOMAS: Well, I understand
9 that, but it seems as though the -- a
10 proceeding, short of the forfeiture proceedings
11 determination in Neumann, the Court said it was
12 unnecessary to sustain constitutional stature of
13 the forfeiture. It wasn't -- you did not need
14 that intervening process of remission.

15 I don't -- and I don't see how that's
16 different from your intervening retention
17 proceeding.

18 MR. DVORETZKY: Justice Thomas, I
19 think it's because, in Von Neumann, you had the
20 remission proceeding, but the remission
21 proceeding was entirely discretionary, whereas,
22 here, Alabama has created this innocent owner
23 defense, which is not discretionary. It's a
24 substantive right that owners have to retain
25 their cars if they are innocent, and it's that

1 innocent owner defense that gives rise to
2 additional due process protections needed to
3 realize the right that the state has created.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 JUSTICE ALITO: Well, you just said
7 that it's not discretionary. What if it were
8 discretionary?

9 MR. DVORETZKY: If Alabama -- just to
10 clarify, if Alabama had in effect created a
11 discretionary innocent owner right, if -- if you
12 are an innocent owner, then the state may let
13 you keep your car?

14 JUSTICE ALITO: Yes.

15 MR. DVORETZKY: I -- I think that
16 would likely not give rise to due process
17 protections in much the same way that the
18 remission procedure doesn't.

19 JUSTICE ALITO: Could the state create
20 an innocent owner defense but say that it can
21 only be adjudicated at the final forfeiture
22 hearing?

23 MR. DVORETZKY: I -- I'm not sure that
24 it could because I think, at that point, it's
25 created a substantive right to the innocent

1 owner defense, and the procedural protections
2 that arise to -- to protect that are questions
3 at that point of federal law. I don't think
4 that the state could -- could curtail the right
5 that way.

6 JUSTICE ALITO: Well, some of my
7 colleagues may not be interested in this
8 question, but I am interested in this question.
9 You have asked us to say that the Constitution
10 requires this thing called a retention hearing,
11 so I would just like to know, what is this thing
12 that you are asking us to recognize?

13 So how soon? What happens at it? Why
14 is it -- how is it practicable for the police?
15 And why is it necessary for the owner?

16 MR. DVORETZKY: Sure. So, first,
17 we're not actually asking you to recognize that.
18 We're asking you to decide the methodological
19 question, and there may be ways in which --

20 JUSTICE ALITO: Well, let me just
21 interrupt you, because the last argument in your
22 brief says that Alabama violated the
23 Petitioners' rights by failing to provide a
24 retention hearing. Anyway, assume that that is
25 part of the question. Go ahead.

1 MR. DVORETZKY: So, in terms of what a
2 retention hearing looks like, I think the -- the
3 Legal Aid Society brief describes how these
4 hearings have worked for 20 years in New York.

5 In New York, it's a hearing that
6 happens within, again, 10 business days, so a
7 couple of weeks, at the request of the innocent
8 owner. It is a process -- it is a hearing at
9 which there are brief opening and closing
10 arguments, and there can be evidence presented,
11 there can be witnesses.

12 At the end of that, the -- the -- the
13 adjudicator will decide, is there probable
14 validity for retaining the property, and,
15 second, what are the government's interests in
16 retaining the property during the pendency of
17 the forfeiture proceedings?

18 Now, to address the government's
19 concerns about evidence disappearing or evidence
20 potentially being actually evidence in the
21 underlying crime, those -- ex parte proceedings
22 with the decisionmaker, with the judge, are an
23 available tool in that situation to address the
24 government's interests.

25 So, if the government comes in and

1 says this car might actually be evidence in the
2 underlying drug crime, they'd probably be
3 allowed to keep it in that situation and that's
4 something that could be addressed ex parte. The
5 due process standard is flexible, including to
6 protect the government's interests.

7 JUSTICE ALITO: Well, let's just take
8 what might be sort of a typical case. So a car,
9 similar to the facts in -- in one of these
10 cases, that a car is stopped by the police, they
11 find a large quantity of meth in the car, the
12 person driving the car is not the owner of the
13 car, the person driving the car is the spouse or
14 domestic partner of the owner.

15 And then, within a short period of
16 time, there's this innocent owner defense, and
17 the owner of the car, I suppose, testifies, I
18 had no idea this was going on. And then what do
19 you think the -- the state -- what -- what do
20 you think it is reasonable to require the state
21 to do in that situation?

22 MR. DVORETZKY: At -- at a minimum, I
23 would expect the state to cross-examine the
24 owner of the car. And, by the way, the owner of
25 the car would have provided that testimony under

1 penalty of perjury. If they're later determined
2 not to have been an innocent owner, then
3 providing that testimony could subject them to
4 additional prosecution just for that. So in --

5 JUSTICE ALITO: Does -- does that
6 happen in New York City, perjury prosecutions
7 under those circumstances? Do you know of cases
8 like that?

9 MR. DVORETZKY: I -- I don't know of
10 cases like that, but I would also assume that
11 people are not going to perjure themselves at
12 the innocent owner hearing. But, if -- if
13 the -- the owner comes forward and testifies,
14 this is my car and I had no idea about the
15 wrongdoing, the government would have the chance
16 to cross-examine them.

17 The government would have a -- a few
18 weeks in which to have conducted whatever
19 investigation they want to conduct. They would
20 have the opportunity to make a case that way.

21 They would also, if necessary, be able
22 to go to the judge and say: Here's evidence
23 that we can only provide to you ex parte so as
24 not to prejudice any later prosecution that they
25 might bring. They might even be able to say to

1 the judge, again, perhaps ex parte, we're in the
2 middle of an investigation and we need a couple
3 more weeks, and the judge would continue the
4 hearing.

5 There's flexibility built into this.
6 But -- but the point is that due process
7 requires some sort of an initial determination
8 when --

9 JUSTICE ALITO: All right. Thank you.
10 Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 JUSTICE SOTOMAYOR: Bad facts make bad
14 law, and I fear we may be headed that way.

15 Justice Gorsuch started with the right
16 question. We know there are abuses of the
17 forfeiture system. We know it because it's been
18 documented throughout the country repeatedly of
19 the incentives that police are given to seize
20 property to keep its value as opposed to issues
21 of probable cause or issues of legitimacy of the
22 seizure, okay?

23 We also know that that incentive has
24 often led to months, if not years, of retention
25 of property that ultimately gets returned to the

1 owner because there was either no probable cause
2 or because of the innocent owner defense.

3 So the question before us is, if we
4 make a determination to take the dicta in Von
5 Neumann and in the 8-8 whatever case, all right,
6 to say that's the entire process you're ever
7 due, do we leave open the possibility that there
8 are states, jurisdictions that are abusing this
9 process and not leaving us any arms to correct
10 it? That's what we're doing, isn't it?

11 If we say there's no overriding first
12 question, is this process, the features of this
13 process, are they enough, whether it's under
14 Mathews or Barker, then what we're basically
15 saying is go at it, states, take as much
16 property as you want, keep it as long as you
17 want, let's hold out no hope whatsoever that
18 there's ever going to be any further process
19 that's due?

20 That's the bottom line, right?

21 MR. DVORETZKY: I -- I think that's
22 right, Justice Sotomayor. And I think that the
23 Court should hold here that Mathews is the way
24 to analyze the question.

25 JUSTICE SOTOMAYOR: I know that's --

1 MR. DVORETZKY: But the --

2 JUSTICE SOTOMAYOR: -- what you want,
3 but the point is --

4 MR. DVORETZKY: Yeah.

5 JUSTICE SOTOMAYOR: -- that if we take
6 that dicta in a case where none of the process
7 itself was at issue, it was a separate process
8 that was at issue or timing of that process,
9 none of the features of the process is at issue
10 as binding on us, we're throwing up our hands
11 and say due process does not give people any
12 protection whatsoever under any set of
13 circumstances?

14 MR. DVORETZKY: I -- I think that's
15 right. And I think the Court shouldn't do that
16 here regardless of the facts.

17 I also think, on the facts -- and I
18 don't want to wear out my welcome -- but I also
19 think --

20 JUSTICE SOTOMAYOR: You are wearing
21 out your welcome --

22 MR. DVORETZKY: I -- I --

23 JUSTICE SOTOMAYOR: -- because, like
24 Justice -- like Justice Jackson, that's not the
25 question before us, whether the process here was

1 enough or not.

2 MR. DVORETZKY: That -- that's right.
3 I -- I -- I do think that there are -- there are
4 explanations for the timeline that took place in
5 this case, but the Court doesn't need to reach
6 that. All the Court needs to decide here is
7 that Von Neumann and \$8,850, as you say, Justice
8 Sotomayor --

9 JUSTICE SOTOMAYOR: There are --

10 MR. DVORETZKY: -- didn't foreclose
11 any and all potential due process claims that
12 one might bring, and Mathews is the way to think
13 about whether additional process is due in this
14 context.

15 JUSTICE SOTOMAYOR: Now, after
16 Krimstock, there are jurisdictions that have
17 looked at these issues under the Mathews test
18 and not required retention hearings, correct?

19 MR. DVORETZKY: Right. A retention --
20 there are different ways in which states might
21 potentially satisfy due process. It doesn't
22 absolutely have to be a retention hearing.

23 JUSTICE SOTOMAYOR: That's what I'm
24 saying, which is it depends on each state's
25 assessment of the factors that Mathews looks at,

1 correct?

2 MR. DVORETZKY: That's right.

3 JUSTICE SOTOMAYOR: And some have not.
4 Some have required others given the uniqueness
5 of their jurisdictions, correct?

6 MR. DVORETZKY: That's right.

7 JUSTICE SOTOMAYOR: All right. Thank
8 you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: Could I just ask you
11 to clarify that? Because I was confused when I
12 read your brief about how exactly you want
13 Mathews v. Eldridge to work, whether you want it
14 to be an -- a determination in each individual
15 case as to whether, under the Mathews v.
16 Eldridge factors, a retention hearing is
17 required or whether Mathews v. Eldridge operates
18 to set up certain categorical rules and, if so,
19 what those categorical rules are. Are they
20 likely to be sort of state-by-state rules? You
21 know, how does Mathews work in this context?

22 MR. DVORETZKY: Justice Kagan, I think
23 it does apply at a more categorical level, and
24 that, in fact, is one of the advantages of
25 Mathews over Barker, is that it can apply at a

1 more categorical level and provide some guidance
2 to the states, whereas Barker is inherently
3 retrospective and looks just at the
4 individualized delay in one particular case.

5 The categorical level at which I think
6 Mathews applies, it would make sense to think of
7 it about car owners in jurisdictions with an
8 innocent owner defense. I think that's --
9 that's the level at which it applies.

10 But it's not a nationwide rule that
11 would require a precise copy of Krimstock
12 hearings in all 50 states. It would allow
13 flexibility for states under Mathews to come up
14 with different ways to potentially satisfy the
15 due process guarantee.

16 Again, the question is, is there a due
17 process -- is there a due process question even
18 to ask? And Mathews tells us that there is.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: Just on that
23 methodological question again, the other side,
24 of course, emphasizes precedent, but they also
25 say that what process is due can't just be a

1 policy question. And they -- they look as well
2 at history and they say that, historically, this
3 kind of interim hearing has not been required by
4 the federal government or the states. There
5 have been lots of different approaches.

6 And they say that even today, Alabama
7 is not an outlier. There are lots of different
8 approaches in the states. The states' amicus
9 brief really highlights this. So they say, if
10 we went your way, we would be
11 constitutionalizing a policy question that for
12 over 200 years has been left with the states and
13 the federal government, handled in different
14 ways.

15 So I just want you to respond to that
16 overarching theme that I think is in the
17 Solicitor General's brief, in Alabama's brief,
18 and the states' amicus brief.

19 MR. DVORETZKY: If I could make two
20 points in response to that, Justice Kavanaugh.

21 One, as we've been discussing, our
22 rule does -- that -- the application of Mathews
23 would allow for some amount of continued
24 flexibility by the states. We're not asking the
25 Court to dictate a national rule that a

1 particular type of hearing is required within a
2 particular -- a particular time period. There
3 will still be room for states to -- to
4 experiment and to customize what they think is
5 an appropriate -- an appropriate time and an
6 appropriate kind of hearing or perhaps even a
7 substitute for a hearing, like a -- a hardship
8 determination that could potentially be made
9 based on a -- on a paper filing. So we're
10 leaving room for flexibility.

11 The second point, with respect to
12 history, I don't think the history provides a
13 clear answer for us here. First, at common law,
14 property could be forfeited regardless of
15 whether the owner was innocent. The innocent
16 owner defense is something that didn't exist at
17 common law. And, again, that gives rise to new
18 procedural protections.

19 Second, as Justice Thomas explained in
20 the -- in his Leonard versus Texas dissent from
21 denial, historical forfeiture laws were quite
22 limited. They were limited to a few specific
23 subject areas, like customs and piracy, where it
24 made some sense to think about in rem
25 proceedings. Civil forfeiture today bears

1 little resemblance to that.

2 As Justice Thomas also pointed out
3 there, there's some question about whether, at
4 common law, forfeiture was civil or criminal and
5 whether it carried the additional protections of
6 criminal process.

7 At the founding, forfeiture
8 proceedings had to move quickly. The IJ brief,
9 Institute for Justice brief, explains that
10 courts had to rule within 14 days of the filing
11 date at common law. And so, again, you didn't
12 have this sort of question of months- or
13 years-long delays.

14 JUSTICE KAVANAUGH: Oh, okay.

15 MR. DVORETZKY: And --

16 JUSTICE KAVANAUGH: Well, keep going
17 then. I don't want you to keep going forever,
18 but --

19 (Laughter.)

20 MR. DVORETZKY: The -- the only -- the
21 only last point I was going to make is that
22 common -- is that forfeiture at common law was
23 also considered against a backdrop that the
24 founders had of distrust to civil forfeiture
25 generally based on what the British were doing

1 before the revolution. And so --

2 JUSTICE KAVANAUGH: Well, the --

3 MR. DVORETZKY: -- the history --

4 JUSTICE KAVANAUGH: -- I mean, I'll
5 end it by just saying the early federal statutes
6 seem somewhat inconsistent with that, but I'll
7 -- I'll leave that.

8 MR. DVORETZKY: Well, I --

9 CHIEF JUSTICE ROBERTS: Thank you.
10 Justice Barrett?

11 JUSTICE BARRETT: I have a similar
12 question to Justice Kavanaugh. So -- and I
13 don't think it'll require a long answer. Do you
14 agree -- so, you know, Judge Thapar, in his
15 concurrence in the Sixth Circuit, said: Well,
16 listen, Mathews doesn't apply, you know, drawing
17 on cases like Hurtado, if there is a defined
18 historical practice on point.

19 Do you agree with that, or do you
20 think Mathews would always apply? I understand
21 you think that the history isn't determinative
22 here. And it seems to me like that's kind of do
23 you go with the Constitutional Accountability
24 Center's amicus brief or the municipal lawyers'
25 brief, account on the history? But, just

1 methodologically, do you agree with Judge
2 Thapar's reading of Mathews and our precedent
3 about history and procedure?

4 MR. DVORETZKY: I think that if there
5 is a precise answer to the question in the
6 history, then the history would probably govern,
7 but I think we're very far from that.

8 JUSTICE BARRETT: Okay.

9 MR. DVORETZKY: Very far from that in
10 this case.

11 JUSTICE BARRETT: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: And is it your
15 position that the application of Mathews would
16 necessarily always mean that some additional
17 procedure would be required in a situation like
18 this?

19 MR. DVORETZKY: No. If the
20 application of Mathews could lead to a
21 conclusion that the state's existing process is
22 sufficient, then no additional process is
23 required.

24 JUSTICE JACKSON: Okay. And, you
25 know, I was surprised a little bit, I think,

1 about your answer to Justice Thomas about Von
2 Neumann and why, if at all, remission is
3 different.

4 I had thought that it was not because
5 it was discretionary. I thought it was because
6 the -- the case seems to make pretty clear that
7 it is an administrative alternative to judicial
8 forfeiture under the statute at issue in that
9 case.

10 And so, given that -- you know, the
11 owner was complaining about it not happening
12 quickly enough. He chose the option of
13 remission rather than forfeiture, and he wanted
14 the remission hearing to happen quickly.

15 And the Court, I thought, in the
16 language that has been quoted, was making a much
17 more narrow point, which is just that this
18 remission is not a part of the forfeiture
19 hearing. It's not required by due process. And
20 so, therefore, you don't have a claim that it
21 has to be faster under the Constitution, that,
22 really, forfeiture is where due process lies in
23 terms of your constitutional rights. But, of
24 course, that doesn't tell us what steps are
25 necessary in a forfeiture proceeding.

1 But, to the extent that this language
2 is talking about forfeiture being the only
3 thing, I thought it was relative to the
4 alternative administrative remission process.

5 Am I misreading this?

6 MR. DVORETZKY: No. And I don't think
7 we're disagreeing. I would simply add the point
8 that this alternative administrative process
9 didn't create any substantive rights because it
10 was discretionary whether the government would
11 give you back your property or not.

12 JUSTICE JACKSON: True. But it's also
13 the case, I think from this case, that the court
14 then goes on to talk about how remission is not
15 a part of forfeiture, how those are two
16 different things. And so the language, I
17 thought, was just distinguishing forfeiture from
18 remission, as opposed to telling us something
19 about the nature of forfeiture, that it's only
20 the forfeiture hearing and you don't get other
21 steps or whatever, which is the way it's being
22 read, I think, by your counterparts on the other
23 side.

24 MR. DVORETZKY: I -- I agree. I think
25 that's -- that's also a -- a -- a relevant

1 distinction of Von Neumann here.

2 JUSTICE JACKSON: All right. Let me
3 finally just ask you about, again, the timing
4 and whether -- you know, I think there is
5 something to this notion that Barker is about
6 timing, but, again, the question remains, isn't
7 the claimant in this case making a timing kind
8 of argument?

9 And I guess I see that, but can you
10 help me with the following hypo, and then maybe
11 I'll also get the reaction on the other side.

12 So, if we have a scenario in which
13 everyone agrees that the average time for a
14 forfeiture proceeding is, say, six months after
15 the seizure, and everybody agrees that that is
16 reasonable for due process purposes, Plaintiff
17 Number 1 doesn't receive her forfeiture hearing
18 until 12 months after the seizure, so her claim
19 is that the government was too slow in giving
20 her the hearing.

21 Meanwhile, Plaintiff Number 2 receives
22 her hearing in six months, but she claims that
23 at some point within those six months there
24 should be an opportunity for the court to
25 consider whether she should have been allowed to

1 keep her car during that interim period.

2 She's not complaining about the time.
3 Six months is fine. She got her hearing within
4 the six months. But what she's saying is, while
5 you figure out during that six months who owns
6 this car, I should keep custody of it during
7 that period, and I think we should have that
8 adjudicated separately from the forfeiture
9 hearing.

10 Are those two different things, or are
11 they both really about timing?

12 MR. DVORETZKY: No, I think those are
13 two different claims. The -- the first one is
14 claiming: I didn't have a fast enough final
15 merits determination.

16 The other one is claiming: Look, the
17 final merits determination was fast enough under
18 the circumstances, civil litigation takes time,
19 but I shouldn't be deprived of my property
20 during the pendency of that.

21 And, again, it -- it's like the
22 criminal analogy that I used earlier. You
23 wouldn't say that because you have a speedy
24 trial right and that's going to take a year that
25 you don't also have a Gerstein right to a prompt

1 probable cause determination.

2 And in a situation where,
3 hypothetically, the trial did happen within a
4 matter of days, that might moot the probable
5 cause hearing or probable cause determination,
6 but it wouldn't mean that conceptually you don't
7 have two separate rights.

8 JUSTICE JACKSON: And you could have
9 two separate tests --

10 MR. DVORETZKY: Correct.

11 JUSTICE JACKSON: -- depending upon
12 the claims?

13 MR. DVORETZKY: Correct, with the
14 Barker test --

15 JUSTICE JACKSON: Right.

16 MR. DVORETZKY: Correct.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. LaCour.

21 ORAL ARGUMENT OF EDMUND G. LaCOUR, JR.

22 ON BEHALF OF THE RESPONDENTS

23 MR. LaCOUR: Mr. Chief Justice, and
24 may it please the Court:

25 Forfeiture has been a critical tool

1 for deterring crime since before the framing,
2 and both history and precedent show what
3 post-seizure process is due to those whose
4 property has been seized.

5 From the Collection Act of 1789 and
6 Slocum to \$8,850 and Von Neumann, the answer is
7 clear. If the forfeiture proceeding is
8 instituted and concluded promptly, then the
9 forfeiture proceeding without more provides the
10 post-seizure hearing required by due process.

11 Now Petitioners assert that another
12 post-seizure hearing is required, a mini-trial
13 mere days or weeks after seizure, and in their
14 telling, the federal government and the states
15 have been violating fundamental rights for
16 centuries with no one noticing until just a few
17 years ago.

18 But their view cannot be squared with
19 history or precedent, and their own cases show
20 why a timely forfeiture proceeding is the
21 meaningful opportunity to be heard at a
22 meaningful time.

23 Only the timeliness test embodied in
24 Barker v. Wingo accounts for the striking
25 diversity among forfeiture cases. Some will be

1 simple and others will involve wide-ranging
2 investigations. Some claimants will vigorously
3 press their rights and others will default.

4 As long as claimants can appear before
5 judges promptly, then judges can strike that
6 proper balance in each fact-bound case.

7 Now I've heard my friend today say,
8 essentially, don't trust judges to be judges.
9 And so, instead, they invoke Mathews to have
10 federal courts act as legislatures handing down
11 new Rules of Civil Procedure for all 50 states
12 and the federal government.

13 But Barker best accounts for what
14 should be the dispositive fact in these cases.
15 The Petitioners were before state courts within
16 two weeks of seizure, yet they ignored that
17 process for over a year. Petitioners received
18 all the process they were due, and this Court
19 therefore should affirm.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: But you criticize the
22 use of Mathews, but Barker is a Speedy Trial Act
23 case, so that would seem to also be an ill fit
24 for determining whether or not you should have
25 an additional hearing.

1 MR. LaCOUR: I don't think so, Your
2 Honor. In \$8,850, the Court considered multiple
3 ways to measure speed. And the Barker factors
4 are exactly the sorts of factors you imagine any
5 judge would look to whether or not Barker had
6 ever been decided. How long has this taken?
7 Why has it taken so long? Is the claimant
8 pushing her rights? And has there been any
9 prejudice?

10 So I -- I think it makes sense why
11 \$8,850 adopted that test. And I don't think
12 Petitioners have asked for it to be set aside in
13 this case. So it should not be --

14 JUSTICE THOMAS: I think --

15 MR. LaCOUR: -- cast aside.

16 JUSTICE THOMAS: -- it seems that
17 Petitioner is not talking as much about a timing
18 issue as whether or not there should be an
19 additional right vindicated. And Barker seems
20 to focus on timing as opposed to whether the
21 additional right exists at all.

22 MR. LaCOUR: That's right, Your Honor.
23 But I -- I think one advantage of Barker is that
24 it -- it really draws from history. If you look
25 at \$8,850, they looked back to Slocum, that 1817

1 decision from this Court where the Court
2 recognized that while probable cause is enough
3 to justify seizure and retention until trial,
4 the individual's right is best protected by
5 forcing the government into court.

6 And if the case is instituted
7 promptly, then the judge can decide what it
8 takes to move that case along promptly,
9 balancing the government's interests in accuracy
10 and its other interests with the claimant's
11 interest in a speedy --

12 JUSTICE JACKSON: But you seem to be
13 -- you seem to be suggesting that there is no
14 other kind of claim that can be made related to
15 forfeiture other than its timing. And I guess
16 I'd have you react to the hypothetical that you
17 heard me provide to your counterpart.

18 MR. LaCOUR: Well, Your Honor, I think
19 it's really the same question. The way
20 Ms. Vasquez in \$8,850 teed up her claim is
21 whether or not she was receiving a hearing at a
22 meaningful time.

23 JUSTICE JACKSON: Not in \$8,850. I'm
24 talking about in this case. \$8,850 were -- I --
25 I agree with you that --

1 MR. LaCOUR: Right.

2 JUSTICE JACKSON: -- \$8,850 and Von
3 Neumann were both about the timing --

4 MR. LaCOUR: Right.

5 JUSTICE JACKSON: -- because the Court
6 says in, you know, almost -- in the first
7 sentence of Von Neumann that this is about the
8 36-month delay.

9 But are you saying that that's the
10 only type of procedural due process violation
11 that can occur with respect to civil forfeiture?

12 MR. LaCOUR: I think that's what the
13 Court held, Your Honor. Again, the -- the
14 interest is the same, having the car and not
15 being temporarily deprived of the vehicle. And
16 that was what --

17 JUSTICE JACKSON: No, not being
18 permanently deprived of the vehicle is different
19 from not being temporarily deprived of the
20 vehicle, isn't it?

21 MR. LaCOUR: Right. But Mr. Von
22 Neumann's complaint was the temporary
23 deprivation --

24 JUSTICE GORSUCH: Well, let's --

25 MR. LaCOUR: -- that you should --

1 JUSTICE GORSUCH: -- let's -- let's
2 put it this way. I mean, due process has very
3 -- various components, you'd agree. One
4 component is how quickly your claim can be
5 heard. Another component would be what
6 procedures your claim is going to be decided
7 pursuant to, right?

8 MR. LaCOUR: Yes, Your Honor.

9 JUSTICE GORSUCH: So there's a
10 substantive aspect to it, wrong word, idea,
11 though, that the procedure has to have some
12 robustness to it, okay?

13 MR. LaCOUR: Yes.

14 JUSTICE GORSUCH: So, for example, if
15 I said, oh, I got a quick hearing, but I had to
16 call between 3 and 5 p.m., I had to speak to
17 Sam, but Sam it turns out is on permanent
18 vacation, okay? But I -- I can get a quick
19 hearing, I can get it the next day, but that's
20 what I have to do to get it.

21 Or I get it in front of a kangaroo
22 court, and -- and -- and the judge turns out to
23 be wholly biased, for example, and I can prove
24 it beyond a shadow of a doubt.

25 Those would all be due process issues

1 besides how quickly I got to court, right?

2 MR. LaCOUR: Yes, Your Honor.

3 JUSTICE GORSUCH: Okay. So I -- I get
4 the -- I get that Barker is all about Speedy
5 Trial Act. It's right there in the title. It's
6 all about timing. And that certainly is an
7 important component of due process.

8 But I think your colleague on the
9 other side suggests I'm arguing more about the
10 kangaroo court stuff too and what's happening
11 around the country, as -- as Justice Sotomayor
12 pointed out -- I'm not accusing Alabama of this,
13 to be very clear.

14 MR. LaCOUR: Thank you, Your Honor.

15 JUSTICE GORSUCH: Okay. But there are
16 arguments to be made that there are attempts to
17 create processes that are deeply unfair and
18 obviously so in order to retain the property for
19 the coffers of the state.

20 And I think Justice Sotomayor's
21 concerned that we are not -- if we go down the
22 Barker road and just focus on timing, we're
23 losing that capacity to address those cases.

24 Am I putting it fairly?

25 JUSTICE SOTOMAYOR: You're putting it

1 fairly.

2 JUSTICE GORSUCH: Long-windedly but
3 fairly, I hope.

4 MR. LaCOUR: A couple points. There's
5 no -- just as in \$8,850, there's no argument
6 that the final hearing they received here was a
7 kangaroo court or was not in any way sufficient.

8 JUSTICE GORSUCH: For sure.

9 MR. LaCOUR: And so --

10 JUSTICE GORSUCH: But could those
11 claims -- you acknowledge there might be claims
12 like that to be had?

13 MR. LaCOUR: There may be, Your Honor.
14 I think Barker answers them. If you're
15 requiring someone to reach Sam between 3 and
16 5:00, that's not a very good reason under Barker
17 II and -- for the delay. And if the delay is
18 extending longer --

19 JUSTICE GORSUCH: No, but let's say it
20 happens really quickly, but it's a kangaroo
21 court, an unfair adjudication. You and I would
22 agree that that was wholly and grossly unfair?

23 MR. LaCOUR: Yes, Your Honor, but I
24 think we're -- we're far removed from -- from
25 that scenario.

1 JUSTICE GORSUCH: Of course, we are --

2 MR. LaCOUR: I think this is totally
3 different.

4 JUSTICE GORSUCH: -- in your case. Of
5 course, you're going to say that, and I
6 understand that.

7 MR. LaCOUR: Right.

8 JUSTICE GORSUCH: But your argument
9 would seem to strip the courts of tools to deal
10 with those kinds of cases.

11 MR. LaCOUR: I don't think so, Your
12 Honor. Keep in mind --

13 JUSTICE GORSUCH: All right. How --
14 help -- help -- help me write it so that we
15 don't do that --

16 MR. LaCOUR: Well, because in --

17 JUSTICE GORSUCH: -- if you
18 acknowledge that's a trap --

19 MR. LaCOUR: Yes. Your Honor --

20 JUSTICE GORSUCH: -- we have to avoid.

21 MR. LaCOUR: -- because, in \$8,850 and
22 in Von Neumann, the final hearing was going to
23 be by a federal judge. You can trust that they
24 are going to uphold the Constitution, they're
25 going to do justice. We shouldn't craft a test

1 that suggests otherwise.

2 Similarly here, the final hearing is
3 going to be in front of a state circuit court
4 judge. So we're not dealing with the kangaroo
5 court scenario. I think that's -- that's far
6 removed.

7 Now you might have that in the
8 administrative law context, like in the Social
9 Security context, and that's where Mathews might
10 be a useful test if you're writing on a blank
11 slate, but, here, we're dealing with a process
12 as well as the country, two litigants coming
13 into court in front of a judge and adjudicating
14 their case.

15 And -- and that's why Barker is enough
16 in that context, because the judge is going to
17 be best situated to balance that need for speed
18 with the need for accuracy. So, if someone has
19 a relatively simple case and they say, Your
20 Honor, I want to move to expedite, I want a
21 hearing in two weeks, it's going to be incumbent
22 --

23 JUSTICE GORSUCH: So let me see if --

24 MR. LaCOUR: -- on the government to
25 come back.

1 JUSTICE GORSUCH: -- let me see if
2 you're comfortable with this: So long as the
3 processes that are ultimately given are of the
4 sort that are traditionally used for forfeiture
5 and -- and are -- are reasonably fair and
6 comport with traditional due process principles?
7 Something like that?

8 MR. LaCOUR: Yes, Your Honor, we're --
9 we're --

10 JUSTICE GORSUCH: Something like that?

11 MR. LaCOUR: -- absolutely fine with
12 that if that's how it functions in Alabama.

13 JUSTICE KAGAN: But, General, I mean,
14 maybe that's not enough. I mean, I'm
15 sympathetic to your point that the question here
16 is pretty similar to the question that we've
17 been dealing with in the two cases because
18 they're all how long is it going to take until I
19 can get an adjudication so that I can get my car
20 back, and that's what they're all about. That's
21 why people want this retention hearing, because
22 it takes too long, even under Barker, to have
23 the final adjudication. I want it back more
24 quickly. Totally right.

25 But we, in fact, have not decided this

1 precise question. We have a couple of sentences
2 which were written broadly and, if taken
3 literally, would -- would answer the case. But,
4 in fact, the two cases that we had were about
5 different kind of procedures at a different time
6 in the process.

7 And so we could say that even though
8 this -- there are similarities here, this
9 remains open to us to decide whether there ought
10 to be, in addition to the Barker -- the Barker
11 limited final adjudication, this -- this kind of
12 retention hearing that -- that applies to the
13 interim period.

14 And I think Justice Sotomayor raises a
15 very important point, which is that we know a
16 lot more now than we did when \$8,850 and the
17 other case were decided about how civil
18 forfeiture is being used in some states, about
19 the kinds of abuses that it's subject to, about
20 the kind of incentives operating on law
21 enforcement officers that -- that tend toward
22 those abuses.

23 So -- so, if we look around the world
24 and we think there are real problems here and
25 those problems would be solved if you got a

1 really quick probable cause determination, why
2 shouldn't we do that?

3 MR. LaCOUR: Well, Your Honor, I would
4 advise you to stay within the record of the case
5 and the controversy that's in front of you right
6 now, where you can see ample process was
7 provided to these claimants. We have -- you
8 mentioned the bond that they could have posted
9 at any time to get the vehicles back.

10 And as you were noting earlier with my
11 friend on the other side, they're essentially
12 just asking to have the final hearing two, three
13 weeks after, and that's going to cause serious
14 problems for the government.

15 You -- you will gain speed, but you
16 will lose accuracy. And the stakes are very
17 high in the civil forfeiture context. The
18 government, of course, has a strong interest in
19 obtaining full forfeiture. We have a strong
20 interest as well in -- in making sure that crime
21 doesn't pay.

22 And so, if you have a less accurate
23 retention hearing -- and that's really the only
24 reason to have one, is to have a mini-trial
25 that's less accurate but is faster -- then

1 you're going to have more property released to
2 -- to criminals, it's going to potentially be
3 misused again, crime will pay more, and you will
4 have more crime.

5 JUSTICE SOTOMAYOR: I -- I'm sorry.
6 Why? First of all, I doubt very much that
7 criminal defendants from whom cars have been
8 taken are going to seek a retention hearing
9 because whatever they say will be used against
10 them in the criminal case. I don't think New
11 York's experience reflects the use of these
12 retention hearing by criminals or by people from
13 whom the goods have been taken that are tied to
14 criminal activity.

15 These cases are most important for one
16 group of people, innocent owners, because they
17 are people who claim they didn't know about the
18 criminal activity. Many of these cases involve
19 parents with young -- with teenage or
20 close-to-teenage children involved in drug
21 activity. The ones that don't may involve
22 spouses or friends.

23 And I assume, in many of these
24 hearings, to the extent that a person is
25 involved in drug dealing, that the government

1 pretty quickly will find out or not find out if
2 that person has a relationship to a home or
3 other place where drugs are being stored,
4 distributed, et cetera, and the government can
5 do what your opposing counsel said, ex parte
6 hearing saying this is a wife who claims she's
7 an innocent owner, but we have evidence that
8 there's drug dealing going on from the home,
9 it's unlikely she's an innocent owner. If it's
10 someone who's unrelated and no continuing
11 relationship, et cetera.

12 So you're talking about criminals get
13 -- keeping these cars. But, given that the vast
14 majority -- I -- I believe the statistic was
15 very high -- certainly, over 60 percent of
16 innocent owners win, it is not criminals keeping
17 cars. It's innocent owners receiving back their
18 cars months, if not years, later.

19 So where does the Barker factors take
20 those interests into account? They don't.

21 MR. LaCOUR: Your Honor, I think they
22 do. I think my friend almost conceded that they
23 do by saying, if they had moved for summary
24 judgment on day one --

25 JUSTICE SOTOMAYOR: This is not --

1 MR. LaCOUR: -- they probably would
2 have had their car back sooner.

3 JUSTICE SOTOMAYOR: -- this is not the
4 -- the Barker factors have three -- they have
5 all government interests focused on --

6 MR. LaCOUR: I would dispute that,
7 Your Honor. The length of delay clearly takes
8 into account the interests of the private party.
9 Being deprived of your car for 14 days is a less
10 significant deprivation than being deprived for
11 400 days. So there is a way --

12 JUSTICE SOTOMAYOR: No, but you're
13 still building in massive delay. How about
14 three months when it's hardship?

15 MR. LaCOUR: Well, Your Honor, you're
16 -- you're assuming that Barker --

17 JUSTICE SOTOMAYOR: Where -- where
18 does that go -- where does that go into the
19 Barker factors?

20 MR. LaCOUR: Your Honor, there may be
21 circumstances where Barker needs to be applied
22 with more teeth, but I don't think that means
23 it's not up to the task.

24 JUSTICE SOTOMAYOR: Well, but why
25 don't you see the Mathews factors as that more

1 teeth? Mathews is just more explicit of adding
2 in the -- I guess, in this case, the
3 Petitioners' factors. Barker seems to be with
4 timing and seeing who caused the timing, what
5 were the government's interests.

6 The governmental interest is always
7 going to be great, but where does Barker take
8 into account the hardship of the individual?

9 MR. LaCOUR: Well, I -- I think,
10 again, you -- you get in front of a judge
11 quickly, the judge can do -- he can move the
12 case up faster. And this is the advantage of
13 Barker. My friend suggested that Mathews --

14 JUSTICE SOTOMAYOR: The disadvantage
15 is that that process is very discretionary.

16 MR. LaCOUR: Well, I think one
17 disadvantage is that it asks federal judges to
18 try to project into the future what the next
19 typical thousand forfeiture cases are going to
20 be like. When we're dealing with cars and guns
21 and cash and pirate ships --

22 JUSTICE SOTOMAYOR: Well, I -- I want
23 to --

24 MR. LaCOUR: -- there is no typical
25 case.

1 JUSTICE SOTOMAYOR: I'd like you to
2 point out to me one of these cases involving
3 guns, money, or -- what were the other --
4 putting cars aside. Money, cars, and --

5 MR. LaCOUR: There are a lot of older
6 cases involving pirate ships.

7 JUSTICE SOTOMAYOR: Pirate ships. In
8 which of those cases were those things released
9 immediately after a retention hearing?

10 MR. LaCOUR: I think -- I think that's
11 the point, Your Honor, they haven't been at
12 history.

13 JUSTICE SOTOMAYOR: They haven't been
14 because, as I mentioned, people involved with
15 guns, people involved with money, people
16 involved with other things rarely want to come
17 into court for a retention hearing if they have
18 a criminal proceeding in place. The people who
19 come in are the people who are innocent owners.

20 MR. LaCOUR: Your Honor, I think a
21 claim like that would need to come from my
22 friends and would need to be backed up with --
23 with evidence. And it's not uncommon, as this
24 Court has -- as courts have recognized, that
25 criminals oftentimes do put title of property in

1 someone else's name, and that someone else can
2 come forward. Not every purportedly innocent
3 owner is innocent, and not everyone is even an
4 owner.

5 And this is another problem with
6 rushing this hearing, is that someone could come
7 forward and claim ownership but not actually
8 have proper ownership. And if it's happening
9 too quickly, then the actually innocent owner
10 may be out his property and it's not going to be
11 there at the final forfeiture hearing, which is
12 why the government has always had this authority
13 to seize before a hearing, and the same
14 interests that have long justified seizure
15 before a hearing justify not turning the stuff
16 back over immediately after the seizure but,
17 rather, holding it until you can have a prompt
18 but accurate final hearing.

19 JUSTICE BARRETT: General, can I ask
20 you to respond to Petitioners' argument that the
21 historical analogs are not actually analogous
22 here and that we don't have any settled
23 tradition of having a single forfeiture hearing?

24 MR. LaCOUR: I would expect to have
25 seen a mini-trial or a remission -- or not

1 remission -- a retention hearing somewhere in
2 the history, but we do not have that. And if
3 you contrast that with the liberty interest,
4 Justice Scalia's dissent in County of Riverside
5 highlights how there always was this right at
6 common law to be presented to the magistrate
7 right after the arrest.

8 But there's not similar evidence when
9 it comes to property, and that's because
10 property and liberty are very different. The
11 liberty interest --

12 JUSTICE BARRETT: But Justice Kagan
13 pointed out, I mean, there are new kinds of
14 property that arise and there are new kinds of
15 procedures and that things have shifted and
16 maybe the final hearing itself happened in much
17 closer proximity to the seizure. That was
18 Petitioners' suggestion.

19 So, you know, do we -- what do we do
20 then if we think there is no precise analog?

21 MR. LaCOUR: If it -- if -- I think
22 you're still speaking in the language of speed,
23 which is the language of Barker, which is,
24 again, why we think Barker is the test. It is
25 the historical test. It carries that forward to

1 today, institute promptly, conclude promptly,
2 and then let the judges who are on the ground
3 with the parties in front of them weigh those --
4 weigh those competing interests.

5 And when it comes to this affirmative
6 defense of innocent ownership, I don't think
7 that changes things at all. It's actually very
8 similar to the argument that Mr. Von Neumann
9 made. He said he had an independent interest in
10 this remission petition. And the Court did
11 assume for purposes of deciding part 3 that he
12 did. And the Court said, we don't see how that
13 separate interest, apart from the cars, is in
14 any way prejudiced by this 36-day wait.

15 And the same thing is true here. This
16 separate interest apart from the cars in raising
17 an affirmative defense is prejudiced not at all
18 by being held or being heard for the first time
19 at the final hearing as opposed to two weeks
20 after seizure or two days after seizure for that
21 matter.

22 And if you look to the criminal
23 context, there are affirmative defenses there
24 that typically don't get heard until the
25 criminal trial. So, clearly, affirmative

1 defenses can be meaningful even if they don't
2 get put before a court until the final hearing.
3 And the same thing is true in the civil context.

4 JUSTICE JACKSON: I'm sorry, what is
5 the affirmative -- what -- what is -- your
6 conception of this -- the interest that this
7 Petitioner is raising is the ability to make her
8 affirmative defense early? I don't understand
9 where affirmative defense came from.

10 MR. LaCOUR: They say that this case
11 is somehow different because there's now an
12 innocent owner affirmative defense, but, I mean,
13 that same argument was pressed by Mr. Von
14 Neumann when it came to the remission petition.
15 He said, I have this independent right created
16 by federal law to get a remission petition
17 decision, and the Court said that right received
18 all the process it was due by this 36-day
19 process in deciding.

20 The same thing is true here. Their
21 right to claim innocent ownership was heard and
22 was vindicated at the final hearing. There's no
23 need for it to be heard two days or two weeks
24 after seizure in order for it to comport with
25 fundamental fairness.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas, anything further?

4 Justice Alito?

5 Justice Sotomayor?

6 JUSTICE SOTOMAYOR: Can I go back to
7 this common law issue? Assume -- we do know
8 that English common law provided post-seizure
9 process separate from the final forfeiture
10 hearing. The Fourth -- Restore the Fourth
11 briefs lays out that very robust history.

12 We don't have a similar history in
13 early American courts for all the reasons the
14 opposing counsel raised and Justice Barrett made
15 clear, largely because, except for pirate ships
16 and some isolated other types of seizures, we
17 don't have a robust forfeiture process until the
18 1970s.

19 So going back to her question, which
20 is, if the common law doesn't have a clearly
21 established process, does that mean no process
22 is ever due, or does it mean that we have to
23 judge it by the circumstances that exist in
24 modern times? I would think it's the latter.

25 MR. LaCOUR: You --

1 JUSTICE SOTOMAYOR: And forfeitures
2 were quicker earlier in our history.
3 Forfeitures were rare. And now we've expanded
4 them to all sorts of property interests. Even
5 those involving innocent owners, it's a new
6 thing. So what do we do with a -- without a
7 clear common law analog?

8 MR. LaCOUR: Your Honor, I think the
9 history is a lot clearer and a lot clearer in
10 our favor than the Restore the Fourth brief
11 would make out. We agree with a lot of the
12 premises that in Slocum and I think there's an
13 early Judge Hand decision saying you need to
14 institute or return.

15 Well, that sounds like Barker to me.
16 Institute promptly, conclude promptly. There is
17 not a history of a mini-trial despite the fact
18 that you do have this history in the liberty
19 context of something like a precursor to the
20 Gerstein hearings. I think that -- that absence
21 of evidence is evidence of absence.

22 And then -- and we do think that how
23 courts were protecting the individual right
24 tells us what is demanded today, but not more is
25 demanded, as Von Neumann concluded.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?

3 JUSTICE GORSUCH: No, thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

6 JUSTICE KAVANAUGH: A couple things.
7 First, you agree that Barker takes account of
8 the claimants' interests, hardship, et cetera,
9 correct?

10 MR. LaCOUR: Yes, Your Honor, if
11 you're in front of a judge quickly.

12 JUSTICE KAVANAUGH: In the first -- in
13 the first Barker factor, is that right?

14 MR. LaCOUR: Yes, Your Honor. If you
15 get in front of the judge quickly, he can
16 consider all those factors.

17 JUSTICE KAVANAUGH: Okay. And then,
18 on Barker and Mathews v. Eldridge, the Solicitor
19 General in particular suggests that those really
20 are ultimately the same materially, the same
21 thing in this context, ask the same questions.

22 Do you agree with that or not?

23 MR. LaCOUR: We see a little more
24 daylight between the tests, but we -- we do
25 agree that in -- in these cases, they would cash

1 out the same way. That's what the Southern
2 District of Alabama held in Ms. Culley's case,
3 that under Mathews or under Barker, she loses.

4 JUSTICE KAVANAUGH: And suppose we
5 have no precedent on point and suppose we have
6 no idea what the history says, just a complete
7 blank slate. We're purely -- and suppose we're
8 doing Mathews v. Eldridge, okay? We're purely
9 in Mathews v. -- v. Eldridge land.

10 How do we decide whether the new
11 hearing is -- is necessary or not? We're
12 supposed to weigh the government's interests
13 against the individual interests.

14 MR. LaCOUR: Yes, Your Honor. I mean,
15 I -- I would look -- point you to this Court's
16 opinion in Kaley, for example, where they looked
17 at the significant interests the government has
18 in not having to try their case repeatedly. And
19 it's -- it's bolstered in the forfeiture context
20 because, again, movable property can disappear.
21 It can be hidden. It can be misused again.

22 You don't want to turn the car back
23 over to someone who's just allowed it to be used
24 to traffic methamphetamine because odds are
25 there's at least better than zero odds that it

1 might be misused again or disappear.

2 So we think the government's interests
3 are -- are -- are very strong here. And then
4 it -- it's not clear what additional process is
5 really going to be provided when that retention
6 hearing is going to look a lot like the final
7 hearing except for the fact that it's going to
8 be rushed and, therefore, the risk of error is
9 going to increase.

10 And then that risk of error is not
11 just a problem for the public, it's a problem
12 for the other actually innocent owners if a
13 merely purportedly innocent owner makes off with
14 the property because of the error.

15 JUSTICE KAVANAUGH: Just to finish it
16 out, and you would have us just figure out
17 whether we agree more with the government or the
18 individual on that, which -- which interest
19 outweighs the other, we just have to make a
20 policy call on that?

21 MR. LaCOUR: Yes, I think that's part
22 of the problem with Mathews. And it -- and it's
23 not all that predictable. The Second Circuit
24 and the Seventh Circuit just in the context of
25 cars said you do get the retention hearing. The

1 Fifth Circuit and the Southern District of
2 Alabama in this case said you don't get a
3 retention hearing for cars.

4 So it doesn't really give us a whole
5 lot of guidance. We do think --

6 JUSTICE KAVANAUGH: Thank you.

7 MR. LaCOUR: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 Justice Jackson?

11 JUSTICE JACKSON: Well, Barker has
12 factors too. I mean, is there some evidence
13 that Barker's factors are more predictable or
14 lead to results that are more consistent in some
15 way than Mathews?

16 MR. LaCOUR: No, Your Honor, it's more
17 fact-sensitive. And that's the -- my friend
18 would see that as a drawback. I think that's
19 actually a merit of Barker.

20 JUSTICE JACKSON: More fact-sensitive
21 than the factors in Mathews?

22 MR. LaCOUR: Yes. Petitioners'
23 counsel said just a few moments ago that Mathews
24 allows you to do these categorical projections
25 into what the typical case is going to look like

1 in the future so that trial judges can be told,
2 make sure you have a hearing within 14 days no
3 matter what the facts show you.

4 And we don't think that's very
5 flexible at all. We would prefer a test that
6 allows trial judges to be trial judges and weigh
7 the cases as they come.

8 JUSTICE JACKSON: Okay. So you're
9 saying even though you -- your argument is that
10 both Barker and Mathews come out the same way
11 here, somehow, in application, Mathews has --
12 is -- is deficient vis-à-vis Barker? Barker is
13 the better, easier way to -- what -- what is
14 better about it?

15 MR. LaCOUR: Again, it's -- it's
16 fact-sensitive. No two property cases are
17 going -- movable property cases in the
18 forfeiture context are going to be alike. You
19 have lots of different types of property. Even
20 the same type of property can have different
21 values, different claimants.

22 JUSTICE JACKSON: And I thought that
23 was what Mathews allowed for. But you're saying
24 that's -- in your view, that's what Barker --

25 MR. LaCOUR: The way Mathews has been

1 applied in the Sixth Circuit and the Second
2 Circuit has been to really alter the Rules of
3 Civil Procedure for every case going forward,
4 whether it's a case where the claimant would
5 have defaulted anyway or whether --

6 JUSTICE JACKSON: I'm not talking
7 about how it's been applied, letting judges be
8 judges. I'm talking about the test itself. Are
9 there -- is there something about the factors in
10 the Barker test that is more determinate -- more
11 determinative, allows us to be more predictable
12 about what's going to happen, other than, I
13 guess, the view that you'll never get any other
14 process? If that's -- if that's the result that
15 you think Barker always points to, then I guess
16 it is more consistent than Mathews, but --

17 MR. LaCOUR: Yes, and I think it's --
18 it's a little more specific in describing the
19 government interests. The government has to
20 explain why there is a delay. And then you're
21 looking at the -- the key factor, which is how
22 long has this taken.

23 JUSTICE JACKSON: All right. So just,
24 finally, getting back to Justice Gorsuch's
25 point, is it your argument that plaintiffs are

1 not allowed in this context -- by that, I mean
2 the civil forfeiture context generally -- to
3 assert that the forfeiture procedures themselves
4 are deficient? Not making a delay claim. I'm
5 conceding, says the plaintiff, that this was not
6 -- that the forfeiture hearing is going to
7 happen or has happened in a timely fashion. But
8 I would like to complain about the procedures
9 that were given to me in that context.

10 Is it your view that -- that no such
11 claim can be made?

12 MR. LaCOUR: Your Honor, if the claim,
13 for example, was that the judge who's sitting
14 over my case is biased against me --

15 JUSTICE JACKSON: No, not that claim.
16 I -- I don't want to make it kangaroo court
17 because that's hard and it'll go back to the
18 question that Justice Gorsuch asked.

19 I want to make it something else about
20 the process that is unfair. You know, these
21 involve, as Justice Sotomayor says, people who
22 are -- say that they're innocent owners, that
23 they own the property and that they knew nothing
24 about the drugs.

25 So the state has a system -- this is a

1 hypothetical I'm making up on the spot. The
2 state has a system in which the manner of
3 proving that the person, you know, knows about
4 the drugs is very unfair. You know, the state
5 says we presume that if you are -- you know,
6 know this individual, then you're aware of their
7 drug activity. And since this person is your
8 son, you obviously know them. You can't bring
9 in any evidence that shows that you didn't know
10 anything about it. You're not an innocent owner
11 under that test.

12 And what the person, the -- the owner,
13 would like to do is say that you can't have a
14 system -- you can't have a method of proof that
15 is so unfair in terms of my ability to prove
16 that I didn't know what was going on. That's my
17 challenge, not that the hearing took too long.
18 It has nothing to do with speed. I want to make
19 that kind of challenge.

20 My question is, is it your view that
21 no such claims exist? And if they do exist, are
22 we judging the due process by the Barker test or
23 some other test in that situation?

24 MR. LaCOUR: Your Honor, I think this
25 Court's decision in District Attorney's Office

1 v. Osborne would suggest that if you've created
2 a new procedural right, then, yes, there's some
3 due process protections that attach, but the
4 state has a tremendous amount of discretion in
5 terms of what processes are going to attach to
6 that new --

7 JUSTICE JACKSON: Understood. So --

8 MR. LaCOUR: -- procedural right.

9 JUSTICE JACKSON: -- if you agree that
10 the person could make such a claim, are you
11 saying the Barker test would apply in that
12 situation to determine the -- the ultimate due
13 process question?

14 MR. LaCOUR: It doesn't sound like
15 that's a timing issue, so probably not, Your
16 Honor, but, again, in -- in this case, the issue
17 is they've had my car too long.

18 JUSTICE JACKSON: Okay.

19 MR. LaCOUR: And that's a timing
20 question.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Ms. Reaves.

25

1 ORAL ARGUMENT OF NICOLE F. REAVES
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENTS

4 MS. REAVES: Mr. Chief Justice, and
5 may it please the Court:

6 I think it may be helpful for me to
7 lay out how the federal government sees this
8 case. In our view, the Court has already found,
9 as indicated in *Shelton* and *Von Neumann*, that the
10 only process a claimant is entitled to after
11 personal property is seized is a timely final
12 forfeiture hearing.

13 If this Court is of the view that it
14 has not yet addressed that issue, it should now,
15 and it should hold that a claimant has no right
16 to an interim post-seizure hearing.

17 History and tradition support that
18 rule. At the time of the founding, there was no
19 right to an early hearing when property was
20 seized. Only a timely forfeiture hearing was
21 required. That approach has prevailed for
22 nearly 250 years.

23 The hearings that Petitioners request
24 would upend that history, be extremely onerous,
25 and would require more process for the pretrial

1 deprivation of property than the pretrial
2 detention of persons.

3 Finally, if the government disagrees
4 with our front-line position, while we think
5 that \$8,850 is the better fit for Petitioners'
6 particular claims, the government is largely
7 ambivalent about whether Eldridge or \$8,850
8 applies to determine whether an interim hearing
9 is required in a given case.

10 But, either way, this Court's decision
11 should emphasize that the public and government
12 interests identified in \$8,850 and Pearson Yacht
13 will often weigh strongly against allowing such
14 a hearing.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Ms. Reaves, there's
17 -- there have been quite a few questions that
18 say maybe something substantively goes wrong in
19 this process. How would you address that,
20 assuming that the forfeiture proceedings are
21 timely?

22 MS. REAVES: So I think, if there was
23 some sort of question that an individual wasn't
24 receiving due process in the course of the
25 proceedings, so some sort of procedural

1 irregularity, I think there could be a due
2 process claim for that.

3 It wouldn't necessarily be by --
4 governed by Eldridge or even \$8,850. It could
5 be governed by just the closest, you know, civil
6 law analogy. Like, if there's an inappropriate
7 burden of proof being placed on someone, I think
8 that there might be due process analogies for
9 that.

10 But that wouldn't be solved by
11 requiring an additional layer of proceedings in
12 all cases or in a significant category of cases.
13 That's just a different issue.

14 CHIEF JUSTICE ROBERTS: The assessment
15 whether a civil forfeiture proceeding meets the
16 requirements of due process, timeliness is a
17 significant consideration in that, right?

18 MS. REAVES: Yes, it is.

19 CHIEF JUSTICE ROBERTS: And it is, of
20 course, in retention as well?

21 MS. REAVES: Yes.

22 CHIEF JUSTICE ROBERTS: So -- but
23 there's presumably a gap between when you would
24 have that question asked under retention and
25 when you would have it asked under civil

1 forfeiture. How do we look at the significance
2 of that -- that gap?

3 MS. REAVES: So I think the Court
4 would look at that under \$8,850 because \$8,850
5 allows the Court to take into consideration the
6 burden to a particular claimant in a particular
7 case. I think that comes in under the first
8 factor in \$8,850.

9 And I think, you know, the government
10 interests really aren't any different. You
11 know, this Court's talked about the government
12 interests in Pearson Yacht in not having a
13 pre-seizure hearing. And I think most of those
14 government interests continue to apply to allow
15 the government to retain the property while the
16 hearing is proceeding, you know, as long as the
17 hearing is proceeding in an appropriate amount
18 of time and the government isn't sitting on its
19 hands and doing nothing while holding someone's
20 property.

21 And I -- and I think the history and
22 tradition really are consistent with that. You
23 know, the best evidence of the history here
24 comes from the Collection Acts, which were
25 passed by founding-era Congresses. There was no

1 requirement that there be any sort of interim
2 hearing. The normal rule was that once property
3 was seized, it was held until the final
4 forfeiture hearing.

5 And Petitioners' counsel has suggested
6 that once the forfeiture proceeding was filed,
7 there was a 14-day hearing requirement. That's
8 just not the case. So, first of all, under the
9 Collection Acts, the federal government had up
10 to three years between seizure and initiating
11 the forfeiture action. And then --

12 JUSTICE GORSUCH: Sorry to interrupt.
13 Do we need to decide any of that in this case
14 given that under your count and the state's, the
15 Petitioner here was -- could have brought a
16 summary judgment motion at any time and -- and,
17 presumably, most of the facts that she would
18 have wanted to present would have been in her
19 control?

20 MS. REAVES: So I -- I think that's
21 right. You could issue a very narrow decision
22 in this case.

23 JUSTICE GORSUCH: Yeah, how would it
24 -- what would it look like in the government's
25 view if we were to say -- want to avoid ruling

1 on -- on that question and also leave open the
2 possibility, as you alluded to with Justice
3 Thomas, that there may be due process
4 considerations beyond timing that might arise in
5 some of these cases?

6 I mean, there are allegations before
7 us that in some states, because law enforcement
8 uses these -- these forfeitures to fund
9 themselves, that they sometimes require somebody
10 who wants some of their property back to agree
11 to give some of it to the government or engage
12 in other concessions outside of regular process.
13 How -- how do we write a narrow opinion that
14 does no harm here?

15 MS. REAVES: So I think the Court
16 could say that we haven't decided whether
17 there's ever any entitlement to an interim
18 hearing, but assuming that there could be such a
19 requirement in some category of cases, it
20 clearly would not -- Petitioners were not
21 entitled to that sort of hearing in this
22 particular case.

23 Now there may be some dangers in
24 kicking it down the road. I think there will be
25 other petitions coming up because of the Sixth

1 Circuit's decision and even coming out of
2 Krimstock. But the Court definitely could save
3 this for another day if the Court wanted to.

4 JUSTICE KAVANAUGH: I -- I thought you
5 were going to say that the -- that we could say
6 that there's no due process right to an interim
7 hearing, period, but there could be other due
8 process issues related to other aspects of
9 forfeiture proceedings and you don't need to
10 rule those problems out by saying there's no due
11 process right to an interim hearing.

12 MS. REAVES: That's certainly our
13 preferred rule. I think I was assuming that
14 Justice Gorsuch wanted a much more limited rule
15 that just dealt with the facts of this case.
16 But, as I said in my opening, we certainly think
17 that the Court has already indicated that
18 there's no --

19 JUSTICE SOTOMAYOR: So what do you --

20 MS. REAVES: -- due process right to
21 --

22 JUSTICE SOTOMAYOR: -- see Barker
23 being if it's not an interim hearing?

24 MS. REAVES: So I --

25 JUSTICE SOTOMAYOR: I mean, Barker, a

1 defendant comes in -- not a defendant -- a
2 petitioner comes in, makes a motion and says,
3 I'm entitled to a Barker hearing. The
4 government claims its interests, but I have
5 hardship and I want a hearing on the level of my
6 hardship versus their interests and their level
7 of proof?

8 Because your brief seems to argue that
9 the Mathews test is fully consistent would --
10 with and would not require any material changes
11 in the Court's traditional Barker-based
12 analysis. That's your brief at page 19.

13 MS. REAVES: So I think I want to --

14 JUSTICE SOTOMAYOR: So due process
15 does require Barker hearings. That's what we
16 said in *Mathews*, and, basically, you just don't
17 want to call it a retention hearing?

18 MS. REAVES: So I think I want to be
19 clear where we are in the analytical framework
20 here. So we don't think there's ever a right to
21 an interim hearing. We think the only right
22 that there is is a timely final forfeiture
23 hearing.

24 And it's certainly true that someone
25 whose forfeiture proceedings are ongoing can

1 say: Look, this is moving too slowly under
2 Barker, and the court can, you know, set its
3 deadlines accordingly, can dismiss the case if
4 it's already proceeded for too long a period of
5 time.

6 And we've also suggested that in this
7 particular case, where the claims really are
8 just about timing, you know, Petitioners haven't
9 alleged there wasn't due process to seize their
10 vehicles, they haven't complained with the time
11 -- final proceeding, they concede in their reply
12 that sometimes a final forfeiture hearing could
13 happen quickly enough, that when the claim
14 really is about timing, that there's going to be
15 little difference between applying \$8,850 or
16 Barker to that type of claim.

17 JUSTICE JACKSON: But I guess you --

18 JUSTICE SOTOMAYOR: You keep saying
19 "timely." I don't know what timely is. I have
20 a brief that set out the fact that some
21 hearings, by the nature of what the courts are
22 doing, are taking up to a year or more.

23 I don't consider that timely if I'm an
24 innocent owner who relies on my car for my --
25 for survival. And there's evidence of claimants

1 who, in fact, had children, who lost their job,
2 et cetera.

3 So how do we take care of those
4 things?

5 MS. REAVES: So I think, if you're
6 concerned about that sort of thing, the claimant
7 can raise the concern that the proceedings are
8 already taking too long in their ongoing
9 forfeiture proceedings or, if the forfeiture
10 proceedings haven't been filed, they can file a
11 Rule 41(g) motion in the federal system or a
12 Rule 313 motion in the Alabama system.

13 So there are ways to bring the
14 timeliness claim up to a court without requiring
15 a retention hearing in all cases. And I think
16 one important thing to keep in mind, you know,
17 Petitioner has focused extensively on the fact
18 that there's an innocent owner defense at play
19 here and that that somehow means that there's an
20 earlier entitlement to a hearing. And Alabama
21 law, the version of law that was in effect for
22 this case, makes it clear that that is an
23 affirmative defense.

24 That's in Wallace versus State, which
25 --

1 JUSTICE SOTOMAYOR: Is --

2 MS. REAVES: -- is cited on page 3 of
3 our brief.

4 JUSTICE SOTOMAYOR: -- is that part of
5 its new law?

6 MS. REAVES: Excuse me?

7 JUSTICE SOTOMAYOR: Is it part of the
8 Alabama new law?

9 MS. REAVES: It is not, no, but the
10 Alabama new law, of course, is not at issue in
11 this case. And the version of the innocent
12 owner defense that's at issue here only comes in
13 after the state has made out its prima facie
14 case before the forfeiture.

15 JUSTICE SOTOMAYOR: Quite interesting,
16 isn't it, that once the incentive is taken out
17 of police officers taking advantage of the
18 system as it exists, that Alabama puts in a
19 system that is much fairer?

20 That was one of the reasons that
21 Alabama resisted granting cert in this case,
22 because the new system does look to guarantee a
23 faster process?

24 MS. REAVES: So I think the new
25 system's processes are different, but I think

1 it's important to keep in mind that I don't even
2 think the new system's process would have given
3 these Petitioners faster process.

4 So the innocent owner defense under
5 Alabama's new law, once an innocent owner seeks
6 -- seeks an innocent owner hearing, the state
7 has up to 60 days to respond to that. And
8 that's almost exactly the amount of time that
9 Petitioners would have had their cars returned
10 to them had they proceeded under Alabama state
11 law as it had existed at the time of this case.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas, anything?

15 Justice Alito?

16 Anything further, Justice Sotomayor?

17 Justice Kagan?

18 Justice Gorsuch?

19 Justice Jackson?

20 JUSTICE JACKSON: Yeah, can I just
21 clarify one thing? You -- you say that you
22 think that the only right is to a timely final
23 forfeiture hearing, but I thought what was at
24 issue in this case is the test that is to be
25 used to make that determination. So I

1 appreciate that the government thinks it knows
2 the answer in all of these cases, which is, you
3 don't get a hearing. But I thought this -- that
4 the -- I thought we had tests that we applied in
5 the law to lead us to that conclusion in
6 particular cases depending upon the claims and
7 the circumstances.

8 And so our question was what test?
9 And am I wrong? It -- it -- it feels to me
10 strangely like the government has picked the
11 answer and is choosing the test that will
12 inevitably lead to the answer that the
13 government wants, as opposed to telling us here
14 is the difference between the Barker test and
15 the Mathews test and which one is better in
16 terms -- more consistent with our prior case
17 law, et cetera, et cetera?

18 MS. REAVES: So I think we view the
19 answer to the question presented as being it
20 doesn't matter because the Court has essentially
21 already decided this in Von Neumann, in \$8,850.
22 And I --

23 JUSTICE JACKSON: What's your -- what
24 is -- what is your view of my thought that Von
25 Neumann is really much narrower in the language

1 that you're talking about than your -- than
2 the -- than the way it is being read, that it's
3 been taking -- taken out of context?

4 MS. REAVES: So I think Von Neumann,
5 the latter part of that decision, I -- I read it
6 as having assumed that there was a due process
7 right to a timely remission -- adjudication of
8 the remission petition. And then the Court
9 there found that --

10 JUSTICE JACKSON: You mean in Section
11 3?

12 MS. REAVES: Yes.

13 JUSTICE JACKSON: But, in Section 2,
14 it says there is no such thing, so it's just
15 kind of continuing to spin out the analysis, but
16 it was pretty clear in 2 that the Court was
17 finding that there was no such thing.

18 MS. REAVES: That -- that's certainly
19 correct. I think the Court had maybe
20 alternative holdings that you could -- you could
21 say, but I don't think the Court should just
22 ignore the last section of -- of Von Neumann.

23 But I think even if you were to view
24 this case as being, and this issue as not
25 already being decided, I think, if you looked at

1 it under an \$8,850-type analysis or even a
2 Mathews v. Eldridge analysis, you'd come to,
3 like, the bottom-line conclusion that the Court
4 came to in Pearson Yacht for the same reasons
5 that there's no entitlement to a pre-forfeiture
6 notice and hearing -- or pre -- excuse me,
7 procedure notice and hearing.

8 JUSTICE JACKSON: So the government's
9 view is that on the methodology, it doesn't
10 really matter whether we do Barker, or, like,
11 the answer to the QP is it doesn't matter?

12 MS. REAVES: That's correct.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Rebuttal, Mr. Dvoretzky?

17 REBUTTAL ARGUMENT OF SHAY DVORETZKY

18 ON BEHALF OF THE PETITIONERS

19 MR. DVORETZKY: Thank you, Mr. Chief
20 Justice.

21 First, Von Neumann and \$8,850 didn't
22 decide the question that is presented here.
23 They didn't decide whether there can be an
24 interest in avoiding temporary deprivation that
25 is different from the time to a final

1 disposition.

2 The Court in this case should not
3 strip the lower courts of the tools they need to
4 analyze whether in a particular case more
5 process is due.

6 We've heard the phrase today "Let
7 judges be judges." The Court -- this Court
8 should let judges be judges and trust the lower
9 courts as well as the states and the federal
10 government to figure out what to do with the
11 guidance that this Court should provide that
12 some meaningful process is due in order to
13 protect an innocent owner pending a final
14 adjudication.

15 And jurisprudentially, Gerstein again
16 is another example here. In Gerstein, the Court
17 recognized that there should be a prompt
18 probable cause determination. It took several
19 years of them -- percolation before the Court in
20 City of Riverside provided more concrete
21 guidance and said: Okay, this is what that
22 needs to look like.

23 So all the Court needs to do here is
24 to recognize that the interests that we're
25 asserting are different than the ones that were

1 asserted in Von Neumann and \$8,850. They should
2 be analyzed under Mathews because Mathews is the
3 test for determining whether additional process
4 is due. And then the lower courts and the
5 states and, if necessary, the federal government
6 can figure out how that works.

7 Now, in terms of some of the
8 flexibility that that might afford, the federal
9 statute, 18 U.S.C. 983(f), it allows the --
10 the -- or it entitles a claimant to the
11 immediate release of seized property if they can
12 show substantial hardship. That is in -- in
13 some ways even more valuable than a hearing.

14 So that may be perfectly
15 constitutionally sufficient. Utah has a similar
16 sort of scheme. And so, again, the Court
17 doesn't need to micromanage exactly how all of
18 this works.

19 With respect to Barker, Barker would
20 be a poor fit for the claim that we're asserting
21 here because Barker is not designed to answer
22 the question of whether more process is due.
23 For starters, under the first prong of Barker,
24 it takes a year before Barker even kicks in.

25 Barker does not account for private

1 interests. It doesn't account, for example, for
2 the difference between taking away somebody's
3 car, which is necessary for their livelihood,
4 and taking away some other piece of property
5 that they might not need in the same way.
6 Mathews does.

7 Barker also provides no flexibility in
8 the remedy. The only remedy that Barker can
9 lead to is, in the criminal context, dismissal
10 of the indictment, here, dismissal of the
11 forfeiture proceeding altogether. It doesn't
12 provide any flexibility for considering whether
13 additional process is due.

14 With respect to the facts here, no
15 Court has considered the value of additional
16 process and whether, in fact, the -- the
17 plaintiffs could have moved for prompt summary
18 judgment and, if so, how long that would have
19 taken. What we do know is that in the course of
20 ordinary litigation, the state here, to use
21 Sutton's case as an example, the state took five
22 months to respond to discovery requests about
23 what the state knew about the innocent owner
24 defense, and, ultimately, those discovery
25 requests were entirely non-responsive.

1 And so all of this back and forth
2 about what could have happened on summary
3 judgment, that's something that the lower courts
4 can consider in the first instance -- it hasn't
5 been considered before -- in applying Mathews
6 and determining what would be the value of
7 additional process.

8 I'd also point out that the facts of
9 this case show how different this case looks
10 from forfeiture at common law. This is not a
11 case about pirates or owners of ships crossing
12 borders. We're talking here about individuals
13 who lost their cars.

14 In Sutton's case, as a result of
15 losing her car, she missed medical appointments,
16 she wasn't able to keep a job, she wasn't able
17 to pay a cell phone bill and, as a result of
18 paying a cell phone bill -- not being able to
19 pay her cell phone bill, was not in a position
20 to be able to communicate about the forfeiture
21 proceedings.

22 In Ms. Culley's case, she not only
23 begged and pleaded with the police for her car
24 back but also had communications with the DA's
25 office. The DA's office said, if you comply

1 with our process, you'll get your car back, but
2 it'll take at least six months until there's a
3 hearing.

4 And so we're far removed from the --
5 the narrow sense in which history recognized
6 forfeiture.

7 Lastly, Alabama talks about government
8 interests here. Government interests can be
9 weighed, in fact, must be weighed as part of the
10 Mathews analysis. They can also be considered
11 at any retention hearing that might result from
12 Mathews. Approximately 20 states have hearings
13 of some sort like that. Alabama itself now
14 provides a much prompter hearing than it did
15 when -- when my clients' cars were taken.

16 Lastly, I would just end with a quote
17 from this Court's decision in Fuentes. This is
18 at 407 U.S. 90. "A prior hearing always imposes
19 some costs in time, effort, and expense, and it
20 is often more efficient to dispense with the
21 opportunity. But these rather ordinary costs
22 cannot outweigh the constitutional right."

23 We ask that the Court adopt Mathews
24 and remand for the lower courts to consider.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 The case is submitted.

3 (Whereupon, at 11:45 a.m., the case
4 was submitted.)

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Official - Subject to Final Review

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