No. 20-1493

In The
Supreme Court of the United States

STEPHEN NICHOLS,

Petitioner,

v.

WAYNE COUNTY, MICHIGAN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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May 20, 2021

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC.

Restore the Fourth, Inc. ("Restore the Fourth") respectfully moves for leave to file the attached brief as *amicus curiae* in support of petitioner under Rule 37.2 of the Rules of this Court. Restore the Fourth's brief will assist the Court by expounding on certain aspects of the law about which Restore the Fourth has special interest and knowledge.

All parties were timely notified of proposed *amicus*'s intent to file this *amicus* brief. Petitioner consented to Restore the Fourth's request to file an *amicus curiae* brief. Respondents each declined to grant consent.

Restore the Fourth has devoted significant time and attention to civil asset forfeiture and due process, and it believes the Court will benefit from its attention to issues not fully addressed by the parties. Additional briefing will assist this Court to determine why the Sixth Circuit's decision denies litigants due process and a meaningful opportunity to timely challenge the seizure of their property by a local government—via a continued detention or retention hearing—when that governmental entity is attempting to obtain ownership of that property through civil asset forfeiture.

Restore the Fourth has a longstanding commitment to safeguarding the civil rights of all Americans and it views the Fourth Amendment's due process protections as extending to civil asset forfeiture actions.

For these reasons, and those set forth in the attached brief, Restore the Fourth respectfully requests leave to file a brief as *amicus curiae*.

Respectfully submitted,

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INTERESTS OF *AMICUS CURIAE*

Restore the Fourth[1] is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

Restore the Fourth advances these principles through *amicus curiae* briefs in significant Fourth Amendment cases[2] and through its network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights.

[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were timely notified more than 10 days prior to the deadline for filing. Petitioner consented to the filing of this brief, but respondents denied consent.

[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Mitchell v. Wisconsin*, No. 18-6210 (U.S. filed Mar. 4, 2019); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, No. 16-1027 (U.S. filed Nov. 17, 2017); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Byrd v. United States*, No. 16-1371 (U.S. filed Nov. 16, 2017); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, No. 16-402 (U.S. filed Aug. 14, 2017).

SUMMARY OF ARGUMENT

Municipalities today routinely seize vehicles and hold them for months or years without any post-seizure, pre-forfeiture opportunity to be heard. The current state of affairs is painfully reminiscent of the British Crown's expansive abuses of civil forfeiture against colonists in America, which, in part, fueled the American Revolution and informed the architects of the U.S. Constitution, its Fourth Amendment, and early congressional limits on civil forfeiture and requirements to provide prompt and meaningful opportunity to be heard.

Founding-era concerns over forfeiture's harshest effects are at their most acute in this case, where the municipal respondents held petitioner's vehicle for three years without any hearing to justifying their continued detention of the vehicle and without ever initiating forfeiture proceedings. A careful historical examination of early American forfeiture and remission proceedings demonstrates the Fourth Amendment requires more: a prompt hearing before a neutral judge to address continued municipal detention of petitioner's vehicle pending forfeiture proceedings.

The decision below only further entrenches such unchecked, unconstitutional civil forfeiture schemes like the one at issue here. The panel did not directly dispute that the respondents' conduct violates the Fourth Amendment. Instead, it created an impossible pleading standard that serves only to prevent meaningful judicial oversight. This new *Monell*-plus pleading

standard erects yet another judicially created barrier to fulfilling the purpose of Section 1983: to provide remedies and deter the deprivation of federal civil rights.

ARGUMENT

I. British Abuses of Civil Forfeiture and Denials of Due Process Informed the Fourth Amendment and Early U.S. Forfeiture Law

The Court "has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Justice Thomas writing separately) (citing *Bennis v. Michigan*, 516 U.S. 442, 446–48 (1996)). That historical context should inform the Court's consideration of the petition and, ultimately, the questions presented.

A. The British Crown Drastically Expanded Forfeitures and Created New Courts to Arbitrarily and Corruptly Effect Them

British common law allowed the Crown to acquire property belonging to individuals over which it lacked *in personam* jurisdiction. Elizabeth B. Cain, *The Absurdity of Civil Forfeiture Law Exposed: Supreme Court Upholds Punishment of Innocent in Bennis v. Michigan and Highlights the Need for Reform*, 47 DEPAUL L. REV. 667, 669 (1998). The Crown used civil

asset forfeiture as a "principal means of tax enforcement." *Id.* at 669–70 n.20 (quoting James R. Maxeiner, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 773 (1977)); *see also Leonard*, 137 S. Ct. at 848 ("English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws.") (citations omitted).

The petition details the protections afforded at common law in Britain, but additional context is crucial to understanding the constitutional implications of this case: in colonial America, the British Crown vastly expanded its civil forfeiture regime while limiting the opportunity for colonists whose property was seized to seek redress. These drastic changes allowed Crown agents to use arbitrary and general writs to seize colonists' goods that would not otherwise have been seized—and ultimately forfeit them.

Starting in the 1660s, Britain passed a series of Navigation Acts requiring all goods imported and exported to the colonies to be carried by a ship flying under the British flag; violating ships could be seized and forfeited in common-law courts. The acts precluded an innocent-owner defense, but colonial juries resurrected the defense anyway. Cain, *supra* at 670; Stefan B. Herpel, *Toward A Constitutional Kleptocracy: Civil Forfeiture in Americ*a, 96 MICH. L. REV. 1910, 1916–17 n.22 (1998). In 1696, responding to colonial juries' resistance, Britain eliminated the right to a jury trial in forfeiture cases and established vice-admiralty courts in the American colonies to hear them instead. But the judges and lawyers in those courts were typically

locals who, over time, evolved generous procedures for property owners to seek meaningful redress. Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 23 (1960) (describing vice-admiralty court procedures and specifying that the party whose property was seized was given no fewer than three opportunities to appear and answer).

The Crown sought to recoup the enormous expense of the Seven Years' War from the colonies through the Revenue Act of 1764, which became known in the colonies as the "Black Act." It bypassed the vice-admiralty courts, which the Crown viewed as hindering its revenue goals, and replaced them with a new super-admiralty court in the remote outpost of Halifax, Nova Scotia, and staffed by a loyal, British-trained judge. Ubbelohde, *supra* at 37, 47–54. This super-admiralty court allowed forfeitures by default based on the customs officer's assessment of probable cause for the seizure. At the same time, it became common for the British Crown to issue writs of assistance permitting customs officials—who received a portion of the proceeds they generated and who colonists commonly viewed as corrupt—to enter homes or vessels and seize whatever they deemed contraband. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 75–76 n.146 (1998).

The super-admiralty court was short-lived, replaced by four courts in Halifax, Boston, Charleston, and Philadelphia, but the abuses and corruption continued. The massive expansion of civil forfeiture

coupled with loyalist, rubber-stamping courts led to massive and often arbitrary forfeiture abuses that the colonists resented. They were key in building momentum for independence from Britain, and they animated our eventual Fourth and Fifth Amendments. Blumenson, *supra* at 76; William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 1602-1791*, 589 (2009). Indeed, the Continental Congress in 1774 petitioned King George III to end the abuses of forfeiture and give meaningful opportunities for redress. Petition of Congress to the King George III (1774), http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=154.

B. The Fourth Amendment and Early U.S. Forfeiture Limitations Reflected a Fundamental Right to Continued-Detention Process

Pre-revolutionary concerns over process and limits to the forfeiture actions carried into America's founding. While the First Congress enacted forfeiture legislation, the founders viewed the United States power of forfeiture as necessarily limited and, in practice, civil forfeiture was used sparingly. *Leonard*, 137 S. Ct. at 849 "[H]istorical forfeiture laws were narrower in most respects than modern ones."); *see also* Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1482–91 (2019); Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 FORDHAM L. REV. 287, 291–92 (1993).

The first statute adopted by Congress authorizing the use of forfeiture was enacted in 1789. Arlyck, *supra* at 1482–91. Within months of the 1789 Collection Act going into effect, Alexander Hamilton called upon Congress to curtail the inevitable harsh effects of the government's extensive authority to seize private property, which he noted raised the prospect of "heavy and ruinous forfeitures" for mere "inadvertence and want of information." Arlyck, *supra* at 1482-91 (quoting Alexander Hamilton, Report on the Petition of Christopher Saddler (Jan. 19, 1790), https://founders.archives.gov/documents/Hamilton/01-06-02-0089).

Fisher Ames—a prominent Federalist—joined Hamilton's concerns, and argued before Congress that it was "necessary to provide some mode of redress for forfeitures that 'bear hard upon individuals.'" Arlyck, *supra* at 1483. So too did his colleagues, who concurred "no person ought to be liable who is not guilty of a violation of the laws intentionally or willfully." *Id*. "Hamilton and Congress agreed that the threat of 'heavy and ruinous forfeitures' under the revenue laws rendered it a 'necessity' that the government create—and continuously exercise—'some power capable of affording relief.'" *Id*. at 1506.

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

While the power of remission was discretionary and the petitioner's eligibility for remission in theory depended solely on whether the petitioner's violation was unintentional, in practice, remissions were liberally granted. *Id*. at 1486–90. Full or partial remission was granted in 91% of all petitions between 1790 and 1807. *Id*. at 1485–86. "The Secretaries accepted a broad range of excuses as justification for lawbreaking conduct," including difficulty or inconvenience in complying with customs regulations. *Id*. at 1489. In Hamilton's view, so long as there "appears to be reasonable ground for a presumption" that the violation "proceeded from ignorance of the law," remission was proper. Letter from Alexander Hamilton to Jeremiah Olney (Sept. 24, 1791), https://founders.archives.gov/documents/Hamilton/01-09-02-0191); Arlyck, *supra* at 1490.

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

II. Modern Governments Drastically Expanded Civil Forfeiture Amid Judicially Created Barriers to Remedy Civil Rights Violations

Modern civil forfeiture bears little resemblance to the historical practice in the early United States. *See Leonard*, 137 S. Ct. at 848. Indeed, the landscape today more closely resembles the experience of the colonists under British rule: since the 1980s, governments—federal, state, and local—have drastically expanded their use of civil asset forfeiture, leading to "egregious and well chronicled abuses." *Id.* And those abuses have largely gone unchecked because judicially created doctrines make it difficult for aggrieved property owners to obtain a remedy.

A. Today's Civil Forfeiture Regime is as Expansive, as Arbitrary, and as Highly Profitable as the British Forfeiture Regime

Civil forfeiture has once again "become widespread and highly profitable." *Id.* (citing D. Carpenter, L. Knepper, A. Erickson, & J. McDonald, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (Institute for Justice 2d ed. Nov. 2015)). It is lucrative to law enforcement agencies and the state and local governments that fund them because the agencies are typically entitled to retain some or all of the proceeds from forfeiture. L. Knepper, J. McDonald, K. Sanchez & E. Smith Pohl, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 9 (Institute for Justice 3d ed. Dec. 2020). In 2018, 19% of forfeiture funds across 13 states

were spent on salaries, benefits, overtime and bonuses, giving law enforcement a strong personal incentive to seize and forfeit property. *Id.* at 52. Combining civil forfeiture's ease and financial benefits to law enforcement distorts priorities and drives its use nationwide.

In 2018[3] alone, asset forfeitures from 42 states, D.C. and the federal government amounted to over $3 billion. Making matters worse, the federal government incentivizes states' forfeiture activity by sharing up to 80% of the proceeds of federal forfeitures with state and local agencies participating in its equitable sharing program. *Id.* at 5–6. This equitable sharing program allows local law enforcement agencies to circumvent state laws by working with the federal government to forfeit property under federal law. *Id.* at 6. Federal equitable sharing payments totaled over $8.8 billion from 2000 to 2019. *Id.*

This current state of civil forfeiture threatens property rights and due process rights. *See Leonard*, 137 S. Ct. at 848 (providing examples of "egregious and well-chronicled abuses" of civil forfeiture). The Sixth Circuit's decision exacerbates these problems by making it even harder for owners to contest forfeiture.

[3] The most recent year for which data were available from the greatest number of states.

B. Modern Judicial Doctrines and the Panel's Decision Provide a Roadmap for Municipalities to Avoid Consequences

The Sixth Circuit's newly heightened pleading standard for *Monell* claims erodes the remedies and deterrence contemplated by Section 1983, and it should be viewed against the backdrop of the other judicially created barriers to relief for civil rights claims. Each barrier undermines the deterrent and remedial effects of the statute. Worse, together with the panel's decision below, they create a roadmap for municipalities like respondents to avoid scrutiny or consequences for their unconstitutional schemes, as this case demonstrates.

Petitioner's vehicle was seized by police officers without a warrant or probable cause to believe the vehicle was either "used or intended to be used in violation" of MITPA or was the proceeds of such a violation. Mich. Comp. Laws § 445.79a(a). When Nichols made a claim to the property and posted a bond, the municipal respondents delegated decision-making authority to the Wayne County Prosecutor's Office and chief prosecutor Kym Worthy, who elected not to provide a continued-detention hearing contemplated under MITPA. She and her office also wholly ignored MITPA's requirement to promptly initiate forfeiture proceedings. Petitioner was deprived of his vehicle for three years under a statutory scheme that incentivized municipalities to seize property while at the same time leaving them the discretion to provide or not a continued-detention hearing. And yet:

- Petitioner cannot sue the prosecutor for this violation because of absolute prosecutorial immunity;
- Petitioner cannot sue the officers who seized his vehicle because of qualified immunity; and now,
- Petitioner cannot sue the municipalities that were granted all the powers and obligations regarding this forfeiture because he did not plead the existence of municipal policies denying every possible avenue of constitutional process.

Thus, municipalities that wish to prevent meaningful federal judicial review of their abusive civil forfeiture regimes have a clear roadmap to do so:

i. Delegate Decision-making Authority to a Prosecutor

MITPA vests forfeiture authority in municipalities, with whom it also vests discretion to provide continued-detention process to aggrieved property owners. In turn, the municipal respondents delegated this discretion to the Wayne County Prosecutor's Office and its chief prosecutor, Kym Worthy.

Many lower courts, including the Sixth Circuit, have held that absolute prosecutorial immunity applies to civil forfeiture suits. *Cooper v. Parish*, 203 F.3d 937, 947 (6th Cir. 2000); *see also Torres v. Goddard*, 793 F.3d 1046, 1052 (9th Cir. 2015) (citing cases). Thus, although the Court has acknowledged there is

no textual basis in Section 1983 for "*any* immunities," *Malley v. Briggs*, 475 U.S. 335, 342 (1986), this judicially created doctrine left petitioner and countless others reliant on a municipal-liability claim.

ii. Fall Back on Qualified Immunity

This Court has also held that *all* public officials sued under Section 1983 are immune from personal liability "so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2014) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). While qualified immunity is not immediately at issue in this case, it is relevant to suits against non-prosecutor officials who are involved in seizures and, if absolute prosecutorial immunity is not sustained, to prosecutors as well. Additionally, the panel's decision states it is an open question whether municipal liability under Section 1983 *must* be predicated on an individual official being liable—which would, in turn, depend on whether the official was entitled to qualified immunity.

iii. Avoid All Remaining Responsibility Through *Monell*-Plus

In *Monell v. Department of Social Services*, this Court overruled a prior case in holding that the Civil Rights Act of 1871 was intended to include municipalities "among those persons to whom Section 1983 applies." 436 U.S. 658, 690 (1978). But it also held that "a

municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691. The municipality itself must directly cause the constitutional harm through policy or custom. *Id.* at 694. Thus, a plaintiff suing under *Monell* need only allege (1) the deprivation of a constitutional or statutory right, or (2) that the deprivation was caused by municipal policy or custom. *Id.* at 690–92; *Hardrick v. City of Detroit*, 876 F.3d 238, 243 (6th Cir. 2017).

After the panel's decision below, however, that is not enough. Even though petitioner's complaint alleged a constitutional violation—"fail[ure] to provide . . . a prompt post-seizure, pre-forfeiture hearing" (App. 68)—and the district court found that "[i]t is undisputed . . . [the municipalities] do not routinely provide post-deprivation, pre-forfeiture hearings." App. 56. Instead, a plaintiff must also allege that the municipalities have no other alternative policies in place that could satisfy constitutional requirements. This effectively allowed the panel to deny any remedy for failing to provide him a prompt continued-detention hearing without deciding whether such a right exists.

CONCLUSION

When petitioner made a claim to his property, the municipal respondents delegated decision making to a prosecutor, who elected not to provide a continued-detention hearing contemplated by the relevant state law and elected to wholly ignore the same law's

requirement to promptly institute forfeiture proceedings. He was deprived of his vehicle for three years under a statutory scheme that allows municipalities to profit while judicially created doctrines also give them a free pass from accountability.

Civil forfeiture today is more like it was for colonists under the British Crown than the limited, process-minded civil forfeiture laws enacted early in our constitutional republic. The Fourth Amendment requires more: a prompt post-seizure hearing before a neutral judge when the government seizes vehicles from private owners pending further forfeiture proceedings. And so does Section 1983: judicially created immunities and pleading standards should not prevent the very remedies and deterrence for which it was designed.

This Court should grant the petition to consider whether such a right exists and, if so, whether *Monell* requires showing a policy to deny all constitutional processes.

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