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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:  
2 SHAY DVORETZKY, ESQUIRE, Washington, D.C.; on behalf  
3 of the Petitioners.  
4 EDMUND G. LaCOUR, JR., Solicitor General, Montgomery,  
5 Alabama; on behalf of the Respondents.  
6 NICOLE F. REAVES, Assistant to the Solicitor General,  
7 Department of Justice, Washington, D.C.; for the  
8 United States, as amicus curiae, supporting the  
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 isn't  
21    to -- is to ensure that laws adequately protect  
22    the 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 -- the process being  
7 provided in this case, as in Good, no hearing,  
8 is 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 -- in your case, if you had filed a  
15 motion for summary judgment a week after the  
16 property had been taken or the process had  
17 begun, forfeiture proceedings began, would --  
18 would you be here?

19 MR. DVORETZKY: I -- I think -- I  
20 think we 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 said  
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, the -- Mr. Chief  
17          Justice, there -- there is not a record on that.  
18          I think, as a -- as a practical matter, not in  
19          the record, it's not very common, but in terms  
20          of applying the Mathews factors, that is  
21          something that could be considered and that  
22          could be developed on remand in assessing what  
23          is the 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 -- the --  
4 that's the traditional test for determining  
5 whether additional process is due in the civil  
6 context, 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 -- that's right,  
24 Justice 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 -- an innocent owner defense, and I would  
6 think that the questions about whether she was  
7 an innocent owner are pretty much the same in  
8 the retention hearing and in the final  
9 forfeiture determination, isn't that correct?

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

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

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

25 JUSTICE KAGAN: Yeah, I suppose --

1 MR. DVORETZKY: But most likely --

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

4 MR. DVORETZKY: Most likely.

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

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

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

23 For one thing, I don't know that the  
24 premise is correct that the government would  
25 just give up if it loses at the retention

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

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

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

24 MR. DVORETZKY: So I -- I think  
25 they're different -- for one thing, I think they

1 are different questions, as the Second and the  
2 Sixth Circuit have explained.

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

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

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



1 JUSTICE KAVANAUGH: But, in both --

2 MR. DVORETZKY: That's a --

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

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

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

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

1 are broad, clear statements that have guided  
2 courts since.

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

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

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

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

1 interest existed.

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

7 And, in any event --

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

10 MR. DVORETZKY: I'm sorry?

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

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

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

25 JUSTICE BARRETT: So, Mr. Dvoretzky --

1 MR. DVORETZKY: That's --

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

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

17 JUSTICE BARRETT: But does the  
18 methodological --

19 MR. DVORETZKY: -- Mathews or Barker.

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

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

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

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

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

20 JUSTICE BARRETT: But does it even --

21 MR. DVORETZKY: -- that are required.

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

1       probable cause determination.

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

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

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

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

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

25                      In this case and particularly where

1 you have an innocent owner defense, there has  
2 not even been any sort of a probable cause  
3 determination made by the police at the time of  
4 the seizure about the innocent owner defense.

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

10 JUSTICE ALITO: Do you think --

11 MR. DVORETZKY: And to all --

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

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

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

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

1 allocated to the government.

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

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

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

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

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



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

2 MR. DVORETZKY: -- because the  
3 Gerstein --

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

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

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

19 JUSTICE JACKSON: Are you asking us --

20 JUSTICE ALITO: What about --

21 JUSTICE JACKSON: -- to decide that in  
22 this case, though? I mean, I guess I'm confused  
23 because I thought we were doing just Barker  
24 versus Mathews in terms of figuring out whether  
25 or not there is a procedural due process claim

1 here. I didn't understand us to be answering  
2 the question how many weeks are necessary, but  
3 maybe I'm confused.

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

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

14 MR. DVORETZKY: Absolutely.

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

25 And then, say, another is I'm

1       contesting the procedures that the government is  
2       offering. I think more things need to be done  
3       with respect to this particular set of  
4       circumstances. That's another kind of claim.

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

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

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

22             JUSTICE JACKSON: So why is it  
23      different?

24             JUSTICE KAGAN: I guess I didn't  
25      understand that. Maybe you could explain.

1 JUSTICE JACKSON: Yes. Why is it  
2 different?

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

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

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

25 I suppose, in a hypothetical

1 situation, where we went from an indictment to a  
2 trial and a verdict within 48 hours, you would  
3 say: Well, there's no need in that situation  
4 for a Gerstein hearing because the superfast  
5 trial in that situation mooted the separate  
6 interest in the probable cause determination  
7 under Gerstein. That doesn't mean that they  
8 aren't separate interests.

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

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

20           JUSTICE GORSUCH: Counsel --

21           MR. DVORETZKY: But, in the real  
22 world, you do.

23           JUSTICE GORSUCH: -- it seems very  
24 strange that we're asking which of two  
25 precedents apply rather than what the Due

1 Process Clause commands. I mean, it's just a  
2 weird question presented as far as I'm  
3 concerned. And I guess I'm -- my head's still  
4 stuck back at -- at -- at that and some of the  
5 questions that you heard early on, which is  
6 whatever test you apply, clearly, there are some  
7 jurisdictions that are using civil forfeiture as  
8 funding mechanisms and say: Ah, you can get  
9 your car back if you call between 3 and 5 p.m.  
10 on a Tuesday and -- and -- and speak with  
11 someone who is never available, right? I mean,  
12 the -- there are -- that is happening out there.

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

23 I -- I'm not sure I understood the  
24 reason for the delay and how it might be fairly  
25 attributable to the state. So, while I'm very

1 sympathetic with the problem that you've  
2 identified, I'm just wondering, is this the case  
3 that presents the due process problem that we  
4 should be worried about?

5 MR. DVORETZKY: So, for one thing, I  
6 think this is the case, and the Court granted  
7 cert on this question, to --

8 JUSTICE GORSUCH: Oh, I know we  
9 granted cert. It's all our fault. I -- I hear  
10 you.

11 (Laughter.)

12 MR. DVORETZKY: Not blaming you. I  
13 appreciate it.

14 (Laughter.)

15 JUSTICE GORSUCH: Both can be true.

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

1 JUSTICE GORSUCH: But even --

2 MR. DVORETZKY: But --

3 JUSTICE GORSUCH: -- even if one were,  
4 couldn't you have gotten one by filing for a  
5 summary judgment motion with your innocent owner  
6 defense on day one? And if that's true, then  
7 what are we doing here?

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

14 JUSTICE GORSUCH: Either way?

15 MR. DVORETZKY: -- moved that quickly.

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

18 MR. DVORETZKY: And -- and I think  
19 that under Mathews, that goes to the question of  
20 what would have been the value of additional  
21 process. If, on remand, the state could show  
22 under Mathews that, in fact, additional process  
23 would have done no good because a summary  
24 judgment motion is routinely granted in a matter  
25 of days in Alabama, then perhaps, under this



1 scheme, there would not be a need for --

2 JUSTICE GORSUCH: Okay.

3 MR. DVORETZKY: -- for -- for an  
4 additional hearing.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

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

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

20 And the -- the principal example that  
21 I would give of that is that the federal scheme  
22 has -- under the federal scheme, a claimant is  
23 entitled to immediate release of the seized  
24 property if they can show substantial hardship.  
25 That substantial hardship inquiry is essentially

1 tracking the Mathews factors. It's asking in a  
2 particular case what --

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

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

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

1 hearing with the court, and the court can either  
2 allow the government to retain the property or  
3 can otherwise take measures in order to preserve  
4 it.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 MR. DVORETZKY: And so --

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Justice Thomas, anything further?

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

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

22 At a retention hearing, what would be  
23 assessed is, first, as we were discussing  
24 earlier, what is the government's probable --  
25 what is the probable validity of the

1 government's right to retain the car, and then,  
2 second, apart from that, and -- and along the  
3 lines of what I was discussing with the Chief  
4 Justice, what -- what might be the government's  
5 interest in retaining the property anyway?

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

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

18 I don't -- and I don't see how that's  
19 different from your intervening retention  
20 proceeding.

21 MR. DVORETZKY: Justice Thomas, I  
22 think it's because, in Von Neumann, you had the  
23 remission proceeding, but the remission  
24 proceeding was entirely discretionary, whereas,  
25 here, Alabama has created this innocent owner

1 defense, which is not discretionary. It's a  
2 substantive right that owners have to retain  
3 their cars if they are innocent, and it's that  
4 innocent owner defense that gives rise to  
5 additional due process protections needed to  
6 realize the right that the state has created.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Alito?

9 JUSTICE ALITO: Well, you just said  
10 that it's not discretionary. What if it were  
11 discretionary?

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

17 JUSTICE ALITO: Yes.

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

22 JUSTICE ALITO: Could a state create  
23 an innocent owner defense but say that it can  
24 only be adjudicated at the final forfeiture  
25 hearing?

1           MR. DVORETZKY: I -- I'm not sure that  
2 it could because I think, at that point, it's  
3 created a substantive right to the innocent  
4 owner defense, and the procedural protections  
5 that arise to -- to -- to protect that are  
6 questions at that point of federal law. I don't  
7 think that the state could -- could curtail the  
8 right that way.

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

16           So how soon? What happens at it? Why  
17 is it -- how is it practicable for the police?  
18 And why is it necessary for the owner?

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

23           JUSTICE ALITO: Well, let me just  
24 interrupt you, because the last argument in your  
25 brief says that Alabama violated the

1     Petitioners' rights by failing to provide a  
2     retention hearing.  Anyway, assume that that is  
3     part of the question.  Go ahead.

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

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

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

21                   Now, to address the government's  
22    concerns about evidence disappearing or evidence  
23    potentially being actually evidence in the  
24    underlying crime, those -- ex parte proceedings  
25    with the decisionmaker, with the judge, are an

1 available tool in that situation to address the  
2 government's interests.

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

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

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

25 MR. DVORETZKY: At -- at a minimum, I



1 would expect the state to cross-examine the  
2 owner of the car. And, by the way, the owner of  
3 the car would have provided that testimony under  
4 penalty of perjury. If they're later determined  
5 not to have been an innocent owner, then  
6 providing that testimony could subject them to  
7 additional prosecution just for that. So in --

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

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

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

24 They would also, if necessary, be able  
25 to go to the judge and say: Here's evidence

1 that we can only provide to you ex parte so as  
2 not to prejudice any later prosecution that they  
3 might bring. They might even be able to say to  
4 the judge, again, perhaps ex parte, we're in the  
5 middle of an investigation and we need a couple  
6 more weeks, and the judge would continue the  
7 hearing.

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

12           JUSTICE ALITO: All right. Thank you.  
13 Thank you.

14           CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor?

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

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

1           We also know that that incentive has  
2 often led to months, if not years, of retention  
3 of property that ultimately gets returned to the  
4 owner because there was either no probable cause  
5 or because of the innocent owner defense.

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

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

23           That's the bottom line, right?

24           MR. DVORETZKY: I -- I think that's  
25 right, Justice Sotomayor. And I think that the

1 Court should hold here that Mathews is the way  
2 to analyze the question.

3 JUSTICE SOTOMAYOR: I know that's --

4 MR. DVORETZKY: But the --

5 JUSTICE SOTOMAYOR: -- what you want,  
6 but the point is --

7 MR. DVORETZKY: Yeah.

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

17 MR. DVORETZKY: I -- I think that's  
18 right. And I think the Court shouldn't do that  
19 here regardless of the facts.

20 I also think, on the facts -- and I --  
21 I don't want to wear out my welcome -- but I  
22 also think --

23 JUSTICE SOTOMAYOR: You are wearing  
24 out your welcome --

25 MR. DVORETZKY: I -- I --

1 JUSTICE SOTOMAYOR: -- because, like  
2 Justice -- like Justice Jackson, that's not the  
3 question before us, whether the process here was  
4 enough or not.

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

12 JUSTICE SOTOMAYOR: There --

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

18 JUSTICE SOTOMAYOR: Now, after  
19 Krimstock, there are jurisdictions that have  
20 looked at -- at these issues under the Mathews  
21 test and not required retention hearings,  
22 correct?

23 MR. DVORETZKY: Right. A retention --  
24 there -- there are different ways in which  
25 states might potentially satisfy due process.

1 It doesn't absolutely have to be a retention  
2 hearing.

3 JUSTICE SOTOMAYOR: That's what I'm  
4 saying, which is it depends on each state's  
5 assessment of the factors that Mathews looks at,  
6 correct?

7 MR. DVORETZKY: That's right.

8 JUSTICE SOTOMAYOR: And some have not.  
9 Some have required others given the uniqueness  
10 of their jurisdictions, correct?

11 MR. DVORETZKY: That's right.

12 JUSTICE SOTOMAYOR: All right. Thank  
13 you.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

1 know, how does Mathews work in this context?

2 MR. DVORETZKY: Justice Kagan, I think  
3 it does apply at a more categorical level, and  
4 that, in fact, is one of the advantages of  
5 Mathews over Barker, is that it can apply at a  
6 more categorical level and provide some guidance  
7 to the states, whereas Barker is inherently  
8 retrospective and looks just at the  
9 individualized delay in one particular case.

10 The categorical level at which I think  
11 Mathews applies, it would make sense to think of  
12 it about car owners in jurisdictions with an  
13 innocent owner defense. I think that's --  
14 that's the level at which it applies.

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

21 Again, the question is, is there a due  
22 process -- is there a due process question even  
23 to ask? And Mathews tells us that there is.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Gorsuch?

1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: Just on that  
3 methodological question again, the other side,  
4 of course, emphasizes precedent, but they also  
5 say that what process is due can't just be a  
6 policy question. And they -- they look as well  
7 at history and they say that, historically, this  
8 kind of interim hearing has not been required by  
9 the federal government or the states. There  
10 have been lots of different approaches.

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

20 So I just want you to respond to that  
21 overarching theme that I think is in the  
22 Solicitor General's brief, in Alabama's brief,  
23 and the states' amicus brief.

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



1           One, as we've been discussing, our  
2 rule does -- that -- the application of Mathews  
3 would allow for some amount of continued  
4 flexibility by the states. We're not asking the  
5 Court to dictate a national rule that a  
6 particular type of hearing is required within a  
7 particular -- a particular time period. There  
8 will still be room for states to -- to  
9 experiment and to customize what they think is  
10 an appropriate -- an appropriate time and an  
11 appropriate kind of hearing or perhaps even a  
12 substitute for a hearing, like a -- a hardship  
13 determination that could potentially be made  
14 based on a -- on a paper filing. So we're  
15 leaving room for flexibility.

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

24           Second, as Justice Thomas explained in  
25 the -- in his Leonard versus Texas dissent from

1 denial, historical forfeiture laws were quite  
2 limited. They were limited to a few specific  
3 subject areas, like customs and piracy, where it  
4 made some sense to think about in rem  
5 proceedings. Civil forfeiture today bears  
6 little resemblance to that.

7 As Justice Thomas also pointed out  
8 there, there's some question about whether, at  
9 common law, forfeiture was civil or criminal and  
10 whether it carried the additional protections of  
11 criminal process.

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

19 JUSTICE KAVANAUGH: Oh, okay.

20 MR. DVORETZKY: And --

21 JUSTICE KAVANAUGH: Well, keep going  
22 then. I don't want you to keep going forever,  
23 but --

24 (Laughter.)

25 MR. DVORETZKY: The -- the -- the --

1 the only -- the only last point I was going to  
2 make is that common -- is that forfeiture at  
3 common law was also considered against a  
4 backdrop that the founders had of distrust to  
5 civil forfeiture generally based on what the  
6 British were doing before the revolution. And  
7 so --

8 JUSTICE KAVANAUGH: Well, the --

9 MR. DVORETZKY: -- the --

10 JUSTICE KAVANAUGH: -- I mean, I'll  
11 end it by just saying the early federal statutes  
12 seem somewhat inconsistent with that, but I'll  
13 -- I'll leave that.

14 MR. DVORETZKY: Well, I --

15 CHIEF JUSTICE ROBERTS: Thank you.  
16 Justice Barrett?

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

25 Do you agree with that, or do you

1 think Mathews would always apply? I understand  
2 you think that the history isn't determinative  
3 here. And it seems to me like that's kind of do  
4 you go with the Constitutional Accountability  
5 Center's amicus brief or the municipal lawyers'  
6 brief, account on the history? But, just  
7 methodologically, do you agree with Judge  
8 Thapar's reading of Mathews and our precedent  
9 about history and procedure?

10 MR. DVORETZKY: I think that if there  
11 is a precise answer to the question in the  
12 history, then the history would probably govern,  
13 but I think we're very far from that.

14 JUSTICE BARRETT: Okay.

15 MR. DVORETZKY: Very far from that in  
16 this case.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Jackson?

20 JUSTICE JACKSON: And is it your  
21 position that the application of Mathews would  
22 necessarily always mean that some additional  
23 procedure would be required in a situation like  
24 this?

25 MR. DVORETZKY: No. If the

1 application of Mathews could lead to a  
2 conclusion that the state's existing process is  
3 sufficient, and that no additional process is  
4 required.

5 JUSTICE JACKSON: Okay. And, you  
6 know, I was surprised a little bit, I think,  
7 about your answer to Justice Thomas about Von  
8 Neumann and why, if at all, remission is  
9 different.

10 I had thought that it was not because  
11 it was discretionary. I thought it was because  
12 the -- the case seems to make pretty clear that  
13 it is an administrative alternative to judicial  
14 forfeiture under the statute at issue in that  
15 case.

16 And so, given that -- you know, the  
17 owner was complaining about it not happening  
18 quickly enough. He chose the option of  
19 remission rather than forfeiture, and he wanted  
20 the remission hearing to happen quickly.

21 And the Court, I thought, in the  
22 language that has been quoted, was making a much  
23 more narrow point, which is just that this  
24 remission is not a part of the forfeiture  
25 hearing. It's not required by due process. And

1 so, therefore, you don't have a claim that it  
2 has to be faster under the Constitution, that,  
3 really, forfeiture is the -- where due process  
4 lies in terms of your constitutional rights.  
5 But, of course, that doesn't tell us what steps  
6 are necessary in a forfeiture proceeding.

7 But, to the extent that this language  
8 is talking about forfeiture being the only  
9 thing, I thought it was relative to the  
10 alternative administrative remission process.

11 Am I misreading this?

12 MR. DVORETZKY: No. And -- and I  
13 don't think we're disagreeing. I would simply  
14 add the point that this alternative  
15 administrative process didn't create any  
16 substantive rights because it was discretionary  
17 whether the government would give you back your  
18 property or not.

19 JUSTICE JACKSON: True. But it's also  
20 the case, I think from this case, that the court  
21 then goes on to talk about how remission is not  
22 a part of forfeiture, how those are two  
23 different things. And so the language, I  
24 thought, was just distinguishing forfeiture from  
25 remission, as opposed to telling us something

1 about the nature of forfeiture, that it's only  
2 the forfeiture hearing and you don't get other  
3 steps or whatever, which is the way it's being  
4 read, I think, by your counterparts on the other  
5 side.

6 MR. DVORETZKY: I -- I -- I agree. I  
7 think that's -- that's also a -- a -- a relevant  
8 distinction of Von Neumann here.

9 JUSTICE JACKSON: All right. Let me  
10 finally just ask you about, again, the timing  
11 and whether -- you know, I think there is  
12 something to this notion that Barker is about  
13 timing, but, again, the question remains, isn't  
14 the claimant in this case making a timing kind  
15 of argument?

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

19 So, if we have a scenario in which  
20 everyone agrees that the average time for a  
21 forfeiture proceeding is, say, six months after  
22 the seizure, and everybody agrees that that is  
23 reasonable for due process purposes, Plaintiff  
24 Number 1 doesn't receive her forfeiture hearing  
25 until 12 months after the seizure, so her claim

1 is that the government was too slow in giving  
2 her the hearing.

3           Meanwhile, Plaintiff Number 2 receives  
4 her hearing in six months, but she claims that  
5 at some point within those six months there  
6 should be an opportunity for the court to  
7 consider whether she should have been allowed to  
8 keep her car during that interim period.

9           She's not complaining about the time.  
10 Six months is fine. She got her hearing within  
11 the six months. But what she's saying is, while  
12 you figure out during that six months who owns  
13 this car, I should keep custody of it during  
14 that period, and I think we should have that  
15 adjudicated separately from the forfeiture  
16 hearing.

17           Are those two different things, or are  
18 they both really about timing?

19           MR. DVORETZKY: No, I think those are  
20 two different claims. The -- the first one is  
21 claiming: I didn't have a fast enough final  
22 merits determination.

23           The other one is claiming: Look, the  
24 final merits determination was fast enough under  
25 the circumstances, civil litigation takes time,



1 but I shouldn't be deprived of my property  
2 during the pendency of that.

3 And, again, it -- it's like the  
4 criminal analogy that I used earlier. You  
5 wouldn't say that because you have a speedy  
6 trial right and that's going to take a year that  
7 you don't also have a Gerstein right to a prompt  
8 probable cause determination.

9 And in a situation where,  
10 hypothetically, the trial did happen within a  
11 matter of days, that might moot the probable  
12 cause hearing or probable cause determination,  
13 but it wouldn't mean that conceptually you don't  
14 have two separate rights.

15 JUSTICE JACKSON: And you could have  
16 two separate tests --

17 MR. DVORETZKY: Correct.

18 JUSTICE JACKSON: -- depending upon  
19 the claims?

20 MR. DVORETZKY: Correct, with the  
21 Barker test --

22 JUSTICE JACKSON: Right.

23 MR. DVORETZKY: Correct.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. LaCour.

3 ORAL ARGUMENT OF EDMUND G. LaCOUR, JR.

4 ON BEHALF OF THE RESPONDENTS

5 MR. LaCOUR: Mr. Chief Justice, and  
6 may it please the Court:

7 Forfeiture has been a critical tool  
8 for deterring crime since before the framing,  
9 and both history and precedent show what  
10 post-seizure process is due to those whose  
11 property has been seized.

12 From the Collection Act of 1789 and  
13 Slocum to \$8,850 and Von Neumann, the answer is  
14 clear. If the forfeiture proceeding is  
15 instituted and concluded promptly, then the  
16 forfeiture proceeding without more provides the  
17 post-seizure hearing required by due process.

18 Now Petitioners assert that another  
19 post-seizure hearing is required, a mini-trial  
20 mere days or weeks after seizure, and in their  
21 telling, the federal government and the states  
22 have been violating fundamental rights for  
23 centuries with no one noticing until just a few  
24 years ago.

25 But their view cannot be squared with

1 history or precedent, and their own cases show  
2 why a timely forfeiture proceeding is the  
3 meaningful opportunity to be heard at a  
4 meaningful time.

5           Only the timeliness test embodied in  
6 Barker v. Wingo accounts for the striking  
7 diversity among forfeiture cases. Some will be  
8 simple and others will involve wide-ranging  
9 investigations. Some claimants will vigorously  
10 press their rights and others will default.

11           As long as claimants can appear before  
12 judges promptly, then judges can strike that  
13 proper balance in each fact-bound case.

14           Now I've heard my friend today say,  
15 essentially, don't trust judges to be judges.  
16 And so, instead, they invoke Mathews to have  
17 federal courts act as legislatures handing down  
18 new Rules of Civil Procedure for all 50 states  
19 and the federal government.

20           But Barker best accounts for what  
21 should be the dispositive fact in these cases.  
22 The Petitioners were before state courts within  
23 two weeks of seizure, yet they ignored that  
24 process for over a year. Petitioners received  
25 all the process they were due, and this Court

1 therefore should affirm.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: But you -- you  
4 criticize the use of Mathews, but Barker is a  
5 Speedy Trial Act case, so that would seem to  
6 also be an ill fit for determining whether or  
7 not you should have an additional hearing.

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

17 So I -- I think it makes sense why  
18 \$8,850 adopted that test. And I don't think  
19 Petitioners have asked for it to be set aside in  
20 this case. So it should not be --

21 JUSTICE THOMAS: I think --

22 MR. LaCOUR: -- cast aside.

23 JUSTICE THOMAS: -- it seems that  
24 Petitioner is not talking as much about a timing  
25 issue as whether or not there should be an

1 additional right vindicated. And Barker seems  
2 to focus on timing as opposed to whether the  
3 additional right exists at all.

4 MR. LaCOUR: That's right, Your Honor.  
5 But I -- I think one advantage of Barker is that  
6 it -- it really draws from history. If you look  
7 at \$8,850, they looked back to Slocum, that 1817  
8 decision from this Court where the Court  
9 recognized that while probable cause is enough  
10 to justify seizure and retention until trial,  
11 the individual's right is best protected by  
12 forcing the government into court.

13 And if the case is instituted  
14 promptly, then the judge can decide what it  
15 takes to move that case along promptly,  
16 balancing the government's interests in accuracy  
17 and its other interests with the claimant's  
18 interest in a speedy --

19 JUSTICE JACKSON: But you seem to be  
20 -- you seem to be suggesting that there is no  
21 other kind of claim that can be made related to  
22 forfeiture other than its timing. And I guess  
23 I'd have you react to the hypothetical that you  
24 heard me provide to your counterpart.

25 MR. LaCOUR: Well, Your Honor, I think

1 it's really the same question. The -- the way  
2 Ms. Vasquez in \$8,850 teed up her claim was  
3 whether or not she was receiving a hearing at a  
4 meaningful time.

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

8 MR. LaCOUR: Right.

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

11 MR. LaCOUR: Right.

12 JUSTICE JACKSON: -- because the Court  
13 says in, you know, almost -- in the first  
14 sentence of Von Neumann that this is about the  
15 36-month delay.

16 But are you saying that that's the  
17 only type of procedural due process violation  
18 that can occur with respect to civil forfeiture?

19 MR. LaCOUR: I think that's what the  
20 Court held, Your Honor. Again, the -- the  
21 interest is the same, having the car and not  
22 being temporarily deprived of the vehicle. And  
23 that was what --

24 JUSTICE JACKSON: No, not being  
25 permanently deprived of the vehicle is different

1 from not being temporarily deprived of the  
2 vehicle, isn't it?

3 MR. LaCOUR: Right. But -- but Mr.  
4 Von Neumann's complaint was that temporary  
5 deprivation --

6 JUSTICE GORSUCH: Let's --

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

8 JUSTICE GORSUCH: -- let's -- let's  
9 put it this way. I mean, due process has very  
10 -- various components, you'd agree. One  
11 component is how quickly your claim can be  
12 heard. Another component would be what  
13 procedures your claim is going to be decided  
14 pursuant to, right?

15 MR. LaCOUR: Yes, Your Honor.

16 JUSTICE GORSUCH: So there's a  
17 substantive aspect to it, wrong word, idea,  
18 though, that the procedure has to have some  
19 robustness to it, okay?

20 MR. LaCOUR: Yes.

21 JUSTICE GORSUCH: So, for example, if  
22 I said, oh, I got a quick hearing, but I had to  
23 call between 3 and 5 p.m., I had to speak to  
24 Sam, but Sam it turns out is on permanent  
25 vacation, okay? But I -- I can get a quick

1 hearing, I can get it the next day, but that's  
2 what I have to do to get it.

3 Or I get it in front of a kangaroo  
4 court, and -- and -- and the judge turns out to  
5 be wholly biased, for example, and I can prove  
6 it beyond a shadow of a doubt.

7 Those would all be due process issues  
8 besides how quickly I got to court, right?

9 MR. LaCOUR: Yes, Your Honor.

10 JUSTICE GORSUCH: Okay. So I -- I get  
11 the -- I -- I get that Barker is all about  
12 Speedy Trial Act. It's right there in the  
13 title. It's all about timing. And that  
14 certainly is an important component of due  
15 process.

16 But I think your colleague on the  
17 other side suggests I'm arguing more about the  
18 kangaroo court stuff too and what's happening  
19 around the country, as -- as Justice Sotomayor  
20 pointed out -- I'm not accusing Alabama of this,  
21 to be very clear.

22 MR. LaCOUR: Thank you, Your Honor.

23 JUSTICE GORSUCH: Okay. But there are  
24 arguments to be made that there are attempts to  
25 create processes that are deeply unfair and



1 obviously so in order to retain the property for  
2 the coffers of the state.

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

7 Am I putting it fairly?

8 JUSTICE SOTOMAYOR: You're putting it  
9 fairly.

10 JUSTICE GORSUCH: Long-windedly but  
11 fairly, I hope.

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

16 JUSTICE GORSUCH: For sure.

17 MR. LaCOUR: And so --

18 JUSTICE GORSUCH: But could those  
19 claims -- are -- you acknowledge there might be  
20 claims like that to be had?

21 MR. LaCOUR: There may be, Your Honor.  
22 I think Barker answers them. If you're  
23 requiring someone to reach Sam between 3:00 and  
24 5:00, that's not a very good reason under Barker  
25 II and -- for the delay. And if the delay is

1 extending longer --

2 JUSTICE GORSUCH: No, but let's say it  
3 happens really quickly, but it's a kangaroo  
4 court, an unfair adjudication. You and I would  
5 agree that that was wholly and grossly unfair?

6 MR. LaCOUR: Yes, Your Honor, but I  
7 think we're -- we're far removed from -- from  
8 that scenario.

9 JUSTICE GORSUCH: Of course, we are --

10 MR. LaCOUR: I think this is totally  
11 different.

12 JUSTICE GORSUCH: -- in your case. Of  
13 course, you're going to say that, and I  
14 understand that.

15 MR. LaCOUR: Right.

16 JUSTICE GORSUCH: But your argument  
17 would seem to strip the courts of tools to deal  
18 with those kinds of cases.

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

21 JUSTICE GORSUCH: All right. How --  
22 help -- help -- help me write it so that we  
23 don't do that --

24 MR. LaCOUR: Well, because in --

25 JUSTICE GORSUCH: -- if you

1 acknowledge that's a trap --

2 MR. LaCOUR: Yes. Your Honor --

3 JUSTICE GORSUCH: -- we have to avoid.

4 MR. LaCOUR: -- because, in \$8,850 and  
5 in Von Neumann, the final hearing was going to  
6 be by a federal judge. You can trust that they  
7 are going to uphold the Constitution, they're  
8 going to do justice. You -- we shouldn't craft  
9 a test that suggests otherwise.

10 Similarly here, the final hearing is  
11 going to be in front of a state circuit court  
12 judge. So we're not dealing with the kangaroo  
13 court scenario. I think that's -- that's far  
14 removed.

15 Now you might have that in the  
16 administrative law context, like in the Social  
17 Security context, and that's where Mathews might  
18 be a useful test if you're writing on a blank  
19 slate, but, here, we're dealing with a process  
20 as well as the country, two litigants coming  
21 into court in front of a judge and adjudicating  
22 their case.

23 And -- and that's why Barker is enough  
24 in that context, because the judge is going to  
25 be best situated to balance that need for speed

1 with the need for accuracy. So, if someone has  
2 a relatively simple case and they say, Your  
3 Honor, I -- I want to move to expedite, I want a  
4 hearing in two weeks, it's going to be incumbent  
5 --

6 JUSTICE GORSUCH: So let me see if --

7 MR. LaCOUR: -- on the government to  
8 come back.

9 JUSTICE GORSUCH: -- let me see if  
10 you're comfortable with this: So long as the  
11 processes that are ultimately given are of the  
12 sort that are traditionally used for forfeiture  
13 and -- and are -- are reasonably fair and  
14 comport with traditional due process principles?  
15 Something like that?

16 MR. LaCOUR: Yes, Your Honor, we're --  
17 we're --

18 JUSTICE GORSUCH: Something like that?

19 MR. LaCOUR: -- absolutely fine with  
20 that -- that's how it functions in Alabama.

21 JUSTICE KAGAN: But, General, I mean,  
22 maybe that's not enough. I mean, I'm  
23 sympathetic to your point that the question here  
24 is pretty similar to the question that we've  
25 been dealing with in the two cases because

1 they're all how long is it going to take until I  
2 can get an adjudication so that I can get my car  
3 back, and that's what they're all about. That's  
4 why people want this retention hearing, because  
5 it takes too long, even under Barker, to have  
6 the final adjudication. I want it back more  
7 quickly. Totally right.

8 But we, in fact, have not decided this  
9 precise question. We have a couple of sentences  
10 which were written broadly and, if taken  
11 literally, would -- would answer the case. But,  
12 in fact, the two cases that we had were about  
13 different kind of procedures at a different time  
14 in the process.

15 And so we could say that even though  
16 this -- there are similarities here, this  
17 remains open to us to decide whether there ought  
18 to be, in addition to the Barker -- the Barker  
19 limited final adjudication, this -- this kind of  
20 retention hearing that -- that applies to the  
21 interim period.

22 And I think Justice Sotomayor raises a  
23 very important point, which is that we know a  
24 lot more now than we did when \$8,850 and the  
25 other case were decided about how civil

1 forfeiture is being used in some states, about  
2 the kinds of abuses that it's subject to, about  
3 the kind of incentives operating on law  
4 enforcement officers that -- that tend toward  
5 those abuses.

6           So -- so, if we look around the world  
7 and we think there are real problems here and  
8 those problems would be solved if you got a  
9 really quick probable cause determination, why  
10 shouldn't we do that?

11           MR. LaCOUR: Well, Your Honor, I would  
12 advise you to stay within the record of the case  
13 and the controversy that's in front of you right  
14 now, where you can see ample process was  
15 provided to these claimants. We have -- you  
16 mentioned the bond that they could have posted  
17 at any time to get the vehicles back.

18           And as you were noting earlier with my  
19 friend on the other side, they're essentially  
20 just asking to have the final hearing two, three  
21 weeks after, and that's going to cause serious  
22 problems for the government.

23           You -- you will gain speed, but you  
24 will lose accuracy. And the stakes are -- are  
25 very high in the civil forfeiture context. The

1 government, of course, has a strong interest in  
2 obtaining full forfeiture. We have a strong  
3 interest as well in -- in making sure that crime  
4 doesn't pay.

5           And so, if you have a less accurate  
6 retention hearing -- and that's really the only  
7 reason to have one, is to have a mini-trial  
8 that's less accurate but is faster -- then  
9 you're going to have more property released to  
10 -- to criminals, it's going to potentially be  
11 misused again, crime will pay more, and you will  
12 have more crime.

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

23           These cases are most important for one  
24 group of people, innocent owners, because they  
25 are people who claim they didn't know about the

1 criminal activity. Many of these cases involve  
2 parents with young -- with teenage or  
3 close-to-teenage children involved in drug  
4 activity. The ones that don't may involve  
5 spouses or friends.

6           And I assume, in many of these  
7 hearings, to the extent that a person is  
8 involved in drug dealing, that the government  
9 pretty quickly will find out or not find out if  
10 that person has a relationship to a home or  
11 other place where drugs are being stored,  
12 distributed, et cetera, and the government can  
13 do what your opposing counsel said, ex parte  
14 hearing saying this is a wife who claims she's  
15 an innocent owner, but we have evidence that  
16 there's drug dealing going on from the home,  
17 it's unlikely she's an innocent owner. If it's  
18 someone who's unrelated and no continuing  
19 relationship, et cetera.

20           So you're talking about criminals get  
21 -- keeping these cars. But, given that the vast  
22 majority -- I -- I believe the statistic was  
23 very high -- certainly, over 60 percent of  
24 innocent owners win, it is not criminals keeping  
25 cars. It's innocent owners receiving back their



1 cars months, if not years, later.

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

4 MR. LaCOUR: Your Honor, I -- I think  
5 they do. I think my friend almost conceded that  
6 they do by saying, if they had moved for summary  
7 judgment on day one --

8 JUSTICE SOTOMAYOR: This is not --

9 MR. LaCOUR: -- they probably would  
10 have had their car back sooner.

11 JUSTICE SOTOMAYOR: -- this is not the  
12 -- the Barker factors have three -- they have  
13 all government interests focused on --

14 MR. LaCOUR: I -- I would dispute  
15 that, Your Honor. The length of delay clearly  
16 takes into account the interests of the private  
17 party. Being deprived of your car for 14 days  
18 is a less significant deprivation than being  
19 deprived for 400 days. So there is a way --

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

23 MR. LaCOUR: Well, Your Honor, you're  
24 -- you're assuming that Barker --

25 JUSTICE SOTOMAYOR: Where -- where

1 does that go -- where does that go into the  
2 Barker factors?

3 MR. LaCOUR: Your Honor, there --  
4 there may be circumstances where Barker needs to  
5 be applied with more teeth, but I don't think  
6 that means it's not up to the task.

7 JUSTICE SOTOMAYOR: Well, but why  
8 don't you see the Mathews factors as that more  
9 teeth? Mathews is just more explicit of adding  
10 in the -- I guess, in this case, the  
11 Petitioners' factors. Barker seems to be with  
12 timing and seeing who caused the timing, what  
13 were the government's interests.

14 The governmental interest is always  
15 going to be great, but where does Barker take  
16 into account the hardship of the individual?

17 MR. LaCOUR: Well, I -- I think,  
18 again, you -- you get in front of a judge  
19 quickly, the judge can do -- he can move the  
20 case up faster. And this is the advantage of  
21 Barker. My -- my friend suggested that Mathews  
22 --

23 JUSTICE SOTOMAYOR: The disadvantage  
24 is that that process is very discretionary.

25 MR. LaCOUR: Well, I think one

1       disadvantage is that it asks federal judges to  
2       try to project into the future what the next  
3       typical thousand forfeiture cases are going to  
4       be like.  When we're dealing with cars and guns  
5       and cash and pirate ships --

6                 JUSTICE SOTOMAYOR:  Well, I -- I want  
7       to --

8                 MR. LaCOUR:  -- there is no typical  
9       case.

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

14                MR. LaCOUR:  There are a lot of older  
15       cases involving pirate ships.

16                JUSTICE SOTOMAYOR:  Pirate ships.  In  
17       which of those cases were those things released  
18       immediately after a retention hearing?

19                MR. LaCOUR:  I -- I think -- I think  
20       that's the point, Your Honor, they haven't been  
21       at history.

22                JUSTICE SOTOMAYOR:  They haven't been  
23       because, as I mentioned, people involved with  
24       guns, people involved with money, people  
25       involved with other things rarely want to come

1 into court for a retention hearing if they have  
2 a criminal proceeding in place. The people who  
3 come in are the people who are innocent owners.

4 MR. LaCOUR: Your Honor, I think a --  
5 a claim like that would need to come from my  
6 friends and would need to be backed up with --  
7 with evidence. And it's not uncommon, as this  
8 Court has -- as courts have recognized, that  
9 criminals oftentimes do put title of property in  
10 someone else's name, and that someone else can  
11 come forward. Not every purportedly innocent  
12 owner is innocent, and not everyone is even an  
13 owner.

14 And this is another problem with  
15 rushing this hearing, is that someone could come  
16 forward and claim ownership but not actually  
17 have proper ownership. And if it's happening  
18 too quickly, then the actually innocent owner  
19 may be out his property and it's not going to be  
20 there at the final forfeiture hearing, which is  
21 why the government has always had this authority  
22 to seize before a hearing, and the same  
23 interests that have long justified seizure  
24 before a hearing justify not turning the stuff  
25 back over immediately after the seizure but,

1       rather, holding it until you can have a prompt  
2       but accurate final hearing.

3                   JUSTICE BARRETT:   General, can I ask  
4       you to respond to Petitioners' argument that the  
5       historical analogs are not actually analogous  
6       here and that we don't have any settled  
7       tradition of having a single forfeiture hearing?

8                   MR. LaCOUR:   I -- I would expect to  
9       have seen a mini-trial or a remission -- or not  
10      remission -- a retention hearing somewhere in  
11      the history, but we do not have that.  And if  
12      you contrast that with the liberty interest,  
13      Justice Scalia's dissent in County of Riverside  
14      highlights how there always was this right at  
15      common law to be presented to the magistrate  
16      right after the arrest.

17                   But there's not similar evidence when  
18      it comes to property, and that's because  
19      property and liberty are very different.  The  
20      liberty interest --

21                   JUSTICE BARRETT:   But Justice Kagan  
22      pointed out, I mean, there are new kinds of  
23      property that arise and there are new kinds of  
24      procedures and that things have shifted and  
25      maybe the final hearing itself happened in much

1 closer proximity to the seizure. That was  
2 Petitioners' suggestion.

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

5 MR. LaCOUR: If it -- if -- I think  
6 you're still speaking in the language of speed,  
7 which is the language of Barker, which is,  
8 again, why we think Barker is the test. It is  
9 the historical test. It carries that forward to  
10 today, institute promptly, conclude promptly,  
11 and then let the judges who are on the ground  
12 with the parties in front of them weigh those --  
13 weigh those competing interests.

14 And when it comes to this affirmative  
15 defense of innocent ownership, I don't think  
16 that changes things at all. It's actually very  
17 similar to the argument that Mr. Von Neumann  
18 made. He said he had an independent interest in  
19 this remission petition. And the Court did  
20 assume for purposes of deciding part 3 that he  
21 did. And the Court said, we don't see how that  
22 separate interest, apart from the cars, is in  
23 any way prejudiced by this 36-day wait.

24 And the same thing is true here. This  
25 separate interest apart from the cars in raising

1 an affirmative defense is prejudiced not at all  
2 by being held or being heard for the first time  
3 at the final hearing as opposed to two weeks  
4 after seizure or two days after seizure for that  
5 matter.

6 And if you look to the criminal  
7 context, there are affirmative defenses there  
8 that typically don't get heard until the  
9 criminal trial. So, clearly, affirmative  
10 defenses can be meaningful even if they don't  
11 get put before a court until the final hearing.  
12 And the same thing is true in the civil context.

13 JUSTICE JACKSON: I'm sorry, what is  
14 the affirmative -- what -- what is -- your  
15 conception of this -- the interest that this  
16 Petitioner is raising is the ability to make her  
17 affirmative defense early? I don't understand  
18 where affirmative defense came from.

19 MR. LaCOUR: They say that this case  
20 is somehow different because there's now an  
21 innocent owner affirmative defense, but, I mean,  
22 that same argument was pressed by Mr. Von  
23 Neumann when it came to the remission petition.  
24 He said, I have this independent right created  
25 by federal law to get a remission petition

1 decision, and the Court said that right received  
2 all the process it was due by this 36-day  
3 process in deciding.

4 The same thing is true here. Their  
5 right to claim innocent ownership was heard and  
6 was vindicated at the final hearing. There's no  
7 need for it to be heard two days or two weeks  
8 after seizure in order for it to comport with  
9 fundamental fairness.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Justice Thomas, anything further?

13 Justice Alito?

14 Justice Sotomayor?

15 JUSTICE SOTOMAYOR: Can I go back to  
16 this common law issue? We -- we do know that  
17 English common law provided post-seizure process  
18 separate from the final forfeiture hearing. The  
19 Fourth -- Restore the Fourth briefs lays out  
20 that very robust history.

21 We don't have a similar history in  
22 early American courts for all the reasons the  
23 opposing counsel raised and Justice Barrett made  
24 clear, largely because, except for pirate ships  
25 and some isolated other types of seizures, we



1 don't have a robust forfeiture process until the  
2 1970s.

3 So going back to her question, which  
4 is, if the common law doesn't have a clearly  
5 established process, does that mean no process  
6 is ever due, or does it mean that we have to  
7 judge it by the circumstances that exist in  
8 modern times? I would think it's the latter.

9 MR. LaCOUR: You --

10 JUSTICE SOTOMAYOR: And forfeitures  
11 were quicker earlier in our history.  
12 Forfeitures were rare. And now we've expanded  
13 them to all sorts of property interests. Even  
14 those involving innocent owners, it's a new  
15 thing. So what do we do with a -- without a  
16 clear common law analog?

17 MR. LaCOUR: Your Honor, I think the  
18 history is a lot clearer and a lot clearer in  
19 our favor than the Restore the Fourth brief  
20 would make out. We agree with a lot of the  
21 premises that in Slocum and I think there's an  
22 early Judge Hand decision saying you need to  
23 institute or return.

24 Well, that sounds like Barker to me.  
25 Institute promptly, conclude promptly. There is

1 not a history of a mini-trial despite the fact  
2 that you do have this history in the liberty  
3 context of something like a precursor to the  
4 Gerstein hearings. I think that -- that absence  
5 of evidence is -- is evidence of absence.

6 And then -- and we do think that how  
7 courts were protecting the individual right  
8 tells us what is demanded today, but not more is  
9 demanded, as Von Neumann concluded.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?  
11 Justice Gorsuch?

12 JUSTICE GORSUCH: No, thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Kavanaugh?

15 JUSTICE KAVANAUGH: A couple things.  
16 First, you agree that Barker takes account of  
17 the claimants' interests, hardship, et cetera,  
18 correct?

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

21 JUSTICE KAVANAUGH: In the first -- in  
22 the first Barker factor, is that right?

23 MR. LaCOUR: Yes, Your Honor. If you  
24 get in front of the judge quickly, he can  
25 consider all those factors.

1 JUSTICE KAVANAUGH: Okay. And then,  
2 on Barker and Mathews v. Eldridge, the Solicitor  
3 General in particular suggests that those really  
4 are ultimately the same materially, the same  
5 thing in this context, ask the same questions.

6 Do you agree with that or not?

7 MR. LaCOUR: We see a little more  
8 daylight between the tests, but we -- we do  
9 agree that in -- in these cases, they would cash  
10 out the same way. That's what the Southern  
11 District of Alabama held in Ms. Culley's case,  
12 that under Mathews or under Barker, she loses.

13 JUSTICE KAVANAUGH: And suppose we  
14 have no precedent on point and suppose we have  
15 no idea what the history says, just a complete  
16 blank slate. We're purely -- and suppose we're  
17 doing Mathews v. Eldridge, okay? We're purely  
18 in Mathews v. -- v. Eldridge land.

19 How do we decide whether the new  
20 hearing is -- is necessary or not? We're  
21 supposed to weigh the government's interests  
22 against the individual interests.

23 MR. LaCOUR: Yes, Your Honor. I mean,  
24 I -- I would look -- point you to this Court's  
25 opinion in Kaley, for example, where they looked

1 at the significant interests the government has  
2 in not having to try their case repeatedly. And  
3 it's -- it's bolstered in the forfeiture context  
4 because, again, movable property can disappear.  
5 It can be hidden. It can be misused again.

6 You don't want to turn the car back  
7 over to someone who's just allowed it to be used  
8 to traffic methamphetamine because odds are  
9 there's at least better than zero odds that it  
10 might be misused again or disappear.

11 So we think the government's interests  
12 are -- are -- are very strong here. And then  
13 it -- it's not clear what additional process is  
14 really going to be provided when that retention  
15 hearing is going to look a lot like the final  
16 hearing except for the fact that it's going to  
17 be rushed and, therefore, the risk of error is  
18 going to increase.

19 And then that risk of error is not  
20 just a problem for the public, it's a problem  
21 for the other actually innocent owners if a  
22 merely purportedly innocent owner makes off with  
23 the property because of the error.

24 JUSTICE KAVANAUGH: Just to finish it  
25 out, and you would have us just figure out

1       whether we agree more with the government or the  
2       individual on that, which -- which interest  
3       outweighs the other, we just have to make a  
4       policy call on that?

5                 MR. LaCOUR:  Yes, and I think that's  
6       part of the problem with Mathews.  And it -- it  
7       -- it's not all that predictable.  The Second  
8       Circuit and the Seventh Circuit just in the  
9       context of cars said you do get the retention  
10      hearing.  The Fifth Circuit and the Southern  
11      District of Alabama in this case said you don't  
12      get a retention hearing for cars.

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

15                JUSTICE KAVANAUGH:  Thank you.

16                MR. LaCOUR:  Thank you.

17                CHIEF JUSTICE ROBERTS:  Justice  
18      Barrett?

19                Justice Jackson?

20                JUSTICE JACKSON:  Well, Barker has  
21      factors too.  I mean, I know -- is there some  
22      evidence that Barker's factors are more  
23      predictable or lead to results that are more  
24      consistent in some way than Mathews?

25                MR. LaCOUR:  No, Your Honor, it's more

1 fact-sensitive. And that's the -- my friend  
2 would see that as a drawback. I think that's  
3 actually a merit of Barker.

4 JUSTICE JACKSON: More fact-sensitive  
5 than the factors in Mathews?

6 MR. LaCOUR: Yes. Petitioners'  
7 counsel said just a few moments ago that Mathews  
8 allows you to do these categorical projections  
9 into what the typical case is going to look like  
10 in the future so that trial judges can be told,  
11 make sure you have a hearing within 14 days no  
12 matter what the facts show you.

13 And we don't think that's very  
14 flexible at all. We would prefer a test that  
15 allows trial judges to be trial judges and weigh  
16 the cases as they come.

17 JUSTICE JACKSON: Okay. So you're  
18 saying even though you -- your argument is that  
19 both Barker and Mathews come out the same way  
20 here, somehow, in application, Mathews has --  
21 is -- is deficient vis-à-vis Barker? Barker is  
22 the better, easier way to -- what -- what is  
23 better about it?

24 MR. LaCOUR: Again, it's -- it's  
25 fact-sensitive. No two property cases are

1 going -- movable property cases in the  
2 forfeiture context are going to be alike. You  
3 have lots of different types of property. Even  
4 the same type of property can have different  
5 values, different claimants.

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

9 MR. LaCOUR: The way Mathews has been  
10 applied in the Sixth Circuit and the Second  
11 Circuit has been to really alter the Rules of  
12 Civil Procedure for every case going forward,  
13 whether it's a case where the claimant would  
14 have defaulted anyway or whether --

15 JUSTICE JACKSON: I'm not talking  
16 about how it's been applied, letting judges be  
17 judges. I'm talking about the test itself. Are  
18 there -- is there something about the factors in  
19 the Barker test that is more determinate -- more  
20 determinative, allows us to be more predictable  
21 about what's going to happen, other than, I  
22 guess, the view that you'll never get any other  
23 process? If that's -- if that's the result that  
24 you think Barker always points to, then I guess  
25 it is more consistent than Mathews, but --

1                   MR. LaCOUR:  Yes, and I think it's --  
2                   it's a little more specific in describing the  
3                   government interests.  The government has to  
4                   explain why there is a delay.  And then you're  
5                   looking at the -- the key factor, which is how  
6                   long has this taken.

7                   JUSTICE JACKSON:  All right.  So just,  
8                   finally, getting back to Justice Gorsuch's  
9                   point, is it your argument that plaintiffs are  
10                  not allowed in this context -- by that, I mean  
11                  the civil forfeiture context generally -- to  
12                  assert that the forfeiture procedures themselves  
13                  are deficient?  Not making a delay claim.  I'm  
14                  conceding, says the plaintiff, that this was not  
15                  -- that the forfeiture hearing is going to  
16                  happen or has happened in a timely fashion.  But  
17                  I would like to complain about the procedures  
18                  that were given to me in that context.

19                  Is it your view that -- that no such  
20                  claim can be made?

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

24                  JUSTICE JACKSON:  No, not that claim.  
25                  I -- I don't want to make it kangaroo court



1 because that's hard and it'll go back to the  
2 question that Justice Gorsuch asked.

3 I want to make it something else about  
4 the process that is unfair. You know, these  
5 involve, as Justice Sotomayor says, people who  
6 are -- say that they're innocent owners, that  
7 they own the property and that they knew nothing  
8 about the drugs.

9 So the state has a system -- this is a  
10 hypothetical I'm making up on the spot. The  
11 state has a system in which the manner of  
12 proving that the person, you know, knows about  
13 the drugs is very unfair. You know, the -- the  
14 state says we presume that if you are -- you  
15 know, know this individual, then you're aware of  
16 their drug activity. And since this person is  
17 your son, you obviously know them. You can't  
18 bring in any evidence that shows that you didn't  
19 know anything about it. You're not an innocent  
20 owner under that test.

21 And what the person, the -- the owner,  
22 would like to do is say that you can't have a  
23 system -- you can't have a -- a method of proof  
24 that is so unfair in terms of my ability to  
25 prove that I didn't know what was going on.

1 That's my challenge, not that the hearing took  
2 too long. It has nothing to do with speed. I  
3 want to make that kind of challenge.

4 My question is, is it your view that  
5 no such claims exist? And if they do exist, are  
6 we judging the due process by the Barker test or  
7 some other test in that situation?

8 MR. LaCOUR: Your Honor, I think this  
9 Court's decision in District Attorney's Office  
10 v. Osborne would suggest that if you've created  
11 a new procedural right, then, yes, there's some  
12 due process protections that attach, but the  
13 state has a -- a tremendous amount of discretion  
14 in terms of what processes are going to attach  
15 to that new --

16 JUSTICE JACKSON: Understood. So --

17 MR. LaCOUR: -- procedural right.

18 JUSTICE JACKSON: -- if you agree that  
19 the person could make such a claim, are you  
20 saying the Barker test would apply in that  
21 situation to determine the -- the ultimate due  
22 process question?

23 MR. LaCOUR: It doesn't sound like  
24 that's a timing issue, so probably not, Your  
25 Honor, but, again, in -- in this case, the issue

1 is they've had my car too long.

2 JUSTICE JACKSON: Okay.

3 MR. LaCOUR: And that's a timing  
4 question.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Ms. Reaves.

9 ORAL ARGUMENT OF NICOLE F. REAVES  
10 FOR THE UNITED STATES, AS AMICUS CURIAE,  
11 SUPPORTING THE RESPONDENTS

12 MS. REAVES: Mr. Chief Justice, and  
13 may it please the Court:

14 I think it may be helpful for me to  
15 lay out how the federal government sees this  
16 case. In our view, the Court has already found,  
17 as indicated in *Shelton* and *Von Neumann*, that the  
18 only process a claimant is entitled to after  
19 personal property is seized is a timely final  
20 forfeiture hearing.

21 If this Court is of the view that it  
22 has not yet addressed that issue, it should now,  
23 and it should hold that a claimant has no right  
24 to an interim post-seizure hearing.

25 History and tradition support that

1 rule. At the time of the founding, there was no  
2 right to an early hearing when property was  
3 seized. Only a timely forfeiture hearing was  
4 required. That approach has prevailed for  
5 nearly 250 years.

6 The hearings that Petitioners request  
7 would upend that history, be extremely onerous,  
8 and would require more process for the pretrial  
9 deprivation of property than the pretrial  
10 detention of persons.

11 Finally, if the government disagrees  
12 with our front-line position, while we think  
13 that \$8,850 is the better fit for Petitioners'  
14 particular claims, the government is largely  
15 ambivalent about whether Eldridge or \$8,850  
16 applies to determine whether an interim hearing  
17 is required in a given case.

18 But, either way, this Court's decision  
19 should emphasize that the public and government  
20 interests identified in \$8,850 and Pearson Yacht  
21 will often weigh strongly against allowing such  
22 a hearing.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: Ms. Reaves, there's  
25 -- there have been quite a few questions that

1 say maybe something substantively goes wrong in  
2 this process. How would you address that,  
3 assuming that the forfeiture proceedings are  
4 timely?

5 MS. REAVES: So I think, if there was  
6 some sort of question that an individual wasn't  
7 receiving due process in the course of the  
8 proceedings, so some sort of procedural  
9 irregularity, I think there could be a due  
10 process claim for that.

11 It wouldn't necessarily be by --  
12 governed by Eldridge or even \$8,850. It could  
13 be governed by just the closest, you know, civil  
14 law analogy. Like, if there's an inappropriate  
15 burden of proof being placed on someone, I think  
16 that there might be due process analogies for  
17 that.

18 But that wouldn't be solved by  
19 requiring an additional layer of proceedings in  
20 all cases or in a significant category of cases.  
21 That's just a different issue.

22 CHIEF JUSTICE ROBERTS: The assessment  
23 whether a civil forfeiture proceeding meets the  
24 requirements of due process, timeliness is a  
25 significant consideration in that, right?

1 MS. REAVES: Yes, it is.

2 CHIEF JUSTICE ROBERTS: And it is, of  
3 course, in retention as well?

4 MS. REAVES: Yes.

5 CHIEF JUSTICE ROBERTS: So -- but  
6 there's presumably a gap between when you would  
7 have that question asked under retention and  
8 when you would have it asked under civil  
9 forfeiture. How do we look at the significance  
10 of that -- that gap?

11 MS. REAVES: So I think the Court  
12 would look at that under \$8,850 because \$8,850  
13 allows the Court to take into consideration the  
14 burden to a particular claimant in a particular  
15 case. I think that comes in under the first  
16 factor in \$8,850.

17 And I think, you know, the government  
18 interests really aren't any different. You  
19 know, this Court's talked about the government  
20 interests in Pearson Yacht in not having a  
21 pre-seizure hearing. And I think most of those  
22 government interests continue to apply to allow  
23 the government -- and -- to retain the property  
24 while the hearing is proceeding, you know, as  
25 long as the hearing is proceeding in an

1 appropriate amount of time and the government  
2 isn't sitting on its hands and doing nothing  
3 while holding someone's property.

4           And I -- and I think the history and  
5 tradition really are consistent with that. You  
6 know, the best evidence of the history here  
7 comes from the Collection Acts, which were  
8 passed by founding-era Congresses. There was no  
9 requirement that there be any sort of interim  
10 hearing. The normal rule was that once property  
11 was seized, it was held until the final  
12 forfeiture hearing.

13           And Petitioners' counsel has suggested  
14 that once the forfeiture proceeding was filed,  
15 there was a 14-day hearing requirement. That's  
16 just not the case. So, first of all, under the  
17 Collection Acts, the federal government had up  
18 to three years between seizure and initiating  
19 the forfeiture action. And then --

20           JUSTICE GORSUCH: Sorry to interrupt.  
21 Do we need to decide any of that in this case  
22 given that under your count and the state's, the  
23 Petitioner here was -- could have brought a  
24 summary judgment motion at any time and -- and,  
25 presumably, most of the facts that she would

1 have wanted to present would have been in her  
2 control?

3 MS. REAVES: So I -- I think that's  
4 right. You could issue a very narrow decision  
5 in this case.

6 JUSTICE GORSUCH: Yeah, how would it  
7 -- what would it look like in the government's  
8 view if we were to say -- want to avoid ruling  
9 on -- on that question and also leave open the  
10 possibility, as you alluded to with Justice  
11 Thomas, that there may be due process  
12 considerations beyond timing that might arise in  
13 some of these cases?

14 I mean, there are allegations before  
15 us that in some states, because law enforcement  
16 uses these -- these forfeitures to fund  
17 themselves, that they sometimes require somebody  
18 who wants some of their property back to agree  
19 to give some of it to the government or engage  
20 in other concessions outside of regular process.  
21 How -- how do we write a narrow opinion that  
22 does no harm here?

23 MS. REAVES: So I think the Court  
24 could say that we haven't decided whether  
25 there's ever any entitlement to an interim



1 hearing, but assuming that there could be such a  
2 requirement in some category of cases, it  
3 clearly would not -- Petitioners were not  
4 entitled to that sort of hearing in this  
5 particular case.

6 Now there may be some dangers in  
7 kicking it down the road. I think there will be  
8 other petitions coming up because of the Sixth  
9 Circuit's decision and even coming out of  
10 Krimstock. But the Court definitely could save  
11 this for another day if the Court wanted to.

12 JUSTICE KAVANAUGH: I -- I thought you  
13 were going to say that the -- that we could say  
14 that there's no due process right to an interim  
15 hearing, period, but there could be other due  
16 process issues related to other aspects of  
17 forfeiture proceedings and you don't need to  
18 rule those problems out by saying there's no due  
19 process right to an interim hearing.

20 MS. REAVES: That's certainly our  
21 preferred rule. I think I was assuming that  
22 Justice Gorsuch wanted a much more limited rule  
23 that just dealt with the facts of this case.  
24 But, as I said in my opening, we certainly think  
25 that the Court has already indicated that

1       there's no --

2                   JUSTICE SOTOMAYOR:   So what do you --

3                   MS. REAVES:   -- due process right to

4       --

5                   JUSTICE SOTOMAYOR:   -- see Barker

6       being if it's not an interim hearing?

7                   MS. REAVES:   So I --

8                   JUSTICE SOTOMAYOR:   I mean, Barker, a  
9       defendant comes in -- not a defendant -- a  
10      petitioner comes in, makes a motion and says,  
11      I'm entitled to a Barker hearing.  The  
12      government claims its interests, but I have  
13      hardship and I want a hearing on the level of my  
14      hardship versus their interests and their level  
15      of proof?

16                   Because your brief seems to argue that  
17      the Mathews test is fully consistent would --  
18      with and would not require any material changes  
19      in the Court's traditional Barker-based  
20      analysis.  That's your brief at page 19.

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

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

1 MS. REAVES: So I think I want to be  
2 clear where we are in the analytical framework  
3 here. So we don't think there's ever a right to  
4 an interim hearing. We think the only right  
5 that there is is a timely final forfeiture  
6 hearing.

7 And it's certainly true that someone  
8 whose forfeiture proceedings are ongoing can  
9 say: Look, this is moving too slowly under  
10 Barker, and the court can, you know, set its  
11 deadlines accordingly, can dismiss the case if  
12 it's already proceeded for too long a period of  
13 time.

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

25 JUSTICE JACKSON: But I guess you --

1 JUSTICE SOTOMAYOR: You keep saying  
2 "timely." I don't know what timely is. I have  
3 a brief that set out the fact that some  
4 hearings, by the nature of what the courts are  
5 doing, are taking up to a year or more.

6 I don't consider that timely if I'm an  
7 innocent owner who relies on my car for my --  
8 for survival. And there's evidence of claimants  
9 who, in fact, had children, who lost their job,  
10 et cetera.

11 So how do we take care of those  
12 things?

13 MS. REAVES: So I think, if you're  
14 concerned about that sort of thing, the claimant  
15 can raise the concern that the proceedings are  
16 already taking too long in their ongoing  
17 forfeiture proceedings or, if the forfeiture  
18 proceedings haven't been filed, they can file a  
19 Rule 41(g) motion in the federal system or a  
20 Rule 313 motion in the Alabama system.

21 So there are ways to bring the  
22 timeliness claim up to a court without requiring  
23 a retention hearing in all cases. And I think  
24 one important thing to keep in mind, you know,  
25 Petitioner has focused extensively on the fact

1 that there's an innocent owner defense at play  
2 here and that that somehow means that there's an  
3 earlier entitlement to a hearing. And Alabama  
4 law, the version of law that was in effect for  
5 this case, makes it clear that that is an  
6 affirmative defense.

7 That's in Wallace versus State, which  
8 --

9 JUSTICE SOTOMAYOR: Is --

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

12 JUSTICE SOTOMAYOR: -- is that part of  
13 its new law?

14 MS. REAVES: Excuse me?

15 JUSTICE SOTOMAYOR: Is it part of the  
16 Alabama new law?

17 MS. REAVES: It is not, no, but the  
18 Alabama new law, of course, is not at issue in  
19 this case. And the version of the innocent  
20 owner defense that's at issue here only comes in  
21 after the state has made out its prima facie  
22 case before the forfeiture.

23 JUSTICE SOTOMAYOR: Quite interesting,  
24 isn't it, that once the incentive is taken out  
25 of police officers taking advantage of the

1 system as it exists, that Alabama puts in a  
2 system that is much fairer?

3 That was one of the reasons that  
4 Alabama resisted granting cert in this case,  
5 because the new system does look to guarantee a  
6 faster process?

7 MS. REAVES: So I think the new  
8 system's processes are different, but I think  
9 it's important to keep in mind that I don't even  
10 think the new system's process would have given  
11 these Petitioners faster process.

12 So the innocent owner defense under  
13 Alabama's new law, once an innocent owner seeks  
14 -- seeks an innocent owner hearing, the state  
15 has up to 60 days to respond to that. And  
16 that's almost exactly the amount of time that  
17 Petitioners would have had their cars returned  
18 to them had they proceeded under Alabama state  
19 law as it had existed at the time of this case.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Justice Thomas, anything?

23 Justice Alito?

24 Anything further, Justice Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

2 Justice Jackson?

3 JUSTICE JACKSON: Yeah, can I just  
4 clarify one thing? You -- you say that you  
5 think that the only right is to a timely final  
6 forfeiture hearing, but I thought what was at  
7 issue in this case is the test that is to be  
8 used to make that determination. So I  
9 appreciate that the government thinks it knows  
10 the answer in all of these cases, which is, you  
11 don't get a hearing. But I thought this -- that  
12 the -- I thought we had tests that we applied in  
13 the law to lead us to that conclusion in  
14 particular cases depending upon the claims and  
15 the circumstances.

16 And so our question was what test? Am  
17 -- am I wrong? It -- it -- it feels to me  
18 strangely like the government has picked the  
19 answer and is choosing the test that will  
20 inevitably lead to the answer that the  
21 government wants, as opposed to telling us here  
22 is the difference between the Barker test and  
23 the Mathews test and which one is better in  
24 terms -- more consistent with our prior case  
25 law, et cetera, et cetera?

1 MS. REAVES: So I think we view the  
2 answer to the question presented as being it  
3 doesn't matter because the Court has essentially  
4 already decided this in Von Neumann, in \$8,850.  
5 And I --

6 JUSTICE JACKSON: What's your -- what  
7 is -- what is your view of my thought that Von  
8 Neumann is really much narrower in the language  
9 that you're talking about than your -- than  
10 the -- than the way it is being read, that it's  
11 been taking -- taken out of context?

12 MS. REAVES: So I think Von Neumann,  
13 the latter part of that decision, I -- I read it  
14 as having assumed that there was a due process  
15 right to a timely remission -- adjudication of  
16 the remission petition. And then the Court  
17 there found that --

18 JUSTICE JACKSON: You mean in Section  
19 3?

20 MS. REAVES: Yes.

21 JUSTICE JACKSON: But, in Section 2,  
22 it says there is no such thing, so it's just  
23 kind of continuing to spin out the analysis, but  
24 it was pretty clear in 2 that the Court was  
25 finding that there was no such thing.



1 MS. REAVES: That -- that's certainly  
2 correct. I think the Court had maybe  
3 alternative holdings that you could -- you could  
4 say, but I don't think the Court should just  
5 ignore the last section of -- of Von Neumann.

6 But I think even if you were to view  
7 this case as being, and this issue as not  
8 already being decided, I think, if you looked at  
9 it under an \$8,850-type analysis or even a  
10 Mathews v. Eldridge analysis, you'd come to,  
11 like, the bottom-line conclusion that the Court  
12 came to in Pearson Yacht for the same reasons  
13 that there's no entitlement to a pre-forfeiture  
14 notice and hearing -- or pre -- excuse me,  
15 procedure notice and hearing.

16 JUSTICE JACKSON: So the government's  
17 view is that on the methodology, it doesn't  
18 really matter whether we do Barker, or, like,  
19 the answer to the QP is it doesn't matter?

20 MS. REAVES: That's correct.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Rebuttal, Mr. Dvoretzky?

25

1 REBUTTAL ARGUMENT OF SHAY DVORETZKY  
2 ON BEHALF OF THE PETITIONERS  
3 MR. DVORETZKY: Thank you, Mr. Chief  
4 Justice.

5 First, Von Neumann and \$8,850 didn't  
6 decide the question that is presented here.  
7 They didn't decide whether there can be an  
8 interest in avoiding temporary deprivation that  
9 is different from the time to a final  
10 disposition.

11 The Court in this case should not  
12 strip the lower courts of the tools they need to  
13 analyze whether in a particular case more  
14 process is due.

15 We've heard the phrase today "Let  
16 judges be judges." The Court -- this Court  
17 should let judges be judges and trust the lower  
18 courts as well as the states and the federal  
19 government to figure out what to do with the  
20 guidance that this Court should provide that  
21 some meaningful process is due in order to  
22 protect an innocent owner pending a final  
23 adjudication.

24 And jurisprudentially, Gerstein again  
25 is another example here. In Gerstein, the Court

1 recognized that there should be a prompt  
2 probable cause determination. It took several  
3 years of them -- percolation before the Court in  
4 City of Riverside provided more concrete  
5 guidance and said: Okay, this is what that  
6 needs to look like.

7           So all the Court needs to do here is  
8 to recognize that the interests that we're  
9 asserting are different than the ones that were  
10 asserted in Von Neumann and \$8,850. They should  
11 be analyzed under Mathews because Mathews is the  
12 test for determining whether additional process  
13 is due. And then the lower courts and the  
14 states and, if necessary, the federal government  
15 can figure out how that works.

16           Now, in terms of some of the  
17 flexibility that that might afford, the -- the  
18 federal statute, 18 U.S.C. 983(f), it allows  
19 the -- the -- or it entitles a claimant to the  
20 immediate release of seized property if they can  
21 show substantial hardship. That is in -- in  
22 some ways even more valuable than a hearing.

23           So that may be perfectly  
24 constitutionally sufficient. Utah has a similar  
25 sort of scheme. And so, again, the Court

1 doesn't need to micromanage exactly how all of  
2 this works.

3           With respect to Barker, Barker would  
4 be a poor fit for the claim that we're asserting  
5 here because Barker is not designed to answer  
6 the question of whether more process is due.  
7 For starters, under the first prong of Barker,  
8 it takes a year before Barker even kicks in.

9           Barker does not account for private  
10 interests. It doesn't account, for example, for  
11 the difference between taking away somebody's  
12 car, which is necessary for their livelihood,  
13 and taking away some other piece of property  
14 that they might not need in the same way.  
15 Mathews does.

16           Barker also provides no flexibility in  
17 the remedy. The only remedy that Barker can  
18 lead to is, in the criminal context, dismissal  
19 of the indictment, here, dismissal of the  
20 forfeiture proceeding altogether. It doesn't  
21 provide any flexibility for considering whether  
22 additional process is due.

23           With respect to the facts here, no  
24 Court has considered the value of additional  
25 process and whether, in fact, the -- the

1 plaintiffs could have moved for prompt summary  
2 judgment and, if so, how long that would have  
3 taken. What we do know is that in the course of  
4 ordinary litigation, the state here, to use  
5 Sutton's case as an example, the state took five  
6 months to respond to discovery requests about  
7 what the state knew about the innocent owner  
8 defense, and, ultimately, those discovery  
9 requests were entirely non-responsive.

10           And so all of this back and forth  
11 about what could have happened on summary  
12 judgment, that's something that the lower courts  
13 can consider in the first instance -- it hasn't  
14 been considered before -- in applying Mathews  
15 and determining what would be the value of  
16 additional process.

17           I'd also point out that the facts of  
18 this case show how different this case looks  
19 from forfeiture at common law. This is not a  
20 case about pirates or owners of ships crossing  
21 borders. We're talking here about individuals  
22 who lost their cars.

23           In Sutton's case, as a result of  
24 losing her car, she missed medical appointments,  
25 she wasn't able to keep a job, she wasn't able

1 to pay a cell phone bill and, as a result of  
2 paying a cell phone bill -- not being able to  
3 pay her cell phone bill, was not in a position  
4 to be able to communicate about the forfeiture  
5 proceedings.

6 In Ms. Culley's case, she not only  
7 begged and pleaded with the police for her car  
8 back but also had communications with the DA's  
9 office. The DA's office said, if you comply  
10 with our process, you'll get your car back, but  
11 it'll take at least six months until there's a  
12 hearing.

13 And so we're far removed from the --  
14 the narrow sense in which history recognized  
15 forfeiture.

16 Lastly, Alabama talks about government  
17 interests here. Government interests can be  
18 weighed, in fact, must be weighed as part of the  
19 Mathews analysis. They can also be considered  
20 at any retention hearing that might result from  
21 Mathews. Approximately 20 states have hearings  
22 of some sort like that. Alabama itself now  
23 provides a much prompter hearing than it did  
24 when -- when my clients' cars were taken.

25 Lastly, I would just end with a quote

1 from this Court's decision in Fuentes. This is  
2 at 407 U.S. 90. "A prior hearing always imposes  
3 some costs in time, effort, and expense, and it  
4 is often more efficient to dispense with the  
5 opportunity. But these rather ordinary costs  
6 cannot outweigh the constitutional right."

7 We ask that the Court adopt Mathews  
8 and remand for the lower courts to consider.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 The case is submitted.

12 (Whereupon, at 11:45 a.m., the case  
13 was submitted.)

14

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