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**Admitted pursuant to Ariz. Sup. Ct. R. 38(f)

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Rhonda Cox,

Plaintiff,

v.

Lando M. Voyles, Pinal County Attorney; Paul Babeu, Pinal County Sheriff; Detective Samuel Hunt, Deputy Pinal County Sheriff; Amanda Stanford, Pinal County Clerk of the Superior Court; Craig Cameron, Deputy Pinal County Attorney,

Defendants.

No. 15-cv-01386-DJH

PLAINTIFF'S CONSOLIDATED RESPONSE TO DEFENDANTS'/ INTERVENOR'S MOTIONS TO DISMISS

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION AND FACTUAL BACKGROUND

Plaintiff Rhonda Cox ("Rhonda") owned a truck (the "Truck") which she often allowed her son to drive. Unbeknownst to her, one night her son used the Truck in a minor property crime, to which he eventually pled guilty. There was no suggestion that Rhonda was even aware of her son driving the Truck that night; certainly she had no idea that he would use it to break the law. When an innocent owner like Rhonda has property seized, she should get it back, either right away or after a fair, neutral judicial proceeding which affords innocent owners the process which they are constitutionally due. But the Defendants, motivated by the prospect of keeping the Truck for their own use, denied Rhonda's requests to return the Truck. Each of the Defendants acted in violation of Rhonda's constitutional rights by ensuring that Rhonda would either lose her Truck, lose her day in Court, or both.

Now, having once succeeded in bullying Rhonda out of court and preventing her from righting the wrongs done to her, Law Enforcement, the Clerk, and the State (collectively "Defendants")[1] are at it again. Even though Rhonda's Complaint states, in detail, numerous constitutional claims against Law Enforcement and the Clerk, they ask this Court to again bar her from having the merits of her claims considered. Law Enforcement has also gone so far as to send a letter and draft motion seeking sanctions against undersigned counsel because, in the opinion of Mr. Jellison, Rhonda's suit was filed "under circumstances where their [sic] the lawyers and their respective firms are politically motivated to pursue a baseless lawsuit for the purposes of harassing or creating unnecessary cost for the Defendants." [Letter from J. Jellison to J. Cabou and E. Andersson, Sept. 8, 2015] That threat won't work—Rhonda will not be bullied out of court again. As shown below, each of the arguments raised in support of Defendants'

[1] Defendants Voyles, Babeu, Hunt, and Cameron are collectively referred to in this Response as "Law Enforcement."

Motions is meritless. The Motions to Dismiss[2] should be denied, allowing, finally, a court to consider and redress the unconstitutional actions of Defendants and the unconstitutionality of the laws which authorize them.

ARGUMENT

I. THE STANDARDS AND LAW APPLICABLE TO MOTIONS UNDER RULE 12(B)(6) MAKE CLEAR THAT DEFENDANTS' MOTIONS MUST BE DENIED.

In considering a motion under Fed. R. Civ. P. 12(b)(6), "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009) (citation omitted). "It is axiomatic that '[t]he motion to dismiss for failure to state a claim is viewed with disfavor . . . .'" *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986)). The showing needed to survive such a motion is low, as the complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is *plausible* on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added) (citation omitted); *see also Stapley v. Pestalozzi*, 733 F.3d 804, 809 (9th Cir. 2013).

In addition, the State and the Clerk move to dismiss based on Fed. R. Civ. P. 12(b)(1), claiming that Rhonda has failed to establish the propriety of this Court's jurisdiction. Because Rhonda has invoked this Court's jurisdiction, she bears "the burden of proving its existence." *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (quoting *Rattlesnake Coal. v. E.P.A.*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007)).

[2] Plaintiff is responding to the following Motions: (1) Defendants Voyles, Babeu, Cameron, and Hunt's Motion to Dismiss ("Law Enforcement MTD") (Doc. 24); (2) Defendant Amanda Stanford's Motion to Dismiss ("Clerk MTD") (Doc. 27); and (3) Intervenor-Defendant State of Arizona's Motion to Dismiss Under Rule 12(b), Fed. R. Civ. P. ("State MTD") (Doc. 32), and collectively "Motions to Dismiss" or "Defendants' Motions."

II. NEITHER *RES JUDICATA* NOR *ROOKER-FELDMAN* ABSTENTION BARS RHONDA'S CLAIMS BECAUSE THIS CASE DEPENDS ON DIFFERENT EVIDENCE, AND RAISES DIFFERENT CLAIMS FROM THOSE AT ISSUE IN THE CASE AGAINST HER TRUCK.

A. The Defendants Ignore and Distort Long-Established Principles of Arizona Law in Claiming that *Res Judicata* Prevents Rhonda from Pursuing Her Claims in this Court.

Relying on inaccurate and incomplete statements of Arizona and federal law, Defendants claim that Rhonda is precluded from bringing her claims to this Court. The Full Faith and Credit Act, 28 U.S.C. § 1738, requires that the judicial proceedings of state courts "shall have the same full faith and credit in every court within the United States." In *Migra v. Warren City School District*, 465 U.S. 75, 75-76 (1984), the Supreme Court interpreted § 1738 and held that a plaintiff's constitutional claims under 42 U.S.C. § 1983 in federal court may be precluded after the plaintiff brought other claims in state court arising from the same facts. Whether the constitutional claims are precluded depends on the state's laws on claim preclusion. *See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 368 (1996) ("A federal court must first determine whether the rendering State's law indicates that the claim would be barred from litigation in a court of that State . . . .").

Arizona's doctrine of *res judicata* provides that "[1] a judgment [2] 'on the merits' [3] in a prior suit involving the same parties or their privies bars a second suit [4] based on the same cause of action." *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 471, 573, 716 P.2d 28, 30 (1986) (quoting *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 326 (1955)). All four elements must be present for *res judicata* to bar a case—none of the elements alone is sufficient. *Id.* Here, because Rhonda's suit is not "based on the same cause of action" as the State's prior suit against her Truck, *res judicata* does not apply.

Arizona uses the "same evidence" test for determining whether a current action is the same as, and thus potentially barred by, a previous action. *Phoenix Newspapers, Inc. v. Dep't of Corrections, State of Ariz.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (Ct. App. 1997). Pursuant to this test, "[i]f *no additional evidence* is needed to prevail in the second

action than that needed in the first, then the second action is barred." *Id.* (emphasis added). That *some evidence* might overlap in a second case is of no moment. As this Court recently explained, "[t]he 'same evidence' test is quite liberal, and permits a plaintiff to avoid preclusion 'merely by posturing the same claim as a new legal theory,' even if both theories rely on the same underlying occurrence." *Power Rd.-Williams Field LLC v. Gilbert*, 14 F. Supp. 3d 1304, 1309 (D. Ariz. 2014) (quoting *Phoenix Newspapers*, 188 Ariz. at 241, 934 P.2d at 805).

The application of Arizona's same evidence test in *Phoenix Newspapers* demonstrates just how sparingly *res judicata* applies to bar a lawsuit. In that case, after Phoenix Newspapers lost its first challenge to an Arizona Department of Corrections Order based on a theory that the Order "unconstitutionally discriminate[d] against media representatives by denying them visitation privileges afforded members of the general public," 188 Ariz. at 239, 934 P.2d at 803, the court of appeals held that *res judicata* did not preclude Phoenix Newspapers from filing a second lawsuit challenging the Order. Even though the second suit was against the same defendants and concerning the same Order, the court explained that because the plaintiffs "assert[ed] a new theory in their second action, supported by some additional facts," the second suit could proceed on its merits. *Id.* at 241, 242, 934 P.2d at 805, 806.

Under Arizona's same evidence test, it is clear that *res judicata* does not bar Rhonda from pursuing her claims in this Court. In her previous defense of the *in rem* case against her Truck, Rhonda had to offer evidence showing that she "did not know and could not reasonably have known of the act or omission [allegedly making her property forfeitable,] or that it was likely to occur." A.R.S. § 13-4304(4)(c); [Claim against Declaration for Forfeiture Remission or Mitigation, Oct. 30, 2013 (CV-201302162) ("I am an innocent owner who had no knowledge and could have not reasonably known my [Truck] would . . . be used in the theft and possesion [sic] of stolen property my son has been charged with.")] In this case, Rhonda has to offer evidence showing that the Defendants' acts and omissions leading to the seizure and forfeiture of her Truck violated

her First Amendment, Fourth Amendment, and Due Process rights under the U.S. Constitution. Here, as in *Phoenix Newspapers*, "additional evidence is needed to prevail in the second action . . . ." *Phoenix Newspapers*, 188 Ariz. at 240, 934 P.2d at 804. Thus "[a]lthough the claims involved in the two proceedings arise out of the same event . . . they do not constitute the same cause of action under existing Arizona law." *Id.* at 242, 934 P.2d at 806.

The State's claim that Rhonda's suit is barred because the "evidence is identical," to that which was needed in the *in rem* action [State's MTD at 6], conveniently misstates, or misunderstands, the same evidence test. The State conflates the factual events from which Rhonda's case arises with the evidence she needs to prevail on her legal claims against Defendants. Because, as described above, Rhonda has to offer different evidence for her constitutional claims in this Court than she had to offer in state court for her innocent owner claims, the two cases are not the same cause of action and *res judicata* does not bar this case.

The State's citation to two *in rem* cases where claimants raised constitutional questions does not support its allegation that Rhonda's current case rests on the same evidence as the *in rem* case against her Truck. [*See* State MTD at 6 (citing *In re 319 E. Fairgrounds Dr.*, 205 Ariz. 403, 71 P.3d 930 (Ct. App. 2003); *Matter of 1632 N. Santa Rita*, 166 Ariz. 197, 801 P.2d 432 (Ct. App. 1990))] The State may wish that its own *res judicata* law operated more broadly to preclude more lawsuits, but longstanding Arizona law clearly dictates that the application of *res judicata* here does not turn on whether Rhonda "could have litigated the same constitutional challenges in the *in rem* proceeding." [State MTD at 6][3]

[3] The State also attempts to skirt the same evidence rule by arguing that the Restatement (Second) of Judgments Section 22(2)(b) bars Rhonda's claims because she "could have brought her federal claims as counterclaims in the state action." [State MTD at 5] Here, the State cites *Estate of Walton*, 164 Ariz. 498, 500, 794 P.2d 131, 133 (1990), for the proposition that "Arizona courts follow the Restatement of Judgments absent contrary case law." But, case law clearly requires the application of the same evidence test when *res judicata* is invoked. *See Phoenix Newspapers*, 188 Ariz. at 240, 934 P.2d at 804 (explicitly acknowledging the divergence between Arizona's same evidence test and

In addition, while *Norriega v. Machado*, 179 Ariz. 348, 878 P.2d 1386 (Ct. App. 1994), on which the State heavily relies, arises in a similar context, it does not, properly read, apply here. *Norriega* addressed the third *Chaney* factor, not the fourth, which is applicable here. There, the court of appeals addressed whether two plaintiffs in a civil action were parties in previous *in rem* proceedings against property in which they asserted an interest. The court concluded that the plaintiffs "were not parties in the prior forfeiture actions and thus the doctrine of *res judicata* does not bar their action involved in this appeal." *Norriega*, 179 Ariz. at 353, 878 P.2d at 1391. The court simply did not apply, and in fact did not even mention, the same evidence test which governs Rhonda's facts and under which it is clear that *res judicata* is irrelevant. Under Arizona law, Rhonda's constitutional claims in this case require different evidence than her statutory innocent owner claim in the prior *in rem* proceeding. The two cases are not the same cause of action and *res judicata* does not bar the present case.[4]

B. Defendants Misstate Controlling Law in Claiming that the Narrow *Rooker-Feldman* Doctrine Prevents Rhonda from Pursuing Her Claims in this Court.

Rhonda's suit asks this Court—a federal court—to hear her claims that the Defendants actions in seizing and forfeiting her Truck violated her rights under the federal Constitution. The *Rooker-Feldman* doctrine bars lawsuits in lower federal courts "brought by state-court losers *complaining of injuries caused by state-court judgments*

Section 24 of the Restatement (Second) of Judgments, which employs a transactional test for determining whether two cases are the same cause of action for *res judicata* purposes).

[4] Because Rhonda's case does not depend on the "same evidence" as the State's prior *in rem* action in which she was a claimant, and because *res judicata* only applies if **all** four parts of the *Chaney* test are satisfied, 148 Ariz. at 573, 716 P.2d at 30, Rhonda does not need to address at length the other elements of the test. That said, a simple comparison of Rhonda's Complaint with the complaint against the Truck reveals that *Chaney's* "same parties" requirement is also absent here. None of the Defendants in this action were party to the suit against the Truck. Also, the notion that having been forced from court by the baseless, unconstitutional threats of Defendant Cameron, Rhonda is now precluded by the judgment entered in her absence, offends basic notions of Due Process. *See, e.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (Due Process must be afforded meaningful to be constitutionally adequate); *see also In re Cassidy's Estate*, 77 Ariz. 288, 293, 270 P.2d 1079, 1082 (1954) (*res judicata* does not apply in presence of "extrinsic fraud which prevents a party from having his day in court").

rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (emphasis added). Invoking this language and claiming that the doctrine bars Rhonda's claims here, Defendants ignore that Rhonda's suit does not "complain[] of injuries caused by [a] state-court judgment[]." *Id.* Rather, her suit asks this Court to redress injuries separate from, and caused by Defendants well-before, the state court entered judgment against the Truck. Defendants also ignore that *Exxon* explicitly clarified that *Rooker-Feldman* is a "narrow preclusion doctrine." *Carmona v. Carmona*, 603 F.3d 1041, 1050 (9th Cir. 2008); *see also Exxon*, 544 U.S. at 284 (noting the concern that district courts were interpreting the doctrine "to extend far beyond the contours of the *Rooker* and *Feldman* cases."). Put another way, Defendants' claim that *Rooker-Feldman* bars Rhonda's suit is based on an overly broad application of the doctrine that the Supreme Court denounced in *Exxon*. Indeed, not only do Defendants misstate this doctrine, they misapply it to Rhonda's claims.

Rooker-Feldman bars direct and "de facto" appeals of state court judgments. *Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012). Rhonda does not bring, nor do Defendants allege that she brings, a direct appeal of the *in rem* judgment against her Truck. [State MTD at 6-10; Law Enforcement MTD at 10-12] Rather, Defendants allege that her case is a forbidden "de facto" appeal that triggers *Rooker-Feldman*. But to trigger the doctrine and bar the federal case, a plaintiff "must seek not only to set aside a state court judgment; he or she must also allege a legal error by the state court as the basis for that relief." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004). Rhonda does neither. Applying this rule, the Supreme Court explained that "a state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action." *Skinner v. Switzer*, 562 U.S. 521, 532 (2011) (holding that *Rooker-Feldman* does not preclude an as-applied or facial challenge to the constitutionality of a Texas statute after the state court denied plaintiff relief based on the text of that statute); *see also Maldonado v. Harris*, 370 F.3d 945, 950 (9th Cir. 2004)

(concluding that *Rooker-Feldman* does not apply because, as here, "[t]he legal wrong that [plaintiff] asserts in this action is not an erroneous decision by the state court . . . but the continued enforcement by [state agency] of a statute [plaintiff] asserts is unconstitutional," and observing that the "conclusion remains the same even though [plaintiff's] complaint seeks relief from the injunction entered by the state court") (citing *Kougasian*, 359 F.3d at 1140).

Rhonda challenges the constitutionality of the process that prevented her from having a fair chance to contest the government's taking of her property. Rhonda does not allege in this case that she is entitled to relief from the state court's judgment because it made "a legal error" in concluding that her Truck was forfeitable under Arizona's Forfeiture Laws. *Kougasian*, 359 F.3d at 1140. "The legal wrong that [Rhonda] asserts in this action is not an erroneous decision by the state court" in the *in rem* case brought against her Truck, "but the continued enforcement by [Defendants] of a statute [Rhonda] asserts is unconstitutional." *Maldonado*, 370 F.3d at 950. *Rooker-Feldman* does not bar Rhonda's federal case.[5]

III. NO DOCTRINE OF IMMUNITY APPLIES TO BAR RHONDA'S SUIT OR ANY RELIEF IT SEEKS, AND NO QUESTION OF STANDING PREVENTS HER FROM SEEKING THE RELIEF FOR WHICH SHE PLEADS.

The Defendants' attempts to avoid the court reaching the merits of Rhonda's suit do not stop with their misapplications of *res judicata* and the *Rooker-Feldman* doctrine. Seeking quarter in perhaps more familiar territory, Defendants also spill considerable ink arguing that the Court should bar Rhonda from passing through its doors on the grounds of immunity and lack of standing. But, although these arguments may be more familiar

[5] Defendants misapply the law in claiming that *Rooker-Feldman* bars Rhonda's case because her "constitutional challenges are inextricably intertwined with the [*in rem*] judgment." [State MTD at 9] The inextricably intertwined test is considered "[o]nly when there is already a forbidden de facto appeal in federal court." *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003); *see also Maldonado*, 370 F.3d at 950 ("[Plaintiff] is not bringing a forbidden de facto appeal . . . . [t]herefore, the 'inextricably intertwined' test does not come into play.").

for Section 1983 defendants, they are equally and irreparably flawed as applied to Rhonda's case.

A. Sovereign Immunity Does Not Bar Claims for Prospective Relief or Prevent the Clerk from Returning Property She Wrongfully Took From Rhonda.

Just as the rarely-cited *Rooker-Feldman* doctrine does not bar any of Rhonda's claims, neither does the often-cited doctrine of sovereign immunity bar any of her claims. The Supreme Court has been clear that the Eleventh Amendment does not bar cases against state officials for declaratory and injunctive relief. In the very case the Clerk cites (at 4) in claiming that she is not a "person" whom Rhonda can properly sue for her constitutional claims, the Court stated: "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' This distinction is 'commonplace in sovereign immunity doctrine,' and would not have been foreign to the 19th–century Congress that enacted § 1983 . . . ." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (internal citations omitted). The Eleventh Amendment only provides sovereign immunity for state officials when plaintiffs seek money damages to be paid from a state treasury. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (explaining that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment").

As is clear from the face of the Complaint, Rhonda does not seek money damages from the Clerk that would be paid by the state treasury. For her claims against the Clerk (Claims 4, 5, and 7), Rhonda requests declaratory and injunctive relief and the equitable relief of disgorgement of the filing fee she paid to the Clerk. Disgorgement in this context, as discussed below, is distinct from liability for damages to be paid by the state treasury. The Clerk is a "person" for § 1983 purposes and she cannot hide behind sovereign immunity to insulate her from either Rhonda's claims for declaratory and injunctive relief or her claim for disgorgement.

In order to exercise the basic right to contest the government's actions depriving her of the Truck before a neutral decision-maker, Rhonda had to pay the Clerk a filing fee of $304. [Compl. ¶ 21] *See, e.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (opportunity to be heard "must be granted at a meaningful time and in a meaningful manner"); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (only "when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented"). As discussed further below, the taking of this money was constitutionally infirm and Rhonda is therefore entitled to its return. And contrary to the Clerk's overbroad reading of the Eleventh Amendment, sovereign immunity does not bar the relief Rhonda seeks.

"Ordinarily, the Eleventh Amendment bars a plaintiff from using a lawsuit in federal court to get money damages for wrongful conduct by state officials out of the general fund of the state government." *Taylor v. Westly*, 402 F.3d 924, 930 (9th Cir. 2005); *see also Edelman*, 415 U.S. at 663. The Supreme Court and Ninth Circuit, however, have recognized a critical limitation to this general rule. The Eleventh Amendment does not bar "suits in which a plaintiff asserts a claim for return of his property . . . if . . . the plaintiff's theory [is] that the action leading to the government's possession of the property was constitutionally infirm." *Taylor*, 402 F.3d at 933 (internal citation omitted) (citing *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962)). In *Taylor*, plaintiffs sought "disgorgement and return of either their stock investment or the return of the reasonable value thereof," which the State of California's Controller had escheated and was holding in trust. 402 F.3d at 929, 931. The Ninth Circuit concluded that "[b]ecause this is a constitutional claim for the return of property taken and held in custody by the state," plaintiffs' due process claim fell within the "constitutionally infirm" exception and was not barred by sovereign immunity. *Id.* at 934; *see also Suever v. Connell*, 439 F.3d 1142, 1147 (9th Cir. 2006) (explaining that "although the Eleventh Amendment ordinarily bars claims primarily requesting funds held in the State's coffers,

sovereign immunity does not apply to claims alleging such funds are individuals' property that the State improperly seized through . . . unconstitutional acts.").

Rhonda, like the plaintiffs in *Taylor* and *Suever*, alleges that the Clerk's action of requiring her to pay a filing fee to contest the government's taking of her Truck "was constitutionally infirm." *Taylor*, 402 F.3d at 933. Rhonda's request for disgorgement of the filing fee she paid to the Clerk is "a constitutional claim for the return of property taken and held in custody by the state." *Id.* at 934. Accordingly, the Eleventh Amendment does not bar this claim or the corresponding request for relief.[6]

B. Defendant Cameron is Not Absolutely Immune from Damages for His Assertion, in the Field, that Rhonda's Truck was Subject to Forfeiture.[7]

The simple fact that Defendant Cameron is a prosecutor, and thus immune from suit for certain actions he might take in the course of his role as an advocate, does not entitle him to absolute immunity against liability for his role in the seizure of Rhonda's Truck. In Claim 6, Rhonda alleges that Defendants Cameron and Hunt violated her Fourth Amendment rights when they seized her Truck without a warrant and without any lawful basis under Arizona's forfeiture statutes. [Compl. at 26-27] Defendant Cameron's role in the seizure is evident from the Notice of Property Seizure ("NOPS"). Defendant Cameron was contacted from the scene of the seizure on August 2, 2013. He approved the seizure "at 1645 hrs [and] gave [Defendant Hunt] authorization . . . to sign on his behalf" the NOPS. [Compl. Ex. 2] Defendant Cameron, the "official seeking absolute immunity[,] bears the burden of showing that such immunity is justified *for the function in*

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[6] In addition, "[t]he State of [Arizona's] sovereign immunity applies to the *state's* money." *Taylor*, 402 F.3d at 932 (emphasis added). A significant percentage of the filing fees the Clerk collects goes into County rather than State coffers. *See, e.g.*, A.R.S. § 12-284.03(A)(9)(b) (providing for deposit of "32.10 per cent" of Clerk-collected fees "[i]n the county general fund . . . in a county with a population of five hundred thousand persons or less").

[7] Law Enforcement strangely asserts that Defendant Voyles is immune from any claims for damages. [Law Enforcement MTD at 8-9] The only claim for which Rhonda seeks damages is Claim 6, and only Defendants Cameron and Hunt are named in that Claim. [Compl. at 26]

question." *Burns v. Reed*, 500 U.S. 478, 486 (1991) (emphasis added). Since Defendant Cameron has failed to meet his burden, this Court must deny him absolute immunity.

"[T]he actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). And "[l]ike a criminal prosecutor, a civil forfeiture prosecutor isn't entitled to absolute immunity merely because of his status as a prosecutor." *Torres v. Goddard*, 793 F.3d 1046, 1052 (9th Cir. 2015). Instead, courts "must evaluate each act a civil forfeiture prosecutor took and determine whether the prosecutor was performing a function that's protected by absolute immunity." *Id*. at 1052-53 (citing *Milstein v. Cooley*, 257 F.3d 1004, 1011-13 (9th Cir. 2001) (evaluating absolute immunity act by act)). Prosecutors are entitled to absolute immunity "when performing the traditional functions of an advocate," *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997), but when "'cast [] in the role of an administrator or investigative officer rather than that of advocate,'" prosecutors are not entitled to this immunity. *Id*. at 125 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). More specifically, "[w]hen the functions of prosecutors and [police officers] are the same . . . the immunity that protects them is also the same." *Buckley*, 509 U.S. at 276.

Applying these well-established rules in *Torres*, the Ninth Circuit concluded that a forfeiture prosecutor was entitled to absolute immunity for presenting warrant applications to a state court judge for approval and for overseeing the preparation of the applications, including reviewing and editing the factual affidavits sworn to by detectives. 793 F.3d at 1053. The same prosecutor, however, was not entitled to absolute immunity for executing the seizures covered by those same warrants. *Id*. at 1055-56. In reaching this conclusion, the court consulted the Arizona forfeiture statutes and noted that these laws "make clear that the seizure of property pursuant to a seizure warrant is the function of police officers, not prosecutors." *Id*. at 1055 (citing A.R.S. § 13-4301(8)). Moreover, in rejecting the prosecutor's argument that he was entitled to absolute immunity for the execution of the warrants, the court explained that such a sweeping, status-based claim "can't be squared with the Supreme Court's reasoning in *Kalina*, where the Court distinguished between the

prosecutor's preparation and filing of the information and motion for an arrest warrant (which were shielded by absolute immunity), and her *personal* attestation to the factual allegations in the probable cause certification (which was not)." *Id*. at 1055-56. In *Torres*, just as in Rhonda's case, personally approving the seizure for forfeiture and of the recitations in the NOPS "cast[s] the prosecutor in the role of a witness, not an attorney." *Id*. at 1056.

The Complaint demonstrates that Defendant Cameron violated Rhonda's Fourth Amendment rights when he made a field-based decision that probable cause existed to seize Rhonda's Truck for forfeiture under Arizona's laws. The full title of the NOPS is "Notice Of Property Seizure & Pending Uncontested Forfeiture." [Compl. Ex. 2] The NOPS is a notice of "seizure for forfeiture," which according to the Forfeiture Laws "means seizure of property by a peace officer coupled with an *assertion by the seizing agency or by an attorney for the state* that the property is subject to forfeiture." A.R.S. § 13-4301(9) (emphasis added). The signature on the NOPS, here Defendant Cameron's, functions as the "assertion . . . that the property is subject to forfeiture." *Id.*

Defendant Cameron's assertion is analogous to the *Kalina* prosecutor personally attesting to factual allegations in a probable cause certification—for which she was *not* absolutely immune. Asserting that property is subject to forfeiture to justify a warrantless seizure is simply not "the traditional function[] of an advocate" and is therefore not shielded by absolute immunity. *Kalina*, 522 U.S. at 131. Indeed, as *Torres* instructs, the statute itself compels this outcome because the assertion that property is subject to forfeiture can be made "by the seizing agency or by an attorney for the state." A.R.S. § 13-4301(9). Thus, if Defendant Cameron were absolutely immune for this assertion it would lead to the prohibited "'incongruous' result where a prosecutor performing the function of a police officer would be entitled to absolute immunity merely because of his status as a prosecutor." *Torres*, 793 F.3d at 1056 (citing *Buckley*, 509 U.S. at 275 n.6). "When the functions of prosecutors and [police officers] are the same . . . the immunity

that protects them is also the same." *Buckley*, 509 U.S. at 276. Defendant Cameron is not entitled to absolute immunity against Rhonda's Fourth Amendment claim.[8]

C. Defendants Cameron and Hunt are Not Entitled to Qualified Immunity Because it was Clearly Established in 2013 that a Warrantless and Lawless Seizure of Property Violates the Fourth Amendment.

In clear violation of her Fourth Amendment rights, Defendants Cameron and Hunt seized Rhonda's Truck for forfeiture without a warrant and without a lawful basis under state law. Their actions contravened even the most basic understanding of the Fourth Amendment; they are not entitled to qualified immunity for this trampling of the Constitution.

The Supreme Court has explained that "qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The purpose of qualified immunity is to strike a balance between the competing "need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. Two questions bear on the issue of whether Defendants are entitled to qualified immunity: "first, [courts] decide whether the officer violated a plaintiff's constitutional right; if the answer to that inquiry is 'yes,' [courts] proceed to determine whether the constitutional right was 'clearly established in light of the specific context of the case' at the time of the events in question." *Mattos v.*

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[8] In addition to being the notice of forfeiture, the NOPS also appears to serve the statutory directive that "[i]f a forfeiture is authorized by law, the attorney for the state may make uncontested civil forfeiture available to owners of and interest holders in personal property . . . ." A.R.S. § 13-4309. As a result, Defendant Cameron's signature on the NOPS serves two functions—asserting that the property is subject to forfeiture and making uncontested civil forfeiture available. Rhonda seeks damages only for Defendant Cameron's assertion that her Truck was forfeitable, an action that is not shielded by absolute immunity because it could have been performed by an officer or a prosecutor. The fact that Law Enforcement chose to make the NOPS form serve two functions—one that can be performed by either an officer or a prosecutor, and one that can only be performed by a prosecutor—cannot expand the scope of absolute immunity for the assertion that Rhonda's Truck was forfeitable.

Agarano, 661 F.3d 433, 440 (9th Cir. 2011) (en banc) (quoting *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009)). The Supreme Court has instructed that courts should "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson*, 555 U.S. at 236.

1. The Warrantless and Lawless Seizure of Rhonda's Truck Violated the Fourth Amendment.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. It is a fundamental tenet that "[a] seizure conducted without a warrant is *per se* unreasonable under the Fourth Amendment–subject only to a few specifically established and well delineated exceptions." *United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001) (citation omitted); *see also United States v. Place*, 462 U.S. 696, 701 (1983) ("In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized."). "The burden is on the Government to persuade the district court that a seizure comes 'under one of a few specifically established exceptions to the warrant requirement.'" *Hawkins*, 249 F.3d at 872 (citation omitted).

Here, the warrantless taking of Rhonda's Truck was a seizure for purposes of the Fourth Amendment because it "meaningful[ly] interfer[ed] with [her] possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Claiming that the seizure was nonetheless reasonable and Defendants Cameron and Hunt are entitled to qualified immunity, the Law Enforcement Motion does not identify a single applicable exception to the warrant requirement.

a. Forfeiture is not authorized for burglary, the offense Defendants Cameron and Hunt claimed give them the right to seize the Truck.

In addition to being presumptively unreasonable because it was warrantless, the seizure of Rhonda's Truck was unreasonable because it was without any basis in state law. The Forfeiture Laws provide that "[p]roperty subject to forfeiture . . . may be seized

for forfeiture by a peace officer . . . [b]y making a seizure for forfeiture without court process if . . . [t]he peace officer has probable cause to believe that the property is subject to forfeiture." A.R.S. § 13-4305(A)(3)(c). The statute specifies that "[a]ll property . . . described in a statute providing for its forfeiture is subject to forfeiture." A.R.S. § 13-4304. According to the NOPS, forfeiture of Rhonda's Truck was authorized "particularly" by A.R.S. § 13-1506(A)(1). [Compl. Ex. 2] But this provision, which proscribes burglary in the third degree, does not authorize forfeiture, and no other provision of Arizona law authorizes forfeiture for this offense.

b. Neither Defendants Cameron and Hunt, nor the Court, can rewrite the Forfeiture Laws to excuse their mistake.

Doubling down on the lawless nature of its seizure, Law Enforcement claims that the fact that the seizure was unauthorized by law does not matter and does not make it unreasonable. It argues that because forfeiture is authorized as a remedy for *racketeering* (A.R.S. § 13-2314), and because the definition of racketeering includes *theft* (A.R.S. § 13-2301(D)(4)(b)(v)), and because the definition of *theft* has certain things in common with *burglary*, the seizure was authorized by law. [*See* Law Enforcement MTD at 16]

This tortured argument invites, without justification and in violation of basic tenets of federalism, this Court to rewrite Arizona's forfeiture and racketeering laws to sweep even more broadly than they already do. Furthermore, Law Enforcement's argument contravenes two fundamental canons of statutory interpretation. First, pursuant to the maxim e*xpressio unius est exclusio alterius*, items not on a list are presumed to have been omitted intentionally. *Silvers v. Sony Pictures Entm't*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (citation omitted) ("The doctrine of *expressio unius est exclusion alterius* as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions."). The statute's list of offenses that qualify as racketeering is lengthy, specific, and exclusive. *See* A.R.S. § 13-2301(D)(4). Burglary—in the third degree or otherwise—is not on this list. Basic principles foreclose Law Enforcement's argument

that forfeiture is authorized for burglary in the third degree because it is authorized for theft, which is sort of, kind of like burglary. *Compare* A.R.S. § 13-1506(A)(1) *with* A.R.S. § 13-1801 *et seq*. Moreover, even if the Court were to perceive some ambiguity in the definition of racketeering permitting the expansion advocated by Law Enforcement, "the rule of lenity requires that doubts be resolved in favor of the defendant and against imposing the harsher punishment." *State v. Anderson*, 199 Ariz. 187, 193, 16 P.3d 214, 220 (Ct. App. 2000). Since "[*i*]*n rem* proceedings seeking the forfeiture of property connected to criminal activity are functionally analogous to criminal proceedings," the rule of lenity applies here. *Torres*, 793 F.3d at 1052. In essence, Law Enforcement claims that the seizure of Rhonda's Truck was reasonable even though it was based on an offense for which forfeiture is not available because forfeiture is available for other offenses. This argument is untenable.[9]

2. None of the Other Grab-bag Arguments Made by Defendants Cameron and Hunt Relate to, Much Less Excuse Them From Liability For, Their Actions Here.

In addition to the "theft is kind of like burglary" argument it urges, Law Enforcement further thrashes about, offering a few other legally incorrect and irrelevant arguments to excuse Defendants Cameron and Hunt's constitutional violation. First, Law Enforcement claims that *Maryland v. Dyson*, 527 U.S. 465 (1999), and *In re United States Currency in the Amount of $26,980.00*, 193 Ariz. 427, 973 P.2d 1184 (Ct. App. 1998), demonstrate that the seizure of Rhonda's Truck was reasonable. [Law Enforcement MTD

[9] Defendant Cameron and Hunt's mistake in thinking that burglary in the third degree authorizes forfeiture is not a reasonable mistake of law as defined by the Supreme Court in *Heien v. North Carolina*, 135 S. Ct. 530 (2014). In *Heien*, the Court explained that "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable." 135 S. Ct. at 539. In applying the mistake of law rule, "[a] court tasked with deciding whether an officer's mistake of law can support a seizure thus faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not." *Id*. at 541. Here, it requires only basic reading skills, no hard interpretative work, to see that neither A.R.S. § 13-1506(A)(1), A.R.S. § 13-2301(D)(4), nor any other statute authorizes forfeiture for burglary in the third degree. As a result, Defendant Cameron and Hunt's mistake of law was not reasonable under the Fourth Amendment.

at 15] Neither case is relevant to the Fourth Amendment issue here. *Dyson* held that the Fourth Amendment permits officers to perform a warrantless *search* of a car if they have probable cause to believe that the car contains illegal drugs. 527 U.S. at 466-67. Defendants Cameron and Hunt's actions here have nothing to do with drugs (despite the false statements in the NOPS), and Rhonda does not challenge a *search* but rather a seizure for forfeiture. In *$26,980.00*, the court unremarkably approved of a seizure of cash because "[a]t the time the property was 'seized for forfeiture' . . . the officers had probable cause to believe that the property was subject to forfeiture," due to its suspected involvement in narcotics offenses. 193 Ariz. at 430, 16 P.3d at 1187. But there, forfeiture was authorized by statute for both narcotics offenses and money laundering, A.R.S. § 13-2301(D)(4)(b)(xi), (xxvi). Here there was *no legal basis* for the seizure, hence Rhonda's Sixth Claim for Relief.

Next, again straining to link a case barring a plaintiff from court with the case before this Court, Law Enforcement cites *Moreland v. Las Vegas Metropolitan Police Department*, 159 F.3d 365, 369 (9th Cir. 1998), for the notion that Rhonda lacks standing to allege a Fourth Amendment violation because the NOPS was given to her son in her absence. [Law Enforcement MTD at 16] In *Moreland*, the court explained that the "survivors of an individual killed as a result of an officer's excessive use of force may assert a Fourth Amendment claim on that individual's behalf [only] if the relevant state's law authorizes a survival action," because "'Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.'" 159 F.3d at 369 (alteration in original) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). *Moreland* has no bearing on this case. The Truck belonged to Rhonda. Rhonda was personally deprived of her property. It was her Fourth Amendment rights that Defendants Cameron and Hunt violated when they interfered with her possessory interest in that property. *Jacobsen*, 466 U.S. at 113. Her claims seek redress for her "personal rights"; rights specifically protected by Section 1983.

In sum, Defendants Cameron and Hunt seized Rhonda's Truck without a warrant and outside of any exception to the warrant requirement, alleging that the Truck was subject to forfeiture based on a statute that plainly does not authorize this remedy. The seizure was unreasonable and violated Rhonda's Fourth Amendment rights.

3. In 2013, It was Clearly Established that Warrantless and Lawless Seizures of Property Violate the Fourth Amendment.

Because Defendants Cameron and Hunt violated the Fourth Amendment when they seized Rhonda's Truck, the Court must next determine "whether the constitutional right was 'clearly established in light of the specific context of the case' at the time of the events in question." *Mattos*, 661 F.3d at 440 (citation omitted). Since it was clearly established, Defendants Cameron and Hunt are not entitled to qualified immunity.

"For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citation omitted). Notably, this standard does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (citations omitted). The "'state of the law' was sufficiently clear if it gave 'fair warning' to an officer that his conduct was unconstitutional." *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 454 (9th Cir. 2013) (citation omitted).

When Rhonda's Truck was seized in 2013, a reasonable officer would have understood that the Fourth Amendment does not permit the warrantless seizure of property based on a state law that does not authorize its seizure for forfeiture. Indeed, "[t]his is one of those rare cases in which the constitutional right at issue is defined by a standard that is so 'obvious' that . . . qualified immunity is inapplicable, even without a case directly on point." *Id.* at 455; *see also Jones v. Cnty. of Los Angeles*, 802 F.3d 990, 1005 (9th Cir. 2015) ("the violation is sometimes so 'obvious' as to be clearly established 'even without a body of relevant case law.'") (quoting *Brosseau v. Haugen*, 543 U.S. 194,

198-99 (2004)). In other words, the very text of the Fourth Amendment itself was fair warning to Defendants Cameron and Hunt that their actions were unconstitutional. Because the violation at issue was clearly established, Defendants Cameron and Hunt do not enjoy qualified immunity.

In trying to avoid this result, Law Enforcement offers more constitutionally specious arguments and irrelevant citations. Law Enforcement claims that it is not clearly established that a "technical defect" renders a seizure unreasonable. [Law Enforcement MTD at 16] The Constitution is not a technicality, and failing to provide a legal basis for forfeiture is not a mere "defect" in adherence to it. Seizing property without a warrant is *presumptively unconstitutional* unless some specific authority provides otherwise. A warrantless seizure without any legal justification is not a "technical defect," it is a *per se* violation of the Fourth Amendment.

Also, none of the cases Law Enforcement cites are actually relevant to its "technical defect" argument or to whether the legality of the seizure in Rhonda's case was clearly established in 2013.[10] Law Enforcement's assertion that "technical defects in search warrants do not violate the Fourth Amendment" is also useless to Defendants Cameron and Hunt since there was no warrant in this case and since the Fourth Amendment violation here was a seizure, not a search. [*Id*. at 17]

Finally, Law Enforcement claims that notwithstanding the fact that the seizure was unauthorized by law, it was constitutionally reasonable because the NOPS contained some relevant information. [*Id*.] Here again, as before with its failed argument that burglary is kind of like theft, close enough is not constitutionally good enough.

[10] For example, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." So what? And *Moore v. Marketplace Restaurant, Inc*., 754 F.2d 1336, 1349 (7th Cir. 1985), observed that "an alleged violation of a state statute does not give rise to a corresponding § 1983 violation, unless the right encompassed in the state statute is guaranteed under the United States Constitution." But Rhonda's rights *are* guaranteed by the Constitution.

Defendants Cameron and Hunt seized the Truck without a warrant. Unless they did so pursuant to a recognized exception to the warrant requirement, that seizure is unconstitutional. They had no such exception, and they do not enjoy qualified immunity as to Rhonda's claim that the seizure violated her Fourth Amendment rights.

4. Longstanding Ninth Circuit Law Makes Clear that Rhonda has Standing to Seek Prospective Relief.

Rhonda's Due Process and First Amendment injuries are directly traceable to Law Enforcement's application of the Forfeiture Laws against her. As a result, Rhonda has standing to seek prospective relief in this case. In claiming that Rhonda lacks standing, Defendants make superficial reference to a single Supreme Court case and entirely ignore the Ninth Circuit's binding precedent about how to apply that case.

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 149 (2010). Applying these general principles, the Supreme Court specifically articulated the requirements for standing to seek equitable relief in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In *Lyons*, the Court concluded that the plaintiff did not have standing to seek prospective equitable relief as a remedy for being subjected to a chokehold *that the police department's policy did not authorize*. *Id*. at 110. Focusing on the injury requirement of Article III standing, *Lyons* requires that a plaintiff seeking equitable relief must show that she "has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct." *Id*. at 101-02 (citations omitted).

Relying on and applying *Lyons*, the Ninth Circuit has held that a plaintiff can establish likelihood of a future injury sufficient to have standing for prospective relief where she can "show that the defendant had, at the time of the injury, a written policy, and that the injury 'stems from' that policy. In other words, where the harm alleged is directly traceable to a written policy, there is an implicit likelihood of its repetition in the immediate future." *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001), *abrogated on*

other grounds by Johnson v. California, 543 U.S. 499, 504-05 (2005) (internal citations omitted); *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001); *see also Nordstrom v. Ryan*, 762 F.3d 903, 911 (9th Cir. 2014) (articulating the same rule).

And because statutes are the ultimate "written policy," where plaintiffs suffer an injury traceable to the enforcement of a statute or regulation,[11] they establish a likelihood of reoccurrence sufficient to confer standing for prospective relief.[12] For example, in *Taylor v. Westly*, 488 F.3d 1197, 1200-01 (9th Cir. 2007), the Ninth Circuit applied *Lyons* and *Armstrong* and held that plaintiffs established likelihood of recurrence where their property had escheated to the state, because the actions plaintiffs challenged, like the actions Rhonda challenges here, were codified under state law. *See also Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) ("The causal link between the government's actions and Mayfield's injury is not disputed. Nor is the fact that the government's actions were authorized by FISA, which constitutes both the 'written policy' and 'pattern of officially sanctioned behavior' that gave rise to standing under *Armstrong*."); *see also* Linda E. Fisher, *Caging Lyons: The Availability of Injunctive Relief in Section 1983 Actions*, 18 Loy. U. Chi. L.J. 1085, 1109 (1987) ("Appellate courts have distinguished *Lyons* and have held that justiciability existed under a reasonable likelihood standard in cases in which plaintiffs challenged statutes as unconstitutional.").

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[11] Law Enforcement claims that Rhonda has not identified a municipal policy, custom, or practice that was the moving force behind the constitutional injuries she suffered. [Law Enforcement MTD at 9-10, 17] As is evident from the Complaint, Rhonda alleges that Law Enforcement's policy, custom, *and* practice of using the Forfeiture Laws to enrich themselves and their agencies caused her injuries. Absent this Law Enforcement practice, the Forfeiture Laws would not have been used against Rhonda since state law allows but does not mandate the use of civil forfeiture. A.R.S. § 13-4302 (empowered attorneys "*may* commence a proceeding in the superior court . . .") (emphasis added). Thus, the unpublished order in *Kidd v. Los Angeles Police Department*, No. CV 10-0104 VBF, 2010 WL 2104669, at *1 (C.D. Cal. May 24, 2010), where the only defendant was the Los Angeles Police Department but "the only policy Plaintiff identifie[d] [was] a policy of the Los Angeles City Clerk's Office," *id.* at *3, does nothing to advance Law Enforcement's argument. Rhonda has sued Defendants Voyles and Babeu because *their* practice of using the Forfeiture Laws for *their* benefit was the direct moving force behind her injuries.

[12] The same legal standard applies to injunctive and declaratory forms of equitable relief. *See Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006).

Here, Rhonda's injuries are "directly traceable" to Law Enforcement's practice of using of the Forfeiture Laws and, as a result, "there is an implicit likelihood" that these injuries will be repeated "in the immediate future." *Armstrong*, 275 F.3d at 861. Unlike the plaintiff in *Lyons*, who suffered a chokehold that was *not* authorized by a policy, Rhonda's constitutional injuries here resulted from Defendants' practices of enforcing, and decisions to enforce, state law.[13] As was the case in *Mayfield*, the "causal link between the government's actions and [Rhonda's] injury is not disputed . . . [and] the government's actions were authorized by [the Forfeiture Laws]." 599 F.3d. at 971. Thus, Defendants' challenge to Rhonda's standing fails. She has standing to pursue prospective relief.[14]

IV. ARIZONA'S FORFEITURE LAWS ALLOW FINANCIALLY-INTERESTED GOVERNMENT ACTORS TO DEPRIVE RHONDA OF HER PROPERTY, CHARGE HER A FEE TO ACCESS A NEUTRAL DECISION-MAKER, AND PUNISH HER WITH MORE FEES IF SHE DOES NOT WIN HER CASE. THESE LAWS VIOLATE DUE PROCESS AND THE FIRST AMENDMENT.

Defendants' arguments on the merits are decidedly shorter than, though just as weak as, their arguments to avoid the merits. Defendants cannot seriously deny that they were, and remain, financially, unconstitutionally motivated to separate Rhonda from her property. There is also no means to fairly deny that Defendant Cameron bullied Rhonda out of court, using a statute that expressly authorized him to do just that, despite the fact that such behavior violates the First and Fifth Amendments. And the Due Process Clause and First Amendment make clear, despite Defendant Stanford's arguments to the contrary, that Rhonda cannot, in a quasi-criminal proceeding which is her only chance to fight for her property, charge a substantial fee for the right to wage that fight.

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[13] Also notable is that Rhonda did nothing in particular to fall victim to the laws when the Truck was seized. The ordinary activities she performed, owning and lending her son a truck, are things she does and will continue to do.

[14] Since Rhonda never got her Truck back, she is also suffering from "present adverse effects" of the constitutional injuries she suffered. *Lyons*, 461 U.S. at 102.

A. Due Process Forbids Government Actors from Taking Private Property, Adjudicating Claimants' Rights, and Prosecuting the Same Cases in Court When those Government Actors Have a Direct and Substantial Financial Interest in Outcomes.

The U.S. Constitution's Fifth and Fourteenth Amendment Due Process Clauses require impartial decisionmakers in both criminal and civil cases. U.S. CONST. amends. V, XIV; *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Neutrality furthers procedural due process by preventing mistaken deprivations of life, liberty, or property, and by preserving both the appearance and the reality of fairness, which in turn encourages active participation by affected individuals in the decision-making process. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976), and *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

Unconstitutional bias is pervasive in Arizona's Forfeiture Laws. First, in so-called "uncontested forfeiture," prosecutors function as adjudicators and are directly financially incentivized to deny claims. *See* A.R.S. § 13-4309 (describing process for uncontested forfeiture wherein "attorney for the state" is also ultimate decision maker); [*see also* Compl. ¶ 67; Compl. Ex. 4 (Declaration of Forfeiture signed by Cameron)] This financial incentive also infects judicial forfeiture, where profit-seeking motivates police officers and prosecutors to vigorously use the Forfeiture Laws, including the threat of pursuing attorneys' fees against those like Rhonda who attempt to fight back, because their enforcement decisions have a significant impact on their agency budgets. *Cf. United States v. $186,416 in U.S. Currency*, 590 F.3d 942, 950 (9th Cir. 2009) (recognizing that "[l]aw enforcement agencies today depend, at least in part, on the proceeds of forfeiture actions to finance their activities" and recognizing "the government's strong financial incentive to prevail in civil forfeiture actions"). Taking, as the Court must do, all of Rhonda's allegations of material fact as true and construing them in the light most favorable to her, Rhonda has stated Due Process claims which are more than "plausible on [their] face" and thus more than sufficient to require that Defendants' Motions be denied. *Cousins*, 568 F.3d at 1067-68; *Iqbal*, 556 U.S. at 678.

1. In Uncontested Forfeiture, Prosecutors are Biased Adjudicators in Violation of Due Process.

In uncontested forfeiture, Defendant Voyles is the prosecutor, the adjudicator, and the profiteer. *See* A.R.S. § 13-4309 (uncontested forfeiture). This process plainly violates the constitutional requirement that adjudicators be impartial. Indeed, since 1927 it has been clear that due process is offended when government officials act both as adjudicators and maintain a "direct personal pecuniary interest" in the outcome of the case before them. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). This interest may result from the certainty that the adjudicator himself will profit from one outcome but not another, *see id.*; *Connally v. Georgia*, 429 U.S. 245, 250 (1977) (per curiam), or it may result from the adjudicator's official responsibility for the finances of a government body that derives a "substantial portion" of its budget from fines, forfeitures, costs, and fees associated with conviction, *Ward v. Village of Monroeville*, 409 U.S. 57, 58-59 (1972). Arizona's uncontested forfeiture process is infected with both personal and institutional bias.

The financial incentive doctrine derives from the Supreme Court's decision in *Tumey*, where the mayor of a small town presided over hearings for violations of Ohio's Prohibition Act. 273 U.S. at 516-17. Fines resulting from the mayor's convictions were distributed to the city, the state, and to city employees charged with enforcing the Prohibition Act. *Id.* at 517-19. Those fines also compensated the mayor himself for his time spent adjudicating such cases. *Id.* at 520. The fine collection system was structured so as to stimulate local enforcement of the Prohibition Act. *Id.* at 521. The mayor also owned a house in the village, which had benefited from improvements funded by conviction fines. *Id.* The Supreme Court held that the mayor's "direct personal pecuniary interest" in conviction, and the conflict between the mayor's adjudicative responsibility and his institutional interest in the health of the town's finances, violated the Fourteenth Amendment's Due Process Clause. *Id.* at 532-34. The Court stated unequivocally that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him

not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.* at 532.

The Court built on *Tumey* in *Ward*, where it held that due process was violated even where a mayor-judge received no personal profit from his convictions. 409 U.S. at 60. The mayor in *Ward* had broad executive powers, including responsibility for the town's finances. *Id.* at 58. Fines resulting from the mayor's convictions constituted a "major part of village income." *Id.* Even though the mayor did not personally profit from his convictions, the Supreme Court held that the mayor's "executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court," thus violating Fourteenth Amendment Due Process in the trials of defendants before him. *Id.* at 60; *see also Connally*, 429 U.S. at 250 (holding that Due Process was violated where an unsalaried justice of the peace received payment for search warrants issued, but not for warrant applications denied); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (finding a due process violation where an Alabama Supreme Court justice cast the deciding vote and wrote the opinion in a case upholding a punitive damages award, while he was the lead plaintiff in a nearly identical pending civil case); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that due process was violated where an administrative board composed of optometrists presided over a hearing against competing optometrists, as the board members had a competitive, pecuniary interest of "sufficient substance.").

The Court has made clear repeatedly that to violate due process, an adjudicator's interest need not actually influence the outcome of the case, *Aetna*, 475 U.S. at 825, so long as the procedure is objectively one that "would offer a possible temptation to the average man." *Tumey*, 273 U.S. at 532; *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009) ("The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'").

Applying the Supreme Court's rules, the Ninth Circuit has established additional guidance for due process claims arising from adjudicators' financial interest. The Ninth Circuit separates *Tumey* and *Ward* into two prongs of impermissible judicial financial interest: personal (*Tumey*) and institutional (*Ward*). *See Alpha Epsilon Phi Tau Chapter Housing Ass'n v. City of Berkeley*, 114 F.3d 840, 844-45 (9th Cir. 1997). Due process imposes a *per se* bar on any *personal* financial interest, but it permits a *de minimis institutional* financial interest. *Id*. In the institutional bias context, the court has warned against situations where "[t]he agency that is the decision-maker is [] funded in operations that it conducts." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1309-10 (9th Cir. 2003) (Noonan, J., concurring).

Assuming the truth of the facts asserted in her Complaint, Rhonda has stated a plausible claim that uncontested forfeiture violates Due Process. In uncontested forfeiture, Defendant Voyles performs, at minimum, quasi-judicial functions since he receives evidence from claimants and rules on disputed factual and legal questions. *Marshall*, 446 U.S. at 247; [*see also* Compl. Ex. 4 (Declaration of Forfeiture of Defendant Voyles by Defendant Cameron) (citing various authorities and explaining (error-filled) legal rationale)] He has a personal interest in the outcome of cases, violating *Tumey*, and a substantial institutional interest, violating *Ward*.

a. Defendant Voyles has an unconstitutional personal interest in uncontested forfeiture cases.

To satisfy the personal financial interest prong, Rhonda has offered evidence that like the mayor in *Tumey* whose house had benefited from improvements funded by conviction fines, forfeiture proceeds are used to pay for Defendant Voyles' home security system. 273 U.S. at 521; [Compl. Ex. 22] In addition, Defendant Voyles has publicized his unilateral decisions to fund certain community groups with forfeiture monies, which has advanced his political career. [Compl. ¶ 113] Since there is a *per se* bar on adjudicators having any personal financial interest in the matters they are empowered to

decide, Defendant Voyles' personal interests as alleged in Rhonda's Complaint support a more-than-plausible Due Process claim. *See Alpha Epsilon Phi*, 114 F.3d at 844-45.

b. Defendant Voyles has an unconstitutional institutional interest in uncontested forfeiture cases.

Rhonda has also offered evidence that Defendant Voyles has a substantial institutional financial interest in the outcome of uncontested forfeiture cases, which violates Due Process under *Ward*. At a minimum, as alleged in the Complaint, Defendant Voyles pays personnel and retirement contribution costs with forfeiture money. [Compl. Ex. 23] In addition, on their face, the Forfeiture Laws "create a budget for [County Attorneys] that, in the conduct of more [forfeitures], make [them] independent of the normal appropriation process . . . giv[ing] [them] a perpetual revolving fund not dependent on [the Legislature]." *Earth Island Inst.*, 351 F.3d at 1310. Thus, Rhonda has stated a plausible Due Process claim because Defendant Voyles has more than a *de minimus* institutional interest in deciding uncontested forfeiture cases against claimants like herself.[15]

At a minimum, Defendant Voyles' ability to personally and institutionally gain from uncontested forfeiture cases is objectively one that "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused," *Tumey*, 273 U.S. at 532. Indeed, whether Defendant

[15] Even to the extent it is appropriate at this early procedural stage to consider the actual percentage of revenues Defendant Voyles gets from forfeiture, and it is not, the institutional gain alleged here is far greater than in cases where the Ninth Circuit has not found a due process violation. *See Hirsch v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 713-14 (9th Cir. 1995) (finding no due process violation where the California Supreme Court's assessment of disciplinary fines contributed to approximately 1% of the State Bar's funds, such that the State Bar fund did not depend on assessed fines to pay the California justices' salaries); *Commonwealth of N. Mariana Islands v. Kaipat*, 94 F.3d 574, 582 (9th Cir. 1996) (finding no due process violation where fines levied by a superior court constituted about 5% of the budgeted costs of building a new courthouse, where the superior court judges bore no responsibility for funding the construction); *Alpha Epsilon Phi*, 114 F.3d at 847 (finding no due process violation where the Berkeley Rent Stabilization Board served both executive and adjudicative functions and received approximately 5% of its annual funding from the fees it assessed).

Voyles is "actually, subjectively biased" or not, this system is undoubtedly one that creates the "potential for bias." *Caperton*, 556 U.S. at 881; *see also Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (observing that "the adjudicator's pecuniary or personal interest in the outcome of the proceedings may create an *appearance of partiality* that violates due process, even without any showing of actual bias").[16]

The State does not deny that Defendant Voyles has a significant financial interest in the outcome of forfeiture cases like Rhonda's.[17] Instead, the State claims that Defendant Voyles' lack of neutrality is cured by the Superior Court's role in finalizing forfeitures. [State MTD at 11-14] As the law reflects, the Superior Court's role is not sufficient to cure the bias that has already infected the proceeding.[18] As explained further below, where the County Attorney choses to make uncontested forfeiture available—which is entirely within the attorney's discretion, A.R.S. § 13-4309—a claimant may decide to first seek return of her property through this procedure in order to avoid paying the Superior Court's filing fee and avoid exposure to liability for the County Attorney's fees. If her claim is denied by the very County Attorney who initiated the proceeding to begin with and who stands to gain financially, she then has the option again to pay the

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[16] Defendant Voyles's participation in both the investigative and adjudicative parts of uncontested forfeiture are also cause for concern. In *Withrow v. Larkin*, 421 U.S. 35 (1975), the Court held that the mere fact that investigative and adjudicative powers were combined in a state administrative agency did not violate due process absent any additional evidence that the agency's dual responsibility created a conflict of interest. *Id.* at 48-52. But the Court cautioned that federal courts must "be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." *Id.* at 54. That bias leaps rather than lurks here where Defendant Voyles has investigative and adjudicative powers *and* he financially benefits from the exercise of his discretion in performing these functions.

[17] Although the State, through Attorney General Brnovich, has intervened to defend the constitutionality of the Forfeiture Laws, he recently said in a press interview: "I know it is an effective tool for law enforcement. However, the potential for abuse or misuse is there." Andy Howell, *Brnovich: Forfeiture laws need to change,* Casa Grande Dispatch (Sept. 9, 2015), http://www.trivalleycentral.com/casa_grande_dispatch/area_news/brnovich-forfeiture-laws-need-to-change/article_3fa8dd3e-5709-11e5-96f8-27f1f2c34e6b.html.

[18] It is especially insufficient because the Forfeiture Laws allow, indeed incentivize, prosecutors like Defendants Cameron and Voyles to bully claimants out of court with the threat of assessing the State's attorneys' fees against them.

Superior Court's filing fee and expose herself to the risk of attorneys' fee liability. A.R.S. § 13-4309(3)(c). If she chooses not to take these additional financial risks, the County Attorney is instructed to file a "written application showing jurisdiction, notice and facts sufficient to demonstrate probable cause for forfeiture." A.R.S. § 13-4314(A). Upon this showing, "the court shall order the property forfeited to the state." *Id.* This requirement is minimal at best and a rubber-stamp at worst, because the County Attorney usually faces, and faced here, no opposition. So the proceeding before the Superior Court is entirely one-sided and non-adversarial. *See Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (observing "[c]learly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised"). Thus, the State's claim that this constitutes meaningful "[j]udicial oversight, review, and adjudication" rings hollow. [State MTD at 14] In uncontested forfeiture, Defendant Voyles is the real decision-maker, and because Rhonda has alleged facts showing that he has both a personal and substantial institutional financial interest in the outcomes of the cases he decides, she has stated a plausible Due Process claim.

2. Judicial Forfeiture Violates Due Process Because the Prosecutors and Police Officers Using the Law Enjoy Significant Financial Gain From Their Enforcement Decisions.

The Supreme Court's decision in *Marshall*, 446 U.S. at 238, makes clear that the judicial forfeiture proceeding against Rhonda was also unconstitutionally tainted with Defendant Voyles' and Babeu's bias towards enforcement that is financially lucrative for them. To be sure, the procedural due process interests in accurate adjudication and fair process are "not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties." *Marshall*, 446 U.S. at 248-49. Still, procedural due process imposes a limit on "scheme[s] injecting a personal interest, financial or otherwise, into the enforcement process." *Id.* at 249. Indeed, the Court stated that such schemes in some contexts "raise serious constitutional questions." *Id.* at 250.

In *Marshall*, the Court relied on three factors to find that regional Department of Labor administrators serving a prosecutorial function did not have a sufficient financial interest in enforcement to violate due process: (1) no governmental official stood to profit economically from vigorous enforcement of the Act; (2) the enforcing agent was not financially dependent on the maintenance of a high level of penalties, as the penalties collected constituted less than 1% of the agency's annual budget; and (3) the agency's national office determined the amount of funds to be distributed to regional agency offices, so the regional administrators had no direct financial incentive to increase their enforcement efforts. *Id.* at 250-52.

Under the Forfeiture Laws though, all three of the *Marshall* factors weigh heavily in favor of establishing a Due Process violation. First, Defendant Voyles and Defendant Babeu—in addition to all Arizona County Attorneys and Sheriffs—stand to profit substantially from vigorous enforcement of the Forfeiture Laws. As Rhonda alleges in the Complaint, law enforcement agencies are dependent on forfeiture monies for their continuing operations, paying for everything from traditional law enforcement equipment to office supplies, furniture, office refreshments, and even toilets. [Compl. ¶ 101] Defendant Voyles stands to gain both personally and institutionally from vigorous enforcement, as discussed above. And Defendant Babeu likewise profits from vigorous enforcement of the Forfeiture Laws. Most obviously (for now) the Arizona Public Safety Foundation, originally named the "Pinal County Sheriff's Office Justice Foundation," receives hundreds of thousands of dollars from forfeiture funds that Defendant Babeu helps to bring in the door. [Compl. ¶¶ 118-127] That same money is then recycled back into use by Defendant Babeu to purchase items like "[a]utomatic rifles for deputies to have for illegals involved in drug related situations." [Compl. Ex. 33] Thus, the first *Marshall* factor weighs strongly in Rhonda's favor. *See also Buritica v. United States*, 8 F. Supp. 2d 1188, 1193-95 (N.D. Cal. 1998) (expressing "grave concern" about a U.S. Customs Service program in which customs inspectors could receive cash rewards or other incentives for interdicting drug smugglers, and contrasting it with the policy in

Marshall, where due process was not violated because the government agents had no personal incentives to issue fines).[19]

The second *Marshall* factor is whether the government officials responsible for enforcement are financially dependent on the maintenance of a high level of penalties. In *Marshall*, where the Court found no due process violation, the penalties collected constituted less than 1% of the agency's annual budget. 446 U.S. at 245. In sharp contrast again, Arizona law enforcement officials, including Defendants Voyles and Babeu, rely heavily on forfeiture money. Indeed, the Arizona Prosecuting Attorneys' Advisory Commission advertised a Forfeiture Training by telling members that "an asset forfeiture practice that supplements other law enforcement activities provides an opportunity that is unique among governmental agencies - the direct augmentation of the agency's budget through the performance of its designated function." *Compare* Compl. Ex. 10, *with Marshall*, 446 U.S. at 246 (noting that "[t]he challenged provisions have not, therefore, resulted in any increase in the funds available to the [agency] over the amount appropriated by Congress."). It is common knowledge among Arizona law enforcement that budgetary needs directly affect the vigor with which they enforce the Forfeiture Laws. [*See* Comp. Ex. 11 at 7 ("When your bosses can't find any money in their budget they get depressed. When they get depressed they tell you to start doing forfeiture cases. . . . When you feel like a winner you go back to your jurisdiction and just start seizing everything in sight.")] Even before discovery, Rhonda has offered extensive evidence that law enforcement substantially depends on forfeiture money. [*See* Compl. ¶ 104, Exs. 14, 15 (the Arizona Department of Public Safety relies entirely on forfeiture monies to fund its bomb squad, S.W.A.T. team, and hazardous materials unit); Compl. ¶ 102, Ex. 12 (A

[19] Rhonda's case is distinguishable from *William Jefferson & Co. v. Board of Assessment and Appeals No. 3 ex rel. Orange County*, 695 F.3d 960, 966 (9th Cir. 2012), where the court found no improper financial incentive in part because the fees at issue were triggered "only when a taxpayer requests . . . written findings of fact" and the plaintiff was unable to "show[] that there is anything that [the fee-beneficiary] can do to encourage this request." Here, by contrast, Rhonda certainly did not request that the government embroil her in civil asset forfeiture proceedings to deprive her of her property.

Deputy County Attorney and Bureau Chief in Pima County told a reporter that "[w]hen the economy tanked and we lost a good part of our budget, we could absolutely not survive without [revenue from forfeiture]."); Compl. Ex. 13 (When asked by APAAC what uses his forfeiture funds were going to, one County Attorney wrote: "All of my [forfeiture] funds are used to supplement the salaries of my employees and office operating expenses. This use of my RICO funds has become necessary to avoid furloughs and/or layoffs as the county has cut back on staffing due to budget cuts.")]

This reliance on forfeiture money creates a realistic possibility that local law enforcement agencies' judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts. *Marshall*, 446 U.S. at 250.

The third factor that weighed against finding a due process violation in *Marshall* was that the agency's national office determined the amount of funds to be distributed to regional agency offices, so the regional administrators had no direct financial incentive to increase their enforcement efforts. *Id*. at 246. Once again, the exact opposite is true under the Forfeiture Laws. A.R.S. § 13-4315(A) and (B)(2), provide that "[a]ny property, including all interests in property, forfeited to the state under this title shall be transferred as requested by the attorney for the state to the seizing agency or to the agency or political subdivision employing the attorney for the state . . ." and "[i]f the property declared forfeited is an interest in a vehicle, the court shall order it forfeited to the local, state or other law enforcement agency seizing the vehicle for forfeiture or to the seizing agency." Thus, there is no statewide office that collects all forfeiture money and distributes it without regard to who brought in what. To the contrary, the Forfeiture Laws challenged here *require* that Defendants Voyles and Babeu have an "opportunity that is unique among governmental agencies[:]" the ability to "direct[ly] augment[] the agency's budget through" vigorous enforcement of the Forfeiture Laws. [Compl. Ex. 10] Under the Forfeiture Laws, individual law enforcement agencies get to keep the spoils of their efforts against people like Rhonda. The funds at each agency's disposal are directly proportional to the zeal of their enforcement efforts.

Thus, all three *Marshall* factors weigh heavily towards finding that in the judicial forfeiture context, county attorneys and sheriffs—including Defendants Voyles and Babeu—have a financial interest that distorts their enforcement decisions and therefore "raise[s] serious constitutional questions." *Marshall*, 446 U.S. at 249-50. Nowhere do Defendants Voyles and Babeu dispute this. Rhonda has therefore made a plausible Due Process claim.[20, 21]

B. The Constitution Forbids Defendant Voyles from Punishing Rhonda for Fighting the Government's Taking of her Truck.

The grotesqueness of Defendants' financial incentive to make sure Rhonda lost her Truck is compounded by Defendants' ability under the Forfeiture Laws to further impoverish her merely for daring to defend herself. Rhonda's right to contest the seizure of her Truck without fearing that her challenge to the government's action will cost her even more money is protected by the free speech and due process guarantees of the U.S. Constitution. Arizona's one-way attorneys' fee statute, which punishes claimants like Rhonda if they are not entirely successful in challenging the government's taking of their property, is unconstitutional.

[20] The State claims misleadingly that *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 619 (1989), controls Rhonda's financial incentive claims. [State MTD at 13] In *Caplin*, the Court determined that the federal drug forfeiture statute did not include an exemption for assets that a defendant wishes to use to pay an attorney who conducted his defense in the criminal case where forfeiture was sought and that the statute did not violate the Fifth or Sixth Amendments. The State's cobbled together bits of dicta aside—the Court in *Caplin* did not consider, much less reject, the Due Process implications of financial incentives baked into a civil forfeiture statute.

[21] In *State ex rel. Cnty. of Cumberland v. One 1990 Ford Thunderbird*, 852 A.2d 1114, 1124 (N.J. App. Div. 2004), the court rejected an argument that New Jersey's civil forfeiture statute violated Due Process because "[t]here are more similarities than differences between the situation in *Marshall* and the one presented here." As discussed at length above, the opposite is true in Rhonda's case. Moreover, the Superior Court of New Jersey's decision is not binding on this Court.

1. The First Amendment Bars Both Arizona's One-Way Attorneys' Fees Law and the Application of it to Rhonda.

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The Supreme Court has "recognized this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights,' and have explained that the right is implied by '[t]he very idea of a government, republican in form.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (alteration in original) (internal citations omitted). The *Noerr–Pennington* doctrine "derives from the First Amendment's guarantee of 'the right of the people . . . to petition the Government for a redress of grievances.'" *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). The "essence" of the "doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct." *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1006-07 (9th Cir. 2008). While the doctrine originally arose in the anti-trust context, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), it has since been applied "outside the antitrust field," *Sosa*, 437 F.3d at 930, and "to actions petitioning each of the three branches of government," *Theme Promotions*, 546 F.3d at 1007. Indeed, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), the Court recognized that "the right to petition extends to all departments of the [g]overnment" and that "[t]he right of access to the courts is . . . but one aspect of the right of petition."

To determine whether a statute violates the *Noerr-Pennington* doctrine, the Supreme Court has engaged in a three-step inquiry. First, courts examine the "burden that the threat of [statutory liability] imposes on [a party's] petitioning rights." *Sosa*, 437 F.3d at 930 (citing *BE & K*, 536 U.S. at 530). Second, courts should consider "the precise petitioning activity at issue, to determine whether the burden on that activity implicated the protection of the Petition Clause." *Id.* Third, courts look "to see whether [the statute]

could be construed so as to preclude such a burden on the protected petitioning activity." *Id.*

Here, "the threat of [statutory liability]" imposed a considerable burden on Rhonda. *Sosa*, 437 F.3d at 930. When she went to the Superior Court to contest the government's taking of her Truck, she and Defendant Cameron started the discovery process. She expressed confusion to Defendant Cameron when he served Requests for Admission, and in response, Defendant Cameron cited the one-way attorneys' fee statute and threatened to impose liability on Rhonda if she continued in her efforts to get her Truck back. [Compl. Ex. 6] Defendant Cameron's threat was effective. Just over a week later, Rhonda filed a "Motion to Withdrawal Claim," in which she stated that she was withdrawing her claim "based on the likelihood of the [S]tate winning the case and the fear of additional financial loss [from having attorneys' fees awarded against her]." [*See* Compl. Ex. 8] Thus, Defendant Cameron's threat "quite plainly burden[ed]" Rhonda's ability to protect her property rights. *Sosa*, 437 F.3d at 932. If Rhonda had continued to seek the return of her Truck, lost, and been liable for attorneys' fees, that amount would have far exceeded the value of her Truck. [Compl. ¶¶ 83, 153]

The second step in the *Noerr-Pennington* inquiry demonstrates that the statute's burden on Rhonda's ability to seek redress for the government's taking of her property implicates the protection of the Petition Clause. Whether the Court views the "precise petitioning activity at issue" here to be Rhonda's attempt to regain her property through filings with the Superior Court, or her attempt to navigate the discovery process, the result is the same: the "burden on that activity implicated the protection of the Petition clause." *Sosa*, 437 F.3d at 930; *see also Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005) (stating that communications to the court that constitute petitions include a "complaint, an answer, a counterclaim and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something," and holding that that discovery communications, while not themselves petitions, constitute "conduct incidental to a

petition" and therefore protected by the *Noerr-Pennington* doctrine) (internal citation omitted).[22]

Finally, Arizona's one-way attorneys' fee statute is plain on its face—it cannot be construed so as to preclude the burden on Rhonda's protected petitioning activity. The law states unequivocally, that "[t]he court shall order any claimant who fails to establish that his entire interest is exempt from forfeiture . . . to pay . . . the state's costs and expenses of the investigation and prosecution of the matter, including reasonable attorney fees." A.R.S. § 13-4314(F). Since "the statute[] clearly provide[s] for the burden" of liability based on petitioning conduct, the court must "address whether the statute may be applied to the petitioning conduct consistently with the Constitution." *Sosa*, 437 F.3d at 932. Application of this statute can have only one effect—punishing Rhonda for asking the only neutral decision-maker available to her to decide whether Defendants were entitled to deprive her of her property. There could be no clearer example of a law "abridging . . . the right of the people . . . to petition the Government for a redress of grievances," by imposing statutory liability for petitioning conduct. Thus, Rhonda has satisfied her burden at this stage to make a plausible claim that the one way attorneys' fee statute violates the First Amendment.

2. The Attorneys' Fee Law is a Uniquely Pernicious, One-Way Penalty. It is Not a "Fee Shifting" Provision, Because the Fees Can Never Shift to the State.

In critical ways, Arizona's one-way attorneys' fee statute is different than typical "fee shifting" schemes in which losers pay attorneys' fees and other costs. For starters, fee-shifting generally happens between private parties on equal footing, not between the

[22] Rhonda's attempts to get her Truck back by petitioning the superior court do not fall within the "sham litigation" exception to *Noerr-Pennington*. *Sosa*, 437 F.3d at 938 (enumerating the "three circumstances in which the sham litigation exception might apply: first, where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful, second, where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose, and third, if the allegedly unlawful conduct consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." (citations omitted).

government, with its police powers and tools, and a private party whose constitutionally protected interests have been involuntarily infringed upon and whose only recourse is appearing in court to defend herself. In addition, typical fee shifting schemes operate in both directions—both parties bear a risk of being liable for the other's fees. In contrast, the statute at issue here is one-way. *If Rhonda had continued to press her claims in the Superior Court and won, Defendant Voyles would not be liable for attorneys' fees; he would simply have to return her Truck. But if Rhonda lost in the Superior Court, she would lose her Truck and have to pay Defendant Voyles' attorneys' fees.* The rule only operates against property owners seeking to vindicate their rights against a government intrusion. Because of these differences between the statute at issue here and typical fee-shifting schemes, the State's citations to cases approving of typical schemes are irrelevant. [*See* State MTD at 14-15]

The one-way attorneys' fee statute also infringes on Rhonda's Due Process rights by attempting to deprive her of, to dissuade her from using, or charge her for using her opportunity to be heard in the forfeiture proceeding. Not all processes are equal and not all processes amount to constitutionally sufficient means through which the State may deprive a citizen of their property. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). It is fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Manzo*, 380 U.S. at 552. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes*, 407 U.S. at 81; *see also Joint Anti-Fascist*, 341 U.S. at 170-72 ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.").

Here, fully participating in the Superior Court proceeding was Rhonda's only opportunity to be heard by a neutral decision-maker and contest the Defendants' taking of

her Truck. By threatening to extract financial penalties from her simply based on her desire to defend her property rights, the attorneys' fee statute encouraged—and in fact lead to—a "one-sided determination of the facts decisive of" Rhonda's rights. *Joint Anti-Fascist*, 341 U.S. at 170-72. On its face, the statute discourages people from "speak[ing] up in [their] own defense." *Fuentes*, 407 U.S. at 81. It therefore has the effect of allowing—as it allowed here—"substantively unfair and simply mistaken deprivations of property interests" to thrive. *Id.* The one-way attorneys' fee provision thus violates Due Process.

C. Charging Rhonda a $304 Filing Fee Simply to Access a Neutral Court and Defend Her Property Violates the Constitution.

Defendants seized Rhonda's Truck without a warrant and without any legal basis. Then the Clerk charged her $304 to exercise the basic right of trying to convince a neutral decision-maker that she was entitled to the return of her property.[23] This filing fee is unlike any that the Supreme Court has sanctioned and violates both the First Amendment and Due Process.

1. Forfeiture Cases are Criminal In Nature and Imposing a Tax on the Right to Defend One's Property Violates Due Process.

The Constitution prohibits the government from imposing a tax on the right to appear in court and defend against its allegations of criminal wrongdoing. *See Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J. concurring) ("[T]he jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never

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[23] The Clerk baldly asserts that she "does not set the filing fees." [Clerk MTD at 8] But it is unclear what the source of authority is for her publicly posted $304 filing fee to seek judicial review of seizures for forfeiture. *See* http://www.coscpinalcountyaz.gov/fees.html.

Neither the statutory fee schedule at A.R.S. § 12-284 nor Ariz. Code Jud. Admin. 3-404 includes a fee specifically for contesting seizures for forfeiture. https://www.azcourts.gov/Portals/0/admcode/pdfcurrentcode/3-404_Amended_06-2013.pdf. But whether the filing fee is set by the Clerk or another authority, and this seems to be a question of fact, it is the Clerk who enforced the rule when Rhonda tried to access the Superior Court. The Clerk is therefore an appropriate party against whom Rhonda can seek equitable and prospective relief.

been efficient; but it has always been free."); *see also State v. Cushing*, 399 A.2d 297, 298 (N.H. 1979) ("[A] criminal defendant cannot be required to purchase a jury trial even for so nominal a sum as eight dollars."). Civil forfeiture proceedings are "considered 'quasi-criminal' and implicate certain constitutional rights [including due process]." *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 558 (9th Cir. 1988); *see, e.g., also United States v. One 1985 Mercedes*, 917 F.2d 415, 419 (9th Cir. 1990). Rhonda's opportunity (such as it is) to defend her property in court is neither a luxury nor optional. Her right to challenge the seizure is fundamental; Due Process requires it as explained at length above. And where such a fundamental right is at stake, no fee or tax may be imposed upon its exercise "whether the citizen . . . has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (declaring poll tax of $1.50 unconstitutional, regardless of ability of voter to pay, because right to vote is a fundamental right).

In *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), the Supreme Court held that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons *forced* to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." (Emphasis added). The Court made clear that this rule applies when a party's need to "resort to the judicial process is entirely a state-created matter" because her "[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Id.* at 383, 387; *see also Little v. Streater*, 452 U.S. 1, 9-10 (1981) (distinguishing, for Due Process purposes, in a case challenging a state-required fee, between circumstances where "State action has undeniably pervaded [a] case," and "ordinary civil litigation between private parties"). Rhonda's need to access the Superior Court to defend her property was involuntary—"entirely a state-created matter" that "forced [her] to settle [her] claims of right and duty through the judicial process." *Boddie*,

401 U.S. at 377, 383. Thus, the Clerk must afford her, and other claimants, a meaningful opportunity to be heard unabridged by a filing fee.[24]

Defendants cite several cases approving of filing fees but none involve an initial filing fee in an "entirely [a] state-created matter" that involved a fundamental right and "forced [parties] to settle their claims of right and duty through the judicial process." *Id*. For example, the State cites *Adsani v. Miller*, 139 F.3d 67, 69 (2d Cir. 1998), a copyright case, in which the court found no due process violation where an unsuccessful plaintiff was required to post an appeal bond. In *Taylor v. Delatoore*, 281 F.3d 844, 848 (9th Cir. 2002), the court upheld a PLRA filing fee because the right of access to the courts "is not absolute or unconditional in the civil context, except in a very narrow band of cases where the litigant has "'a fundamental interest at stake.'" (Citation omitted). But a person's right to a meaningful opportunity to be heard when the state seeks to deprive her of property based on allegations of criminal wrongdoing is fundamental. *See In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and *an opportunity to* be heard *in his defense*—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."); *Faretta v. California*, 422 U.S. 806, 818 (1975) (Due Process Clause guarantees that criminal charge "may be answered in a manner now considered fundamental to the fair administration of American justice through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence."); *see also, e.g., Joint Anti-Fascist*, 341 U.S. at 170-72. The cases upon which the State relies are simply inapposite here.

The Clerk also cites filing fee cases that are distinguishable from the forfeiture filing fee in constitutionally significant ways. *United States v. Kras*, 409 U.S. 434, 444-45

[24] The State over-reads *Boddie* in claiming that a facial challenge to a filing fee must fail. [State MTD at 16] The fact that a filing fee that is valid on its face may nonetheless be unconstitutional as applied—like the fee in *Boddie*—does not mean that a filing fee can never be unconstitutional on its face.

(1973) (upholding a bankruptcy filing fee and observing that "[i]f [plaintiff] is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense," and "bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors; the utter exclusiveness of court access and court remedy, as has been noted, was a potent factor in *Boddie*"); *Ortwein v. Schwab*, 410 U.S. 656, 659 (1973) (upholding an appellate filing fee for an adverse welfare decision and explaining that "[t]his interest, like that of *Kras*, has far less constitutional significance than the interest of the *Boddie* appellants"). Ultimately, none of the cases Defendants cite support or sanction the imposition of a tax on the right to defend one's property.

2. The Filing Fee also Violates the First Amendment by Impermissibly Taxing Rhonda's Petitioning Conduct.

The forfeiture filing fee also unconstitutionally burdened Rhonda's First Amendment right to petition the government for redress of her grievance that Defendants interfered with her fundamental property rights. Thus, this burden must be able to withstand the "intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." *Turner Broad. Sys, Inc. v. FCC*, 512 U.S. 622, 662 (1994); *see also United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377; *see also Turner*, 512 U.S. at 662.

The forfeiture filing fee cannot survive this test. First, the fee does not further an important governmental interest. Rather, this fee serves the illegitimate government interest of dissuading property owners from defending themselves before a neutral decision-maker. And since many of the Clerk's filing fees are lower than the forfeiture filing fee, the restriction it imposes on petitioning rights is clearly greater than necessary.

Rhonda has therefore stated a plausible claim that the filing fee fails under intermediate scrutiny.

D. The Cumulative Effect of Defendants' Financial Interest in Depriving Rhonda of her Truck, the Requirement that She Pay a Substantial Filing Fee Just to Contest this Deprivation of Property Before a Neutral Decision-Maker, and the Threat of Being Punished with Attorneys' Fees for Standing up for Herself, Deprived Her of Due Process.

In a system where individual rights are supposed to be paramount over government self-interest, the forfeiture scheme cannot reasonably be described as having afforded Rhonda due process. The Forfeiture Laws inflicted a number of individual due process errors that also cumulatively violated Rhonda's constitutional rights.

The Supreme Court has recognized that errors are like viruses, doing greater harm as they multiply, and eventually reaching a constitutional magnitude, even if the separate errors themselves would not warrant relief. *E.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process"); *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) ("[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."). Indeed, the Court has "clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007). *Parle* and the cases upon which it relies have cemented the cumulative error doctrine as part of federal due process jurisprudence.

At every stage and on the whole, the forfeiture scheme is distorted to privilege Defendants' moneymaking interests over Rhonda's property rights. First, the process incentivized Defendant Voyles and Babeu to vigorously apply the law to augment their agencies' budgets. Then, the process gave Rhonda a chance to seek return of her property from Defendant Voyles, a financially-biased adjudicator. Then, in order to access a neutral decision-maker, Rhonda was required to pay a filing fee to exercise the basic right of defending herself in court. Finally, Rhonda was threatened that if she continued to

defend herself and failed, she would lose her property and be forced to pay attorneys' fees in a sum greater than the value of her lost property. This forfeiture process is a shameful example of government working for itself instead of working for the people, and the cumulative effect of its individual errors violates due process.

CONCLUSION

Defendants' Motions spend most of their collective 45 pages trying to convince this Court not to hear Rhonda's case at all. None of these avoidance arguments bear scrutiny. Similarly, once the Motions to Dismiss got around to engaging the merits of this case, they advanced no arguments which, properly considered, answer the constitutional infirmities for which Rhonda seeks redress in this Court.

Defendant Babeu said "[a]t a poorly attended press conference in front of the federal courthouse in Phoenix" to announce the filing of his motion to dismiss: "This is all about due process." Michael Kiefer, *Pinal County Seeks to Dismiss Forfeiture Lawsuit*, Ariz. Republic (Oct. 9, 2015), http://www.azcentral.com/story/news/arizona/politics/2015/10/09/pinal-county-forfeiture-lawsuit/73661522/?from=global&sessionKey=&autologin. Rhonda agrees. And due process, as well as the Fourth and First Amendments, bars the actions of Defendants here. Rhonda respectfully asks that the Motions to Dismiss be denied and that she finally be given her day in court—the process which she has long been, and remains, constitutionally due.

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ACLU CRIMINAL LAW REFORM PROJECT

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CERTIFICATE OF SERVICE

☒ I hereby certify that on November 20, 2015, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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