No. 19-1056

United States Court of Appeals for the Sixth Circuit

Stephen Nichols,

Plaintiff-Appellant,

v.

Wayne County, Mich.;
the Wayne County Prosecutor's Office;
Kym Worthy, Wayne County Prosecutor;
and the City of Lincoln Park,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan,
No. 2:18-cv-12026-RHC-EAS

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE, MACKINAC CENTER FOR PUBLIC POLICY, DKT LIBERTY PROJECT, AND DUE PROCESS INSTITUTE IN SUPPORT OF PANEL REHEARING AND REHEARING EN BANC

Wesley Hottot
INSTITUTE FOR JUSTICE
600 University Street,
Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org

Marie Miller
Keith Neely
INSTITUTE FOR JUSTICE
901 N. Glebe Road,
Suite 900
Arlington, VA 22203
(703) 682-9320
mmiller@ij.org

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are four nonprofits dedicated to protecting individual liberties. Each organization advocates for, among other things, the constitutional right to a judicial hearing whenever a person's property is seized. The panel decision erodes that right. It also makes it harder for the 32 million people in the Sixth Circuit to assert *any* federally protected right against more than 5,000 local governments. While the panel majority erroneously limited the enforceability of *all* rights, a one-judge concurrence addressed a question over which courts are divided: Whether the Fourteenth Amendment's Due Process Clause requires a prompt post-seizure hearing before a neutral judicial officer. *Amici* have special expertise on these topics.

The **Institute for Justice (IJ)** is a nonprofit, public-interest law firm. IJ has three cases pending in federal court closely resembling this case. Each case involves an innocent person whose

[1] No party or party's counsel authored this brief in whole or in part, nor contributed money to fund this brief's preparation or submission. No one other than *amici* contributed money intended to fund this brief's preparation or submission.

vehicle was seized and held for six months or longer without an opportunity for a hearing, even though no criminal charges were contemplated, let alone filed.[2] IJ litigates cases seeking damages for harm to people's bodies and deprivations of their property, including a police brutality case set for argument in the Supreme Court later this Term.[3] IJ's research on civil forfeiture has been cited by, among others, Justice Thomas, in an opinion questioning the constitutionality of current practices. *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting the denial of *certiorari*). IJ seeks permission to share its views and those of the following friends.

---

[2] *See Serrano v. Customs & Border Patrol*, No. 18-50977, 2020 WL 5539130 (5th Cir. Sept. 16, 2020) (affirming dismissal; petition for *cert.* forthcoming); *Davis v. City of Chicago*, No. 19-cv-3692, 2020 WL 4926551 (N.D. Ill. Aug. 21, 2020) (denying city's motion to dismiss in part); *Ingram v. County of Wayne*, No. 2:20-cv-10288 (E.D. Mich., filed Feb. 5, 2020) (motion to dismiss pending).

[3] *See King v. United States*, 917 F.3d 409 (6th Cir. 2019), *cert. granted sub nom. Brownback v. King*, 140 S. Ct. 2563 (2020) (oral argument scheduled for Nov. 9, 2020); *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (holding that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures by state and local authorities); *Nwaorie v. U.S. Customs & Border Prot.*, 395 F. Supp. 3d 821 (S.D. Tex. 2019) (granting government's motion to dismiss), *appeal pending*, No. 19-20706 (5th Cir. argued Sept. 2, 2020).

Based in Midland, Michigan, the **Mackinac Center for Public Policy** is a research, advocacy, and education nonprofit working to advance liberty and opportunity for all by challenging government overreach. Mackinac recently invoked Michigan's Freedom of Information Act to collect data about seizures and forfeitures in Wayne County and statewide. Mackinac wishes to share the results with the Court.

Founded in 1997, the **DKT Liberty Project** promotes individual liberty against interference by all levels of government. Its particular focus in recent years has been law-enforcement overreach that restricts civil liberties. Through its counsel at Jenner & Block, the Liberty Project has recently filed a series of *amicus* briefs in the Supreme Court, and state and federal courts, concerning several constitutional issues relevant to this case.

The **Due Process Institute** works to honor, preserve, and restore principles of fairness in the American legal system. Through advocacy, litigation, and education, it seeks to safeguard due process as a bedrock principle of a free society. In this case, it shares its research concerning Detroiters' ability to pay fines and fees.

INTRODUCTION

The three-year detention of Stephen Nichols's 1998 Toyota Avalon represents more than one prosecutor's mistake. Over three years, Wayne County has seized property from thousands of people like Nichols and impounded their vehicles for six months or longer, with zero judicial oversight. It is now standard practice for the Vehicle Seizure Unit—employees of the Wayne County Prosecutor's Office—to hold cars for a minimum of six months unless the owner agrees to pay a "redemption fee," plus towing and storage expenses, before County prosecutors initiate civil forfeiture proceedings. The County's price for avoiding a six-month (or longer) impound is a minimum of $1,000. This practice deprives innocent people (and their families) of a means of transportation to work, school, healthcare, and other necessities of life.

Amici agree with Nichols: Due process requires a hearing in cases of long-term vehicle seizures, and municipalities can—and should—be held accountable for failing to offer such a hearing. The Court should grant the petition for rehearing, vacate the panel decision, and reverse the district court's judgment.

SUMMARY OF ARGUMENT

The Court should be aware of two things.

First, what happened to Stephen Nichols was not unique. *Amici* know for a fact that Wayne County has a policy and practice of denying people prompt, post-seizure hearings when it seizes vehicles for possible civil forfeiture. Mackinac has documented it; the Institute for Justice represents people who have experienced it.

The panel majority overlooked some of Nichols's allegations about this practice. As the dissent explains, the majority elided key passages of the complaint, leading it to break with settled law, create new limitations on municipal liability, and affirm dismissal. *See Nichols v. Wayne County*, No. 19-1056, 2020 WL 4784751, at *13, slip op. at 27–28 (6th Cir. Aug. 18, 2020) (Moore, J., dissenting). The panel decision was a departure from the Supreme Court's municipal-liability cases and Sixth Circuit precedent. But Nichols has done a commendable job explaining these issues, *see* Appellant's Combined En Banc & Panel Reh'g Pet. (ECF No. 53) at 6–11, so *amici* will address the far-reaching implications of the concurrence.

Second, *amici* address the concurrence's argument that prompt post-seizure hearings are never required. The concurrence suggests that the Supreme Court has already held that vehicles can be seized and impounded indefinitely pending forfeiture proceedings. *Amici* demonstrate that, on the contrary, an entrenched circuit split exists. The Supreme Court granted *certiorari* to resolve this split, only to dismiss the case as moot at the merits stage. *See Alvarez v. Smith*, 558 U.S. 87, 89 (2009). However, the concurrence aligns itself with the view of the Fifth, Eighth, and Eleventh Circuits, suggesting there is no right to a prompt, post-seizure hearing. This breaks from the Second and Seventh Circuits, which hold that due process requires a hearing. This unsettled question should be decided by the *en banc* Court.

I. What happened to Stephen Nichols is not unique.

The panel majority deemed it "unclear" why Wayne County took almost three years to return Stephen Nichols's car. *Nichols v. Wayne County*, No. 19-1056, 2020 WL 4784751, at *2 n.1, slip op. at 3 n.1 (6th Cir. Aug. 18, 2020). But whatever the cause of the delay, this case represents much more than one prosecutor's negligence.

But cf. id. (noting County's assertion that one prosecutor "overlooked sending th[e] correspondence" necessary to release Nichols's vehicle). What Nichols experienced was not an isolated incident. It was part of a systematic—and ongoing—policy of long-term vehicle seizures, without judicial oversight, designed to maximize "redemption fees."

Wayne County operates the most extensive seizure and forfeiture program in Michigan. In 2017 and 2018, it seized more than 2,600 vehicles and collected at least $1.2 million in revenue.[4] In 2017, local governments statewide completed 736 civil-forfeiture proceedings in which no one was charged with a crime; Wayne County completed more than 50 percent (380).[5] In other words, the County seizes roughly 1,300 vehicles per year, with less than a third of cases resulting in civil-forfeiture proceedings. *See* nn.4–5 *below*.

---

[4] Tyler Arnold, *Michigan County seizes more than $1.2 million in personal property over two years*, The Center Square (Mar. 29, 2019), https://bit.ly/3mTNgea.

[5] Tyler Arnold, *Wayne County Took Cars From 380 People Never Charged With A Crime*, Michigan Capitol Confidential (Oct. 27, 2018), https://bit.ly/3cAJvFx.

What should an innocent person do if one of those 1,300 vehicles belongs to them? The County provides one mechanism for getting your vehicle out of impound prior to the beginning of forfeiture proceedings: Car owners can pay a $900 "redemption fee" to the Vehicle Seizure Unit, plus towing and storage costs (the fee increases $900 with each subsequent seizure). *See Ingram v. County of Wayne*, No. 2:20-cv-10288 (E.D. Mich.), Cnty.'s Mot. to Dismiss at Ex. 6 (ECF No. 20-7 PageID 522–25) (confirming this policy). This policy is reflected on every vehicle seizure form given to drivers on the side of the road. *See id.* at Ex. 11 (ECF No. 20-12 PageID 549–50); *see also* p. 7 n.4 *above* (reporting same). As a result, a guilty vehicle owner and an innocent vehicle owner face the same Hobbesian choice: (1) pay $1,000 or more to get their vehicle back; or (2) wait six months or longer for the County to initiate forfeiture proceedings.

All of this occurs with zero judicial oversight. The County provides no means of contesting a vehicle seizure prior to the commencement of civil-forfeiture proceedings some six months or longer after the fact. Stuck on the horns of a dilemma—effectively

told, "your money or your rights"—those who can afford to pay will pay, no matter how unjust the terms.

Many cannot afford to pay. At least a plurality of Americans lack savings sufficient to cover an unexpected expense of $1,000 or more.[6] For these people, the long-term seizure of a vehicle can be the difference between security and bankruptcy. A person whose car is seized is left without any reliable means of getting to work. And Detroit has one of the least-reliable public transit systems in the United States.[7]

The panel majority opinion made it virtually impossible to challenge this regime; a one-judge concurrence would have held it constitutional (in line with the Fifth, Eighth, and Eleventh Circuits); and a one-judge dissent would have held it potentially unconstitutional (in line with the Second and Seventh Circuits) and

---

[6] Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2018*, at 21–23 (May 2019), https://bit.ly/3ljUczh; Amanda Dixon, *Nearly 4 in 10 Americans would borrow money to cover a $1K emergency*, Bankrate.com (Jan. 22, 2020), https://bit.ly/34qdX1D; Cameron Huddleston, *69% of Americans Have Less Than $1,000 in Savings*, GoBankingRates.com (Dec. 16, 2019), https://bit.ly/36sSIi2.

[7] Henry Grabar, *Can America's Worst Transit System Be Saved?*, Slate.com (June 7, 2016), https://bit.ly/30wAdFN.

remanded for further proceedings. This split decision warrants reconsideration by the *en banc* Court.

II. The full Court should decide whether a prompt post-seizure hearing is required.

The *en banc* court should address the due-process issue that the panel majority did not reach: Does the Due Process Clause of the Fourteenth Amendment entitle vehicle owners to a prompt hearing on whether the government may continue to detain their vehicles pending an eventual forfeiture decision? The Supreme Court granted *certiorari* to decide that question, but ultimately did not decide it. *See Alvarez v. Smith*, 558 U.S. 87, 89 (2009). Mootness prevented an answer then, leaving courts divided today.

Absent rehearing, this Circuit's leading opinion on this unsettled question will be the one-judge concurrence in this case. That decision breaks from the Second Circuit's unanimous decision in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) (Sotomayor, J.) and the Seventh Circuit's unanimous decision in *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), *vacated as moot sub nom.*

Alvarez, 558 U.S. at 89.[8] In fact, the concurrence is already being cited as the prevailing view of the Sixth Circuit. *See Ingram v. County of Wayne*, No. 2:20-cv-10288 (E.D. Mich.), Cnty.'s Supp'l Br. re *Nichols v. Wayne County* at 6–8 (ECF No. 40 PageID 894–96) (arguing that the concurrence demonstrates that "binding Supreme Court precedent holds that Due Process does not require an 'interim' hearing as long as the civil complaint is filed in state court in a timely fashion as the term is understood by traditional Due Process principles."). To state the obvious, a one-judge concurrence should not resolve this Circuit's position on a question over which other circuits are split.

The Fifth, Eighth, and Eleventh Circuits align with the concurrence's view. Each has concluded that there is no due-process right to a prompt post-seizure hearing in cases involving vehicles. *See Serrano v. Customs & Border Patrol*, No. 18-50977, 2020 WL

[8] The panel decision in *Smith* was circulated to all active judges of the Seventh Circuit prior to issuance under 7th Cir. R. 40(e). *See Smith*, 524 F.3d at 839. This gave each active member of the Seventh Circuit an opportunity to call for rehearing. Notably, no judges voted to rehear the case, giving *Smith* the *en banc* court's tacit approval. *See id.*

5539130, at *5–10 (5th Cir. Sept. 16, 2020) (affirming dismissal of that claim); *Booker v. City of St. Paul*, 762 F.3d 730, 734–37 (8th Cir. 2014) (same); *Gonzales v. Rivkind*, 858 F.2d 657, 660–61 (11th Cir. 1988) (overturning a ruling that required a post-seizure hearing). One state high court takes this view as well. *People v. One 1998 GMC*, 960 N.E.2d 1071, 1080–82 (Ill. 2011).

By contrast, vehicle owners have a right to a hearing in the Second and Seventh Circuits. *See Krimstock*, 306 F.3d at 48–69; *Smith*, 524 F.3d at 838.[9] This right is recognized by the high courts of New York and Minnesota. *See County of Nassau v. Canavan*, 802 N.E.2d 616, 622–25 (N.Y. 2003); *Olson v. One 1999 Lexus MN License Plate No. 851LDV*, 924 N.W.2d 594, 612–16 (Minn. 2019). Other state high courts recognize it in limited circumstances.[10]

---

[9] Though vacated as moot, the panel decision in *Smith* remains persuasive authority. *See, e.g.*, *Washington v. Marion Cnty. Prosecutor*, 264 F. Supp. 3d 957, 974–75 (S.D. Ind. 2017) (citing *Smith* as persuasive and agreeing with its reasoning); *Brown v. District of Columbia*, 115 F. Supp. 3d 56, 66 (D.D.C. 2015) ("join[ing] with the courts in *Krimstock* [and] *Smith*").

[10] *See State v. Hochhausler*, 668 N.E.2d 457, 465–66 (Ohio 1996) (holding due process requires a hearing for a third-party vehicle owner before a driver's initial appearance in criminal court); *Dep't of Law Enf't v. Real Prop.*, 588 So. 2d 957, 965 (Fla. 1991)

[*cont. next page*]

Additionally, the Ninth Circuit has concluded that the government's long-term detention of vehicles must be reasonable—at all times—under the Fourth Amendment. That right led the court to hold that California's mandatory 30-day impound when someone operated a car without a license could not be applied to a vehicle owner who had a license. *See Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017); *but cf. Sandoval v. County of Sonoma*, 912 F.3d 509, 521–22 (9th Cir. 2018) (Watford, J., concurring) (indicating reversal of his view in *Brewster* and arguing that vehicle seizures should be addressed under the Due Process Clause).

The constitutional question at the bottom of this case has split the circuits and state high courts. The *en banc* Court should grant rehearing and decide where the Sixth Circuit falls on this unsettled issue of great public importance.

(concluding as a matter of state constitutional law that due process requires a preliminary hearing "as soon as possible after seizure"); *Reach v. State*, 530 So. 2d 40 (Ala. 1988) (concluding that due process requires a post-seizure hearing, or release of the vehicle on bond, when forfeiture proceedings did not commence for eight months).

CONCLUSION

The petition for rehearing should be granted.

Dated: October 5, 2020

Respectfully submitted,

/s/ Wesley Hottot
Wesley Hottot
INSTITUTE FOR JUSTICE
600 University St., Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org

Marie Miller
Keith Neely
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
mmiller@ij.org
kneely@ij.org

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 2,600 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1).

This brief complies with the font requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface (Century Schoolbook) and a 14-point font.

/s/ Wesley Hottot
Wesley Hottot

Attorney for *amici*

CERTIFICATE OF SERVICE

I certify that on this October 5, 2020 the foregoing Brief of Amici Curiae the Institute for Justice, Mackinac Center for Public Policy, DKT Liberty Project, and Due Process Institute in support of panel rehearing and rehearing *en banc* was served through the Court's CM/ECF system on counsel for all parties.

/s/ Wesley Hottot
Wesley Hottot

Attorney for *amici*