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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 08-351, Alvarez v.  
5 Smith.

6 Mr. Castiglione.

7 ORAL ARGUMENT OF PAUL CASTIGLIONE

8 ON BEHALF OF THE PETITIONER

9 MR. CASTIGLIONE: Mr. -- excuse me.  
10 Mr. Chief Justice, and may it please the Court:

11 Despite the holding in Von Neumann that the  
12 civil forfeiture hearing itself is all the process that  
13 is due for the seizure of personal property, the Seventh  
14 Circuit struck down Illinois's Drug Asset Forfeiture  
15 Procedure Act specifically because it does not require  
16 an additional adversarial hearing that takes place  
17 post-seizure but before the forfeiture hearing.

18 As far back as this Court's decision in  
19 Gelston v. Hoyt and Slocum v. Mayberry, this Court has  
20 recognized that the civil forfeiture hearing itself is  
21 the single unitary hearing, where all persons having an  
22 interest in the property are present and the following  
23 questions are resolved: One --

24 JUSTICE SOTOMAYOR: Is there any other  
25 area -- is there any other area of law where we permit a

1    prejudgment attachment and/or seizure of property  
2    without a neutral magistrate reviewing the reason for  
3    that seizure?

4                   We don't permit a pretrial attachment, do  
5    we, except in some narrow circumstances?

6                   MR. CASTIGLIONE:   Except in some narrow  
7    circumstances, and I note -- and certainly in  
8    garnishment cases and in replevin cases that you would  
9    have to have that type of hearing.   But the interests  
10   are different here.   The State's interests in the -- in  
11   the seized property takes --

12                  JUSTICE SOTOMAYOR:   But that's --

13                  MR. CASTIGLIONE:   I'm sorry.

14                  JUSTICE SOTOMAYOR:   I don't deny that  
15   there's a State interest.   The question is who tests  
16   that interest?   In what time frame?   Meaning you can  
17   assert an interest, but someone has to determine whether  
18   it really exists or not.

19                  MR. CASTIGLIONE:   Your Honor, historically,  
20   that has always been at the civil forfeiture hearing,  
21   and that's going -- as I say, going back to Gelston,  
22   because what -- what Gelston recognized is that --

23                  JUSTICE GINSBURG:   Mr. Castiglione, you have  
24   been asked to address the mootness question -- both  
25   counsel.

1 MR. CASTIGLIONE: Yes, Your Honor.

2 JUSTICE GINSBURG: Have forfeiture  
3 proceedings occurred in the plaintiffs' cases? Is there  
4 any lingering question concerning the status of the  
5 property?

6 MR. CASTIGLIONE: No -- Your Honor, the  
7 forfeiture cases have concluded, it's true. We --

8 JUSTICE GINSBURG: Have concluded?

9 MR. CASTIGLIONE: They have concluded.  
10 The -- there are three -- three of the Respondents  
11 sought the return of cars. Three had had cash seized.  
12 In the three car cases, the cars had actually been  
13 returned. In two of the cash cases, the Respondents  
14 defaulted, and in one of the cash cases, the -- the  
15 State and the Respondent reached an agreement. So those  
16 cases are over.

17 But we would submit, Your Honor, that this  
18 case is not moot because, subsequent to the Seventh  
19 Circuit decision in this case, the plaintiffs filed an  
20 amended motion for class certification, and that's at  
21 Docket 49 -- Docket Number 49 of the Northern District  
22 docket, filed on June 19th, 2008, specifically asking  
23 for damages and restitution, in addition to declaratory  
24 and injunctive relief.

25 JUSTICE ALITO: Well, has there ever been a

1 case in which this Court has considered the merits of a  
2 dispute where the individual claims of the named  
3 plaintiffs expired before we heard argument and a -- and  
4 a class had not yet been certified?

5 MR. CASTIGLIONE: That's not the case here,  
6 Your Honor. At least one of the -- one of the  
7 Respondents, a certain Tyhesha Brunston -- her  
8 forfeiture case ended in 2009, so at the time the  
9 amended motion for class certification was filed asking  
10 for damages and restitution.

11 JUSTICE ALITO: No, but that wasn't my  
12 question. The class has not yet been certified, has it?

13 MR. CASTIGLIONE: No, it has not, Your  
14 Honor. That's true.

15 JUSTICE ALITO: And the -- the claims of all  
16 the named plaintiffs are -- have expired?

17 MR. CASTIGLIONE: Well, the injunctive  
18 claims may have expired, with the possible exception of  
19 the two Respondents whose -- whose cash cases were  
20 defaulted. But, no, the damage claims, I think were --

21 JUSTICE GINSBURG: There were no damage  
22 claims when the final judgment was entered in the  
23 district court?

24 MR. CASTIGLIONE: That's correct, Your  
25 Honor.

1 JUSTICE GINSBURG: So it was a final  
2 judgment, and it went up on appeal. And at what point  
3 did they seek to -- I mean, while the case was in the  
4 court of appeals, the final judgment dismissing the  
5 case, there was nothing for the district judge to do.

6 MR. CASTIGLIONE: Well, but after the -- the  
7 Seventh Circuit reversed the district judge's decision  
8 granting the motion to dismiss, upon -- upon remand, the  
9 plaintiffs -- then, at that point, asked for a  
10 certification of the damage class and a restitution  
11 class and expressly stated that they wished to pursue  
12 a claim -- a claim for damages and restitution based on  
13 --

14 JUSTICE GINSBURG: But --

15 JUSTICE SCALIA: It wasn't granted then, and  
16 it still hasn't been granted.

17 MR. CASTIGLIONE: That's true, Your Honor.  
18 And --

19 JUSTICE SCALIA: So you have nobody before  
20 this Court with a live claim, neither the original named  
21 plaintiffs nor a certified class.

22 MR. CASTIGLIONE: I would -- well --

23 JUSTICE SCALIA: So who's here?

24 MR. CASTIGLIONE: For -- for mootness  
25 purposes, Your Honor, I think the -- the fact that

1 plaintiffs were allowed to ask for damages and -- and  
2 filed a pleading asking --

3 JUSTICE GINSBURG: They did not ask for  
4 damages originally.

5 MR. CASTIGLIONE: No, they did not.

6 JUSTICE GINSBURG: So as the case comes to  
7 us, we have a district court final judgment dismissing  
8 the case. The case was only for injunctive relief. It  
9 goes to the Seventh Circuit. It's in that shape. We  
10 are taking the case from the Seventh Circuit.

11 MR. CASTIGLIONE: Yes.

12 CHIEF JUSTICE ROBERTS: I -- I suppose, if  
13 the case is moot, then you are entitled to a Munsingwear  
14 order.

15 MR. CASTIGLIONE: I would --

16 CHIEF JUSTICE ROBERTS: So there's no  
17 controlling authority.

18 MR. CASTIGLIONE: We would -- that's our  
19 position, Your Honor.

20 CHIEF JUSTICE ROBERTS: And then I suppose  
21 the district court doesn't know whether to award damages  
22 or not until it gets a final decision from -- or a  
23 decision from the Seventh Circuit or this Court.

24 MR. CASTIGLIONE: That's correct, Your  
25 Honor. I mean, the -- whether or not a damage claim



1     could go forward would depend on the -- on the validity  
2     of the Seventh Circuit decision.

3                 And our view, Justice Scalia, is that the  
4     -- when -- the -- upon -- even though they did not  
5     formally amend the complaint -- that's true; we  
6     acknowledge that, but in the -- in the motion for  
7     class -- in the amended motion for class cert, I think  
8     the assertion of the claim for damages, at least for  
9     mootness purposes, is enough to give this Court  
10    jurisdiction over -- over those claims.

11                JUSTICE GINSBURG:  If it been there  
12    originally, but the problem is it wasn't there.  The  
13    case comes to us on a complaint that is simply for  
14    injunctive relief.  And that is moot.

15                MR. CASTIGLIONE:  That -- with the possible  
16    exception of the two Respondents whose claims defaulted,  
17    Your Honor, in that it's unclear what it -- to the  
18    extent they were seeking the return of their property,  
19    their situation has not changed.  Their property never  
20    was returned.

21                JUSTICE SCALIA:  What were they seeking to  
22    have enjoined?

23                MR. CASTIGLIONE:  They were seeking, Your  
24    Honor -- they were asking the court to declare that the  
25    Illinois statute was unconstitutional for not providing

1 an interim hearing, and an injunction preventing --  
2 preventing Illinois from enforcing the statute.

3 JUSTICE SCALIA: But -- I -- since they  
4 defaulted in the -- in the final hearing, how can -- can  
5 they possibly have any claim left with regard to an  
6 interim hearing?

7 MR. CASTIGLIONE: Well, I just think the  
8 nature of their claim hasn't changed. To the extent  
9 they were seeking the return of their property through  
10 such an injunction, that hasn't changed for those two  
11 plaintiffs, Yunker and Williams. But we rest our -- our  
12 response, Your Honor, and we will --

13 JUSTICE SOTOMAYOR: So am I forgetting, but  
14 didn't this start out as a class action and wasn't the  
15 claim -- wasn't the class action denied?

16 MR. CASTIGLIONE: It was denied as moot,  
17 that's correct, Your Honor.

18 JUSTICE SOTOMAYOR: And you didn't appeal  
19 that?

20 MR. CASTIGLIONE: Well, we didn't -- we  
21 didn't appeal at all. The plaintiffs appealed the  
22 district court's order, which -- it was a single order  
23 that granted -- I'm sorry -- that granted our motions to  
24 dismiss and denied plaintiffs' motion for class  
25 certification as moot. That was the order.

1 JUSTICE GINSBURG: And the plaintiffs -- the  
2 plaintiffs didn't appeal the denial of certification.

3 MR. CASTIGLIONE: The two -- well, no, Your  
4 Honor, they did not. They appealed the order -- they  
5 appealed the denial of the motion to dismiss -- I'm  
6 sorry -- the granting of the motion to dismiss. Excuse  
7 me.

8 JUSTICE GINSBURG: Well, maybe we should --  
9 we should ask the plaintiffs about that. But you're  
10 saying that the two cases that were defaulted are not  
11 moot? Isn't a default the end of it?

12 MR. CASTIGLIONE: I'm saying they may not be  
13 moot, Your Honor, in that the claim for relief has not  
14 -- and they defaulted before, in at least one of the  
15 cases, before the complaint was even filed. So nothing  
16 has really changed in the status of their case. I  
17 believe Mr. Williams -- nothing has changed in his case  
18 from the time the complaint was filed.

19 JUSTICE GINSBURG: You said in your opening  
20 that there is just the one proceeding, and that's the  
21 petition for forfeiture. But in your brief you  
22 suggested that there is a means that these plaintiffs  
23 could get back their property pending the ultimate  
24 forfeiture proceeding. You mentioned a Slocum type  
25 hearing, a petition for return of their property. So I

1 don't understand your argument that there's one and  
2 only procedure, the forfeiture procedure, when on the  
3 other hand you are telling us that there is a means.

4 MR. CASTIGLIONE: Well, maybe I can explain,  
5 and I think it also goes to the -- what is -- why  
6 the 8,850 -- the use of 8,850 and the Barker speedy  
7 trial factors makes sense. The one hearing where these  
8 issues are resolved is a civil forfeiture hearing, it's  
9 true. But I think what Slocum does, just in a similar  
10 way to how speedy trial factors operate, it gives the  
11 claimant an opportunity to come in and ask the court to  
12 tell the government to fish or cut bait. So you either  
13 file an action or release the property. I think it  
14 operates much the same way that the speedy trial factors  
15 would operate in a criminal case.

16 JUSTICE SCALIA: And they -- and they can do  
17 that before the -- before the time period has expired?

18 MR. CASTIGLIONE: Absolutely, Your Honor.  
19 And they can certainly do that. That's a remedy that's  
20 available up until -- up until the forfeiture case is  
21 filed, and from that --

22 CHIEF JUSTICE ROBERTS: But surely your  
23 position is going to be that the statutory procedure  
24 pre-empts and takes the place of any Slocum hearing,  
25 isn't it? I mean, somebody comes in and files a

1 petition saying, here I'm raising this right under, you  
2 know, an early 19th century procedure, and you're not  
3 going to say, okay, here's our position or here's the  
4 property. You are going to say, wait until the  
5 forfeiture proceeding that is provided under Illinois  
6 law.

7 MR. CASTIGLIONE: Well, I -- the -- what  
8 Slocum does, Your Honor, we think -- we believe that  
9 Illinois has recognized for at least over 50 years that  
10 a property owner has a common law right to come in.

11 JUSTICE STEVENS: But that was before the  
12 statute was enacted.

13 MR. CASTIGLIONE: That's certainly true,  
14 Your Honor, but that --

15 JUSTICE SCALIA: The statute is a dead  
16 letter if you allow a Slocum action. All you -- all you  
17 need is a Slocum action, and the fact that the statute  
18 says you have to wait for -- you know, that the  
19 government has 40 days, is meaningless.

20 MR. CASTIGLIONE: Well, Slocum I think is a  
21 way of getting into court, getting the government --

22 JUSTICE SCALIA: Exactly. It's a way of  
23 defeating the statute.

24 MR. CASTIGLIONE: Well, once -- once the  
25 government does act, Your Honor, then at that point I'd

1 say if in fact the government's being -- once the  
2 government files a forfeiture action, if the  
3 government's dilatory, there's remedies under - under  
4 Illinois law, our Code of Civil Procedure, or even  
5 perhaps a motion to dismiss for --

6 JUSTICE SCALIA: But the statute says the  
7 government isn't dilatory until -- until the time  
8 period, 40 days. It has 40 days. What does that mean  
9 if it doesn't mean that the government has 40 days?

10 MR. CASTIGLIONE: Oh, the -- I think -- I  
11 think certainly, Your Honor, the government does have  
12 the time periods. Yes, I agree with that. The  
13 government certainly has the time periods. But if the  
14 case were to somehow to fall through the cracks and  
15 nothing would happen, I think what -- what the common  
16 law remedies provide is a safety net for property owners  
17 to be able to get into court.

18 JUSTICE SCALIA: Before the 40 days?

19 MR. CASTIGLIONE: No, I would say after the  
20 40. I would say --

21 JUSTICE SCALIA: Oh, okay. Well, that's a  
22 different story. These people are asking for a hearing  
23 before the elapsing of the 40 days, and if all -- if all  
24 you say that Slocum provides is a hearing after the 40  
25 days have elapsed and nothing has occurred, that doesn't

1 satisfy what they are asking for.

2 MR. CASTIGLIONE: Well, I would say Slocum  
3 provides a hearing after 40 days, Your Honor. I would  
4 say, if the government does nothing, it's a way of  
5 getting into court.

6 JUSTICE SCALIA: It doesn't have to do  
7 anything for 40 days, is what the statute says.

8 MR. CASTIGLIONE: And we don't dispute that.  
9 And --

10 JUSTICE SCALIA: But you say if it -- you  
11 don't dispute that doesn't have to do anything, but you  
12 -- you assert that if it does nothing, you can bring a  
13 Slocum action. I mean, which is it? One or the other?

14 MR. CASTIGLIONE: Well, Slocum is an  
15 equitable remedy. If someone can establish -- I don't  
16 think before the time has run out in our procedures one  
17 could probably establish that, but it's possible if a  
18 case were to -- were to fall through the cracks, and it  
19 gives --

20 CHIEF JUSTICE ROBERTS: Slocum then is the  
21 answer to a very different case. It's a case where  
22 you have a class action of people whose cases fell  
23 through the cracks and never got the procedures they  
24 were entitled to. It doesn't seem at all responsive to  
25 the claim that they are entitled to procedures before it

1 falls through the cracks.

2 MR. CASTIGLIONE: Well, our position, Your  
3 Honor, is that the -- the statute -- is the regime that  
4 Illinois has adopted with the time periods, does -- does  
5 comply with due process. It provides a way of dealing  
6 with some number of the issues Respondents have raised.

7 JUSTICE STEVENS: But isn't the basic  
8 argument that you make that a forfeiture hearing is all  
9 the process that is due?

10 MR. CASTIGLIONE: Yes, Your Honor.

11 JUSTICE STEVENS: Now, let me ask you this  
12 question: Suppose your statute said there shall be a  
13 forfeiture hearing with all the procedures you want, but  
14 the forfeiture hearing shall take place 1 year after the  
15 seizure. Would that be adequate?

16 MR. CASTIGLIONE: Under this Court's view --  
17 decision in FDIC v. Mallen, I don't think you would look  
18 to the outer limits, Your Honor. But I think --

19 JUSTICE STEVENS: Yes, I'm saying the  
20 minimum. The hearing will take place 1 year after the  
21 seizure, nothing earlier or nothing later. Would that  
22 be constitutional?

23 MR. CASTIGLIONE: Again, applying -- well,  
24 if it is possible for the States to do it in a shorter  
25 fashion --



1 JUSTICE STEVENS: Clearly, it's possible to  
2 do it in less than a year.

3 MR. CASTIGLIONE: And if a State -- if a  
4 State's practice were to do so, but I would say --

5 JUSTICE STEVENS: Well, there is no  
6 practice, no background practice. This is a new  
7 statute. So this -- you have to have a forfeiture  
8 hearing, as you describe it, that shall take place 6  
9 months --

10 MR. CASTIGLIONE: One year later.

11 JUSTICE STEVENS: -- or a year later. Would  
12 that be constitutional?

13 MR. CASTIGLIONE: Well, that's shorter than  
14 the time period that this Court found complied with due  
15 process in 8,850 --

16 JUSTICE STEVENS: Well, I understand what  
17 the Court has held. I'm asking your view of that  
18 hypothetical statute.

19 MR. CASTIGLIONE: I think -- I think --

20 JUSTICE STEVENS: And if you agree that it's  
21 unconstitutional, then you have to agree that time is --  
22 is relevant to the question whether the forfeiture  
23 hearing --

24 MR. CASTIGLIONE: I would not agree -- I  
25 would not agree that it's unconstitutional.

1 JUSTICE STEVENS: So you would then say it  
2 would be constitutional to say one hearing 1 year later?

3 MR. CASTIGLIONE: I think facially it is.

4 JUSTICE SCALIA: Ten years?

5 MR. CASTIGLIONE: Well, I think, again, I'd  
6 go back to FDIC v. --

7 JUSTICE SCALIA: Ten years?

8 MR. CASTIGLIONE: Well, no, I would say 10  
9 years without any judicial intervention --

10 JUSTICE SCALIA: You've -- you've given up  
11 the position, then. You've said time does matter. So  
12 we are just arguing over what the time is, whether it's  
13 10 years, 1 year, or 40 days, right?

14 MR. CASTIGLIONE: Well, 40 days I think is  
15 consistent, is I think a reasonable --

16 JUSTICE SCALIA: It may be, but that's a  
17 different argument. It's -- it's not an absolute.  
18 It's -- we have to consider whether the time period is  
19 reasonable, right?

20 MR. CASTIGLIONE: If -- if -- I would say  
21 this: If the statute said you can't come in -- the  
22 State said you can't proceed for 10 years and no one has  
23 any -- property owner or interest owner has no way of  
24 going into court, that probably would be --

25 JUSTICE ALITO: I ask you this about the

1 government's interest involved here and the practicality  
2 of the situation, and I want to put aside the innocent  
3 owner defense, which I hope to ask your adversary about.  
4 But putting that aside, let's take what I envision as  
5 sort of the typical case where the police officer  
6 arrests someone in a vehicle for a drug offense and --  
7 without a warrant -- and then has to file a complaint in  
8 court.

9                   What -- what is the government -- what is  
10 the burden on the government, and what would be the  
11 burden on Chicago or the State of Illinois in a  
12 requirement that within some reasonably brief period of  
13 time after that that there must be the equivalent of the  
14 filing of a complaint in court, just as you would for  
15 the arrest of an individual without a warrant, where the  
16 only issue would be whether there was probable cause for  
17 the seizure, not whether there, you know, is some  
18 innocent owner defense, but just whether there's  
19 probable cause?

20                   MR. CASTIGLIONE: I think there are several  
21 burdens. One, I think that hearing would be duplicative  
22 of the ultimate forfeiture hearing. I think if it's an  
23 adversarial hearing, it might be a way of doing, like, a  
24 -- like, almost back door discovery in the -- in the  
25 attendant criminal case if we had to do an adversarial

1 hearing in a civil forfeiture case. I think it  
2 disregards the State's interest, Your Honor, in -- in  
3 promoting informal negotiation and settlement. And  
4 that's something I had hoped to talk about.

5 JUSTICE BREYER: I mean, he was just talking  
6 about probable cause. How could that be duplicative?

7 MR. CASTIGLIONE: Well, just something along  
8 the line --

9 JUSTICE BREYER: Look, I thought this case,  
10 though I grant you I could well be wrong, is not about a  
11 final forfeiture hearing where you have to show that  
12 it's more probable than not that the car was used for  
13 drugs. But under the Illinois law, just as Justice  
14 Alito said, you can seize a car without a warrant.

15 MR. CASTIGLIONE: Yes.

16 JUSTICE BREYER: And there are lists of  
17 circumstances. But in the Florida statute that Justice  
18 Thomas wrote about, it said that a person whose car it  
19 is, is entitled to a hearing, I thought, in a brief time  
20 to see if there was probable cause, just as a person  
21 arrested. You have to bring them before a magistrate  
22 within a short time to see if there's probable cause.  
23 Now, how do you do that in Chicago?

24 MR. CASTIGLIONE: Well, first of all,  
25 Justice Breyer, we say the complete deprivation of one's

1 liberty is not the same as the deprivation of property.  
2 The way we do it under our statute -- the way we deal  
3 with this issue is there's -- the statutory regime  
4 really has two concepts, one for property, seized  
5 property, that -- whose value exceeds 20,000, and one  
6 where --

7 JUSTICE BREYER: So you're saying the answer  
8 to the question is there is no way? A person who doubts  
9 this probable cause has no way. He has to wait 6 months  
10 until there's a forfeiture hearing. He's out of luck  
11 because then it merges with the merits.

12 MR. CASTIGLIONE: It does merge with the  
13 merits. That's historically --

14 JUSTICE BREYER: Okay. That's your answer.  
15 There is no way.

16 MR. CASTIGLIONE: Well, there's still a --

17 JUSTICE BREYER: Then I don't see why you  
18 win this case.

19 MR. CASTIGLIONE: -- there's no formal  
20 hearing.

21 JUSTICE BREYER: What?

22 MR. CASTIGLIONE: I'm sorry, Your Honor.

23 JUSTICE BREYER: I mean, is there a way or  
24 not? You have pointed to three statutes. Do they give  
25 him any way?

1                   MR. CASTIGLIONE: Those statutes are a way  
2 to getting into -- to getting into court --

3                   JUSTICE BREYER: Look --

4                   MR. CASTIGLIONE: -- to expedite the  
5 hearing. And once the hearing is filed, Your Honor, it  
6 is certainly possible to -- you know, to move to  
7 expedite the trial.

8                   JUSTICE GINSBURG: How do you get an  
9 expedited hearing? I thought -- I thought for property  
10 under 20,000, the State -- the time before the  
11 forfeiture proceeding could be 187 days.

12                  MR. CASTIGLIONE: Forty-five of those days,  
13 Your Honor, is what would be the property owner deciding  
14 whether to file a claim. And if -- I mean, one of the  
15 possibilities -- it's at section 6 of our statute, which  
16 is actually nonjudicial in rem forfeitures. If one were  
17 to simply file -- a property owner simply file a claim  
18 but not a cash bond, then there wouldn't be a judicial  
19 proceeding. It would just be informal negotiations with  
20 the State's attorney. One could always go to court by  
21 filing a cash bond.

22                  JUSTICE GINSBURG: And the bond is for  
23 costs, not to get your car back.

24                  MR. CASTIGLIONE: The bond is for costs,  
25 right. But the --

1 JUSTICE GINSBURG: Is there -- is there any  
2 procedure for putting up a bond for the car so you can  
3 get the car back, for the full value of the car?

4 MR. CASTIGLIONE: There isn't, Your Honor.  
5 I would briefly address that. I know I have 1 minute  
6 remaining. I would like to -- to reserve the time for  
7 rebuttal. I would like to answer this question.

8 No, Your Honor. For bond, about 80 to 85  
9 percent of our cases are cash, seizures of cash, and as  
10 the Seventh Circuit recognized, posting a cash bond for  
11 cash is an absurdity.

12 With respect to cars, Your Honor, the  
13 problem is the State's duty is to be able to preserve  
14 and prevent the destruction or dissipation of the  
15 property prior to the forfeiture hearing. If we bond it  
16 out, we can't guarantee that at the ultimate forfeiture  
17 hearing, that property would be -- would be preserved.

18 Your Honor, I would like -- if I may, I  
19 would like to reserve the remainder of my time.

20 CHIEF JUSTICE ROBERTS: We will afford you  
21 additional time because the Court's questions have  
22 intruded upon your rebuttal time.

23 MR. CASTIGLIONE: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Mr. Jay.

25 ORAL ARGUMENT OF WILLIAM M. JAY

1                   ON BEHALF OF THE UNITED STATES,  
2                               AS AMICUS CURIAE,  
3                   SUPPORTING THE PETITIONER

4                   MR. JAY: Mr. Chief Justice, and may it  
5 please the Court:

6                   I would like to begin, if I may, with the  
7 colloquy that Justice Stevens and Justice Scalia had  
8 with my co-counsel about the hypothetical where the  
9 State mandates a minimum time --

10                  CHIEF JUSTICE ROBERTS: Well, I would think  
11 you'd begin with the mootness question.

12                  MR. JAY: I would be happy to begin with the  
13 mootness question, Your Honor. And I -- although I  
14 think that it's, to some degree, a question for the  
15 Respondents what precisely they are seeking. Because  
16 there are two Respondents, Yunker and Williams, who have  
17 lost their property. The property is in the possession  
18 of the State. And if their position is that unless a  
19 hearing is held within 10 days, which is what they  
20 originally asked for in their complaint, a probable  
21 cause hearing within 10 days, if after that no  
22 forfeiture is possible because timely post-deprivation  
23 process has not been afforded, if that's their claim,  
24 then it appears their claim is still alive because the  
25 State still has their property.



1           If, however, their claim expires when the  
2   forfeiture proceeding is actually held, then that  
3   proceeding is over and we agree that their injunctive  
4   claims are moot.

5           JUSTICE SCALIA: Well, what were they  
6   seeking to enjoin?

7           MR. JAY: It's not entirely clear from their  
8   complaint, Your Honor. They were -- they were asking  
9   for the imposition of this 10-day hearing requirement,  
10   but it -- and they are -- they were contending -- now,  
11   each of these was filed after the 10 days had run. The  
12   most recent seizure had occurred 2 months before the  
13   class action complaint was filed in district court.

14           So it appears they were contending that they  
15   wanted the forfeiture proceeding stopped because a  
16   hearing had not been held within 10 days. So the  
17   complaint doesn't make perfectly clear what kind of  
18   injunction they were seeking except that they wanted the  
19   imposition of this 10-day procedure.

20           JUSTICE SOTOMAYOR: What did the Illinois  
21   court do? Didn't it remand for an appropriate hearing  
22   to be given?

23           MR. JAY: Your Honor, the Seventh Circuit  
24   remanded for the district court to fashion -- to fashion  
25   some kind of procedure, that's right. And after that

1 remand order the plaintiffs, interpreting what the  
2 Seventh Circuit had said, filed the amended motion for  
3 class certification that Mr. Castiglione referred to,  
4 and in that they said they wanted a class certified to  
5 pursue damages for the time that their property was  
6 detained, and they wanted the court to certify a class  
7 of anyone who had had their property held for more than  
8 7 days this time without -- without a proper hearing.

9 JUSTICE BREYER: Am I right that what is --  
10 what is the rationale your supporting it for the  
11 following: My car was parked on the street. There  
12 happened to be some big drug crime nearby, and the  
13 policeman took my car. In my opinion, there was no  
14 probable cause. I would like my car back.

15 Now, I take it that in Illinois there is no  
16 proceeding, as there was in Florida, so that I can claim  
17 there was no probable cause, and I -- none at all. I  
18 never get that determination made; and, moreover, I have  
19 to wait, for 6 months possibly, before I get a different  
20 determination made, which is whether they had -- more  
21 likely than not, whether that's entitled to forfeiture  
22 on the merit.

23 Is that the law? If anything like it is the  
24 law, what's the constitutional justification for it?

25 MR. JAY: Well, let me begin, Your Honor, by

1 pointing out that it's not the law, because the State's  
2 ultimate burden at the hearing is not preponderance of  
3 the evidence; it's probable cause. It's -- it's  
4 precisely the same burden that --

5 JUSTICE BREYER: You mean they can keep my  
6 car even if it's more likely than not that it was never  
7 involved?

8 MR. JAY: When the -- when the State shows  
9 probable cause, the burden shifts to the claimant to  
10 prove by a preponderance -- so the ultimate burden is by  
11 a preponderance.

12 JUSTICE BREYER: But it's still -- okay,  
13 fine.

14 MR. JAY: But it's --

15 JUSTICE BREYER: Thank you. That is -- all  
16 right. That's a burden of proof thing at the final  
17 thing. That's not the thrust of my question.

18 The thrust of my question is: Do I have to  
19 wait for up to 6 months before I have any magistrate,  
20 any neutral official, pass on my claim there was no  
21 probable cause to take my car?

22 MR. JAY: And, Justice Breyer, you --

23 JUSTICE BREYER: And the Florida statute, by  
24 the way, doesn't do that. It says of course you get a  
25 hearing on probable cause.

1 MR. JAY: The Florida statute --

2 JUSTICE BREYER: Am I right?

3 MR. JAY: The Florida statute -- you are  
4 correct -- unique as far as I know among all the  
5 statutes legislated by the 50 States that use asset  
6 forfeiture or the Federal Government, does provide an  
7 adversarial probable cause hearing within the --

8 JUSTICE BREYER: Okay. So nobody gives you  
9 -- they go around taking cars even without probable  
10 cause. There's no way to do -- it happens in every  
11 State.

12 What's the constitutional justification for  
13 making a person wait for 6 months before he gets a  
14 neutral judicial official to say whether there was even  
15 cause to take his car?

16 MR. JAY: The constitutional justification,  
17 Justice Breyer, requires that a reviewing court look at  
18 each step in the process, and it's not just a matter of  
19 6 months from beginning to end. That process in  
20 Illinois and in many other systems has different steps.

21 The first step is investigation and notice.  
22 The -- and then the second step is deciding whether to  
23 pursue this. The third step is completely in the hands  
24 of the claimant, where the claimant decides whether to  
25 pursue a judicial hearing. And the fourth --

1 JUSTICE SOTOMAYOR: I'm sorry. You take the  
2 car and then you investigate?

3 MR. JAY: Your Honor, there's more to  
4 investigate than just the probable cause to seize. In  
5 many cases, the probable cause to believe the car is  
6 forfeitable is ironclad, but there is more to  
7 investigate because, for example, an innocent owner in  
8 Illinois by statute is entitled not to have her car or  
9 her gun or her personal -- other personal property -- it  
10 could be currency -- forfeited. And that --

11 JUSTICE SOTOMAYOR: But -- but you are --  
12 but you're sort of begging the question. You are saying  
13 to me that initial period is for the government to  
14 figure out if it made a mistake or not, and we're  
15 entitled to that time. You're not entitled, meaning  
16 you, property owner, to go to a neutral magistrate who  
17 will make that decision without a personal interest in  
18 the outcome, because the person who seized does have an  
19 interest of some sort. Many local police departments do  
20 in seizing property, because they keep the proceeds.

21 So what you're saying is that  
22 constitutionally it's okay for the party holding on to  
23 property without a warrant to decide whether or not it  
24 wants to give something back, whether or not there's  
25 -- there's a viable defense. I'm a little confused.

1           MR. JAY: Let me respond to that in a couple  
2 of steps. And the first is to respond to your point  
3 about the incentives that local police departments may  
4 face. There is no incentive to -- to hold property  
5 longer than necessary because, while the property is  
6 being held, there is no ability to access that property.  
7 If it's currency, for example -- as Mr. Castiglione  
8 pointed out, 85 percent of their seizures are -- the  
9 currency is held in a suspense account and is not  
10 accessible by the -- by the seizing government at all.  
11 So the government has no interest in delaying longer  
12 than necessary, especially for cars. The government has  
13 to take care of the car, maintain it in a lot, you know,  
14 preserve it from -- from harm.

15           Second, on the basic question of what is the  
16 government doing during this time? The government has a  
17 due process obligation, especially in an in rem  
18 proceeding like this one, which deals with a piece of  
19 property to which there may be competing claims. The  
20 government has a -- itself has a due process obligation  
21 to notify everyone who has a claim to this property that  
22 it's in the government's custody and that there will be  
23 a proceeding to adjudicate the competing claims to it.

24           I mean, this Court in *Robinson v. Hanrahan*,  
25 a decision in 1972, held that Illinois under its

1 forfeiture statute had violated due process by not  
2 providing notice to the owner -- to the registered owner  
3 of a car, because it sent notice to that owner at his  
4 address when in fact he was in the custody of the State  
5 of Illinois in a criminal proceeding.

6           The State has an obligation to notify -- to  
7 investigate, especially after a seizure, even if it is a  
8 car which only a minority of seizures are -- even if it  
9 is a car. Identifying the driver is not enough to  
10 identify who has a claim to that car. There may be a  
11 registered owner. There may be -- there may be a  
12 security interest. In currency cases, it's even more  
13 difficult, because on the face of currency there is no  
14 indication who owns the currency --

15           JUSTICE STEVENS: May I just get you to  
16 answer what I thought you were going to do at the  
17 beginning of the argument. How do you answer my  
18 hypothetical? You have a forfeiture hearing, but you  
19 have a provision that it shall not take place for 6  
20 months.

21           MR. JAY: And that, of course, as I think  
22 the hypothetical recognizes, Justice Stevens, is  
23 different from a statute like we have here where there's  
24 a maximum time, but it may well take place within --

25           JUSTICE STEVENS: I understand it's

1 different. I'm just curious to know what your answer  
2 is.

3 MR. JAY: My answer, Justice Stevens, is  
4 that it might well be unconstitutional as applied. And  
5 the Court, in 8,850, says --

6 JUSTICE STEVENS: Wouldn't it be  
7 unconstitutional on its face?

8 MR. JAY: It wouldn't be unconstitutional on  
9 its face, Justice Stevens, because sometimes the State  
10 has a valid interest in holding property for more than a  
11 year, as Mr. Castiglione said. In 8,850 itself, the  
12 property was held for 18 months. The Court has said in  
13 any due process case --

14 JUSTICE STEVENS: Would that justify a  
15 statute that says in all cases it shall be held for at  
16 least 18 months without telling the owner?

17 MR. JAY: I think, Your Honor, that if the  
18 State responded to an 8,850 defense and said -- and said  
19 nothing other than the statute says 18 months or  
20 10 years, and -- you know, and we have done nothing  
21 during that time, I think that it would be  
22 unconstitutional as applied.

23 But as a practical matter, States and the  
24 Federal Government are not sitting around doing nothing  
25 after seizing property. They are actively investigating



1 who has a claim, they are notifying all claimants, they  
2 are allowing -- allowing those claimants to file claims  
3 if they wish. A majority of all seizures are  
4 uncontested.

5 And then whenever a claimant wants one, that  
6 claimant is entitled to an in rem judicial hearing,  
7 where all -- all claimants come into court and have --  
8 have the government's right to seize the property  
9 adjudicated and also the affirmative defenses, such as  
10 the innocent owner defense. Now --

11 JUSTICE SCALIA: Suppose a situation in  
12 which the property taken is really essential to the --  
13 to the living of the person from whom -- who owns it --  
14 a car -- and the person needs a car to get to work every  
15 day. And -- and there is really no reason why the --  
16 why the government has to wait that long.

17 Is there no procedure by which he can say,  
18 you know -- do it quickly. You don't have to wait so  
19 long. I'm the owner. I'm the only owner. I can -- I  
20 can prove that. Let's have a quick hearing.

21 MR. JAY: I think that as the Federal  
22 framework reflects, that is the kind of situation that  
23 is -- that can be addressed by legislation. And the  
24 Federal hardship provision, 18 U.S.C. 983(f), is a good  
25 way of illustrating that; that the government has

1 competing interests in all these cases that compete with  
2 the claimants' interests and in cases such as currency,  
3 where the government can't be secured against the  
4 possibility that the property will disappear, then --  
5 then there's no hardship exception. And -- but the  
6 government -- Congress, after extensive study, has  
7 made a hardship provision for other forms of personal  
8 property.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 JUSTICE GINSBURG: There is no -- there's  
11 no hardship under the Illinois statute? There is no  
12 provision comparable to the Federal legislation for  
13 hardship, is there?

14 MR. JAY: You are correct, Justice Ginsburg,  
15 that there is no statutory provision, no.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Peters.

18 ORAL ARGUMENT OF THOMAS PETERS

19 ON BEHALF OF THE RESPONDENTS

20 MR. PETERS: Mr. Chief Justice, and may it  
21 please the Court:

22 This case is not moot. It's not moot  
23 because at the time that the plaintiffs filed the case  
24 they clearly had standing. They immediately moved for  
25 class certification. And although their motion for

1 class certification was denied, it was denied because  
2 the merits of the case were simultaneously denied. And,  
3 in fact, this Court has addressed a situation remarkably  
4 similar to this in United States Parole Commission v.  
5 Geraghty.

6 In the Geraghty case, the class was not  
7 certified. It was denied, as it was here. The case  
8 became moot because the plaintiff in that case was a  
9 Federal prisoner, had been released on parole, and  
10 nonetheless the Court allowed the case to proceed. And  
11 the reason the Court allowed the case to proceed, as I  
12 understand it, is that the "capable of repetition, yet  
13 evading review" doctrine was invoked. Once that  
14 document is invoked, the claim -- the standing relates  
15 back to the time of the filing of the complaint. At the  
16 time of the filing of the complaint, there was standing,  
17 and the putative class --

18 JUSTICE SCALIA: And you say it was likely  
19 to -- these same named plaintiffs were likely -- likely  
20 -- to face this same situation again?

21 MR. PETERS: No, that's not what I'm saying,  
22 Your Honor. What I'm suggesting --

23 JUSTICE SCALIA: Well, if you are relying  
24 on -- on, you know, "capable of repetition, yet evading  
25 review," that's -- that's the test, whether -- whether

1 indeed these people stand a chance of having the same  
2 thing happen.

3 MR. PETERS: I respectfully beg to differ,  
4 Your Honor. With respect to class actions and cases  
5 where the plaintiff has timely requested to certify a  
6 class, the "capable of repetition" relates to the class.  
7 There is right now today a class of people in the city  
8 of Chicago who have their cars impounded. That -- their  
9 claims are repeating daily.

10 JUSTICE SCALIA: You are begging the  
11 question. That is, you are assuming that the class is a  
12 valid class. It hasn't been certified. How -- how can  
13 you make that -- that argument when there is no class?

14 MR. PETERS: Well, I -- I can make that  
15 argument --

16 JUSTICE SCALIA: Just an asserted class on  
17 your part. There's no class.

18 MR. PETERS: Yes, and that was also true in  
19 Geraghty, Your Honor. There were -- the motion for  
20 class --

21 JUSTICE SOTOMAYOR: No, it wasn't. The  
22 appeal in Geraghty included an appeal of the denial of  
23 class certification.

24 MR. PETERS: Yes, it did, Your Honor.

25 JUSTICE SOTOMAYOR: So both issues -- both

1 the merits and the denial of the class certification --  
2 were still active before the Court. Here you didn't  
3 appeal the dismissal of the class certification or the  
4 mootness of it.

5 MR. PETERS: Well, we couldn't, Your Honor,  
6 because it was inextricably linked to the merits. In  
7 Geraghty --

8 JUSTICE SOTOMAYOR: But -- but in many  
9 appeals parties plead in the alternative and say, if you  
10 -- if we win on the merits, reverse the dismissal of the  
11 class certification because we still want to proceed as  
12 a class. You didn't do that. You waited for the merits  
13 to be adjudicated and then filed a new class action.  
14 It's a very different procedural step.

15 MR. PETERS: I don't think that it is  
16 significantly different when one considers the concerns  
17 that animated the Court's decision in Geraghty. The  
18 concerns that were at issue in that case were the fact  
19 that the plaintiff was representing a class that was  
20 going to continue to exist and that as to that class  
21 there was constantly going to be a claim repeating; and  
22 that that person, even though the class was denied -- in  
23 that case it truly -- it was denied on the merits,  
24 because he had an opportunity to litigate the merits.  
25 We did not have a -- opportunity to litigate the merits

1 of the Rule 23 issue.

2 JUSTICE GINSBURG: Mr. Peters, I think the  
3 Court in Geraghty said it split the interests. And they  
4 said his interests in challenging the denial of class  
5 action status continued even though he was no longer  
6 incarcerated.

7 So they were concentrating on his right to  
8 appeal the denial of class action certification. And  
9 that's what you don't have here. And that's what  
10 distinguishes this case from Geraghty.

11 MR. PETERS: I -- I certainly agree that it  
12 is not an identical situation, Your Honor. But I  
13 think -- as I said before, I think again that the  
14 concerns that caused the Court to reach that position in  
15 Geraghty are in fact the same because in this case  
16 the -- there is a continuing activity with respect to  
17 the class. There is some -- there are a group of people  
18 who are aggressively pursuing the rights of that class.  
19 There is a live controversy between the government and  
20 that class.

21 So in all of those respects, which are  
22 similar to what --

23 JUSTICE GINSBURG: But we must take it as it  
24 came into the Seventh Circuit, which is no appeal from  
25 the denial of class certification. So we have

1 individual plaintiffs who are seeking to overturn the  
2 denial of injunctive relief. And that's all that's  
3 before the Seventh Circuit.

4 MR. PETERS: That was -- that was all that  
5 was before the Seventh Circuit because I don't -- it  
6 seems to me that it is just sort of a gratuitous gesture  
7 to say, I am appealing the denial of the class  
8 certification ruling, when the class certification  
9 ruling is itself based entirely on the denial of the  
10 merits.

11 If there had not -- if there had been any  
12 inkling, any ruling that suggested that the Rule 23  
13 aspect, the class aspect, was being denied on  
14 class-related grounds, then of course there would be an  
15 appeal. But what --

16 JUSTICE SCALIA: As it turns out it -- it  
17 wouldn't have been gratuitous.

18 (Laughter.)

19 MR. PETERS: Well -- I understand Your  
20 Honor's position, although I --

21 JUSTICE BREYER: But if I have a different  
22 position, which is I'd like to see if it's practical  
23 to decide this case now, two things stand in the way in  
24 my mind which I'd like you to address. The first  
25 is your opponents are saying, no, you shouldn't really

1 address this issue now because there are three Illinois  
2 statutes which actually give them, anyone who wants it,  
3 a right to a hearing at least on probable cause. And  
4 that's a matter of Illinois law. And although the  
5 statutes don't seem to say it, they might.

6 And the second is that this seems mixed up  
7 in my mind -- not necessarily your fault; it may be my  
8 mind -- but it seems to me there are two quite separate  
9 questions: when you are entitled to a final hearing of  
10 whether forfeiture is right or wrong; and whether you  
11 are entitled to a preliminary hearing on whether there  
12 was probable cause under the statute to obtain the car.

13 Now, that latter question I think might be  
14 impractical in many cases to work out until there's been  
15 a trial of an individual who's accused of a crime, which  
16 may be much later.

17 But the former question is where I think you  
18 have a point, that there are five instances here in this  
19 statute where a policeman could seize a car without a  
20 warrant and he has to have probable cause under most of  
21 them nonetheless. So your clients might say: He did  
22 not have probable cause; I want a neutral magistrate to  
23 contest it.

24 Now, in my mind that reaches -- that's a  
25 different question than the final hearing about who's



1   entitled to the car. And I also see the three statutes  
2   and now I see a case where here in front of me  
3   everything is mixed up. So I think -- perhaps I'm just  
4   seeing it that way, but those issues are mixed up  
5   confused and not separated out. So why don't we  
6   wait? What's your answer now?

7               MR. PETERS: I think that -- that waiting  
8   would be the prudent thing to do. And it's  
9   unquestionably true that what we're suggesting with  
10  respect to the preliminary hearing is not identical to  
11  the final hearing. The final hearing is -- is on the  
12  merits. It decides where the property is going to,  
13  finally and ultimately. The hearing we are talking  
14  about is a conditional release hearing, similar to what  
15  happens in Krimstock, similar to what happens under the  
16  Civil Asset Forfeiture Review Act.

17              CHIEF JUSTICE ROBERTS: Well, but then if  
18  it's -- if it's money that is being conditionally  
19  released, there's no security for the government. If  
20  it turns out later on it shouldn't have been released,  
21  it's probably gone.

22              MR. PETERS: Well, there -- there could be  
23  grounds for -- there could be ways of getting security  
24  for it. I mean, perhaps a person would post some other  
25  collateral because they desperately needed the cash at

1     that moment. I certainly agree with Your Honor that the  
2     bond procedure is much more in tune with and much more  
3     likely to work with cars than with other property.

4                   JUSTICE ALITO: May I ask you --

5                   MR. PETERS: Sure.

6                   JUSTICE ALITO: -- exactly what you think  
7     needs to take place at this hearing? And the hearing  
8     you think has to take place within 10 days? Is that  
9     your figure?

10                  MR. PETERS: No, Your Honor. In the  
11     complaint we did reference 10 days, and the reason we  
12     did that is because we thought that that was an  
13     appropriate time frame.

14                  JUSTICE ALITO: Well, whatever the period  
15     is: 10 days, 14 days, whatever. Some short period.

16                  MR. PETERS: Yes.

17                  JUSTICE ALITO: I have two questions: Must  
18     it be an adversarial hearing, and must the State  
19     disprove the innocent owner defense?

20                  MR. PETERS: No and no. I think that  
21     the -- with respect to whether it's an adversarial  
22     hearing, I -- what we envision is a hearing similar to  
23     what happens in Krimstock where basically the  
24     government's burden is met by having police reports  
25     which on their face establish probable cause to at least

1     seize the car.

2                   JUSTICE ALITO:   Well, but my understanding  
3     of Krimstock is that a lot of those seizures -- and  
4     others know more about this than I do -- were for DWI,  
5     and that it is possible to assert an innocent owner  
6     defense there.  And that's where I see a great  
7     impracticality in this.  I -- I don't see how you can  
8     expect the State to come into court within such a short  
9     period and have any burden of contesting an innocent  
10    owner defense without compromising a criminal  
11    investigation.

12                  MR. PETERS:   Well, if there was -- my answer  
13    to that, I think, Your Honor, is in two parts:  One is  
14    the Federal Government is already doing something like  
15    that with the CAFRA.  There are hardship provisions, and  
16    part of the hearing could include showing by the car  
17    owner or the property owner that they are in fact likely  
18    to prevail as an innocent owner.  Now --

19                  JUSTICE GINSBURG:  I thought that -- I  
20    thought the government said it doesn't apply to cash.  
21    So that -- which we are told is 85 percent of the  
22    seizures involved.

23                  MR. PETERS:   The CAFRA doesn't apply to  
24    cash.  That's true.

25                  JUSTICE GINSBURG:  Right.

1 JUSTICE ALITO: Well, let me give you this  
2 example which is pretty much based on something that you  
3 -- you wrote in your own brief. Joe is arrested on a  
4 drug offense driving a car, and there are drugs in the  
5 car. But Joe isn't the owner of the car; John is the  
6 owner of the car. Then John comes in 10 days later or  
7 14 days later and says, well, you know, I never had any  
8 inkling that Joe was using the car to deal in drugs and  
9 had no reason to know that. And you think that within  
10 that short period of time the State has to disprove  
11 that, you know, that John didn't have --

12 MR. PETERS: No, Your Honor.

13 JUSTICE ALITO: -- reason to believe that  
14 Joe was involved in drug dealing?

15 MR. PETERS: No, Your Honor. I think the  
16 burden will be on the property owner to establish first  
17 that that the person is the owner of the property, and  
18 second to establish to some yet-undefined degree that  
19 they have a likely innocent owner defense.

20 JUSTICE SCALIA: I thought you said -- I  
21 thought you said the innocent owner defense didn't have  
22 to be inquired into in the probable cause here. I  
23 thought that was your position.

24 MR. PETERS: It -- it is not ordered  
25 by the Seventh Circuit but I -- we would believe that an

1 innocent owner --

2 JUSTICE SCALIA: Okay, you want --

3 MR. PETERS: -- argument should be included,  
4 and --

5 JUSTICE SCALIA: Okay. That makes it  
6 harder. You're challenging this -- this statute on its  
7 face, isn't that right?

8 MR. PETERS: No, Your Honor.

9 JUSTICE SCALIA: No?

10 MR. PETERS: As applied.

11 JUSTICE SCALIA: Just as applied?

12 MR. PETERS: Yes, we made that clear in the  
13 complaint. There has never been any argument --

14 JUSTICE SCALIA: No, how can you have an --

15 MR. PETERS: -- to the contrary until this  
16 Court.

17 JUSTICE SCALIA: How can you have an  
18 as-applied challenge to an entire class?

19 MR. PETERS: Well, first of all, Your Honor,  
20 what we're suggesting, the order of the Seventh Circuit  
21 does not invalidate any provision of this Act and in  
22 fact it's entirely consistent with section 2 of the  
23 Act, which incorporates by reference Federal remedies  
24 which include interim remedies. So it is not how the  
25 Act on its face is written. It's how it is being

1 applied to these people. And in addition to that, we  
2 are not suggesting that every --

3 JUSTICE SCALIA: Why -- why -- to -- to have  
4 an as-applied challenge, regardless of whether the  
5 Illinois law provides a -- a remedy, wouldn't you be  
6 able to individually assert under section 1983  
7 unconstitutional action?

8 I mean, isn't there a Federal remedy? If  
9 all you're concerned about is as-applied, you mean you  
10 are being treated unconstitutionally by a State and you  
11 have no remedy?

12 MR. PETERS: There is a Federal remedy, Your  
13 Honor, but that is not --

14 JUSTICE SCALIA: Why isn't that enough?

15 MR. PETERS: That's -- that's certainly not  
16 enough, Your Honor, for the following reason: It is  
17 largely impractical for most people -- many of the  
18 people who are involved in drug forfeiture seizures are  
19 people with modest to low incomes, probably little to no  
20 access to attorneys. The likelihood of them  
21 understanding, first of all, that they may have this  
22 right, then contacting an attorney and getting an  
23 attorney to litigate --

24 JUSTICE SCALIA: But they will know about  
25 the probable cause hearing that you want to -- that you

1 want set up, right?

2 MR. PETERS: If -- this is why it should be  
3 a class, and it clearly applies to a large class of  
4 people.

5 JUSTICE SCALIA: Which -- which is why you  
6 are asking for a facial challenge. You want these  
7 hearings in all cases --

8 MR. PETERS: No, Your --

9 JUSTICE SCALIA: -- regardless of what the  
10 individual circumstances are; isn't that so?

11 MR. PETERS: No, that is not so.

12 JUSTICE SCALIA: It is not so?

13 MR. PETERS: Yes, and the reason is --

14 JUSTICE SCALIA: Well, what are the  
15 individual circumstances of all the other people in  
16 the class? We don't know what they are. We don't know  
17 whether it's a car that has been taken, money that has  
18 been taken, whether they are millionaires, whether they  
19 need the car. We know nothing about them.

20 MR. PETERS: That's correct, Your Honor.  
21 But that's a function of the fact that this case came to  
22 the Court without the benefit of discovery, without  
23 having an opportunity to identify.

24 But what I was -- what I would suggest to  
25 Your Honor is this: We are not suggesting that every

1 single person who has a piece of property taken is  
2 necessarily entitled to this hearing. If, for example,  
3 the police seize my favorite baseball card, I would not  
4 be entitled to a hearing under the Mathews criteria  
5 because my favorite baseball card does not justify  
6 putting the government through the expense. On the  
7 other hand, there are categories of people -- say they  
8 seized \$5,000. There is some limit below which the  
9 hearings may not apply. But if all --

10 CHIEF JUSTICE ROBERTS: What if -- what  
11 if at your innocent owner or the hearing that you are  
12 seeking, you establish, well, I was going to sell my  
13 baseball card to give me the money to -- to survive, to  
14 get food?

15 That was my -- I mean, what happens then?

16 MR. PETERS: There would have to be -- first  
17 of all, we don't know how that would administratively be  
18 handled because of the posture of the case, but my  
19 suggestion, Mr. Chief Justice, would be this: That the  
20 likely result in a case -- in this case, is that there  
21 should be hearings for all car owners and that there  
22 should be a baseline dollar value below which a person  
23 is not entitled to a hearing. Now, how that --

24 CHIEF JUSTICE ROBERTS: So just to get back  
25 to the cars, I thought your answer to Justice Alito was



1 a little abstract. In the absolute concrete case, where  
2 the drug -- the suspect is driving the car, there are  
3 drugs in the car.

4 MR. PETERS: Yes.

5 CHIEF JUSTICE ROBERTS: At your hearing, the  
6 -- it's not registered to him. The registered owner  
7 comes in and says, that's my car, I had no idea it was  
8 being used for drugs.

9 Who wins, the State or the registered owner?

10 MR. PETERS: Well, in -- in those  
11 circumstances and that's the only car, I would say,  
12 most likely, the property should be returned to the car  
13 owner.

14 However, I would add that, if the government  
15 has some concerns about -- for example, that they need  
16 additional time to investigate this innocent owner  
17 claim, then by having the hearing in front of a neutral  
18 and detached person --

19 CHIEF JUSTICE ROBERTS: Well, aren't they  
20 always going to say that? They are going to say, well,  
21 we don't know if the registered owner is involved in the  
22 drug conspiracy. We don't know how closely he is tied  
23 with the owner, so it's reasonable to assume he knew  
24 what was going on, and besides, we've got a lot of other  
25 bigger fish to fry during this period.

1                   We are trying to find out the scope of the  
2   conspiracy. We are trying to find out where the sales  
3   were going to take place. Why do you force us to -- to  
4   focus our energies on the relationship between a  
5   registered owner and the guy driving the car?

6                   MR. PETERS: Well, I don't think that that  
7   is likely to happen, and I think what's going on in New  
8   York is proof that that is not how it works out, and I  
9   think --

10                  JUSTICE ALITO: Well, the situation is much  
11   worse than that, that they don't have the -- that they  
12   need time to investigate. They may have the registered  
13   owner under investigation.

14                  They may think he is involved in the drug  
15   conspiracy as well. They may have him on wiretaps.  
16   They may be preparing to arrest him. Now, you want to  
17   force them to come into court within 10 or 14 days and  
18   disclose the details of a -- of a pending criminal  
19   investigation and prepare to -- that makes a great --

20                  MR. PETERS: No, Your Honor. I'm not  
21   suggesting that at all.

22                  JUSTICE ALITO: Well, then I don't  
23   understand how this -- how you can possibly have the  
24   innocent owner issue adjudicated at this quick hearing.

25                  I can understand the argument that you have

1 to have the filing of the equivalent of a -- of a  
2 complaint when you -- that has to be filed when someone  
3 is arrested without a warrant, where it's not  
4 adversarial and you establish probable cause for the  
5 seizure.

6 But when you start to go beyond that in drug  
7 forfeiture cases, at least, not -- not DWI cases, I just  
8 don't see how that's workable.

9 MR. PETERS: Well, except --

10 JUSTICE SOTOMAYOR: Counsel, can you  
11 unpackage for me this hearing? Because there is a  
12 confusion in it that appears, both in your papers and in  
13 this argument.

14 There's a probable cause component, which  
15 is the police coming before a neutral magistrate and  
16 saying, this is the reason I seized; I have probable  
17 cause to believe that this car was involved in an  
18 illegal activity, and this is why.

19 And then there is what sounds like, to me, a  
20 sort of remission-type component to the hearing you are  
21 looking at, which is a magistrate saying, okay, you have  
22 probable cause, but there's no reason for the seizing  
23 authorities to keep the car because you can post a bond  
24 instead, or something else should be done to mitigate  
25 the damage to you during this process of forfeiture.

1           Am I correct that there are two components  
2   to your request? And if there are, I understand the  
3   probable cause component, but I'm not sure how you get  
4   to the second component of how and why due process would  
5   require the State to have a -- I'm calling it  
6   remission -- but a remission-like proceeding?

7           Am I correct? Am I understanding what --  
8   what it is you're --

9           MR. PETERS: Yes, Your Honor, but let me go  
10   back in response to your question and, I think, in  
11   part to Justice Alito's.

12           The Seventh Circuit hasn't ordered any  
13   specific hearing, so I am, at this point, advising the  
14   Court of what I think this hearing should look like.

15           It could well be, upon remand and discovery,  
16   that what I am suggesting the -- the hearing should look  
17   like, it may -- it may not look like that at all. It  
18   could be that --

19           JUSTICE GINSBURG: Isn't that one of the  
20   problems with the Seventh Circuit decision? That it  
21   covers the waterfront. It covers cash, as well as any  
22   property. It's not concentrated on cars.

23           And what your complaint asks for -- you said  
24   it was as applied, but you are asking for a declaration  
25   that defendants must hold a post-seizure probable cause

1 hearing within 10 business days, and you are asking the  
2 Court to enjoin the defendant's current practice of  
3 seizing property and retaining custody without a  
4 judicial determination of probable cause.

5 That sounds, to me, like a facial challenge  
6 to this statute, and you are asking for a declaration  
7 that the statute is invalid, not as applied to any  
8 particular person.

9 MR. PETERS: I think it's invalid as applied  
10 to categories of people, but I would continue to  
11 maintain --

12 JUSTICE SCALIA: You think -- you think it's  
13 unconstitutional as applied to everybody who is not  
14 given this -- this preliminary hearing. That's --  
15 that's what the complaint says.

16 Your -- the class you want certified is the  
17 class of everybody who has not been given a preliminary  
18 hearing. I don't know the difference between that and  
19 saying that this statute is unconstitutional as  
20 applied.

21 MR. PETERS: On that --

22 JUSTICE SCALIA: I mean, just -- just  
23 because you don't say in your complaint, this is a  
24 facial challenge, it amounts to a facial challenge. You  
25 say, everybody who has not been given a preliminary

1 hearing is entitled to relief because the statute is bad  
2 as to all of them.

3 MR. PETERS: The Seventh Circuit, however,  
4 did not endorse completely what we alleged in the  
5 complaint. We, of course, in the complaint, like most  
6 complaints, ask for as much as you think you might be  
7 able to get.

8 But the Seventh Circuit did not order  
9 hearings across the board for every single person whose  
10 property is taken. And I'm not suggesting that every  
11 single person whose property is taken will necessarily  
12 be entitled to a hearing.

13 JUSTICE BREYER: Okay, can we --

14 MR. PETERS: There are --

15 JUSTICE BREYER: Go ahead. Finish.

16 MR. PETERS: There are going to be  
17 circumstances when the value of the property is de  
18 minimis as compared to the cost of the hearing. And --

19 JUSTICE SCALIA: That is not the class you  
20 asked to be certified. You asked to certify everybody  
21 who had been denied a preliminary hearing.

22 MR. PETERS: Yes, I -- I did, Your Honor,  
23 and in that regard, I was mistaken, but the Seventh  
24 Circuit corrected my mistake and only ordered a remand  
25 for a determination as to who it would be, who would be

1     entitled to --

2                   JUSTICE GINSBURG:   Where -- where does the  
3     Seventh Circuit --

4                   JUSTICE SCALIA:   It doesn't change this --  
5     this action from a class action -- from a facial  
6     challenge into a nonfacial challenge.  They can't change  
7     your complaint.

8                   You were either asking this to be struck  
9     down on its face, or you weren't.  And what -- what the  
10    Seventh Circuit did doesn't change that.

11                  MR. PETERS:   Well, Your Honor, I think what  
12    the Seventh Circuit did does change it because now the  
13    ruling is what was determined by the Seventh Circuit,  
14    and the Seventh Circuit did not say that every single  
15    person is entitled to a hearing.

16                  JUSTICE BREYER:   Well, can I get to the  
17    merits for a second?

18                  MR. PETERS:   Yes, sir.

19                  JUSTICE BREYER:   Go back to what Justice  
20    Alito and Justice Sotomayor were asking.  This  
21    statute gives a policeman the right to seize some  
22    property without a warrant if it's a circumstance where  
23    you could seize a person without a warrant.

24                  That's basically what it says, doesn't it?

25                  MR. PETERS:   Yes.

1 JUSTICE BREYER: All right. In that kind of  
2 situation, I would think maybe you are entitled to a  
3 quick hearing where the only subject would be: Was that  
4 language carried out? Was that policeman right? Was  
5 there probable cause, or wasn't there?

6 Now, if that's the issue, I don't see why  
7 you give up at all on the baseball card. I mean, if  
8 somebody comes into my house and takes a baseball card,  
9 and he's supposed to have probable cause and he doesn't,  
10 I don't see why I can't go get a judge or a magistrate,  
11 determine whether he had at my baseball card, and pretty  
12 quickly, too.

13 JUSTICE SCALIA: Some of them are worth --

14 JUSTICE BREYER: But if you go to the other  
15 --

16 JUSTICE SCALIA: -- a lot of money. Yes.

17 JUSTICE BREYER: If you go to the other,  
18 which is whether there's an innocent owner or whether  
19 in fact you should give bail to the property -- I mean,  
20 that's -- I know we give bail to people, but I don't  
21 know that we give bail to property. Maybe real  
22 property, but that seems a much more complex argument.

23 So I want to know: What's your authority  
24 that we should give bail to the property and have a  
25 hearing on that?



1                   MR. PETERS: I don't --

2                   JUSTICE BREYER: And why do you give up in  
3   respect to baseball cards or anything in effect to the  
4   first?

5                   MR. PETERS: Well, I wouldn't like to give  
6   up my favorite baseball card, but the reason that I said  
7   that, Your Honor, is this: The Mathews criteria, which  
8   we are espousing here, require a cost-benefit analysis,  
9   and if the value of the property under that -- using  
10  that criteria does not warrant a hearing, then as to  
11  that property, there shouldn't be a hearing. So there  
12  doesn't have to be a hearing in every case. There may  
13  --

14                  CHIEF JUSTICE ROBERTS: So it's as -- so  
15  it's as applied in every case, which I think ties in a  
16  little bit to the mootness question that we began with.  
17  Because it focuses on the circumstances of the  
18  individual claimants, and if the individual claimants  
19  have already had their property returned, I think it  
20  accentuates the mootness issue.

21                  MR. PETERS: I -- I continue to maintain,  
22  Your Honor, that the -- as long as there was standing  
23  when the case was filed, and as long as there is a live  
24  class that could be represented by these class -- or  
25  putative class --

1 JUSTICE SCALIA: "My potential class," you  
2 should call it.

3 MR. PETERS: Potential class. Yes, Your  
4 Honor.

5 Then there is standing on -- and I believe  
6 that the standing can be established through the  
7 Geraghty decision. I agree that it is not literally  
8 identical to Geraghty, but I think the underlying  
9 circumstances that animated the Court's decision in that  
10 case are the same and that, therefore, these people  
11 maintain standing.

12 If, however, in response to a question  
13 that you asked Mr. Castiglione earlier, if the case  
14 became moot as a result of the return of the property,  
15 then it wouldn't be a Munsingwear situation. It would  
16 be a Bancorp v. Bonner situation, because if it became  
17 moot as a result of the settlement of the case after the  
18 Seventh Circuit's decision, then the Seventh Circuit's  
19 decision should stay in place.

20 So if -- I do not agree that the case is  
21 moot, but if hypothetically the case were moot, then we  
22 are not in a Munsingwear situation; we are in a Bancorp  
23 situation, because the mootness --

24 CHIEF JUSTICE ROBERTS: Well, that's an  
25 interesting -- that's an interesting question. I mean,

1 is it becoming moot through their voluntary cessation or  
2 activity when the State law requires them to take  
3 particular action?

4 MR. PETERS: No, what -- what I'm saying,  
5 Your Honor, is if we're -- if we're defining mootness as  
6 the ultimate return of the property, then the property  
7 was returned pursuant to settlements in four of the  
8 cases. The plaintiffs agreed, we'll pay \$400 instead of  
9 \$20,000, if you return our car. The car was returned.

10 So if the case was settled and became moot  
11 because of the settlement, it is not a situation in  
12 which the Court can adopt the Munsingwear position. It  
13 really is a Bancorp situation, and the Seventh Circuit's  
14 decision remains --

15 JUSTICE STEVENS: Of course, all of these  
16 problems really arise out of the fact that the effect of  
17 the court of appeals' decision basically was to overrule  
18 the motion to dismiss, left everything open on remand.  
19 So if we said it is moot, you'll just get another  
20 plaintiff and bring another lawsuit, which is what you  
21 do if the Court -- we are trying to get into the case  
22 much earlier than we should, it seems to me. Just let  
23 the proceedings go ahead on remand and find out what all  
24 the -- all these factual answers that -- or these  
25 questions that should be answered.

1                   MR. PETERS: I certainly agree with that,  
2   Your Honor. The -- there are many --

3                   JUSTICE STEVENS: The mootness -- the  
4   mootness decision won't really decide anything. You'll  
5   just say you've got to file another lawsuit and start  
6   over again.

7                   MR. PETERS: Yes.

8                   JUSTICE STEVENS: But if you just say, we --  
9   probably, in my judgment, we ought to dismiss this writ  
10   as improvidently granted and let the record be developed  
11   and the case go by, and we could decide the issues.

12                  MR. PETERS: That, it seems to me, is a very  
13   wise choice of action.

14                  JUSTICE GINSBURG: But where you said -- you  
15   said that --

16                  MR. PETERS: For obvious reasons. But  
17   beyond that --

18                  JUSTICE GINSBURG: -- the Seventh  
19   Circuit -- your complaint, you say, is -- you asked for  
20   the universe, every kind of property of due process  
21   hearing within 10 days or a short period. But you said  
22   the Seventh Circuit narrowed the relief. And I'm  
23   looking at the Seventh Circuit decision, and I really  
24   don't see what was narrowed. I think they left  
25   everything open for the district Court.

1 MR. PETERS: Well, they --

2 JUSTICE GINSBURG: Where -- where is there  
3 any narrowing?

4 MR. PETERS: Well, the narrowing, as I  
5 perceive it, Your Honor, is this: I believe the Court  
6 said at different times whether an appropriate remedy  
7 can be fashioned. The Court did not say for whom. It  
8 didn't say it must be for everybody. It didn't say what  
9 would be necessary to trigger the right to the hearing.  
10 It didn't say how much time would elapse.

11 It left -- it did leave, in that sense,  
12 everything open, but by leaving everything open, it also  
13 allows the court to narrow the categories of people who  
14 would be entitled to this hearing that -- in such a way  
15 that it would be an effective practical remedy.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MR. PETERS: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Castiglione, why  
19 don't you take 3 minutes?

20 REBUTTAL ARGUMENT OF PAUL CASTIGLIONE

21 ON BEHALF OF THE PETITIONER

22 MR. CASTIGLIONE: Thank you, Your Honor.

23 Well, Your Honor, initially, two of the  
24 claimants here lost their property. They defaulted.  
25 Three had their property returned. This is not a case

1 where the matter -- the underlying matter is concluded  
2 by voluntary cessation.

3 JUSTICE SCALIA: I thought they didn't. I  
4 thought some didn't have it returned, but there was a  
5 settlement.

6 MR. CASTIGLIONE: One did, Your Honor, but  
7 it wasn't in response to the Federal litigation. So our  
8 position would be if this is moot, this is really --  
9 Munsingwear would apply.

10 JUSTICE SCALIA: The mootness was not a  
11 result of any settlement between the city and --

12 MR. CASTIGLIONE: That's correct. Well, I  
13 mean -- it didn't settle because of the lawsuit.

14 JUSTICE SCALIA: Your -- your friend said  
15 the opposite. I mean --

16 MR. CASTIGLIONE: Well, it settled, Your  
17 Honor, just as through a normal course. It was not a  
18 response to the Federal litigation that was going on  
19 independently.

20 JUSTICE SCALIA: I don't understand.

21 MR. CASTIGLIONE: Well, I'm --

22 JUSTICE SCALIA: They got all of their  
23 property back?

24 MR. CASTIGLIONE: Oh, no, no. In most  
25 cases, yes, Your Honor. The private -- the hearing --

1 the cases went to hearing and the three -- with the  
2 three car owners and they ultimately received their cars  
3 back.

4 JUSTICE SCALIA: No, I don't understand.  
5 They got their cars back, right?

6 MR. CASTIGLIONE: Yes.

7 JUSTICE SCALIA: The people who had money at  
8 stake, what happened to the money?

9 MR. CASTIGLIONE: Two of them -- two  
10 defaulted and one reached a settlement with the State.

11 JUSTICE SCALIA: A settlement?

12 MR. CASTIGLIONE: Yes, sir.

13 JUSTICE SCALIA: So you have at least one  
14 case where the mootness is attributable to a settlement.  
15 You have at least one plaintiff, and you can't get the  
16 kind of remand for mootness that you are asking for.

17 MR. CASTIGLIONE: No, I understand, Your  
18 Honor. I'm just making the point that if this case --  
19 if the Court finds it's moot, that we would want --  
20 would ask for an entry of an order vacating the  
21 orders below pursuant to -- pursuant to Munsingwear.

22 JUSTICE SCALIA: But we don't do Munsingwear  
23 orders where -- where the mootness is a result of a  
24 settlement.

25 MR. CASTIGLIONE: Our position, Your Honor,

1 is that the settlement wasn't in response. We didn't  
2 settle the Federal -- we didn't settle the Federal  
3 litigation. The -- the underlying forfeiture case was  
4 -- was resolved.

5 CHIEF JUSTICE ROBERTS: I thought your  
6 answer is that they didn't all settle.

7 MR. CASTIGLIONE: They all didn't settle.  
8 That's right. In fact, that's a better answer, I think,  
9 Your Honor.

10 JUSTICE STEVENS: Well, what good would a  
11 Munsingwear order do, anyway? They'll just file another  
12 lawsuit, won't they?

13 MR. CASTIGLIONE: They could.

14 JUSTICE STEVENS: Yes.

15 MR. CASTIGLIONE: They certainly could, if  
16 you -- they have the right to do that, Your Honor.

17 JUSTICE STEVENS: And then if the district  
18 judge said -- having read this opinion, which was  
19 vacated, says, well, I guess it states a cause of  
20 action, I will deny the motion to dismiss -- we would  
21 be exactly where we are now.

22 MR. CASTIGLIONE: We -- and we would. There  
23 is no doubt about that.

24 JUSTICE SOTOMAYOR: Can I just get  
25 clarification?



1 Under your State law, there is no way for an  
2 owner to come in and challenge probable cause to seize?

3 MR. CASTIGLIONE: There --

4 JUSTICE SOTOMAYOR: Not a defense --

5 MR. CASTIGLIONE: Right.

6 JUSTICE SOTOMAYOR: -- but the examples  
7 Judge Breyer said: My car was just sitting there.

8 MR. CASTIGLIONE: There is not, Your Honor.  
9 I mean, the forfeiture is not going to help.

10 JUSTICE SOTOMAYOR: All right. And, second,  
11 is there any procedure under your State law to do the  
12 second half of what your adversary said he was looking  
13 for, a remission-type proceeding that would balance the  
14 government's need to hold the property and the  
15 individual's need for it, and whether there is a bond  
16 that could be posted or not?

17 MR. CASTIGLIONE: Not that we -- Illinois  
18 doesn't provide for a bond, Your Honor. As we  
19 indicated, there are problems with bonds, certainly for  
20 cash and for -- and for other personal property as well,  
21 but --

22 JUSTICE SOTOMAYOR: Well, that may be part  
23 of the Mathews issue, that once you prove probable  
24 cause, giving away -- giving back money just never would  
25 probably be rational to hold a hearing about, but that

1 might not be true for real property, correct?

2 Under -- even under Mathews, under -- in a  
3 Mathews analysis.

4 MR. CASTIGLIONE: I'm not sure I understand  
5 Your Honor's question.

6 JUSTICE SOTOMAYOR: If you apply a Mathews  
7 analysis --

8 MR. CASTIGLIONE: Yes.

9 JUSTICE SOTOMAYOR: -- the multifaceted item  
10 would say for the seizure of cash, maybe only the  
11 hearing has to address probable cause, but for real  
12 property it has to go further. Not real property, in  
13 the sense of real personal property. It has to go  
14 further, because there has to be some sort of  
15 protection of the interest of the individual, pending --

16 MR. CASTIGLIONE: Let me attempt to address  
17 that. The -- the statute does contemplate, Your Honor,  
18 section -- especially section 6 of DAFPA, nonjudicial  
19 remedies, and then essentially if the amount of property  
20 is under 20,000 or if we are dealing with a car, which  
21 falls under section 6, those cases are routinely dealt  
22 with by negotiation, Your Honor.

23 And I think that's the best way to deal with  
24 hardship -- the hardship examples given -- is that both  
25 through negotiation and a speedy hearing --

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
2 The case is submitted.

3 MR. CASTIGLIONE: Thank you, Your Honor.

4 (Whereupon, at 11:09 a.m., the case in the  
5 above-entitled matter was submitted.)

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