**No. A13-0445**

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State of Minnesota
# In Supreme Court

Daniel Garcia-Mendoza,

*Appellant,*

v.

2003 Chevy Tahoe, VIN #1GNEC13V23R143453,
Plate #235JBM and $611.00 in U.S. Currency,

*Respondents.*

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## Statement of the Case and Facts[1]

IJ concurs with Appellant's statement of the case and facts.

## Standard of Review

IJ concurs with Appellant's statement of the applicable standard of review.

## Introduction

The United States Supreme Court held in 1965 that the exclusionary rule applies to civil forfeiture proceedings in *One 1958 Plymouth Sedan v. Pennsylvania*. The vast majority of federal and state courts have applied *Plymouth* and held that the exclusionary rule applies to all civil forfeiture proceedings. This Court should follow suit for two reasons. First, forfeiture is an independent law enforcement objective. Law enforcement agencies view forfeiture as a separate method for fighting crime, totally independent of getting a criminal conviction, that removes the financial rewards from criminal activity. This independence is enhanced by the fact that Minnesota's forfeiture statutes create a profit incentive for law enforcement to pursue seizures and forfeiture by allowing law enforcement agencies to keep up to 90 percent of forfeiture proceeds. Indeed, the data show that from 2003 to 2010 Minnesota law enforcement kept almost $30 million in forfeiture proceeds.

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[1] Certification is hereby made pursuant to Minn. R. Civ. App. P. 129.03 that no person or entity has paid for or authored this brief other than undersigned counsel and the Institute for Justice.

Also, modern forfeiture as its own objective is inconsistent with the original purpose of forfeiture, which was to enforce admiralty and piracy laws when suspected violators were beyond law enforcement's reach and could not be apprehended. Second, Minnesota courts have historically upheld heightened privacy protections, above what the Fourth Amendment requires, including applying the exclusionary rule even in non-forfeiture civil proceedings.

## Argument

### I. Black-letter Federal Law Applies the Exclusionary Rule to Civil Forfeiture Proceedings.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV; Minn. Const. art. I, § 10 (with only differences in punctutation.)

The framers of the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution drafted those provisions in order to guarantee Americans and Minnesotans the right to be protected from unreasonable searches and seizures. *Boyd v. United States*, 116 U.S. 616, 630 (1886), (*overruled on other grounds by Warden, Md., Penitentiary v. Hayden*, 387 U.S. 294 (1967); *State v. Mohs*, 743 N.W.2d 607, 611 (Minn. 2008). The exclusionary rule is a longstanding remedy for

Fourth Amendment violations and exists to protect Fourth Amendment rights by excluding from trial any evidence obtained through an unconstitutional search or seizure. *Weeks v. United States*, 232 U.S. 383, 398 (1914), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961). At first, the Supreme Court held the exclusionary rule applied only against the federal government. *Weeks*, 232 U.S. at 398.[2] Then, in 1961, the Supreme Court extended the exclusionary rule to the states, concluding that the Fourth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp*, 367 U.S. at 660, 655.

In 1965, the Supreme Court held that "the exclusionary rule is applicable to forfeiture proceedings." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965). *Plymouth* concerned Pennsylvania's state civil forfeiture statute, which allowed for the forfeiture of an automobile carrying liquor not bearing Pennsylvania state tax seals. *Id.* at 694 n.2 (citing see 47 Pa. Stat. Ann. § 6-601 (West 1964)). Declining to apply the exclusionary rule to the civil forfeiture proceeding, the Pennsylvania

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[2] In *Weeks*, a federal marshal entered Fremont Weeks's home without a warrant and seized letters, books, notes, and other private documents. *Weeks*, 232 U.S. at 387. Declining to allow the illegally seized evidence to be admitted into evidence, the Supreme Court concluded, "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the [Fourth] Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Id.* at 393.

Supreme Court held that "the exclusionary rule . . . applies only to criminal prosecutions and is not applicable in a forfeiture proceeding which the Pennsylvania court deemed civil in nature." *Id.* at 695. The Supreme Court overturned the Pennsylvania Supreme Court, disagreeing that forfeiture proceedings are civil in nature and relying largely on a previous civil forfeiture case, *Boyd v. United States*, 116 U.S. 616 (1886). In *Boyd* the Court held that civil forfeiture proceedings are "criminal proceedings for all the purposes of the fourth amendment." 118 U.S. at 634. The *Plymouth* court agreed and held that civil forfeiture proceedings, while technically civil, are "quasi-criminal in character" because a civil forfeiture proceeding's object "like a criminal proceeding, is to penalize for the commission of an offense against the law." 380 U.S. at 700. Thus, the Court held "[i]t would be anomalous . . . to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law ha[d] been violated, the same evidence would be admissible." *Id.* at 701.

Following *Plymouth*, the majority of federal courts (11 out of 13 United States Court of Appeals) have decided that the exclusionary rule applies to all civil forfeiture proceedings.[3] Under *Mapp v. Ohio*, states must adopt the

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[3] *See United States v. $291,828.00 in U.S. Currency*, 536 F.3d 1234, 1237 (11th Cir. 2008); *United States v. One Lot of U.S. Currency,* 103 F.3d 1048,

rule announced in *Plymouth* and exclude all unlawfully seized evidence from state civil forfeiture proceedings. Indeed, the vast majority of state courts deciding the issue have done so.[4] *See, e.g.*, *In re Flowers*, 474 N.W.2d 546,

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1052 n.3 (1st Cir. 1997); *United States v. Premises and Real Property (500 Delaware Street)*, 113 F.3d 310, 313 n.3 (2d Cir. 1997); *United States v. 9844 South Titan Court*, 75 F.3d 1470, 1492 (10th Cir. 1996); *United States v. Taylor*, 13 F.3d 786, 788 (4th Cir. 1994); *Becker v. IRS*, 34 F.3d 398, 407 n.25 (7th Cir. 1994); *United States v. $191,910 in U.S. Currency*, 16 F.3d 1051, 1063 (9th Cir. 1994), *superseded in part by statute*, Civil Asset Forfeiture Reform Act of 2000, (HR 1658), Pub. L. No. 106-185, 106th Cong. (2000); *Wolf v. Commissioner*, 13 F.3d 189, 194 (6th Cir. 1993); *United States v. $639,558 in U.S. Currency*, 955 F.2d 712, 715 (D.C. Cir. 1992); *United States v. South Half of Lot 7 and Lot 8*, 876 F.2d 1362, 1369, *vacated and reh'g granted*, 883 F.2d 53 (8th Cir. 1989), *rev'd on other grounds*, 910 F.2d 488 (8th Cir. 1990); *United States v. One 1978 Mercedes Benz*, 711 F.2d 1297, 1303 (5th Cir. 1983).

[4] *See Berryhill v. State*, 372 So. 2d 355, 356 (Ala. Civ. App. 1979); *Wohlstrom v. Buchanan*, 884 P.2d 687, 690 (Ariz. 1994); *Kaiser v. State*, 752 S.W.2d 271, 272 (Ark. 1988); *In re Conservatorship of Susan T.*, 884 P.2d 988, 993 (Cal. 1994); *People v. Lot 23*, 707 P.2d 1001, 1003 (Colo. Ct. App. 1985), *aff'd in part, rev'd in part on other grounds*, 735 P.2d 184 (Colo. 1987); *In re One 1987 Toyota*, 621 A.2d 796, 799 (Del. Super. Ct. 1992); *District of Columbia v. Ray*, 305 A.2d 531, 533 (D.C. 1973); *State Dept. of Highway Safety & Motor Vehicles v. Killen*, 667 So. 2d 433, 436 (Fla. Dist. Ct. App. 1996); *Pitts v. State*, 428 S.E.2d 650, 651 (Ga. 1993); *Idaho Dept. of Law Enforcement v. $34,000 U.S. Currency*, 824 P.2d 142, 145 (Idaho App. 1991); *People v. Seeburg Slot Machines*, 641 N.E.2d 997, 1003 (Ill. 1994); *Caudill v. State*, 613 N.E.2d 433, 439 (Ind. Ct. App. 1993); *In re Flowers*, 474 N.W.2d 546, 548 (Iowa 1991); *State v. Davis*, 375 So. 2d 69, 73 (La. 1979); *Powell v. Secretary of State*, 614 A.2d 1303, 1306 (Me. 1992); *Boston Housing Auth. v. Guirola*, 575 N.E.2d 1100, 1104 (Mass. 1991); *In re Forfeiture of $176,598*, 505 N.W.2d 201, 203 (Mich. 1993); *State v. Carrier*, 765 S.W.2d 671, 672 (Mo. Ct. App. 1989); *State v. One 1987 Toyota Pickup*, 447 N.W.2d 243, 248 (Neb. 1989); *1983 Volkswagen v. County of Washoe*, 699 P.2d 108, 109 (Nev. 1985) (per curiam); *In re $207,523.46 in U.S. Currency*, 536 A.2d 1270, 1272 (N.H. 1987) (Souter, J.); *State v. Seven Thousand Dollars*, 642 A.2d 967, 974-75 (N.J. 1994); *In re One 1967 Peterbilt Tractor*, 506 P.2d 1199, 1201 (N.M.

548 (Iowa 1991) ("In establishing a right to forfeiture, however, the State may not rely on evidence obtained in violation of fourth amendment protections nor derived from such violations."). In fact, state courts often go even further and apply the exclusionary rule to non-forfeiture administrative proceedings.[5] *Amicus* urges this Court to follow the overwhelming majority of federal and state courts and apply the exclusionary rule to all civil forfeiture proceedings.

## II. This Court Should Follow *Plymouth*.

Beyond the overwhelming case law applying the exclusionary rule to civil proceedings, this Court should follow *Plymouth* for two reasons: First, forfeiture is an independent law enforcement objective that law enforcement pursues in order to take the money out of crime. Two aspects of Minnesota's

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1973); *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 249 N.E.2d 440, 442 (N.Y. 1969); *State v. One 1990 Chevrolet Pickup,* 523 N.W.2d 389, 394 (N.D. 1994); *Loyal Order of Moose Lodge 1044 v. Ohio Liquor Control Comm'n,* 663 N.E.2d 1306, 1308 (Ohio. 1995); *State ex rel. State Forester v. Umpqua River Navigation Co.*, 478 P.2d 631, 634 (Or. 1970); *In re Investigating Grand Jury,* 437 A.2d 1128, 1132 (Pa. 1981); *Board of License Comm'rs v. Pastore,* 463 A.2d 161, 162-63 (R.I. 1983); *State v. Western Capital Corp.,* 290 N.W.2d 467, 472 & n.6 (S.D. 1980); *Pine v. State,* 921 S.W.2d 866, 874 (Tex. App. 1996); *Sims v. Collection Div.,* 841 P.2d 6, 13 (Utah 1992); *Commonwealth v. E.A. Clore Sons, Inc.*, 281 S.E.2d 901, 904 n.4 (Va. 1981); *Deeter v. Smith*, 721 P.2d 519, 520 (Wash. 1986).

[5] *See Sims v. Collection Div. of Utah State Tax Comm'n*, 841 P.2d 6, 13-14 (Utah 1992) (applying exclusionary rule to civil tax proceedings); *In re Finn's Liquor Shop v. State Liquor Auth.,* 24 N.Y.2d 647, 653-55 (1969); *Bd. of License Comm'rs v. Pastore,* 463 A.2d 161, 164 (R.I. 1983) (applying exclusionary rule and finding that although technically civil proceeding, liquor license revocation proceeding is in effect quasi-criminal proceeding because its purpose is to penalize for commission of offense against law).

forfeiture law show the problems resulting from forfeiture having become an independent law enforcement objective. Law enforcement has an additional profit incentive to engage in forfeiture because 90% of forfeiture proceeds go directly into law enforcement budgets and Minnesota's forfeiture statutes are now divorced from the original purpose of civil forfeiture statutes, which was to enforce admiralty and piracy laws in lieu of criminal prosecution. Second, Minnesota has always been more protective of Fourth Amendment rights than the federal courts.

### A. Forfeiture Is An Independent Law Enforcement Objective.

Law enforcement agencies pursue forfeiture for the sake of forfeiture because law enforcement views forfeiture as a separate punitive measure apart from criminal conviction. Specifically, law enforcement agencies see forfeiture as taking the economics out of crime in a way that criminal conviction alone cannot. Minn. Stat. § 609.531, subd. 1(a) (listing one of the purposes of forfeiture is "to reduce the economic incentive to engage in criminal enterprise.") Indeed, according to the Director of the Department Justice's forfeiture unit, "asset forfeiture can be to modern law enforcement what air power is to modern warfare." David Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. Times Mag., Dec. 11, 1994 at 70, 72 (quoting Director Cary H. Copeland from a Congressional subcommittee investigating forfeitures).

In Minnesota, forfeiture can be pursued independently of a criminal conviction because a person does not even have to be charged or convicted of a crime to have their property forfeited when their property is forfeited in connection with a drug crime.[6] Data shows that approximately half of forfeitures are tied to drug crimes.[7] Minn. Stat. § 609.531, subd. 6a(c). For some crimes, such as drug crimes, forfeiture may be the only action law enforcement pursues. Nationwide, more than 80 percent of seizures are not accompanied by a criminal prosecution. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 40 (1998). For other crimes such as DWI where a criminal conviction

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[6] For prostitution, a conviction of the offender is required to forfeit the vehicle but only .1% of forfeitures are tied to prostitution in Minnesota. Minn. Stat. § 609.531, subd. 6a; *A Stacked Deck: How Minnesota's Civil Forfeiture Laws Put Citizens' Property at Risk.* Dick M. Carpenter II, Ph.D., Lee McGrath & Angela C. Erickson, at 10 (2013) *available online*, at http://www.ij.org/stacked-deck. *A Stacked Deck* reviews Minnesota forfeiture data to determine the value and type of properties seized for forfeiture, the allocation of forfeiture proceeds, and cases of law enforcement abuse. The report concluded that Minnesota's civil forfeiture system is designed to frustrate innocent property owners from getting their seized property back.

[7] *A Stacked Deck*, at 10; *Criminal Forfeitures in Minnesota For the Year Ended December 31, 2012*, Rebecca Otto, State Auditor, at 10 (2013) *available at* http://www.osa.state.mn.us/reports/gid/2012/forfeiture/forfeiture_12_report.pdf. Forfeitures connected with DWI were not reported until August 1st, 2010. Before DWI forfeitures were reported, 76% of forfeitures were tied to narcotics offenses and after DWI forfeitures were reported, that number dropped to 47%.

is sometimes required for forfeiture, law enforcement benefits from forfeiture through the profit incentive, as will be discussed in more detail below.

Law enforcement officials themselves and commentators have confirmed that forfeiture is an independent law enforcement objective. As one commentator has stated:

> Far from being merely another weapon in the fight against drugs, forfeiture is shaping the core goals and policies of the fight itself. Asset forfeitures have become a legitimate alternative policy goal for law enforcement; apart from providing a means to the end of curbing drug crime, forfeitures have become an end in themselves.

William Patrick Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 Cal. L. Rev. 1309, 1327 (1992). Knowing the power of forfeiture, law enforcement is taught to use it. "[P]olice policy statements and training manuals instruct and encourage officers to invoke their forfeiture power." Marla J. Crandley, *A Plymouth, A Parolee, and the Police: The Case for the Exclusionary Rule in Civil Forfeiture After Pennsylvania Board of Probation and Parole v. Scott*, 65 Alb. L. Rev. 147, 161 (2001).

Not only is forfeiture a law enforcement objective independent of obtaining criminal convictions; law enforcement often prefers forfeiture instead of criminal prosecution because of the procedural ease in forfeiting property. Often, forfeiture *is* the objective and obtaining a criminal conviction

has nothing to do with it. A forfeiture proceeding may move forward even when there is insufficient evidence for a criminal conviction. Blumenson & Nilsen, *supra* at 46; Minn. Stat. § 609.531, subd. 6a; Minn. Stat. § 609.531. Criminal prosecutions carry the high evidentiary burden of proving an offender is guilty beyond a reasonable doubt, whereas in a civil forfeiture proceeding, the government only has to prove the property is subject to forfeiture by a preponderance of the evidence. Minn. Stat. § 609.531, subd.6a(c). Second, constitutional safeguards present in criminal proceedings are absent from civil forfeiture proceedings. A property owner challenging a forfeiture does not have the right to an attorney and does not receive a presumption of innocence (in fact in Minnesota, the owner's property is often presumed guilty). Blumenson & Nilson, *supra*, at 48; Marian R. Williams, et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 68 (2010).

Because forfeiture is an independent law enforcement objective, this Court must apply the exclusionary rule to civil forfeiture proceedings in order to deter law enforcement from engaging in the illegal searches and seizures that bring property into the forfeiture process. The primary purpose behind the exclusionary rule is to safeguard citizens' Fourth Amendment rights through deterrence of future unlawful police conduct. *United States v. Calandra*, 414 U.S. 338, 347 (1974). Applying the exclusionary rule to criminal proceedings deters law enforcement from conducting illegal searches

and seizures for the purpose of getting a criminal conviction but it does nothing to deter law enforcement from conducting illegal searches and seizures for the purpose of forfeiting property. The only way to deter law enforcement from conducting illegal searches and seizures for the purpose of forfeiture, which is an independent law enforcement objective from criminal conviction, is to apply the exclusionary rule to civil forfeiture proceedings. Otherwise, law enforcement agencies will violate Fourth Amendment rights in pursuit of forfeiture as opposed to criminal conviction.

In a world where the exclusionary rule does not apply to forfeiture proceedings, a scenario can exist where a law enforcement officer invidiously discriminates against certain individuals because of a certain characteristic such as having a tattoo or ponytail and conducts as many illegal searches of vehicles belonging to individuals with tattoos or ponytails as he possibly can looking for drugs and other contraband. This officer knows that even though he would never be able to obtain a criminal conviction for any of these people because the drugs would be excluded in criminal court, the vehicles in which he found the drugs could nevertheless be forfeited because the drugs could be used as evidence in the forfeiture proceeding. This is true even if the officer's sole motivation in searching the vehicles was invidious discrimination and the officer routinely searched vehicles in the hope of getting a new vehicle for the police department. Because forfeiture is an independent law enforcement

objective, this Court should apply the exclusionary rule to civil forfeiture proceedings to deter law enforcement from violating Fourth Amendment rights by conducting illegal searches and seizures for the purpose of forfeiture.

### 1. Minnesota's Civil Forfeiture Statutes Create a Profit Incentive for Law Enforcement to Seize Property

Minnesota's civil forfeiture statutes create a profit incentive for law enforcement to seize property, which further encourages law enforcement to conduct illegal searches and seizures for the sole law enforcement objective of pursuing forfeiture. Minnesota's civil forfeiture statutes incentivize law enforcement agencies to forfeit as much property as possible because forfeiture proceeds go directly into law enforcement budgets. Specifically, 70 percent of the proceeds from the most common forfeitures go to the law enforcement agency which initiated the forfeiture proceeding, 20 percent go to the office of the prosecutor, and only 10 percent go to the state's general fund.[8] Minn. Stat. § 609.5315, subd. 5; Dick M. Carpenter II, Ph.D., et al., *A Stacked Deck: How Minnesota's Civil Forfeiture Laws Put Citizens' Property*

[8] The 70/20 percent divide is true for the most common types of forfeitures, forfeitures resulting from drug and DWI offenses. Minn. Stat. § 609.5315, subd. 5. A different allocation of proceeds exists for other types of less-common forfeitures, such as forfeitures resulting from prostitution and the trafficking of persons. For those forfeitures, 40 percent of the proceeds go to the law enforcement agency, 20 percent go to the prosecutor, and 40 percent go to a program designed to combat crime and provide services to crime victims. Minn. Stat. § 609.5315, subds. 5a-c.

*at Risk* 13 (2013), *available at* http://www.ij.org/stacked-deck. This provides a direct financial incentive for law enforcement to focus on civil forfeitures instead of other law enforcement duties.

Indeed, as data compiled by the State of Minnesota demonstrate, Minnesota law enforcement agencies are responding to the profit incentive.[9] From 2003 to 2010, 75 percent of Minnesota law enforcement agencies engaged in forfeiture at least once, producing a net revenue of $29.1 million statewide. Carpenter et al., *supra*, at 6-7. The total value of forfeitures has increased substantially over time, with the net amount growing 75 percent from 2003 to 2010. *Id.* at 7. The percentage of law enforcement agencies participating in forfeiture has also gone up, with 55 percent of agencies participating in forfeiture in 2010, up from just a quarter of agencies participating in 2003. *Id.* Meanwhile, crime rates in Minnesota over the same

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[9] *A Stacked Deck* is based on forfeiture reporting data from the state of Minnesota. Minnesota law requires all law enforcement agencies to report forfeitures. *See, e.g.*, Minn. Stat. §§ 84.7741, subd. 13, 97A.221, subd. 5, 97A.223, subd. 6, 97A.225, subd. 10, 169A.63, subd. 12, 609.5315, subd. 6, 609.762, subd. 6, and 609.905, subd. 3. Specifically, these statutes require each law enforcement agency using forfeiture to provide a written record of each forfeiture incident to the Office of the State Auditor on a monthly basis. Minn. Stat. § 609.5315, subd. 6(b) and (c). Among other things, each forfeiture record must consist of the date the property was seized, type of property seized, brief description of the circumstances, the statutory authority for forfeiture, whether the forfeiture was contested, and the estimated cash value. *Id.* Law enforcement must identify all incidences in which property seized for forfeiture was returned to the owner.

period actually decreased from 3.4 percent in 2003 to 2.8 percent in 2010, according to data from the Uniform Crime Report. *Id.* That means that although crime rates declined, Minnesota law enforcement found ways to substantially increase their forfeiture revenue.

It is no surprise that in 2009, the state's Metro Gang Strike Force (MGSF) was accused of using its forfeiture power to improperly seize property. An August 20, 2009 report by a former U.S Attorney and a former FBI agent revealed that for several years the MGSF, a multijurisdictional team of police officers charged with reducing gang and drug-related crimes in the Twin Cities, had been seizing cash and property, even from people with no connection to gang activities. *Id.* at 4; Randy Furst, *Payouts Reveal Brutal, Rogue Metro Gang Strike Force*, Star Tribune, Aug. 5, 2012, http://www.startribune.com/local/165028086.html?refer=y. In some instances, officers have even been alleged to keep the property for their own personal use. Michelle Lore, *Criminal defense attorneys seek more protections in forfeiture cases,* Minn. Lawyer, Sept 21. 2009, http://minnlawyer.com/2009/09/21/criminal-defense-attorneys-seek-more-protections-in-forfeiture-cases/.

Law enforcement officials themselves have acknowledged the perverse incentives that Minnesota's civil forfeiture statutes create. Roger Peterson, Rochester's Chief of Police testified, on March 11, 2012 in favor of a bill that

would have significantly overhauled Minnesota's forfeiture laws. Carpenter et al., *supra*, at 9. Central to his testimony was concern about how Minnesota's laws distort the investigative process. In a narcotics investigation, for instance, a police officer often faces a choice between pursuing an offender who just purchased drugs, which would result in the confiscation and destruction of a controlled substance, or pursue the dealer, which would yield forfeitable cash for the department's use.

Chief Peterson testified that Minnesota's laws have the significant potential to tilt the officer's decision toward the cash and away from pursuing the controlled substance. *Id.* After the Minnesota Police and Peace Officers Association criticized his testimony for supposedly impugning the integrity of police officers, Chief Peterson responded, "The people responsible for conducting fair and impartial investigation should never have a vested financial interest in the outcome of a criminal case." Letters from Roger Peterson to Dennis Flaherty, Executive Director, Minnesota Police and Peace Officers Association (Mar. 16, 2010), *available at* http://tinyurl.com/Ltr2Flaherty.

Further evidence that law enforcement is responding to the profit incentive is that law enforcement predominantly seizes low-value property that is worth less than the cost of litigating to get it back because a rational property owner will not challenge the forfeiture. *A Stacked Deck* reveals that

far from involving large drug busts yielding enormous sums of cash or high-value properties, the average value of forfeited property is about $1,000. Carpenter et al., *supra*, at 11. And 50 percent of property kept by law enforcement is worth $400 or less. *Id.* Only 4.2 percent of forfeited items are worth more than $5,000. *Id.* From 2003 to 2010, the largest value property seized and kept by law enforcement was $196,384 in cash while the smallest was a nylon bag worth 22 cents. *Id.* at 7.

Yet, litigating to get one's property back is time-consuming, expensive, and difficult. Thus, law enforcement is incentivized to seize many items—particularly items of low value—because the property owner is less likely to put up a fight when the litigation costs exceed the property's value.

The costs of litigating to get one's property back are high. Under Minnesota law, once law enforcement seizes property, the property's title immediately transfers to the government and the owner must file a civil lawsuit against his own property in order to get it back. Minn. Stat. § § 169A.63, subd.8(e), § 609.5314, subd. 3.[10] In order to challenge the forfeiture,

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[10] The responsibility to file a civil lawsuit in order to get one's property back falls on the property owner in DWI and drug-related cases, which are the reason for the majority of forfeitures. From 2003 to 2010, before DWI forfeitures were reported, 76.2 percent of forfeitures were for narcotic offenses while 0.1 percent were for murder, 0.7 percent were for burglary, and 0.2 percent were for criminal sexual conduct. Carpenter et al., *supra*, at 10. In certain other cases, such as forfeiture in connection with prostitution

the property owner must prepare and serve a detailed complaint on the prosecutor within 60 days or hire an attorney to do it. *Id.* Additionally, the initial filing fee for a civil lawsuit in Ramsey County, for example, can be as high as $327.[11] This does not include the cost of hiring a lawyer, which can easily cost thousands of dollars. On top of that, public defenders are prohibited from representing indigent individuals they represent in criminal cases in a related civil forfeiture proceeding. Minn. Stat. § 611.26, subd. 6 (prohibiting public defenders from litigating civil cases). Unsurprisingly, more often than not, the cost of litigating a forfeiture case exceeds the value of the forfeited property.

Beyond the cost, it is difficult for property owners to win a forfeiture case because Minnesota law presumes that seized property is associated with a crime and the owner has the burden of proving that it is not. Minn. Stat. § 609.531, subd. 6a(c).[12] In particular, and relevant to Garcia-Mendoza's case, anything seized in the vicinity of an alleged drug crime is presumed to be associated with the crime and therefore forfeitable. That means a property

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or fleeing a police officer, the responsibility for filing a lawsuit against the property falls on the prosecutor. Minn. Stat. § 609.5313(a).

[11] Vehicle Seizure and Forfeiture DWI Arrests, Minnesota Judicial Branch http://www.mncourts.gov/district/2/?page=1911, last visited Mar. 6, 2014.

[12] Section 609.531 puts the burden on the property owner to prove the innocence of his property: "The appropriate agency handling the forfeiture has the benefit of the evidentiary presumption of section 609.5314, subdivision 1, for forfeitures related to controlled substances."

owner must prove that seized cash did not come from drug sales and a seized car was not used as an instrument in distributing illegal drugs. In a forfeiture proceeding, owners must prove their properties' innocence as contrasted to a criminal proceeding, where prosecutors must prove the accused is guilty beyond a reasonable doubt. Williams et al., *supra*, at 20.

Therefore, for a property owner to get her low-value forfeited property back, she would have to incur large litigation costs and face off against an evidentiary burden requiring her to prove her property's innocence. With such a high hill to climb, it makes more sense for her to just let law enforcement have her property, even if it was wrongfully seized and subject to forfeiture. The data show the majority of property owners rationally decline to fight this uphill battle. The most recent state auditor report shows that in 2012, out of 3,250 controlled substance-related forfeitures, only three percent of property owners sued to get their forfeited property back. [13]

Law enforcement benefits from seizing all types of property because they can keep the seized items and put them to departmental use, as they often do with vehicles, or they can sell the items and keep the proceeds. Minn. Stat. § 609.5315 subd. 1(a)(2),(a)(8). Given the low value of most forfeited property, it is not surprising that once seized, most of the forfeited

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[13] Rebecca Otto, State Auditor at 10 (2013) available online, at http://www.osa.state.mn.us/reports/gid/2012/forfeiture/forfeiture_12_report.pdf

items—74 percent— were kept by law enforcement in the form of cash, properties sold, or properties retained for law enforcement use. Carpenter et al., *supra*, at 8. Only about 10 percent of properties seized were ever returned to those with an ownership stake. *Id.* And the return percentage is even lower for cash; only three percent of property owners in Minnesota ever see seized cash again, whereas vehicles and houses or land are returned to owners more than a quarter of the time. *Id.*

Because of the tremendous profit incentive civil forfeiture creates, Minnesota should apply the exclusionary rule to civil forfeiture proceedings. Law enforcement has an incentive to conduct more illegal searches to pad law enforcement budgets, completely independent of the prospect of any criminal conviction. The only way to deter law enforcement from conducting illegal searches for the sole purpose of forfeiture is to apply the exclusionary rule to civil forfeiture proceedings.

### 2. Civil Forfeiture Laws Are Divorced from Their Original Purpose.

Forfeiture as an independent objective violates the original purpose of forfeiture laws, which was to enforce admiralty and piracy laws. Forfeiture laws were derived from the British Navigation Acts of the mid-17th century which were passed during England's expansion of maritime power. *Policing for Profit: The Abuse of Civil Asset Forfeiture* 20 (2010); M. Schecter, *Fear*

*and Loathing and the Forfeiture* Laws, Cornell Law Review 75, 1151-1183 (1990); J. R. Maxeiner, *Bane of American Forfeiture Law: Banished at last?*, Cornell Law Review 62(4), 768- 802 (1997). The Acts required imports and exports from England to be carried on British ships and specified that if the Acts were violated, the ships themselves or the cargo on board could be seized and forfeited to the crown. *Policing for Profit: The Abuse of Civil Asset Forfeiture* 20 (2010).

Using the British laws as a model, the first U.S. Congress passed forfeiture laws to aid in the collection of customs duties, which provided 80-90 percent of the finances of the federal government at that time. Maxeiner, *supra*, at 780. The Supreme Court upheld early forfeiture statutes because civil forfeiture was closely tied to the practical necessities of enforcing admiralty, piracy, and customs laws. *See, e.g.*, *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827). Forfeiture enabled courts to obtain jurisdiction over property when it was virtually impossible to seek justice against property owners suspected of violating maritime law because, for example, they were overseas. Thus, civil forfeiture enabled the government to ensure that customs and other laws were enforced even if the owner of the ship or the cargo was outside the court's jurisdiction. Justice Joseph Story justified forfeiture as "from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured

party." *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844). It was this necessity to obtain jurisdiction over the property that gave rise to the legal fiction on which civil forfeiture is based, that property can itself be "guilty" of wrongdoing, regardless of whether the property owner can be found or held blameworthy in any way. Modern forfeiture is very different. Today, law enforcement pursues forfeiture when it has also apprehended a suspect, making plain that forfeiture, in and of itself, is an independent law enforcement objective.

Although civil forfeiture laws have been on the books since our nation's founding, civil forfeiture remained a relative backwater in American law throughout most of the 20th century. Williams et al, *supra*, 10. But during the Prohibition Era, the federal government expanded the scope of its forfeiture authority beyond per se contraband to cover automobiles or other vehicles transporting illegal liquor. *Id.* Modern civil forfeiture use then exploded with the War on Drugs. *Id.*

Also, today's civil forfeiture laws differ from their predecessors in the essential respect that the proceeds of forfeiture now go directly to the law enforcement agencies responsible for seizing the property. But for most of American history, the proceeds of forfeiture did not go to the law enforcement agencies responsible for the seizures but to the government's general fund. Today, by contrast, the proceeds of forfeiture go directly to the law

enforcement agencies that seize the property.[14] As discussed above, this is particularly true in Minnesota where 90% of forfeiture proceeds go directly to law enforcement.

This Court should apply the exclusionary rule to all civil forfeiture proceedings because civil forfeiture is now divorced from its historical limitation as a necessary means of enforcing admiralty and piracy laws when the suspect could not be apprehended and has morphed into a revenue-generating enterprise for law enforcement.

### B. Minnesota Consistently Provides Heightened Protections of Fourth Amendment Rights.

As discussed above, virtually all federal and state courts apply *Plymouth* and hold that the exclusionary rule applies to all civil forfeiture proceedings. However, even aside from the vast majority of courts' interpretation of the Fourth Amendment, Minnesota courts have consistently construed Article I, Section 10 to independently provide heightened privacy protections to Minnesotans, above what the Fourth Amendment provides.

Significantly, the Minnesota Court of Appeals has done what federal courts are unwilling to do and applied the exclusionary rule to non-forfeiture

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[14] This was made possible when in 1984 Congress amended portions of the Comprehensive Drug Abuse and Prevention Act to create the Assets Forfeiture Fund, into which the Attorney General was to deposit all net forfeiture proceeds for use by federal law enforcement agencies. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

civil proceedings. *Minn. State Patrol Troopers Ass'n* ex rel. *Pince v. Minn. Dep't of Pub. Safety*, 437 N.W.2d 670, 676 (Minn. Ct. App. 1989) (holding that the exclusionary rule applied to exclude evidence in state trooper's discharge hearing, finding that "we cannot allow one government agency to use the fruits of unlawful conduct by another branch of the same agency to obtain an employee's dismissal").

Additionally, Minnesota courts have suggested that the state's suppression remedy has a broader purpose than the federal exclusionary rule. In *State v. Herbst, the* court of appeals refused to apply the federal "good faith" exception to the exclusionary rule in Minnesota for cases where the evidence is unlawfully, albeit innocently, seized by officers. 395 N.W.2d 399, 404 (Minn. Ct. App. 1986). The court held that the federal "good faith" exception would not apply to the particular facts of the *Herbst* case but went out of its way to state that even if the "good faith" exception applied, it refused to adopt the "good faith" exception as a matter of Minnesota state constitutional law. Over the years, prosecutors have repeatedly invited Minnesota courts to apply the federal "good faith" exception to Minnesota's exclusionary rule and over the years, Minnesota courts have repeatedly refused this invitation. *See, e.g., State v. Albrecht*, 465 N.W.2d 107, 109 (Minn. Ct. App. 1991); *State v. Lindsey*, 460 N.W.2d 632, 635 (Minn. Ct. App.

1990); *State v. McClosky*, 451 N.W.2d 225, 229 (Minn. Ct. App. 1990), *rev'd on other grounds,* 453 N.W.2d 700 (Minn. 1990).

Minnesota courts also provide greater protections against illegal searches and seizures than federal law by prohibiting custodial arrests and searches for minor traffic offenses, which federal law allows. *Compare State v. Curtis*, 190 N.W.2d 631, 635-36 (Minn. 1971), and *State v. Gannaway*, 191 N.W.2d 555, 556 (Minn. 1971), with *United States v. Robinson*, 414 U.S. 218, 223-24 (1973), *and Gustafson v. Florida*, 414 U.S. 260, 263-64 (1973).

Lastly, whenever this Court has considered a program of routine, suspicionless searches or seizures, this Court has departed from federal law by rejecting the program and instead required a specific reason for the search or seizure that justified the action taken against the particular individual. *Compare Camara v. Municipal Court,* 387 U.S. 523 (1967) (allowing suspicionless searches of residential units for housing code violations), with *State v. Bryant*, 177 N.W.2d 800, 801 (Minn. 1970) (rejecting police officer's search of restroom where he observed everyone in the restroom to see if anyone committed sodomy). Also, where the U.S. Supreme Court has concluded that as long as suspicionless sobriety checkpoints are not discriminatory, they need not be based on individualized suspicions, this Court has rejected such suspicionless searches and held that individualized suspicion was constitutionally required under the Minnesota Constitution.

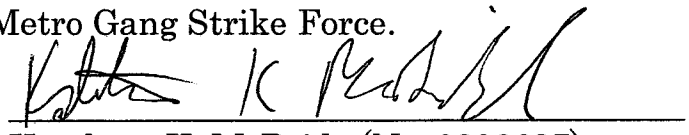
*Compare Mich. Dep't of State Police v. Sitz,* 496 U.S. 444 (1990), with *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183 (Minn. 1994). *See also McCaughtry v. City of Red Wing*, 831 N.W. 2d 518, 528 (Minn. 2013) (Anderson, J., concurring) ("Minnesota has a proud tradition of applying its constitution more broadly than the United States Constitution when acting to protect the privacy interests of its citizens.")

Therefore, because Minnesota courts consistently hold that Article I, Section 10 provides heightened privacy protections, this Court should continue in that tradition and join the majority of courts in applying the exclusionary rule to all civil forfeiture proceedings.

**Conclusion**

Civil forfeiture is a powerful tool independent of criminal prosecution that law enforcement has great incentives to use and is using more and more each year. Data show that Minnesota law enforcement agencies brought in $30 million to their budgets from forfeiture proceeds from 2003 to 2010. Where law enforcement is allowed to keep 90 percent of the proceeds of forfeitures and where law enforcement frequently seizes low-value properties because property owners will not spend more money getting their property back than the property is worth, law enforcement has reason to seize properties with little risk of consequences beyond the possibility of having to return the property to a successful claimant. This Court should follow the

U.S. Supreme Court's clear precedent and apply the exclusionary rule to all civil forfeiture proceedings, including the present case, in order to address the modern separation of civil forfeiture and criminal prosecution, counter the tremendous profit incentive, and reduce the possibility of repeating the forfeiture abuse done by the Metro Gang Strike Force.



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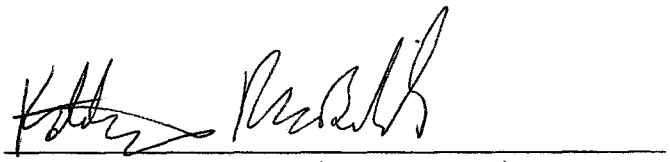
## CERTIFICATE OF COMPLIANCE WITH RULE 132.01, Subd. 3

I, Katelynn McBride, certify that the Brief of Amicus Curiae Institute for Justice complies with the length limitation and font size requirements of Rule 132.01, subd. 3 of the Minnesota Rules of Civil Appellate Procedure. I further certify that, in preparation of this brief, I used Microsoft Word Version 2010, and this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count, excluding only the caption, signature text and certificate of counsel. I further certify that the above-referenced brief contains 6,422 words.



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