

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

Nos. 29 & 30 EAP 2015

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

REAL PROPERTY AND IMPROVEMENTS COMMONLY KNOWN AS
416 S. 62ND STREET, PHILADELPHIA, PA, AND 1997 CHEVROLET AND
CONTENTS SEIZED FROM JAMES YOUNG

APPEALS OF: ELIZABETH YOUNG

*BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA, COMMUNITY LEGAL SERVICES, PHILADELPHIA NAACP,
PHILADELPHIA LEGAL ASSISTANCE, PHILADELPHIA VOLUNTEERS FOR
THE INDIGENT PROGRAM, AND SENIORLAW CENTER*

Commonwealth's Appeal from the December 17, 2014
Order of the Commonwealth Court En Banc for
Consolidated Appeals at Nos. 1990 & 1995 C.D. 2012,
Vacating the Order of the Court of Common Pleas of
Philadelphia County, Trial Division, Dated May 1, 2012,
At Docket Nos. CP-51-MD-0002972-2010 & CP-51-
MD-0013471-2010

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STATEMENT OF INTEREST OF AMICI CURAE

Amici curiae are non-profit organizations that provide free legal assistance to low-income residents of Pennsylvania in civil matters involving basic human needs, such as shelter and economic stability, or that advocate for civil rights and constitutional protections for all Pennsylvanians. Amici have a special interest and substantial expertise with respect to racial justice, access to justice for low-income communities, and constitutional rights.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of over 500,000 members. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty and equality embodied in the United States Constitution and civil rights laws. The ACLU of Pennsylvania is one of its state affiliates, with over 25,000 members throughout Pennsylvania. The ACLU and ACLU of Pennsylvania have appeared many times as amicus curiae in cases in which government action threatens the constitutional rights of either criminal defendants or people who have historically been denied their rights on the basis of race or ethnicity.

Community Legal Services (CLS) was founded in 1966 by the Philadelphia Bar Association as an independent 501(c)(3) organization to provide free legal services, in civil matters, to low-income Philadelphians. Since its founding, CLS

has served more than one million clients who could not afford to pay for legal representation and who would have faced a variety of devastating ends without dedicated, knowledgeable attorneys on their side.

The Philadelphia National Association for the Advancement of Colored People (NAACP) was founded to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. The organization's vision is to ensure a society in which all individuals have equal rights without discrimination based on race.

Philadelphia Legal Assistance ("PLA") was founded in 1996 to provide free civil legal aid to low-income individuals and families to ensure equal access to justice and strengthen Philadelphia's communities. PLA assists approximately 8,000 indigent clients each year in civil matters.

The Philadelphia Volunteers for the Indigent Program's (VIP) mission is to promote equal justice for the poor by providing civil legal services not otherwise available, collaborating with other legal services organizations and promoting a culture of volunteerism by educating and exposing attorneys and law students to issues of poverty. Created in 1981 as a public-private collaboration between the Philadelphia Bar Association and the public interest legal community, VIP was founded to meet the critical legal needs of Philadelphia's underserved by

coordinating the intake and referral of triaged, high-need cases to private volunteer attorneys trained by VIP.

The SeniorLAW Center is a 501(c)(3) nonprofit Pennsylvania organization that protects the legal rights and interests of older Pennsylvanians. It has substantial experience in serving victims of elder abuse, financial exploitation, housing crises, and homelessness. Through the Pennsylvania SeniorLAW Helpline, staff and volunteer attorneys give seniors across the state the information they need to protect themselves and their property, to ensure their rights are not violated, to make important personal planning decisions, to resolve a wide variety of legal problems, and, when necessary, to obtain additional assistance.

INTRODUCTION

The Excessive Fines Clause of the Eighth Amendment and of Article I, Section 13 of the Pennsylvania Constitution is intended to prevent the government from abusing its power to punish.¹ This constitutional limitation is a vital check on the government's power to take private property from ordinary citizens in civil forfeiture proceedings that are harsh, punitive, and disfavored in the law.² The need to ensure that constitutional excessiveness standards are not violated is readily apparent in cases such as the instant one, in which this Court is called upon to determine whether the forfeiture of an indigent grandmother's home and car, as punishment for her adult son's marijuana exchanges, exacts too high a penalty under our constitutional framework.

Although civil forfeiture was intended as a strong weapon in the War on Drugs that would allow prosecutors to confiscate drug kingpins' tools of the trade, it has strayed from its original purpose. Forfeiture is now used aggressively to take homes, cars, and cash from law-abiding citizens, mostly from low-income families and communities of color. In highly instructive ways, Ms. Young's case is

¹ See *Austin v. United States*, 509 U.S. 602, 607 (1993); *Commonwealth v. Real Prop. & Improvements Commonly Known as 5444 Spruce St., Philadelphia*, 832 A.2d 396, 399 (Pa. 2003).

² See *Commonwealth v. Real Prop. & Improvements Known as 2314 Tasker St. Philadelphia, PA 19145*, 67 A.3d 202, 208 (Pa. Commw. Ct. 2013) ("forfeitures are not favored under the laws of the Commonwealth and statutes authorizing forfeiture are strictly construed against the Commonwealth.").

emblematic of the plight of law abiding citizens who possess the fewest resources to defend their property against aggressive civil forfeiture practices pursued by law enforcement authorities that derive millions of dollars each year from forfeited property for their own budgets and salaries, while escaping accountability and oversight functions in the normal budgeting process.

Amici curiae are non-profit organizations that provide free legal assistance to low-income residents of Pennsylvania in civil matters involving basic human needs, such as shelter and economic stability, or that advocate for civil rights and constitutional protections for all Pennsylvanians. In this brief, Amici demonstrate that the civil forfeiture of homes, cars, and cash has become big business in Pennsylvania and that low-income communities of color disproportionately bear the burden of Pennsylvania's civil forfeiture laws. In 2010 alone—the year in which Donald Graham was first arrested in this case—the Philadelphia District Attorney's office sought to forfeit 452 homes in Philadelphia, most of which belonged to people living in low-income communities of color—those who can least afford to lose their homes and who have the least access to counsel and financial resources with which to defend against forfeiture. The official civil forfeiture reports provided by prosecutors reveal that over the past nine years (2005-2014), the Philadelphia District Attorney's office has taken into its budget \$34.2 million in forfeited cash, 1,938 forfeited vehicles, and 746 forfeited homes,

for a total of \$47.7 million in forfeited proceeds through aggressive pursuit of civil forfeiture.

In this brief, Amici present several studies on disparate impact by race and income that reveal the disturbing nature of civil forfeiture, including an analysis of all real estate forfeiture petitions filed by the Philadelphia District Attorney in 2010, which documents that civil forfeiture is pursued disproportionately in non-white and low-income neighborhoods. Amici also present home value data to demonstrate that the robotic, one-dimensional proportionality test for Excessive Fines applied by the trial court, and advanced by the Commonwealth, would have the result of effectively negating any constitutional protection for the overwhelming majority of homeowners who are caught in the web of civil forfeiture. Instead, Amici urge this Court to affirm the decision of the Commonwealth Court and uphold the application of a robust, multi-factored, analysis that is required to fulfill the constitutional mandate of the Excessive Fines Clause in civil forfeiture cases.

FACTUAL BACKGROUND

Elizabeth Young's legal battle to retain her home and car shares a common profile with many civil forfeiture cases. Civil forfeiture is disproportionately brought against the property of low-income individuals and people of color, many of whom are older residents who have taken extended families into their homes during difficult financial times. Elizabeth Young is an African-American grandmother, currently age 71, who owned and resided at 416 S. 62nd Street in the Cobbs Creek section of West Philadelphia. She purchased her home in the 1970s (N.T. 59), and worked for more than twenty-five years for Amtrak, until she retired in 1995. (N.T. 56-57). After her husband's death, Ms. Young remained in her home and in her neighborhood, participating in her church and assisting the needy as a missionary. (N.T. 57). In 2006, she purchased a 1997 Chevrolet Venture to meet her daily transportation needs. (N.T. 60, 72-73).

In October 2009, Ms. Young suffered two blot clots in her lungs and was hospitalized for approximately three weeks extending into November of 2009. (N.T. 68). Upon her release from the hospital, Ms. Young was ordered on bed rest by her doctors and placed on several medications. (N.T. 68). At this time, Ms. Young's adult son, Donald Graham, currently age 50, and two of her grandchildren resided with her at 416 S. 62nd Street and it was during this time in November

2009, while she was in poor health, that police suspicions about Donald Graham's marijuana involvement first came to her attention. (N.T. 59-62).

As Ms. Young freely acknowledged at trial in this case, Donald Graham had a drug problem when he was 16 to 17 years old and had been incarcerated for his drug-related offenses. During that time, she banned Donald from her home and they were estranged for many years. But their relationship changed in the several years leading up to 2009. (N.T. 64). According to Ms. Young, Donald had begun taking care of his children and appeared to have turned his life around. He no longer appeared to be involved with drugs and so she let him move back into her home. She never witnessed any drug activity and testified that she honestly believed that he was not involved with drugs. (N.T. 63-65).

Ms. Young's case resembles many civil forfeiture actions, in which the government seeks to take a home or car not based on any criminal conduct of the property owner, but rather upon the conduct of third parties (adult children, guests, or neighbors) who are involved in low-level drug offenses and hide their actions from the property owner.³ This case involves four "controlled buys" in which

³ The facts are strikingly similar to the story of Mary and Leon Adams, which was highlighted in a cover story for *The New Yorker*. The Philadelphia district attorney served Mary and Leon, an indigent Black husband and wife, with a petition seeking forfeiture of their West Philadelphia home for three alleged \$20 marijuana sales by their adult son, one of which allegedly occurred on their porch. Mary and Leon were 68 and 70 years old, and law-abiding citizens who had never been charged or convicted of a crime. Leon was a former steel plant worker; Mary was a retail saleswoman and former block captain in her neighborhood. Only after an entire year of litigation in which Mary

Donald Graham sold very small amounts of marijuana for \$20 to confidential informants working with police narcotics agents. (N.T. 16-22). Each exchange was initiated by the police, and in each, a narcotics agent called Donald on his cell phone (not on a house phone), offering to buy marijuana and arranging to meet him at or near his residence. (*Id.*) The trial court declined to credit Ms. Young's testimony that she was unaware of her son's drug activity. It thus rejected her statutory "innocent owner" defense, even though there was no evidence that Ms. Young was present or had witnessed marijuana exchanges or had consented to wrongdoing by her son.

After rejecting her innocent owner defense, the trial court gave short shrift to Ms. Young's Excessive Fines defense and misapplied its requirements. Reflecting a basic misunderstanding of the Eighth Amendment, the trial court did not engage in the fact-intensive, multi-prong analysis needed to determine constitutional excessiveness. The trial court simply compared the value of Ms. Young's home (\$54,000) to the maximum statutory fine for Donald Graham's marijuana sales (\$80,000) and concluded that the taking of Ms. Young's two most important possessions in life was not excessive because their combined market value did not exceed the maximum fine that could in theory be levied upon Donald Graham.

and Leon were represented by pro bono counsel were they able to reach an agreement with the DA to discontinue the action. See Sarah Stillman, *Taken*, The New Yorker, Aug. 12, 2013, at 48, available at <http://www.newyorker.com/magazine/2013/08/12/taken>.

The trial court failed to consider critical factors such as the amount of the fine actually imposed upon Donald, the degree of non-culpability of Ms. Young, the minimal relationship between Ms. Young's property and the drug exchanges, the absence of proof of actual harm, the subjective value of Ms. Young's home and car, or the life-altering consequences visited upon the livelihood of a grandmother when the government takes her home and car to punish the conduct of another.

ARGUMENT

I. CIVIL FORFEITURE HAS STRAYED FROM ITS ORIGINAL PURPOSE AND IS NOW DIRECTED FREQUENTLY AGAINST LAW ABIDING CITIZENS, LEADING TO PERSISTENT ABUSES

In the United States, civil forfeiture has evolved from a tool primarily used to combat piracy into a weapon that law enforcement deploys aggressively to take billions of dollars of property each year with a tenuous connection to drug crime, often from innocent people, and disproportionately from people of color. The history of federal civil forfeiture, characterized by documented governmental abuse and failed reform efforts, provides an important backdrop for the Court's consideration of the proper standard for analyzing the Excessive Fines limitation on civil forfeiture. The level of governmental overreach observed at the federal level—emblematic of that reported in many states, including Pennsylvania—requires a strong judicial response to ensure robust constitutional protection for property owners.

The federal government's power to seize property and punish property owners has its roots in English law. *See Austin*, 509 U.S. at 611. This nation's founding fathers were wary of the punitive nature of forfeiture under the Crown and its potential for governmental abuse and therefore limited the permissible uses

of forfeiture under American law.⁴ For much of American history, civil forfeiture was primarily used in admiralty. In these early cases, American authorities were able to gain jurisdiction over absent ship owners who were physically located in Europe, outside the reach of the American legal system. In the seminal case of *The Palmyra*,⁵ the U.S. Supreme Court held that a personal conviction of the offender was not necessary to enforce an *in rem* forfeiture of a vessel for violations of maritime law. Although civil forfeiture was also used in the nineteenth century during the civil war and in the early twentieth century during prohibition, it was not until the 1970's and 1980's, as part of the War on Drugs, that the use of civil forfeiture exploded and soon became focused heavily on ordinary citizens, many of whom were not accused or convicted of a crime.

Congress expanded the reach of civil forfeiture in 1978 to include monies and negotiable instruments, and again in 1984 to include real property, including homes.⁶ Additionally, Congress earmarked forfeiture income exclusively for law enforcement, instead of depositing such funds in the United States Treasury. In a

⁴ See Brent Skorup, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 Geo. Mason. U. C.R. L.J., 427, 433 n.40 (2012); Austin, 509 U.S. at 613.

⁵ *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

⁶ See 21 U.S.C. § 881(a)(6) (2014) (effective 1978); 21 U.S.C. § 881(a)(7) (2014) (effective 1984).

short time, the Department of Justice's federal asset forfeiture fund grew from \$338 million in 1996 to \$1.3 billion in 2008 to more than \$2.0 billion by 2010.⁷

At the same time, civil forfeiture practices came under increasing public scrutiny as a result of allegations of widespread abuse. Although primarily intended to strip drug kingpins of the tools of their trade, ordinary citizens increasingly bore the brunt of civil forfeiture as their property was taken in high-volume highway traffic stops and low-level neighborhood drug transactions.⁸ The *Pittsburgh Press* published a six-day series in 1991 reflecting ten months of national research on civil asset forfeiture. After reviewing 25,000 drug seizures, interviewing 1,600 prosecutors, defense lawyers, cops, federal agents, and victims, and reviewing court documents in 510 cases, the *Press* series concluded that “seizure and forfeiture, the legal weapons meant to eradicate the enemy, have done enormous collateral damage to the innocent.”⁹

⁷ See Skorup, *supra* n.4, at 434; see also Christopher Ingraham, *In tough times, police start seizing a lot more stuff from people*, The Washington Post, Nov. 10, 2015, available at <https://www.washingtonpost.com/news/wonk/wp/2015/11/10/report-in-lean-times-police-start-taking-a-lot-more-stuff-from-people/>.

⁸ An episode of *60 Minutes* highlighted the plight of Willie Jones, a Black landscaper who was stopped at the airport after paying cash for his ticket. Although they did not charge him with any crime, law enforcement claimed he matched the profile of a drug courier, and confiscated \$9,000 that he was carrying to buy shrubs for his landscaping business. Mr. Jones had to sue for the return of his money. In ruling in his favor, the judge noted that forfeiture was ripe for abuse and corruption. See *60 Minutes: You're Under Arrest*, (CBS television broadcast, Apr. 5, 1992); see also *Jones v. United States Drug Enforcement Admin.*, 819 F. Supp. 698, 724 (M.D. Tenn. 1993).

⁹ Andrew Schneider & Mary Pat Flaherty, *Presumed Guilty: The Law's Victims in the War*

Federal courts also began to express concern about civil forfeiture practices. The Second Circuit stated that it “continued to be enormously troubled by the government’s increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.”¹⁰

Congress held congressional hearings in the 1990’s in a bipartisan effort to curb abusive forfeiture practices. Congress expressed particular concern about high default rates in light of evidence that at least 80 percent of all civil forfeiture cases went unchallenged, without benefit of counsel.¹¹ Congress also grew increasingly concerned about the law’s low evidentiary burdens on government that made the taking of property easy without adequate protection for property owners, and its increasingly apparent disproportionate impact on low-income people and communities of color.¹² Representative Henry Hyde, Republican chairman of the House Judiciary Committee, wrote that “arcane laws originally

on Drugs, The Pittsburgh Press, Aug. 11, 1991.

¹⁰ *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992).

¹¹ See Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 Fed. Sent’g Rep. 87, 88 & nn.12-13 (2001) (noting that “80% of all forfeitures are uncontested” and “only 5% of seizures result in contested civil cases.”); see also H.R. Rep. No. 105-358, pt. 1, at 28-29 (1997).

¹² See Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & Pol’y 683, 718 n.150 (2011) (citing H.R. Rep. No. 105-358, pt. 1, at 23-26.).

intended to protect customs revenues from the depredations of smugglers are now used by government to strip innocent Americans of their hard-earned property.”¹³

Seven years of congressional hearings and legislative efforts led to the passage of the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”) which brought about only limited changes to federal forfeiture law.¹⁴ Many commentators, and even some former Justice Department officials, have regarded CAFRA’s impact as disappointing and largely ineffective at balancing the scales of justice or curbing forfeiture abuses.¹⁵

Perhaps most significantly, CAFRA failed to achieve Congress’ expressed goal of encouraging greater use of criminal forfeiture,¹⁶ where criminal convictions of property owners are required and constitutional safeguards are more robust

¹³ Henry J. Hyde, *Forfeiting Our Property Rights* 5-6 (1995).

¹⁴ CAFRA elevated the government’s burden from probable cause to a preponderance of the evidence standard, instituted innocent owner defenses, provided for increased access to legal help, and eliminated cost bonds required to contest civil forfeiture actions. *See generally* Rulli, *CAFRA*, *supra* n.11.

¹⁵ *See, e.g.*, John Yoder & Brad Cates, *Government Self-Interest Corrupted a Crime-Fighting Tool into an Evil*, The Washington Post, Sept. 18, 2014, *available at* https://www.washingtonpost.com/opinions/abolish-the-civil-asset-forfeiture-program-we-helped-create/2014/09/18/72f089ac-3d02-11e4-b0ea-8141703bbf6f_story.html (“The Asset Forfeiture Reform Act was enacted in 2000 to rein in abuses, but virtually nothing has changed. This is because civil forfeiture is fundamentally at odds with our judicial system and notions of fairness. It is unreformable”).

¹⁶ Congress expanded criminal forfeiture powers under the Comprehensive Crime Control Act. *See* 21 U.S.C. § 853.

before property may be taken, instead of civil asset forfeiture.¹⁷ The ease by which government could forfeit private property in civil proceedings, and the generous financial rewards that flowed into prosecutor budgets, continued to fuel increasingly aggressive use of civil forfeiture against ordinary citizens.

A recent *Washington Post* series provides additional evidence of widespread civil forfeiture abuse. The *Post* series documented aggressive policing practices in highway interdictions resulting in the seizure of hundreds of millions of dollars in cash from motorists and others not charged with crimes.¹⁸ Property owners were required to fight lengthy legal battles to get their property back and to prove that their possessions were lawfully acquired. Only one out of six property seizures was legally challenged, but when a challenge occurred, the government voluntarily returned seized cash in 41% of the cases. The *Post* series exposed police practices that went so far as to employ outside consultants to instruct law enforcement authorities on how to successfully target cash on the nation's highways.

And in 400 federal court cases examined by *The Post* where property owners were at least partially successful in challenging the seizures of their property, the

¹⁷ Rulli, *CAFRA*, *supra* n.11, at 91 & n.42.

¹⁸ The *Post* series documented 61,998 cash seizures on highways since 2001. Under equitable sharing rules, federal authorities shared \$1.7 billion of the \$2.5 billion revenues with state law enforcement authorities. See Michael Sallah, Robert O'Harrow Jr., Steven Rich, & Gabe Silverman, *Stop and Seize*, *The Washington Post*, Sept. 6, 2014, available at <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

majority of property owners were people of color.¹⁹ The abuse of civil forfeiture for pecuniary gain led two former leaders of the Department of Justice’s Asset Forfeiture Office to argue that civil forfeiture should now be abolished.²⁰

II. AGGRESSIVE USE OF CIVIL FORFEITURE IN PENNSYLVANIA DISPROPORTIONATELY AFFECTS COMMUNITIES OF COLOR AND LOW-INCOME FAMILIES

Like many states, Pennsylvania’s current civil forfeiture laws have their origin in the War on Drugs and are modeled largely upon the federal statute. Pennsylvania does not have one uniform statute that governs civil asset forfeiture procedures.²¹ However, the vast majority of forfeitures in Pennsylvania occur under the Controlled Substances Forfeiture Act. *See* 42 Pa. Cons. Stat. Ann. §§ 6801–6802. Like its federal counterpart, Pennsylvania’s statute is used aggressively and suffers from high rates of default, a low burden of proof on the government, and few procedural protections for property owners. The structure of

¹⁹ Among many examples, the *Post* series highlighted the plight of a 40-year-old Hispanic carpenter from New Jersey who was stopped on Interstate 95 in Virginia for having tinted windows and had \$18,000 taken from him that was meant to buy a used car. In another case, police took \$17,550 from Mandrel Stuart, a 35-year-old Black owner of a small barbecue restaurant in Virginia during a stop in 2012 for a minor traffic infraction on Interstate 66. While he eventually got his money back, he lost his business because police had deprived him of the cash necessary to pay his overhead. *Id.*

²⁰ *See* John Yoder & Brad Cates, *supra* n.15 (“The program began with good intentions but now, having failed in both purpose and execution, it should be abolished”).

²¹ *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 6801.1 (terrorism forfeiture); 75 Pa. Cons. Stat. Ann. § 4909 (forfeiture of vehicles used to illegally transport waste); 4 Pa. Cons. Stat. Ann. § 1518 (illegal gambling forfeiture); 4 Pa. Cons. Stat. Ann. § 1518 (counterfeiting forfeiture); 18 Pa. Cons. Stat. Ann. § 7707 (chop shop forfeiture).

Pennsylvania’s civil asset forfeiture laws incentivizes law enforcement to aim civil forfeiture enforcement efforts at people who are unable or unlikely to fight back. In Pennsylvania, poor people of color are affected by civil forfeiture in numbers disproportionate to their representation in the population and even disproportionate to their representation among people arrested for crimes punishable by forfeiture.

A. Defending Against Civil Forfeiture Under Pennsylvania Law Is Exceedingly Difficult, Particularly for Property Owners Who Cannot Afford Counsel

In Pennsylvania, the government can seize and retain a person’s property—everything from the cash in her wallet to her personal belongings, car, and home—if law enforcement alleges that there is some connection between the property and a crime. Even though civil forfeiture is premised on the idea that a crime has occurred, a person whose property is being taken through forfeiture does not have to be charged with a crime, much less convicted of a crime, as evidenced by Ms. Young’s case. Indeed, *no one* has to be charged with a crime or convicted of a crime in order for the government to take property through civil forfeiture.²²

When forfeiture is pursued as a civil *in rem* proceeding, the property owner lacks essential legal protections afforded to criminal defendants. *Commonwealth v. All That Certain Lot or Parcel of Land Located at 605 Univ. Drive*, 104 A.3d

²² See *United States v. Bajakajian*, 524 U.S. 321, 330 (1998) (“The theory behind [civil forfeitures] was the fiction that the action was directed against ‘guilty property,’ rather than against the offender himself.”).

411, 426 (Pa. 2014). For example, the strong evidentiary burden in a criminal case that requires the government to affirmatively prove its case beyond a reasonable doubt does not apply in civil forfeiture proceedings. *Id.* (citing *Commonwealth v. \$6,425.00 Seized from Esquilin*, 880 A.2d 523, 529 (Pa. 2005)). Assuming the forfeiture case does not end in default, the prosecution’s burden is only to prove by a preponderance of the evidence the nexus between the property and illegal activity. *Commonwealth v. Marshall*, 698 A.2d 576, 578 (Pa. 1997). To do so, the prosecution may rely on evidence that would be inadmissible in a criminal proceeding under the rules of evidence. 42 Pa. Cons. Stat. Ann. § 6802(h). Once the prosecution meets this low burden, the property owner is then required to affirmatively prove an “innocent owner” defense—that is, that she lawfully acquired the property and did not unlawfully use or possess it herself, and did not know of and consent to its unlawful use by anyone else, and that her lack of knowledge and consent to someone else’s unlawful use of the property was reasonable under the circumstances. 42 Pa. Cons. Stat. Ann. § 6802(j); 42 Pa. Cons. Stat. Ann. § 6801(a)(4)(ii), (a)(6)(ii); *Marshall*, 698 A.2d at 578. In this manner, civil forfeiture inverts the traditional presumption of innocence afforded to defendants in criminal proceedings.

Property owners have no right to appointment of counsel in a civil forfeiture proceeding. *605 Univ. Drive*, 104 A.3d at 426 (citing *\$9,847.00 U.S. Currency*,

704 A.2d at 616–17 (Pa. 1997)).²³ Nor do Pennsylvania’s civil forfeiture laws authorize a prevailing claimant to recoup her attorneys’ fees. Unsurprisingly, the available evidence suggests that most Pennsylvanians who lose property through civil forfeiture each year are unrepresented.²⁴

Challenging a civil forfeiture can be an overwhelming undertaking for individuals who are not represented by counsel. When a civil forfeiture action is brought against a home, the owner often must undertake a separate legal process to address complex tangled title or estate issues before she even has legal standing to defend the home against forfeiture. Once a respondent’s standing is established, she must file an answer, in which statutory and constitutional defenses, like the constitutional defense that forfeiture is an excessive fine, must be invoked or else

²³ The aggressive practices of prosecutors are also reflected in the Commonwealth’s failure to even advise property owners of their right to obtain counsel at their own expense or where they might seek legal help, two things that are accorded to defendants in all other types of civil actions in the Court of Common Pleas pursuant to Pennsylvania Rule of Civil Procedure 1018.1. *See Commonwealth v. Real Prop. and Improvements at 2338 N. Beechwood Street, Philadelphia, PA 19132*, No. 631 C.D. 2012, 2016 WL 980419 at *4 (Pa. Commw. Ct. Mar. 15, 2016) (holding that forfeiture respondents should be on equal footing with defendants in all other types of civil proceedings).

²⁴ *See* Isaiah Thompson, *Cash Machine: How the Philly DA seizes millions in alleged crime money—whether there’s been a crime or not*, Philadelphia City Paper, Nov. 28, 2012, available at <http://citypaper.net/The-Cash-Machine> (“Most individuals who do pursue the return of their property do so pro se—that is to say, alone. . . . Aside from occasional private attorneys hired by individual respondents, there is no one else in the room representing their interest.”); Testimony Presented to Senate Judiciary Comm. by Louis S. Rulli, Practice Professor of Law & Dir. of Clinical Programs, Univ. of Pennsylvania Law School, Oct. 20, 2015, available at <http://www.senatorgreenleaf.com/wp-content/blogs.dir/39/files/2015/10/Testimony-of-Louis-Rulli.pdf> (noting that years of court observations suggest property owners in Philadelphia forfeiture court are “overwhelmingly” unrepresented by counsel).

they are deemed to be waived. The District Attorney then serves lengthy interrogatories on the property owner.²⁵ In addition to the burden of responding to discovery, challenging forfeiture usually means multiple court appearances.²⁶

Sacrificing constitutional protections, filing legal pleadings and answering voluminous discovery requests, taking multiple days off from work or family responsibilities to appear in court, and/or hiring an attorney are often prohibitive burdens for property owners, even for those facing the devastating loss of a family home or vehicle. This calculus is even more obvious in cash forfeiture cases, which constitute the majority of forfeitures brought in Pennsylvania,²⁷ because the

²⁵ See, e.g., *605 Univ. Drive*, 104 A.3d at 426 (holding that the Rules of Civil Procedure apply as to procedural issues not addressed in the text of 42 Pa. Cons. Stat. Ann. §§ 6801, 6802). In Philadelphia, the DA's office often requires property owners to provide written answers to many pages of interrogatories such as "Did you file a federal, state, or local tax return since January 1995? If so, please identify which ones you filed and when." Scott Kelly, American Civil Liberties Union of Pennsylvania, *Guilty Property—How Law Enforcement Takes \$1 Million in Cash from Innocent Philadelphians Every Year—and Gets Away With It* (June 2015), <http://www.aclupa.org/forfeiture> (hereinafter "ACLU-PA, *Guilty Property*") 6-7 (citing interrogatories from 2011 civil forfeiture case in the First Judicial District of Philadelphia).

²⁶ A 2012 article reported that property owners sometimes had to appear at upwards of ten court dates in Philadelphia's forfeiture courtroom before reaching a hearing before a judge. Isaiah Thompson, *Cash Machine*, *supra* n.24; see also ACLU-PA, *Guilty Property* 6 (median of four court appearances required for all civil forfeiture petitions filed in Philadelphia County from 2011 to 2013).

²⁷ Last year, only two counties earned more forfeiture revenue from the sale of personal or real property than from forfeitures of cash. Office of the Pennsylvania Attorney General, *Asset Forfeiture Report, Fiscal Year 2013-14 (Controlled Substances)* (attached hereto as Exhibit A) at 34 (reporting that Huntingdon County received \$0 from cash forfeitures and \$1,950 from the sale of forfeited property); *id.* at 37 (reporting that Juniata County received \$0 from cash forfeitures and \$4,000 from the sale of forfeited property).

value of the property at stake is often dwarfed by the expense and burden of challenging the forfeiture.²⁸ Thus, in light of the high costs and burdens of challenging a forfeiture petition, it is simply not possible—or often rational economically—for many property owners, particularly those who are low-income, to challenge forfeiture, even when they are innocent and there is no legal basis for the forfeiture. *See, e.g.,* Isaiah Thompson, *Cash Machine*, *supra* n.24.

Unsurprisingly, the government wins the overwhelming majority of forfeiture cases filed in Pennsylvania, mostly by default when the property owner fails to file a written response to the forfeiture petition or misses a court date. When a forfeiture case ends in default, the prosecution never has to present any evidence to support the forfeiture. In Philadelphia, approximately 87% of property owners faced with a civil forfeiture petition lose their property by default. ACLU-

²⁸ The sums of cash at issue can be just a few hundred dollars. In Philadelphia, from 2011 to 2013, the median value of cash forfeiture cases was \$192. ACLU-PA, *Guilty Property* 7. In Montgomery County, from 2012 to 2014, the median value of a forfeiture case was \$307, and the District Attorney regularly pursued forfeitures of sums under \$100, and in one instance, even a single dollar. Scott Kelly, American Civil Liberties Union of Pennsylvania, *Broken Justice—An Investigation of Civil Asset Forfeiture in Montgomery County* (October 2015), <http://www.aclupa.org/forfeiture> (hereinafter “ACLU-PA, *Broken Justice*”) at 4 & nn.6, 18. In Cumberland County, half of all cash-only forfeiture cases arising from seizures between 2011 and 2013 involved less than \$356. Scott Kelly, American Civil Liberties Union of Pennsylvania, *Forfeiture in the Shadows—An Investigation of Civil Asset Forfeiture in Cumberland County* (December 2015), <http://www.aclupa.org/forfeiture> (hereinafter “ACLU-PA, *Forfeiture in the Shadows*”) at 5 & nn.20-22. An investigation of more than 700 forfeiture petitions filed in Lancaster County since 2012 also found that a majority involved “small amounts of cash—often under \$500.” Gil Smart & Susan Baldrige, *Civil asset forfeiture: Policing for Profit?* LancasterOnline, Nov. 2, 2014. This is troubling evidence that civil forfeiture is not actually being used to cripple cartels and drug kingpins, as it was intended. *See* Brad Cates & John Yoder, *supra* n.15.

PA, *Guilty Property* 5 & n.20. In Montgomery County, 90% of forfeiture cases end in default. ACLU-PA, *Broken Justice* 4 & n.7. In Lancaster County, a review of forfeiture cases since 2012 turned up just four instances in which a property owner challenged the government’s forfeiture petition. Gil Smart & Susan Baldrige, *supra* n.28.

Notice problems also contribute to Pennsylvania’s high default rates. Current Pennsylvania law does not require service on the property owner, nor does it require the prosecution to prove to the court that the property owner received notice of the forfeiture petition before the court orders default forfeiture.²⁹ And indeed, investigations of practices in several counties have provided reason to believe that property owners do not always receive proper notice of the forfeiture proceeding.³⁰

²⁹ The controlled substances forfeiture statute permits such to be served on *either* the owner or “the person... in possession at the time of the seizure.” 42 Pa. Cons. Stat. Ann. § 6802(b).

³⁰ Isaiah Thompson, *Cash Machine*, *supra* n.24 (noting that court records reflected service in only half of the cases reviewed, and that “[i]n the cases in which service was not made, forfeitures proceeded anyway.”). In the ACLU’s analysis of a randomized sample of 100 Philadelphia cash forfeiture cases, court records for 34% of forfeiture cases did not reflect proper notice. ACLU-PA, *Guilty Property* 6. In Montgomery County, court records revealed that the District Attorney’s office regularly flaunted the statutory notice requirement, taking the position in many cases that property owners must affirmatively move for the return of their property, and that if an owner did not do so promptly enough, their property could be forfeited without any notice. *Id.* at 4-5.

B. Law Enforcement Agencies Have a Direct Financial Incentive to Use Pennsylvania's Civil Forfeiture Laws Aggressively Against Property Owners Who Are Least Able to Contest the Forfeiture

While property owners face many structural obstacles to challenging forfeiture actions, law enforcement has a direct pecuniary incentive to forfeit as much property as possible.³¹ One hundred percent of the proceeds from forfeiture go to the law enforcement agencies charged with making decisions about whether to pursue forfeiture. 42 Pa. Cons. Stat. Ann. § 6801(e)–(g).

Pennsylvania law enforcement agencies reported taking in a staggering \$19.2 million worth of property under two of Pennsylvania's civil forfeiture laws in 2013-2014.³² Philadelphia's forfeiture revenues are consistently the highest in the state, totaling \$3,428,288 in 2013-2014—the equivalent of more than 10% of the District Attorney's appropriated budget.³³ Philadelphia consistently has the largest

³¹ See, e.g., *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 878 (Pa. Commw. Ct. 2014) [hereinafter *Young*] (Pellegrini, J., concurring) (“[An] overriding governmental interest is to instill confidence in the criminal justice system. The present forfeiture regime severely undermines that confidence because of the inherent conflict of interest that a district attorney has in seeking forfeiture to fund his or her expenditures that the Commissioners or Council have chosen not to fund.”).

³² See Office of the Pennsylvania Attorney General, *Asset Forfeiture Report, Fiscal Year 2013-14 (Controlled Substances)*; Office of the Pennsylvania Attorney General, *Asset Forfeiture Report, Fiscal Year 2013-14 (Chop Shop)*. During the last fiscal year for which data is available, eight county prosecutors' offices in Pennsylvania took in more than half a million dollars in income derived from forfeited property. See Exhibit B (charts of forfeiture revenues of the top income-generating counties).

³³ Office of the Pennsylvania Attorney General, *Asset Forfeiture Report, Fiscal Year 2013-14 (Controlled Substances)* at 53; City of Philadelphia Comprehensive Annual Financial Report, Fiscal Year Ended June 30, 2014, at 157, available at

forfeiture revenues in the state, taking in about \$5 million each year on average over the last decade.³⁴

Forfeiture proceeds supplement the budgets allocated to law enforcement agencies by the legislature. Indeed, current law actually prohibits the legislature from reducing any agency's appropriated budget in reliance on expected forfeiture revenues. 42 Pa. Cons. Stat. Ann. § 6801(f), (k). Civil forfeiture thwarts the democratic process, giving police and prosecutors the power to raise their own revenues while circumventing the legislature and the transparency, accountability, and oversight functions that are built into the normal budgeting process.

Law enforcement's direct financial stake in the outcome of a forfeiture proceeding also creates a strong incentive to pursue forfeitures that will not be challenged. Litigation can be expensive and time-consuming, but the cost of filing a forfeiture case that ends in default is minimal. In Philadelphia, an analysis of several years of court records revealed that the District Attorney's office robo-signed and filed the same boilerplate petition in every cash forfeiture case, making the additional cost of prosecuting each unchallenged forfeiture case negligible. ACLU-PA, *Guilty Property* 8.

<http://www.phila.gov/investor/pdfs/2014CAFR.pdf> (District Attorney budget of \$32,808,000).

³⁴ See Exhibit B.

Enforcement strategies directed at people unlikely to challenge forfeitures are, in turn, likely to affect low-income communities of color disproportionately. First, in Pennsylvania, poor people—those with the least ability to hire an attorney to challenge a forfeiture—are disproportionately likely to be people of color. Henry J. Kaiser Family Foundation, Poverty Rate by Race/Ethnicity, *available at* <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (13% of Pennsylvanians live in poverty, including 9% of white Pennsylvanians, 25% of Black Pennsylvanians, and 29% of Hispanic Pennsylvanians). Similarly, focusing forfeiture enforcement on low-income neighborhoods is also likely to disproportionately affect people of color. *See* Sean Reardon et al., *Neighborhood Income Composition by Race and Income, 1990-2009*, *The Annals of the American Academy of Political and Social Science* 660(1), 78-97 (2015) (Black and Hispanic families are much more likely to reside in lower income neighborhoods than families of the same income level but of another race).

Furthermore, people of color may have more reason to distrust the criminal justice system and to doubt their likelihood of success in challenging the government. *See, e.g.,* Michelle Alexander, *The New Jim Crow* 69-70 (rev. ed. 2011). This is because people of color experience unfair disparities at multiple levels of the criminal justice system. These racial disparities are particularly pronounced with respect to drug law enforcement, and there is ample evidence that

racial disparities in drug arrests, prosecutions, and sentences cannot be explained by differences in the rates of offending.³⁵ Law enforcement's direct financial incentive to aggressively seek forfeiture from the easiest targets further undermines public trust that the justice system is fair and impartial.³⁶

C. Communities of Color Disproportionately Bear the Burden of Pennsylvania's Harsh Civil Forfeiture Laws

In light of the incentives described, it is especially troubling that studies consistently reveal racial disparities in whose property is targeted for forfeiture in Pennsylvania. Indeed, the racial disparities among Pennsylvania's forfeiture victims are even more pronounced than the racial disparities in arrest rates for offenses punishable by forfeiture. Disparities in civil forfeiture thus add yet another layer of unfairness and inequity to a criminal justice system already plagued by these problems.

In Philadelphia, Black people make up only 44% of the city's population, and 60% of those arrested for forfeitable offenses. ACLU-PA, *Guilty Property* 10 & n.44. Experts have suggested that Philadelphia's high rate of arrest of Black

³⁵ E.g., James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 46 & n.96 (2012); Michelle Alexander, *The New Jim Crow* 98-103 (rev. ed. 2011); Michael Tonry & Matthew Melewski, *The Malign Effects of Drugs and Crime Control Policies on Black Americans*, in *Crime & Justice* vol. 37 23-31 (2008), available at <https://www.jstor.org/stable/10.1086/588492>.

³⁶ See, e.g., Brad Cates & John Yoder, *supra* n.15 ("Over time, [civil asset forfeiture] has turned into an evil itself, with the corruption it engendered among government and law enforcement coming to clearly outweigh any benefits.").

people results from racial bias in policing.³⁷ Black people comprise 63% of owners subject to forfeiture, raising the question of whether law enforcement bias similarly affects the racial disparity in civil forfeiture enforcement. ACLU-PA, *Guilty Property* 10. The disparity is even more pronounced for property owners who have lost property to forfeiture even though they have not been convicted of a crime related to the forfeiture: approximately 70% of these innocent owners are Black. *Id.* at 10 & n.46.³⁸

Observations of Philadelphia’s civil forfeiture courtroom over an extended period of time confirm that property owners targeted for forfeiture are overwhelmingly Black or Latino. Isaiah Thompson, *Cash Machine*, *supra* n.24 (“The majority of those affected aren’t white, suburban, [or] middle-class . . . they’re generally black or Hispanic, working-class and poor.”); Testimony Presented to Senate Judiciary Comm. by Louis S. Rulli, *supra* n.24.³⁹

³⁷ See Plaintiffs’ Fifth Report to the Court and Monitor on Stop and Frisk Practices, *Bailey v. City of Philadelphia*, No. 10-5952 (E.D. Pa. Feb. 24, 2015), *available at* http://www.aclupa.org/download_file/view_online/2230/198 (finding a rate of unconstitutional stops for Black people that was 6.5 percentage points higher than the rate for white people, among other racial disparities, and concluding that “non-racial factors do not explain the racial disparities.”).

³⁸ Approximately 37% of Philadelphia’s forfeitures of cash were not supported by a related criminal conviction, meaning that the property owner was never proven guilty of a crime punishable by forfeiture. ACLU-PA, *Guilty Property* 4, 9 & n.8.

³⁹ Philadelphia’s civil forfeiture courtroom (478 City Hall) presented many troubling aspects, not the least of which was that it was run by prosecutors without judicial oversight, compounding the difficulties for low-income property owners who were unable to afford legal help. The courtroom became notorious for abusive practices and

The racial disparities in civil forfeiture enforcement extend beyond Philadelphia. In Montgomery County, Black people make up 9% of the population, and 37% of those arrested for offenses punishable by forfeiture. ACLU-PA, *Broken Justice* 6 & n.22. Yet a staggering 53% of property owners faced with forfeiture are Black. *Id.* at 6. Likewise, Cumberland County is only 3% Black, but Black people make up 15% of those arrested for forfeitable offenses and 36% of property owners targeted for forfeiture. ACLU-PA, *Forfeiture in the Shadows* 5 & n.24. That means that in Cumberland County, Black people are eighteen times more likely to be the targets of civil forfeiture than people of other races. *Id.* at 5-6 & n.25.

D. A Quantitative Analysis of All Real Estate Civil Forfeiture Petitions Filed in Philadelphia County in 2010 Reveals the Disparate Impact of Civil Forfeiture

Pennsylvania's civil forfeiture laws provide limited transparency to the public, mandating only that prosecutors provide annual reports with very basic information about the types of forfeited property and forfeiture revenues.⁴⁰ These

was satirized on national television shows. *Last Week Tonight with John Oliver: Civil Forfeiture* (HBO broadcast Oct. 5, 2014), available at <https://www.youtube.com/watch?v=3kEpZWGgJks>; *Daily Show with Jon Stewart: Highway-Robbing Highway Patrolmen* (Comedy Central broadcast July 22, 2014), available at <http://www.cc.com/video-clips/pjxlrn/the-daily-show-with-jon-stewart-highway-robbing-highway-patrolmen>.

⁴⁰ 42 Pa. Cons. Stat. § 6801(j). This provision authorizes law enforcement to withhold data about forfeited property used in ongoing drug enforcement activities.

reports do not present a complete picture of how forfeiture is used in Pennsylvania. Neither the Attorney General's office nor county prosecutors maintain data on the race or income of people from whom they seize property, default rates, or the number of property owners subject to forfeiture who are never charged with a related crime. This information is available to prosecutors but is not required to be collected or disclosed.

An analysis of residential real estate forfeiture petitions brought by the Philadelphia District Attorney in 2010 (the year of Donald Graham's first arrest in this case), when aggregated with Philadelphia's neighborhood demographics, reveals that civil forfeiture is pursued disproportionately in neighborhoods that are predominately non-white and low-income. *See* Figure 1, *infra* p. 35.

The disproportionate use of civil forfeiture based upon race comes into even sharper focus in a close-up analysis of the expanded Center City area of Philadelphia. *See* Figure 2, *infra* p. 36. In all of Greater Center City,⁴¹ the Philadelphia District Attorney's office brought only one real estate forfeiture petition in all of 2010. This home, 2305 Montrose Street, is located in one of the few remaining predominately non-white areas of the Graduate Hospital neighborhood and is owned by a Black family, based upon counsel's review of

⁴¹ Defined as the area from the Delaware River to 44th St. and Powelton Avenue in the West and from Washington Avenue in the South to Fairmount Avenue in the North.

underlying public records. Significantly, not a single forfeiture petition was brought against a white family's home in all of Greater Center City.

At the same time, there is undisputable evidence of drug activity in the Greater Center City area. Police records document, on average, 464 drug-related incidents per year in the Greater Center City Area.⁴² While drug activity is clearly occurring in this largely white area of the City, there were no forfeiture petitions brought here.⁴³

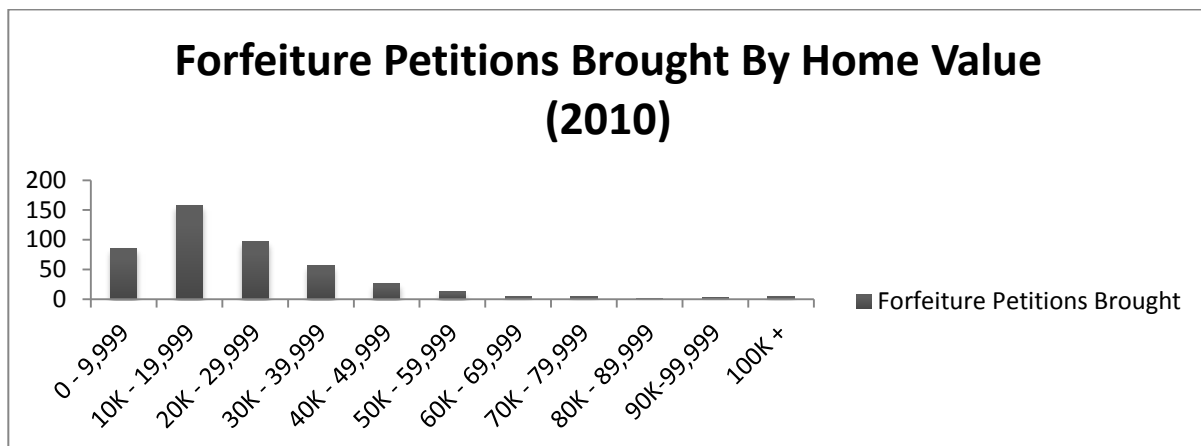
In addition, the vast majority of real estate forfeitures in Philadelphia were brought against families in the lowest income bracket, those making less than \$41,114 per year. *See* Figure 3, *infra* p. 37 (map aggregating 2010 real estate forfeiture petitions with 2010 census data on median family income).

⁴² The Part II Raw Data, which contains information about non-violent offenses including drug offenses, is not publically available for 2010 or 2011. The earliest Part II data available is for calendar year 2012. Amici used the three available years (2012-2014) closest to 2010 to calculate the annual average. All raw data is available at www.opendataphilly.org.

⁴³ A decade of research shows that marijuana is used at roughly comparable rates by white and Black people. *E.g.*, American Civil Liberties Union, *War on Marijuana in Black and White* (2013) at 9 & n.10, 66-67, *available at* <https://www.aclu.org/feature/war-marijuana-black-and-white> (citing National Household Survey on Drug Abuse & Health, 2001-2010; Substance Abuse & Mental Health Serv. Admin., *Marijuana Use by Demographic Characteristics*, <http://www.samhsa.gov>). But across the country, marijuana laws are enforced disproportionately against people of color. *E.g.*, *id.* at 9. A 2013 report revealed that, in Pennsylvania, a Black person was 5.19 times more likely than a white person to be arrested for marijuana possession, ranking Pennsylvania as the seventh worst state in terms of this racial disparity. *Id.* at 18. These disparities continue today.

Graphic mapping of official forfeiture data demonstrates that prosecutors are filing civil forfeiture petitions disproportionately against low-income families of color, while bringing very few actions, if any, against higher-income white families, despite documented drug use and arrests in white neighborhoods. Furthermore, the median value of the homes against which the Philadelphia District Attorney filed forfeiture petitions in 2010 was \$18,550, meaning that half of all homes facing civil forfeiture had an official assessed value of under \$18,550. *See Exhibit D.* Equally troubling is the fact that 75% of all homes against which forfeiture petitions were brought had an official assessed value of \$29,900 or less. *See id.*

Figure 4



Both of these numbers are well below the mean property value of the city, which in 2010 was \$44,143.⁴⁴ These figures support the conclusion that civil forfeiture actions brought against homes in Philadelphia overwhelmingly involve families of very limited means who lack the financial resources to afford legal counsel and generally must proceed on their own if they wish to contest forfeiture petitions brought against their property.⁴⁵

There is perhaps no clearer illustration in Pennsylvania of the disparate use of civil forfeiture based upon race and income than the famous case involving the home of Andy Reid. *See* Gary Myers, *Judge Calls Andy Reid Home a Drug Den*, Philadelphia Daily News, Nov. 2, 2007, *available at* <http://www.nydailynews.com/sports/football/judge-calls-andy-reid-home-drug-den-article-1.256416>. Andy Reid, former head coach of the Philadelphia Eagles, struggled, like many parents, with his children's drug problems. *Id.* His two adult sons were arrested and convicted of serious drug charges. *Id.* Andy Reid's sons resided in his home and police searches of the Reid home in Montgomery County uncovered illegal drugs, prescription pills, weapons, and ammunition. *Id.* One of Reid's sons admitted in a

⁴⁴ Amici calculated city-wide averages based on data provided in Exhibit E. Because average property values are reported by ward, median values for the City are not available.

⁴⁵ Between 2010 and 2015 the City of Philadelphia engaged in an actual value initiative (AVI) which consisted of a reassessment of the value of properties in the city. In 2015 terms, the median value of homes against which forfeitures were brought in 2010 was \$61,250. Still, over half of the homes against which forfeiture petitions were brought were valued at less than the \$80,000 fine in *Young*. *See* Exhibit D.

probation report that he sold drugs to his friends and their parents in the suburbs and in tough areas of Philadelphia, and that he liked being a drug dealer. *Id.* At a sentencing hearing for one of Reid’s sons, a Montgomery County judge said that Andy Reid’s family was “in crisis” and described their home as a “drug emporium . . . with drugs all over the house.” *Id.* Despite this judicial finding, prosecutors never filed a civil forfeiture petition against the Reid home for the serious and undisputed drug offenses committed by his sons.

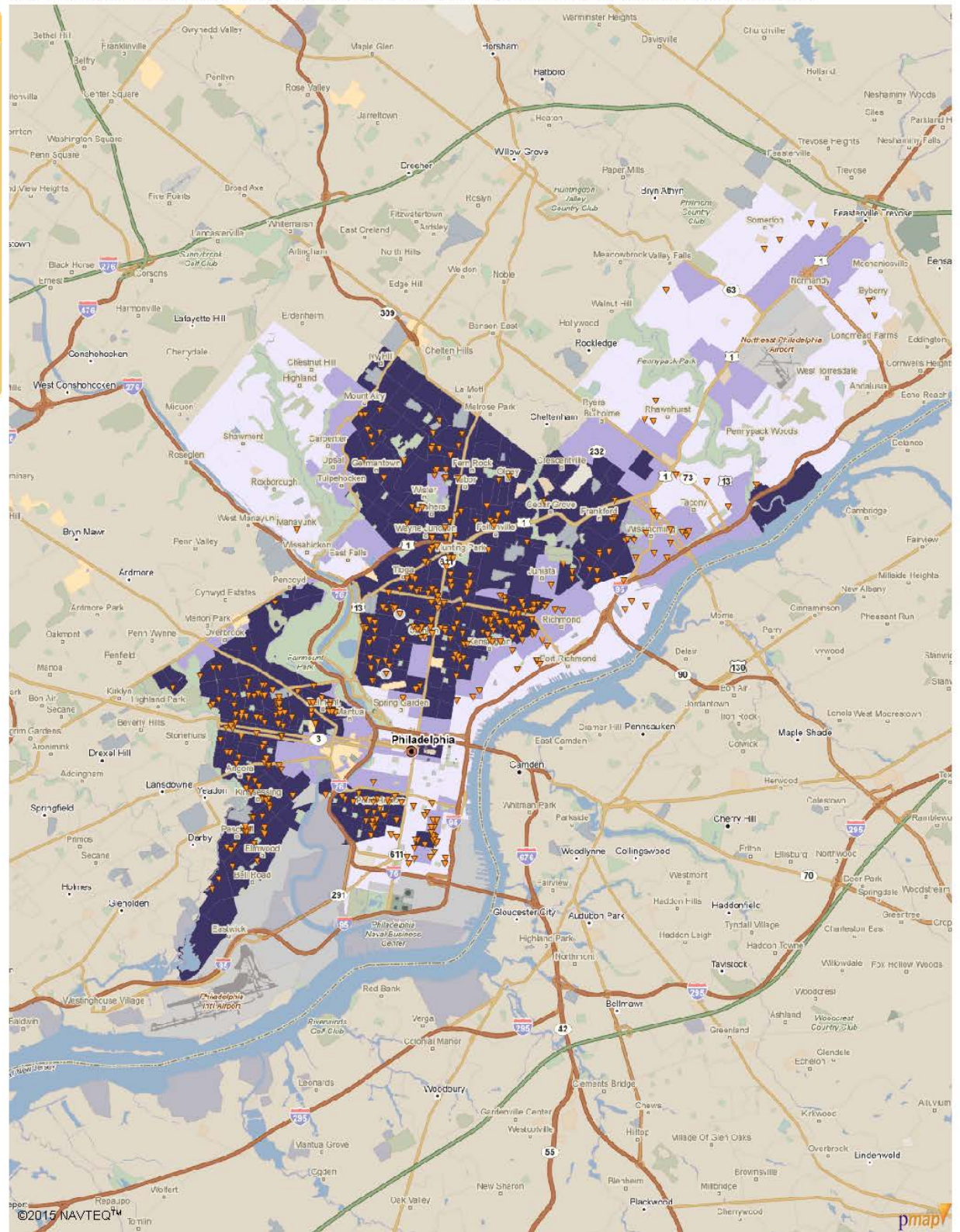
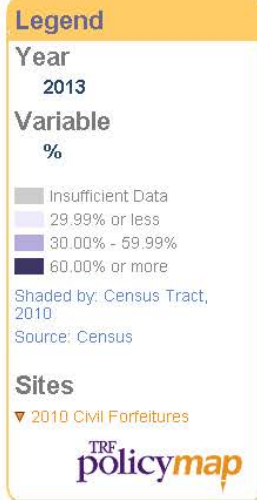
In contrast, in the cases of Elizabeth Young and Mary and Leon Adams (described in footnote 3, *supra*), both involving low-income Black parents, minor marijuana infractions by their adult sons which, at best, were tangentially related to their homes brought certain forfeiture petitions against their homes.⁴⁶ In the case of Andy Reid, a wealthy white parent whose adult sons’ drug offenses were much more serious and where drugs were found throughout the Reid home, prosecutors never brought a civil forfeiture petition against his home. The highly visible disparity in the enforcement of Pennsylvania’s civil forfeiture law clearly undermines confidence in the fairness of Pennsylvania’s system of justice.

⁴⁶ Nationally and in Pennsylvania, there is an emerging trend of decriminalizing marijuana, eliminating laws which disproportionately affect people of color. *See, e.g.*, Phila., Pa., Code § 10-2100 (2014). The small amounts of marijuana found in Ms. Young’s Philadelphia home and car and on her son’s person on the day he was arrested would subject the buyer only to a civil fine in Philadelphia. *Young*, 106 A.3d at 843 (on date of arrest, police recovered 4.6 grams of marijuana from Mr. Graham’s person, 1.3 grams from living room of house, and 8.5 grams from vehicle). Instead, the government took Ms. Young’s house and car.

Map of Block Group (421010010023, PA) with 2010 Civil Forfeitures with Estimated percent of all people who were of a race other than White between 2009-2013.

Estimated percent of all people who were of a race other than White between 2009-2013.

Estimated percent of the population that is not White between 2009-2013. Percentage calculations were suppressed in cases where the denominator of the calculation was less than 10 of the unit that is being described (e.g., households, people, householders, etc). Such areas are represented as having "Insufficient Data" in the map. Denominators for percentage calculations were created by summing all of the component data items in a particular dataset.



Map of Block Group (421010010023, PA) with 2010 Civil Forfeitures with Estimated percent of all people who were of a race other than White between 2009-2013.

Estimated percent of all people who were of a race other than White between 2009-2013.

Estimated percent of the population that is not white between 2009-2013. Percentage calculations were suppressed in cases where the denominator of the calculation was less than 10 of the unit that is being described (e.g., households, people, householders, etc). Such areas are represented as having "Insufficient Data" in the map. Denominators for percentage calculations were created by summing all of the component data items in a particular dataset.

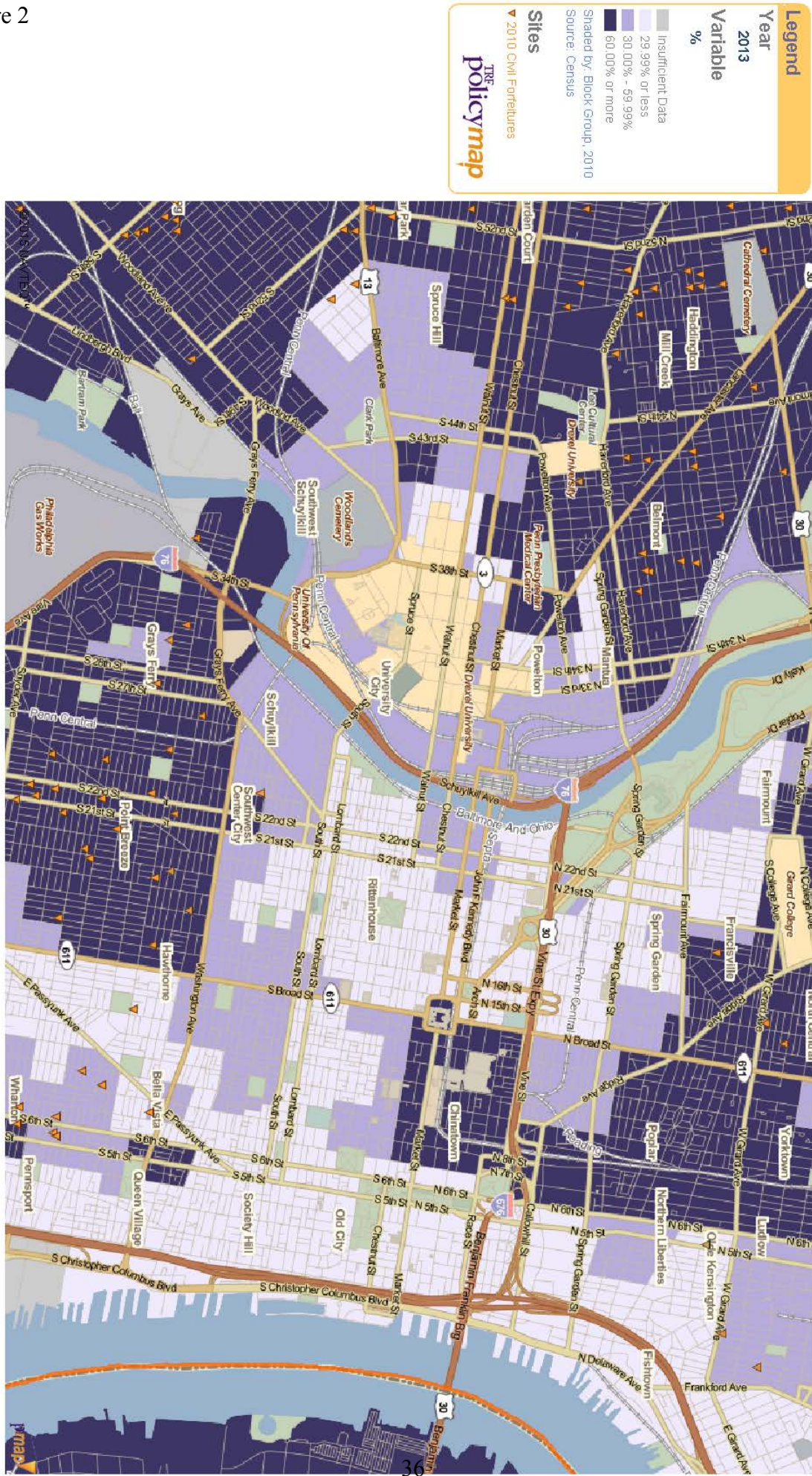


Figure 2

PolicyMap is a service of The Reinvestment Fund

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Map of Block Group (421010142002, PA) with 2010 Civil Forfeitures with Estimated typical (median) income of a family between 2009-2013.

Estimated typical (median) income of a family between 2009-2013.

Estimated median family income in the past 12 months, as reported between 2009-2013. A family is defined by the US Census Bureau as a group of two or more people who reside together and who are related by birth, marriage, or adoption. Medians were suppressed in cases where the sample of the average was less than 10 of the unit that is being described (eg, households, people, householders, etc). Such areas are represented as having "Insufficient Data" in the map. ACS employs values to indicate top and bottom ranges of income. A value of 250,001 indicates a value of 250,000 or greater, whereas a value of 2,499 indicates a value of 2,500 or less.

Legend

Year
2013

Variable
\$

- Insufficient Data
- \$41,114 or less
- \$41,115 - \$53,945
- \$53,946 - \$67,163
- \$67,164 - \$88,750
- \$88,751 or more

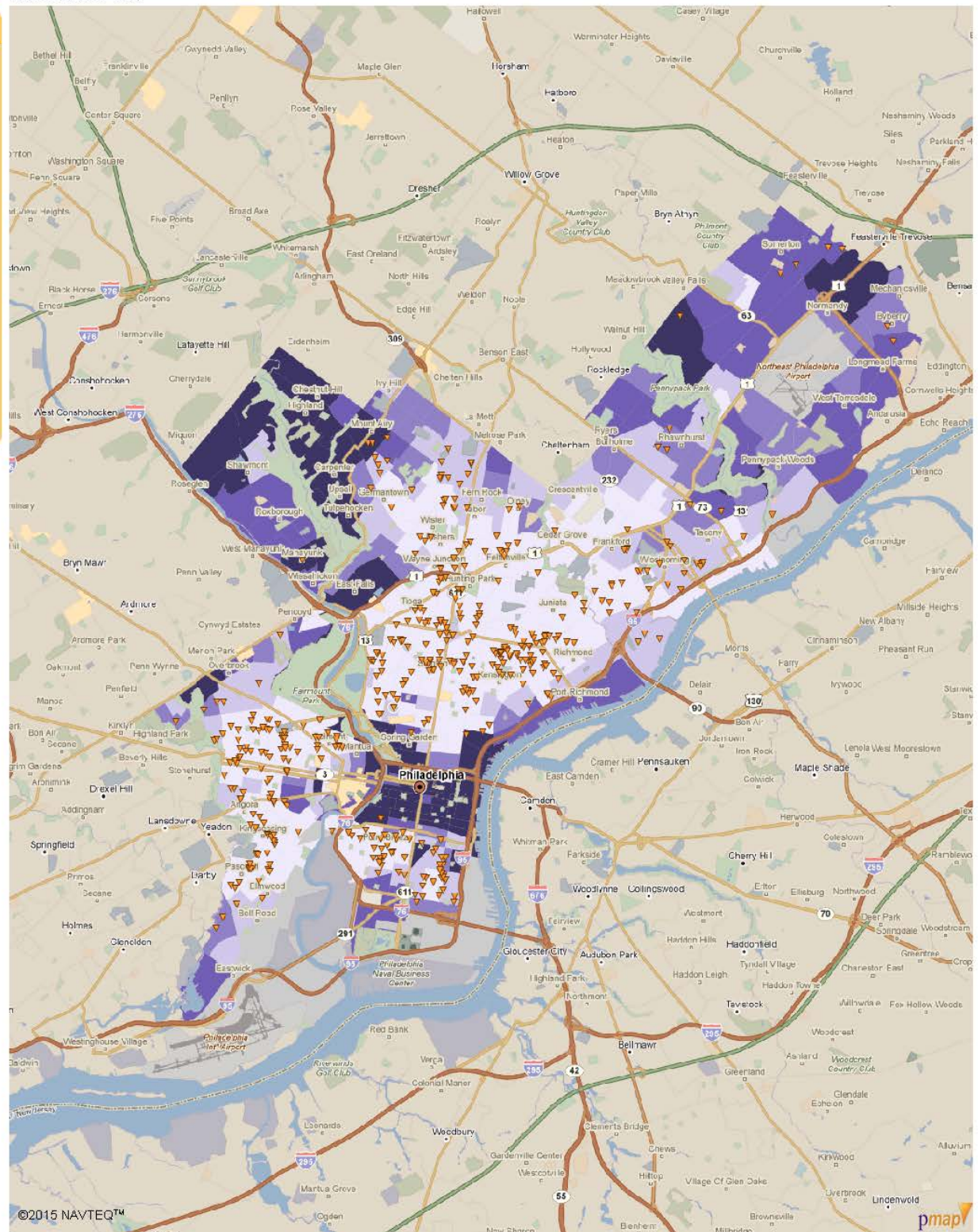
Shaded by: Census Tract,
2010

Source: Census

Sites

▼ 2010 Civil Forfeitures

TRF
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III. A PROPER APPLICATION OF THE EXCESSIVE FINES CLAUSE TO CIVIL FORFEITURE PROTECTS AGAINST ABUSIVE PUNISHMENT AND ENSURES THAT HARD-EARNED PROPERTY IS NOT WRONGFULLY TAKEN BY LAW ENFORCEMENT FOR FINANCIAL GAIN

For the minority of property owners who are able to mount a defense against forfeiture, rather than defaulting without any meaningful opportunity to be heard, the Excessive Fines Clause found in both the state and federal constitutions serves as a final check on the government's power to punish—a power exercised disproportionately against low-income families and communities of color. A simple mathematical comparison between the value of seized property and the maximum statutory fine without regard to any serious consideration of instrumentality, culpability, proportionality, and harm, fails to satisfy this fundamental constitutional requirement or provide a robust and meaningful backstop on the government's power to punish through forfeiture. As the Commonwealth Court has previously cautioned, it is only strong procedural protections that prevent civil forfeiture from amounting “to little more than state-sanctioned theft.” *Commonwealth v. Younge*, 667 A.2d 739, 747 (Pa. 1995).

A. Federal and State Court Precedent Supports the Application of a Flexible, Case-Specific Multi-Factored Analysis to Determine Whether a Fine Is Constitutionally Excessive

The Supreme Court first applied the Excessive Fines Clause to a statutory *in rem* civil forfeiture in *Austin v. United States*, 509 U.S. 602 (1993), holding that

because such actions impose “punishment for some offense,” they are subject to the constitutional protections of the Eighth Amendment. *Id.* at 622. The *Austin* Court made clear that forfeited property must be instrumental to the commission of the alleged criminal offense. *Id.* at 621. However, the Court chose not to establish a definitive test for determining when forfeiture is constitutionally excessive, leaving the development of all relevant factors to the lower courts. *Id.* at 623 n.15.

Five years later, in *United States v. Bajakajian*, 524 U.S. 321 (1998), the Court declined to apply *Austin*’s instrumentality requirement to criminal forfeitures. *Id.* at 333. Instead, in a criminal forfeiture, the Court held that courts “must compare the amount of the forfeiture to the gravity of the defendant’s offense,” such that “[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant’s offense, it is unconstitutional.” *Id.* at 336-37. The Court clearly acknowledged that “any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise,” and thus did not bind lower courts to a rigid or prescribed set of factors. *Id.* at 336. The case-specific factors considered by the Court in deciding that the forfeiture in *Bajakajian* was constitutionally excessive included the actual fine to which Bajakajian was sentenced as well as the maximum authorized penalty for his alleged crime; whether the offense was isolated; and the harm resulting from the offense. *Id.* at 339. Contrary to the Commonwealth’s contention, *Bajakajian* did not purport to

lay out an exhaustive list of all factors relevant to assessing gross proportionality. *Id.* at 336-340.

The Pennsylvania Supreme Court adopted the *Bajakajian* gross disproportionality test for the Excessive Fines Clause in Article 1, Section 13 in *Commonwealth v. 5444 Spruce St., Philadelphia*, 574 Pa. 423, 434-35 (2003) (citing *United States v. Bajakajian*, 524 U.S. 321 (2003)).⁴⁷ But *5444 Spruce Street* specifically rejected the notion that the gravity of the offense could be measured with respect to the general “cost to society of the traffic in illegal drugs,” instead holding that the factors to be analyzed must be “limited to the defendant’s conduct,” which may include “*the penalty imposed as compared to the maximum penalty available*; whether the violation was isolated or part of a pattern of misbehavior; and, the harm resulting from the crime charged.” *Id.* at 432-33 (emphasis added). Again, as in *Austin* and *Bajakajian*, the *5444 Spruce* Court undertook a case-specific factual analysis of the alleged crime, rather than performing a simple mechanical test. The Commonwealth Court recognized as much on remand, noting “our Supreme Court did not authorize a particular approach to the excessive fines analysis or foreclose the application of any

⁴⁷ Notably, Chief Justice Castille authored a concurrence opining that Article I, Section 13 of the Pennsylvania Constitution may provide greater protection against excessive fines than the Eighth Amendment. *Commonwealth v. Baker*, 78 A.3d 1044, 1053-55 (Pa. 2013). Thus, as this Court weighs the proper test for excessive fines, it should consider whether Article I, Section 13 accords greater protection against forfeiture.

particular factors.” *Commonwealth v. 5444 Spruce Street*, 890 A.2d 35, 39 (Pa. Commw. Ct. 2006).

Taken collectively, these cases demonstrate that determining whether a punishment is constitutionally excessive requires an inquiry into gross disproportionality that is flexible and case-specific, including consideration of factors set forth by the Commonwealth Court.

B. The Robotic, One-Dimensional Test Applied by the Trial Court and Advocated by the Commonwealth Is Constitutionally Insufficient to Protect Property Owners Who Are Not Accused of a Crime

The governing case law clearly contemplates a multi-faceted proportionality analysis under the Excessive Fines Clause, one capable of protecting the most vulnerable property owners from government overreaching. The test applied by the trial court in this case, constricted in both breadth and depth of factual analysis, did not comport with this requirement. The Commonwealth, however, argues that the trial court “properly conducted the objective balancing test” for determining an excessive fine, CW Br. at *40, and urges the Court to uphold this insufficient inquiry.

As the Commonwealth acknowledges, the trial court’s assessment of the “gravity of the offense” focused on the fact that, in the court’s view, Ms. Young’s son “theoretically could have faced criminal penalties of \$80,000 for making four sales of marijuana in December 2009 and January 2010.” *Young*, 106 A.3d at 846.

The Court mechanically compared this hypothetical criminal penalty to the value of Ms. Young’s home, which the record evidence indicated was worth approximately \$54,000. (N.T. 84). The Commonwealth argues that this single calculation “weighs heavily in favor of forfeiture,” CW Br. at *43, given that only a “limited review” is necessary “to determine if [the property value] significantly surpasses a normal measure of proportion above the legislative determination.” *Id.* at *41. In the Commonwealth’s view, the determination as to whether forfeiture of a family home is constitutionally excessive is mostly determined by reference to two numbers—drawn from a real estate assessment and a criminal sentencing statute—rather than any evidence of the instrumentality of the property or the specific conduct and culpability of the property owner in the case.

The Commonwealth’s brief actually acknowledges in passing that, under *Bajakajian*, the gravity of the offense analysis includes “the maximum penalties available (*and those actually imposed*).” CW Br. at *41 (emphasis added). Yet the trial court analysis praised by the Commonwealth made no such inquiry into the actual fine imposed. Remarkably, the trial court never mentioned the fact that Donald Graham did not receive a fine in his actual criminal case.⁴⁸ Thus, the Commonwealth’s assertion that “[t]he trial court considered all of the appropriate

⁴⁸ The criminal court did not impose a fine on Donald Graham for the underlying marijuana offenses in this case, but it did require him to pay court costs of approximately \$700.

factors in conducting the *Bajakajian* balancing, each of which weighed in favor of forfeiture”⁴⁹ is not supported by the record.

The Commonwealth also defends the trial court’s decision to infer harm from the general societal consequences of drug activity, without any case-specific analysis of harm. The trial court’s sole observation as to harm was that Mr. Graham’s activities jeopardized the safety of not only Mr. Graham’s neighbors, but also the officers investigating his unlawful activities and serving warrants in connection with that illegal conduct—a suggestion made by the District Attorney in argument (N.T. 97-98), but never supported by evidence—which is no more true in Mr. Graham’s case than in any case involving an investigation of alleged drug sales.⁵⁰ This vague analysis, divorced from the facts of the case, was explicitly rejected by this Court in *5444 Spruce*.

Moreover, while the trial court inferred—from no particular evidence—that Ms. Young’s neighbors experienced harm as a result of Mr. Graham’s alleged activity, it failed to weigh the only actual evidence offered from a neighbor. The deposition testimony of Ms. Young’s neighbor, summarized at trial by Young’s counsel, confirmed that Ms. Young was a good neighbor, that she had not observed

⁴⁹ CW Br. at *46.

⁵⁰ The Commonwealth suggests an additional layer of circular logic in defense of the trial court’s holding, stating “the cost to the public from multiple police investigations weighed in favor of forfeiture.” If the costs of police investigation are sufficient “harm,” surely no forfeiture based on a criminal investigation will be barred by this analysis.

any drug activity at Ms. Young's home, and that as a participant in her neighborhood's town watch, she had never heard any resident concerns about drug activity at the Young home. (N.T. 83-84). Again, the Commonwealth ignores this evidence in favor of the trial court's unfounded inferences of harm.

Finally, the Commonwealth defends the trial court's rejection of Ms. Young's argument that her own lack of culpability relative to her son's should be factored into the Excessive Fines analysis. (Tr. Op. at *13 ("the fact that [Ms. Young] was not convicted of or otherwise charged with a violation" was "irrelevant to our excessive fines analysis.")) Instead, it endorses the trial court's erroneous reliance on its earlier finding that Ms. Young had not satisfied the requirements of the "innocent owner" defense as further justification for forfeiting her property based on her son's conduct. CW Br. at *23. In this manner, the Commonwealth conflates two unrelated defenses and, in essence, argues that a property owner is *per se* culpable if she fails to satisfy the "innocent owner" defense.

In sum, by promoting an overly rigid and mechanical application of the *Bajakajian* Court's gross proportionality test, the Commonwealth ignores both the *Bajakajian* and *5444 Spruce Street* Courts' intention to allow the Excessive Fines inquiry to be shaped to the specific case before the court, based on evidence rather

than generalized inferences. The Commonwealth's attempt to bolster an Excessive Fines test devoid of either legal or evidentiary support must fail.

C. A Gross Disproportionality Test That Only Compares Home Value to the Maximum Statutory Fine That Could Be Imposed Effectively Negates Constitutional Protection for Most Philadelphia Homeowners Caught Up In Civil Forfeiture

When pared to its core, the Commonwealth's argument is essentially that only two objective factors—the assessed value of the property and the maximum statutory fine—are relevant to an Excessive Fines analysis and that no personal culpability, or alternatively the most minimal amount of negligence by the property owner, is sufficient to justify a punishment that forfeits a grandmother's home and car for the conduct of her son. Not only does this interpretation of the Excessive Fines Clause misunderstand governing legal precedent, but its practical application effectively negates any constitutional protection for poor homeowners caught up in aggressive civil forfeiture practices.

An examination of Philadelphia's 2010 real estate forfeitures is illustrative. As discussed, the median value of all real properties forfeited in Philadelphia during the year that Donald Graham was first arrested was only \$18,550. In fact, there were only 8 homes against which forfeiture petitions were brought in 2010 that were assessed at more than \$80,000, the maximum statutory fine calculated by

the trial court for Donald Graham’s alleged four sales of small amounts of marijuana. *See* Exhibit D; 35 P.S. § 780-113(f)(2).⁵¹

Under the Commonwealth’s analysis, all but those eight owners would be presumed to lack constitutional protection against forfeiture if a family member sold small amounts of marijuana out of their home—regardless of the circumstances. In fact, across the city of Philadelphia as a whole in 2010, the mean assessed home value was \$44,143,⁵² and 75% of the homes against which forfeiture petitions were brought in 2010 were valued at \$29,990 or less. This means that the taking of a home would not be viewed as excessive even for underlying offenses less serious than just four small sales of marijuana.⁵³ For the vast majority of Philadelphians, under this interpretation, the Excessive Fines Clause would simply not provide any constitutional protection against civil forfeiture.

If the Excessive Fines proportionality analysis is reduced to this simple comparison of property value against maximum statutory fine for the underlying offense, then the Eighth Amendment’s protection against forfeiture turns

⁵¹ Other drug crimes carry even steeper maximum fines. *See* 35 P.S. § 780-113(b)-(p).

⁵² Notably, only 8 of Philadelphia’s 66 wards had average home values over \$80,000 in 2010. *See* Exhibit E.

⁵³ Even after the City of Philadelphia’s AVI reassessment of all home values in 2015, the Mean assessed home value was \$76,250—still less than the statutory maximum authorized fine associated with a few small sales of marijuana, such that the majority of homeowners in Philadelphia would still lack protection under the Excessive Fines Clause.

exclusively on how expensive the house is rather than any individualized considerations related to the crime and the property's instrumentality, the owner's culpability, or the owner's personal circumstances. Essentially, Philadelphians are penalized because their homes are of relatively lower value than their suburban counterparts, rather than any facts specific to a particular forfeiture. As a result, under the Commonwealth's proposed test, the very same underlying criminal conduct that occurred in the *Young* case would confer constitutional protection to wealthy families with expensive homes while denying protection to families of modest means and lower home values for the very same conduct.

The Commonwealth's proposed test turns the constitutional analysis on its head. Other courts have observed that property owners with fewer resources should actually enjoy *greater* constitutional protection against excessive fines. In analyzing whether property seized in a drug raid constituted an excessive fine, the Supreme Court of Tennessee observed that when analyzing the harshness of the penalty imposed on the property owner by the potential forfeiture:

[C]ourts should consider the monetary value of the property forfeited, particularly in light of the claimant's financial resources. A forfeiture is less likely to be excessive when the claimant has the financial ability to replace the property without undue hardship.

Stuart v. State Dep't of Safety, 963 S.W.2d 28, 36 (Tenn. 1998). The court then highlighted the unfairness inherent in a purely mechanical forfeiture analysis: "If

the claimant's finances are not considered, proportionality analysis will generally permit the forfeiture of property from persons of lesser means, while prohibiting forfeiture from persons of greater means" under identical factual circumstances. *Id.* at 36 n.12.

This clearly cannot be the proper constitutional test under the Eighth Amendment. A robotic, mechanical evaluation of gross proportionality creates a tale of two cities in which low-income citizens are denied protection under the Excessive Fines Clause, leaving those people least able to afford the loss of a home with the least protection against that devastating loss.

IV. A PROPER EXCESSIVE FINES ANALYSIS REQUIRES THE APPLICATION OF A FLEXIBLE, MULTI-FACTORED TEST, WHICH IS CAREFULLY TAILORED TO THE FACTUAL CIRCUMSTANCES OF THE CASE

A. Aligned with Federal and State Courts, the Commonwealth Court Established a Well-Reasoned Hybrid Test, Applying Instrumentality, Culpability, and Proportionality Requirements, to Satisfy the Mandate of the Excessive Fines Clause

Multi-factor tests like the one put forward by the Commonwealth Court allow for consideration of important specific and subjective factors, rather than just hypothetical fines and assessed values, serving as a necessary check on the government's "potential for abusive use of the civil forfeiture statutes." *United States v. Real Prop. Located at 6625 Zumirez Drive, Malibu, Cal.*, 845 F. Supp. 725, 735 (C.D. Cal. 1994). Such fact-intensive inquiries give meaningful weight to

the Excessive Fines defense regardless of the property owner's wealth. These additional factors should include, at a minimum, an instrumentality requirement, the property owner's culpability, and the actual penalty imposed in the underlying criminal case.

First, as the Commonwealth Court properly established, instrumentality is an essential element of the Eighth Amendment analysis in a civil forfeiture case. *Young*, 106 A.3d at 859. This makes sense because if civil forfeiture is based upon the legal fiction that the property has done wrong, then the property must be a significant instrument of the crime or else the punishment will invariably be excessive. Therefore, the instrumentality test is properly viewed as a threshold requirement but, at a minimum, it must be an essential element of the substantive analysis as it requires that the property play a significant—not tangential—role in the underlying offense.

Several federal courts have recognized that taking property from innocent people for marginal connections to the offending conduct of others will fail to meet constitutional standards. As the Second Circuit made clear in *von Hofe v. United States*, “[t]he greater the property’s involvement in the offense—both in terms of its temporal and spatial reach and the other uses to which the property was being put—the stronger the argument that the forfeiture is not excessive.” 492 F.3d 175, 184-5 (2d Cir. 2007); *United States v. Wagoner Cty. Real Estate*, 278 F.3d 1091,

1101 (10th Cir. 2002) (considering factors including “the property’s connection with the offense” because *Bajakajian* “in no way undermines the relevance of these factors”).

Second, in order to account for the scenario presented by Ms. Young’s case in which the property owner is not the individual charged with underlying crimes, the property owners’ degree of culpability must be a weighty factor in the Excessive Fines analysis even if the trial court finds that she did not satisfy the high burden of the statutory innocent owner defense. Again, the Second Circuit’s decision in *von Hofe* is illustrative. There, the court held that the forfeiture of a wife’s one half-interest in her home on account of her husband’s criminal activity “bears no reasonable correlation either to her minimal culpability or any harm she caused.” 492 F.3d 175, 191 (2d Cir. 2007); see *United States v. Ferro*, 681 F.3d 1105, 1115 (9th Cir. 2012) (“[N]othing in *Bajakajian* directs a court to ignore the culpability of the owner and focus solely on whether the fine is excessive given the conduct that subjected the property to forfeiture.”); *United States v. 11290 Wilco Highway*, No. 11-00640, 2013 WL 1412865 at *3 (D. Or. Apr. 5, 2013) (finding forfeiture “constitutionally excessive” because, “although Claimant was wilfully blind to his parents’ drug activity on the Wilco Property, there are no facts that he bore anything more than ‘minimal blame’ for the criminal activity.”). The *Von Hofe* Court further recognized the utter mismatch of a one-dimensional

proportionality test to a case where the property owner is not the criminal defendant, noting that “the utility of the available penalties tends to further diminish where, as here, a claimant does not have knowledge of the full extent of criminal activity occurring on the property.” 492 F.3d. at 189.

Finally, as recognized in *Bajakajian*, a proper Excessive Fines analysis must consider not just the statutory maximum authorized fine, but also the actual penalty imposed upon the criminal defendant for the underlying crime. The Utah Supreme Court expressly refused to compare the value of the forfeited property to the maximum possible penalty, observing that, “[w]hile reference to the maximum penalties is helpful in determining the gravity of the offenses, *it has limited relevance in determining proportionality.*” *State v. 633 E. 640 N.*, 994 P.2d 1254, 1261 (Utah 2000) (emphasis added). The court cited *Bajakajian* for its reasoning, stating that, since the actual fine imposed was “but a fraction of the [maximum] penalties authorized,” the State cannot rely on a maximum possible penalty argument because “[the property owner]’s culpability relative to other potential violators of the . . . provision . . . is small indeed.” *Id.* at 1259; *see also Bajakajian*, 524 U.S. at 339 n.14. The court then proceeded to compare the fair market value of the home to the fines actually imposed, and found the forfeiture to be grossly disproportionate. 633 E. 640 N., 994 P.2d at 1261. *See also Wagoner Cty. Real Estate*, 278 F.3d at 1101 (“[i]n evaluating proportionality, courts must

compare the severity of the offense with which the property was involved, *the harshness of the sanction imposed*, and the culpability of the claimant.”) (emphasis added).

Collectively, these three factors—all recognized by federal and state courts as appropriate factors to consider under *Bajakajian*—offer a nuanced and comprehensive Excessive Fines analysis that will provide robust protection for property owners irrespective of their wealth. Rejecting the one-dimensional analysis proposed by the Commonwealth in favor of a flexible, multi-factor inquiry that incorporates these elements will provide a constitutional backstop to the abusive civil forfeiture practice that already unfairly targets low-income Pennsylvanians and communities of color.

B. A Proper Excessive Fines Analysis of the “Amount of the Forfeiture” Must Also Account for Harm of Forfeiture to the Property Owner’s Family, Including the Loss of Family Home, Loss of Livelihood, and Adverse Impact on Innocent Family Members

Working within the *Bajakajian* gross disproportionality framework of weighing the amount of the forfeiture against the gravity of the offense, the Commonwealth Court identified key factors as lacking from the trial court’s analysis of the gravity of the offense—*i.e.*, property owner’s culpability, actual penalty, and instrumentality. This Court should also incorporate additional considerations into the “amount of the forfeiture” side of the proportionality test, as other jurisdictions have done. Unlike *Bajakajian*, which involved a criminal

forfeiture of cash, this case and many like it in Pennsylvania involve the civil forfeiture of vital family assets, such as homes and cars, which often possess subjective value beyond their fair market price. Rather than accepting assessed market value as the sole measure of the loss in a real estate or vehicle forfeiture, the Court should weigh the impact of the forfeiture with respect to the core interests of the property owner—one’s home, one’s livelihood, and one’s family—interests which the Excessive Fines Clause was designed to protect from excessive punishment.

These subjective factors were collectively incorporated by the Utah Supreme Court in *633 E. 640 N.* into an assessment of the “harshness of the forfeiture,” which encompassed the fair market value of the property; the intangible, subjective value of the property; and the hardship to the defendant, including the effect of the forfeiture on the defendant’s family or financial condition. 994 P.2d at 1259. Consideration of subjective value ensures robust constitutional protection to those most vulnerable to forfeiture under the test performed by the trial court in this case—namely, the low-income people and people of color who are already being disproportionately subjected to civil forfeiture actions in Pennsylvania.

The first such factor to be weighed is whether a home is at stake. With respect to primary residences, courts have recognized that a one-dimensional Excessive Fines analysis discounts the unique and essential quality of real estate

property that serves as a home, beyond its assessed value for tax purposes or sale. These courts have thus held that primary homes are entitled to heightened protection under the Eighth Amendment:

Obviously, the harshness of taking the roof from over the head of a person, even a wrongdoer, is something that must be carefully examined if the Eighth Amendment is to be given meaning, as it was unanimously in *Austin*, even over the strong resistance of the United States.

United States v. One Parcel of Real Prop. Located at 461 Shelby Cty. Rd. 361, Pelham, Ala., 857 F. Supp. 935, 938 (N.D. Ala. 1994); *Stuart*, 963 S.W.2d at 36 (“[T]he intangible value of the forfeited property should be considered. For example, real property, *especially a home*, has higher intangible value than personal property.”) (emphasis added).

For these reasons, the Ninth Circuit articulated as a factor in its analysis “the intangible value, subjective value of the property, e.g., whether it is the family home.” *United States v. Real Prop. Located in El Dorado Cnty. at 6380 Little Canyon Rd., El Dorado, Cal.*, 59 F.3d 974, 985 (9th Cir. 1995). Similarly, the Southern District of Ohio considers “whether the property was a residence [and] the effect of the forfeiture on innocent occupants, including children.” *United States v. 7046 Park Vista Rd.*, 537 F. Supp. 2d 929, 941 (S.D. Ohio 2008), *aff’d sub nom. United States v. 7046 Park Vista Rd., Englewood, Montgomery Cty., Ohio*, 331 Fed. App’x 406 (6th Cir. 2009); *see United States v. Dodge Caravan*

Grand SE, 387 F.3d 758, 763 (8th Cir. 2004) (including in its analysis the fact that the property was a residence and the effect of the forfeiture on innocent occupants of the residence).⁵⁴

The Commonwealth Court has expressed its own serious concern that forfeiture of a family home risks negative consequences to the individual and society that are distinct from those threatened by forfeiture of any other type of property. In *2338 N. Beechwood St.*, 65 A.3d 1055, 1066 (Pa. Commw. Ct. 2013), *vacated*, 114 A.3d 1036 (Pa. 2015),⁵⁵ the Commonwealth Court stated:

We understand the importance of depriving criminals the proceeds of their crimes, and the need to make our communities safer by reducing violence and drug activities by eliminating the safe houses which provide sanctuary to those activities and perpetrators; however, it is our obligation to assure that these laudable goals are achieved within constitutional boundaries. These boundaries become more apparent where there is no alleged criminal conduct of the homeowner, the taking of whose home may result in eviction and homelessness to the homeowner and perhaps even several generations of a family, by the use of civil forfeiture proceedings.

⁵⁴ Legal scholars have pointed to the subjective importance of a home in addition to any objective value of the property. *See e.g.*, Abraham Bell & Gideon Parchmovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871, 887 (2007) (“The [p]roperty owner’s enjoyment of part of the community premium is a potentially important component of subjective value not reflected in the market value of an individual property.”); Megan J. Ballard, *Legal Protections for Home Dweller: Caulking the Cracks to Preserve Occupancy*, 56 Syracuse L. Rev. 277, 280 (2006) (“Because it is hard to objectify the subjective or social value of home . . . the home dweller may lose out too frequently in occupancy or ownership conflicts.”).

⁵⁵ The Commonwealth Court’s subsequent consideration of remaining issues on remand is discussed *supra* note 23.

Further, the Commonwealth Court in *Beechwood* acknowledged that loss of a family home is a particularly egregious outcome where the owner of the property is not the defendant in the underlying offense. *See id.* at 1064. Additionally, low-income homeowners are least able to replace their most valuable asset when it is forfeited by the government. The status of real property that serves as a family's primary residence must be considered in a meaningful analysis of the amount of a forfeiture under the Excessive Fines Clause.

Second, an Excessive Fines analysis should recognize that the Eighth Amendment protects against punishment by the government that deprives a family of its livelihood and allow for consideration of the economic circumstances of the individual facing forfeiture. The historic roots of the Eighth Amendment are founded in the Magna Carta's principle of *salvo tenemento*, protecting against the deprivation of livelihood from government action. *See United States v. Levesque*, 546 F.3d 78, 83-84 (1st Cir. 2008); *United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007) (affirming that an excessive fines analysis should consider whether forfeiture deprives a defendant of his livelihood).⁵⁶ Notably, the Pennsylvania Superior Court has also observed the necessity to consider the economic impact of a forfeiture in a particular case. *See Commonwealth v. Heggenstaller*, 699 A.2d 767, 768 (Pa. Super. Ct. 1997) ("when an ordinance is

⁵⁶ *See also* Nicholas McLean, *Livelihood, Ability to Pay, & the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 853-70 (2003).

written so as to have a punitive and/or confiscatory effect, without relation to the individual's ability to pay the severity of the violation, it does not meet the standard required by Article I Section 13").

For low-income families, the family home and car almost certainly represent two of the family's most valuable assets, and a sizable investment of their livelihood. In many cases, maintaining a family home and car are necessary to protect the family from falling into deep poverty.⁵⁷ In this case, the deprivation of a home and a car from a low-income grandmother, as she enters her seventies, most definitely threatens her livelihood, and therefore must be an important consideration of constitutional excessiveness.

Finally, an Excessive Fines analysis should also accommodate consideration of the harmful effects of civil forfeiture on innocent family members, especially young children. These may include both the effects of residential dislocation—potential homelessness, displacement from employment and education, and loss of neighborhood relationships and networks—as well as the emotional costs to a family. As the District Court of Massachusetts recognized, the “[t]he strongest factor in [a] claimant's favor is the harshness of forfeiture on innocent family members.” *United States v. Real Prop., Buildings, Appurtenances &*

⁵⁷ See generally Yumiko Aratini & Michelle Chau, *Asset Poverty and Debt Among Families with Children*, Nat'l Center for Children in Poverty (Feb. 2010), available at http://www.nccp.org/publications/pdf/text_918.pdf.

Improvements Located at 221 Dana Ave., 81 F. Supp. 2d 182, 191 (D. Mass. 2000).⁵⁸

When faced with the loss of a family asset as essential as one’s home or car, these elements—the special status of the family home, the threatened loss of one’s livelihood, and the potential harm to one’s innocent family—should surely weigh at least as heavily on most Pennsylvanians as the sheer dollar value of the property loss. Incorporating these factors into the proportionality test is therefore essential to capture the true nature of the fine imposed by forfeiture and to provide an appropriate measure of protection to vulnerable families whose homes carry far more subjective and irreplaceable value than real estate assessments alone would suggest.

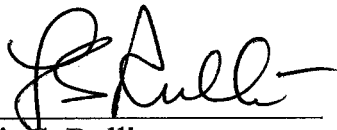
⁵⁸ See also *United States v. Real Prop. Located in El Dorado Cnty. at 6380 Little Canyon Rd., El Dorado, Cal.*, 59 F.3d 974, 985 (9th Cir. 1995) (considering “the hardship to the defendant, including the effect of the forfeiture on defendant’s family or financial condition.”).

CONCLUSION

This Court has a solemn duty to assure that even well-intended drug enforcement does not deprive the most vulnerable people in society of their basic constitutional rights. This is particularly true when the government is forfeiting the home and car of a law-abiding grandmother as punishment for the low-level marijuana offenses of her adult son. And it is vitally important to the fair administration of justice when aggressive forfeiture practices so disproportionately impact low-income families and communities of color.

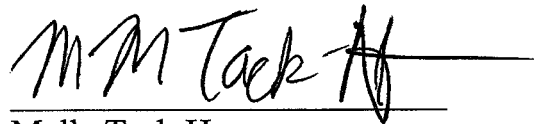
Amici urge this Honorable Court to affirm the decision of the Commonwealth Court.

Dated: March 23, 2016



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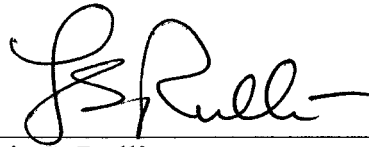
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CERTIFICATION PURSUANT TO PA. R. APP. P. 2135(d)

The undersigned hereby certifies that the foregoing brief contains 13,641 words, excluding the supplementary matters and addendum described in Pa. R. App. P. 2135(b), as calculated by the word processing system used to prepare this brief.

A handwritten signature in black ink, appearing to read "L. S. Rulli", written over a horizontal line.

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PROOF OF SERVICE

I, Louis S. Rulli, hereby certify that on this 23rd day of March, 2016, I caused a true and correct copy of the foregoing Brief of Amici Curiae and Appendix to be served upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R. App. P. 121:

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