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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA Petitioner, vs. TWO HUNDRED TWENTY THOUSAND DOLLARS 00/100 ($220,000.00) CURRENCY OF THE UNITED STATES, Respondent. KY HONG DAI NGUYEN, Claimant/Real Party in Interest	No. RG19-042687 **BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF CLAIMANT'S NON-STATUTORY MOTION TO RETURN PROPERTY** Date: 04/30/2021 Time: 9:00 a.m. Dept.: 1

IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are directly implicated.

Among GI's priorities is reform of the civil asset forfeiture process. GI has litigated or participated as amicus curiae in courts around the nation to defend the rights of those whose property has been seized by the government through the civil asset forfeiture process. GI attorneys, for example, are currently representing property owners in litigation in Arizona,

North Carolina and Massachusetts. GI has also led legislative reform efforts, including drafting legislation to raise the burden of proof on civil asset forfeiture cases (adopted in Arizona in 2017) and to require a criminal conviction prior to forfeiture (adopted in Arizona in 2021).

INTRODUCTION

Ky Hong Dai Nguyen walked into the middle of a rapidly changing legal landscape on October 6, 2019, returning to Oakland International Airport after visiting relatives in Atlanta. California voters legalized the use and possession of recreational marijuana two years earlier, but the Alameda County Sheriff's Office has not adapted to the change in the law. Instead, their canine is trained to detect the mere presence of marijuana—behavior that is now legal. The odor of marijuana no longer provides legal cause to detain or search someone, *People v. Hall*, 57 Cal.App.5th 946, 952 (2020), and a canine alert to the odor of marijuana likewise cannot provide cause to detain someone. *People v. McKnight*, 446 P.3d 397, 400 ¶ 7 (Colo. 2019). Thus the canine's alert to Nguyen's luggage could not, by definition, provide reasonable suspicion to detain him or give officers probable cause to obtain a warrant. Consequently, Nguyen's detention and search violated his constitutional rights to be free from unreasonable search and seizure.

Between 1970 and 1996, the "War on Drugs" relied on three strategies. First, the government expanded the scope of what constitutes a "controlled substance." Second, it made civil asset forfeiture a centerpiece of enforcement and punishment. Third, it substantially increased criminal penalties related to the drug trade. The 1970 Controlled Substances Act also marked the beginning of modern civil asset forfeiture practices, which, in addition to making marijuana a Schedule 1 drug, also added forfeiture as a punishment for certain drug crimes.[1] Outside maritime or customs disputes, *in rem* civil asset forfeiture had previously been the exception, not the rule. The 1984 Comprehensive Crime Control Act of 1984 significantly

[1] Marijuana was first effectively criminalized in 1937, with the passage of the Marijuana Tax Act. The 1970 Controlled Substances Act repealed the Marijuana Tax Act and classified marijuana as a Schedule 1 drug, the same category as heroin, cocaine, LSD and MDNA. Before that, marijuana, hemp, and related products had been used for centuries.

increased criminal penalties and expanded the use of civil *in rem* forfeiture as a key component of the "War on Drugs."

The tide started to turn in 1996, when California became the first state to legalize marijuana for medical purposes. Cal. Health & Safety Code § 11362.5. For the next 12 years, patient advocates frequently found themselves targeted by federal enforcement efforts. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 6-7 (2005) (describing official harassment of licensed, board-certified medical doctors who provided medical marijuana to suffering patients); *Conant v. Walters*, 309 F.3d 629, 632–34 (9th Cir. 2002) (describing federal officials' efforts to censor doctors who prescribed legal marijuana). But in 2009, the United States Department of Justice announced it would no longer "intrud[e] on state legalization schemes or prosecut[e] certain individuals who comply with state law." *Standing Akimbo, LLC v. United States*, No. 20-645, 2021 WL 2637846 at *1 (June 28, 2021) (Thomas, J., concerning denial of certiorari).

In 2012, Washington state and Vermont became the first states to legalize recreational marijuana, with Colorado following in 2012 and California in 2016. Now, there are more states that allow marijuana for recreational use (18) than prohibit it (12). This, combined with the federal government's (sometimes inconsistent) effort to respect state autonomy on this matter has led to a "disjuncture" so dramatic as to result in confusion and legal inconsistency. *Id.* at *2.

Those inconsistencies affect asset forfeiture laws, as well. California receives more than $100,000,000 annually in proceeds from forfeiture. *Potential Impacts of Recent State Asset Forfeiture Changes*, California Legislative Analyst's Office, January, 2020, at 10.[2] In 2000, the federal government passed modest reforms to civil asset forfeiture laws, and California passed its own reforms in 2016. *Id.* at 6-7. Those reforms raised the government's burden of proof in some cases[3] and also require the government prove the owner knew the property would be "used for a purpose for which forfeiture is permitted." Cal. Health & Safety Code §

[2] https://lao.ca.gov/reports/2020/4128/impacts-of-asset-forfeiture-changes-010620.pdf.

[3] Prior to the law, for forfeitures up to $25,000, prosecutors had to prove their case beyond a reasonable doubt. The law raised the limit to $40,000, and provided that above $40,000, prosecutors have to prove the property is subject to forfeiture by clear and convincing evidence. Cal. Health & Safety Code § 11488.4(i).

11488.5(d)(1). But given the disjuncture between state and federal law relating to marijuana, and the fact that California now allows the use of recreational as well as medical marijuana, police practices simply must change to respect the fundamental fairness required by the law and particularly the right of all persons to be free of unreasonable searches. In this case, the Sheriff's Office cannot rely exclusively upon canines trained to alert to the odor of marijuana to provide reasonable suspicion for detaining someone or provide probable cause for search.

In addition, forfeiting Nguyen's property would violate the Excessive Fines Clauses of the federal and state constitutions. Nguyen has not been charged with, let alone convicted of, a crime, and if the owner is not guilty of a crime, "the forfeiture is necessarily excessive—because it punishes someone who has done nothing wrong." *State v. Timbs*, 134 N.E.3d 12, 34 (Ind. 2019). There is no evidence Nguyen committed any criminal violation, so any forfeiture would be grossly disproportionate under the facts here.

This brief first addresses the applicability of the exclusionary rule to forfeiture cases. It discusses the conflict between the California Supreme Court's decision in *People v. Reulman*, 62 Cal.2d 92, 96–97 (1964), which applies the exclusionary rule to forfeiture cases, and the Court of Appeals decision in *People v. $241,600 U.S. Currency*, 67 Cal.App.4th 1100, 1112 (1998), which reached the opposite conclusion, but did not cite to or mention *Reulman*. Additionally, *$241,600 U.S. Currency* is not based on good law. More than a decade ago, Maryland's supreme court reversed the court of appeals decision on which *$241,600 U.S. Currency* exclusively relies.[4] *See One 1995 Corvette v. Baltimore*, 724 A.2d 680 (1999). Additionally, with the exception of Texas, every jurisdiction now follows the rule set forth in *Reulman*, by which lack of probable cause to search equates to lack of probable cause to forfeit.

The brief then addresses how California's legalization of marijuana affects the use of canines for drug enforcement. California law already acknowledges that the presence of marijuana for personal use does not provide probable cause to search. *People v. Lee*, 40

[4] Maryland's highest court is the Maryland Court of Appeals. Its intermediate appellate court is the Maryland Court of Special Appeals. In this case, the Maryland Court of Appeals reversed the opinion of the Maryland Special Court of Appeals upon which *$241,600* extensively relied. See https://mdcourts.gov/courts/about.

Cal.App.5th 853, 863 (2019). Colorado, which legalized recreational marijuana before California, has also addressed the issue and squarely held that alerts from canines trained to detect marijuana cannot provide probable cause. *McKnight*, 446 P.3d at 400 ¶ 7

Finally, the brief outlines two constitutional problems with allowing forfeiture of the property in this case. California law provides an improper financial motivation for officers seizing property, in violation of the due process clauses of the United States and California Constitutions. Any procedure that provides "a possible temptation" to act based on financial considerations can violate due process. *Marshall v. Jerrico, Inc*., 446 U.S. 238, 242 (1980). Additionally, because forfeiture is (at least in part) punishment, any forfeiture in this case would violate the excessive fines clauses of the United States and California Constitutions because such punishment would always be disproportionate to an innocent owner such as Nguyen. *Timbs v. Indiana*, 139 S.Ct. 682, 689-90 (2019).

ARGUMENT

I. The constitutional prohibition against unreasonable search and seizure applies to civil asset forfeiture cases.

Nguyen has done nothing wrong and has not been charged with a crime. Yet the State seeks to forfeit $220,000 seized by Alameda County Sheriff's officers. Body-cam footage documents the entire encounter between officers and Nguyen at the baggage claim area at Oakland International Airport: after he retrieved his suitcase, Nguyen walked toward the airport's exit, whereupon a sheriff deputy detained Nguyen less than a minute later. The deputy stood in front of Nguyen, forced him to stop walking, and seized his luggage. Nguyen refused to consent to a search of the luggage, and police then obtained a warrant based on the canine alert.

Constitutional protections against illegal search and seizure, and the exclusionary rule, apply in civil asset forfeiture cases. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965). In *Plymouth Sedan*, police stopped and searched a vehicle without probable cause, and found contraband untaxed alcohol in it. *Id*. at 694–95. Police sought to forfeit the car under a state law providing that any vehicle used to manufacture, possess or transport contraband alcohol was subject to confiscation. *Id.* at 694 n.2. The trial court held the search illegal, and because the exclusionary rule applied, also dismissed the case. An intermediate appellate court

and the Pennsylvania Supreme Court reversed, holding that the exclusionary rule applied only to criminal prosecutions, and since forfeiture is theoretically a civil proceeding, the rule was inapplicable. *Id.* at 695.

The United States Supreme Court reversed, and held the seizure invalid. Noting that the "leading case on the subject of search and seizure"[5] arose out of a civil forfeiture case involving items imported without paying custom duties, *id.* at 696, it unequivocally held that the exclusionary rule did apply. "[A] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* at 700.

Strangely, California courts have not always respected this conclusion. One year before *Plymouth Sedan*, the California Supreme Court anticipated its holding by ruling that the exclusionary rule applies in forfeiture matters, and rejecting the argument that because forfeiture is "civil in nature," the exclusionary rule should not apply. In *Reulman*, 62 Cal.2d at 96, it said that "[w]hatever the label which may be attached to the proceeding … the purpose of the forfeiture is deterrent in nature and that there is a close identity to the aims and objectives of criminal law enforcement." *See also People v. Super. Ct. (Moraza)*, 210 Cal.App.3d 592, 598-99 (1989) (California follows *Plymouth Sedan* rule that the exclusionary rule applies to forfeiture matters); *People v. Moore*, 69 Cal.2d 674, 680 (1968) ("The exclusionary rule is also applicable to forfeiture proceedings, which, although technically classified as civil proceedings, must be considered criminal proceedings for purposes of the Fourth Amendment.").

On the other hand, in 1998, without reference or citation to *Ruelman* or *Moraza*, the Fourth District Court of Appeal held that the exclusionary rule does *not* apply in a civil asset forfeiture case. *$241,600 US Currency*, 67 Cal.App.4th at 1112. It based that holding on the fact that forfeiture "is an in rem civil proceeding which is not based on a provision requiring the claimant to be found guilty of a criminal offense nor imposing imprisonment as a penalty for a criminal act." *Id.* at 1111-12. It also cited the fact that the state need only "prov[e] by a

[5] *Boyd v. United States*, 116 U.S. 616 (1886).

preponderance of the evidence that the innocent third party 'knew or should have known of facts which made the property subject to forfeiture,'" *id.* at 1112, which is not characteristic of statutes that are "penal in nature." *Id.*

Ruelman, however, provides the better rule. Aside from the fact that *Ruelman* is a Supreme Court decision and therefore authoritative, *$241,000 U.S. Currency* elevated form over substance. Forfeiture is "punishment," even if it is labeled "civil asset forfeiture," as the U.S. Supreme Court recently observed in *Timbs,* 139 S.Ct. at 689-90. While *Ruelman* looked to the purpose of the forfeiture statutes, *$241,000 U.S. Currency* relied only on labels. And although decided decades before *Austin v. United States,* 509 U.S. 602, 618 (1993), the *Ruelman* Court anticipated *Austin*'s holding that civil asset forfeiture "serves, at least in part, to punish the owner," and has "historically … been understood, at least in part, as punishment."[6]

Also, *$214,000 U.S. Currency* ignored the rule that forfeiture statutes are to be construed against the government. *See People v. $28,500 U.S. Currency*, 51 Cal.App.4th 447, 463–464 (1996) ("Statutes imposing forfeitures are not favored and are to be strictly construed in favor of the persons against whom they are sought to be imposed." (citation omitted)). This disfavor applies "notwithstanding the strong governmental interest in stemming illegal drug transactions." *People v. $10,153.38 U.S. Currency,* 179 Cal.App.4th 1520, 1526 (2009) (citation omitted).

In addition, *$241,600 U.S. Currency* relied almost exclusively on the Maryland Court of Special Appeals decision in *Mayor & City Council of Baltimore v. One 1995 Corvette*, 706 A.2d 43 (Md. App. 1998), which the California court said "provides persuasive support for not applying the exclusionary rule." 67 Cal.App.4th at 1112. But Maryland's highest court later reversed that decision, s and sharply criticized its rationale, including its reliance of *United States v. Janis,* 428 U.S. 433 (1976), which the *$241,6000 U.S. Currency* decision also relied

[6] The Illinois Supreme Court also noted that *Austin* "cast into doubt" the assertion that forfeiture proceedings are "ordinary civil proceedings." *People v. 1989 Ford F350 Truck*, 642 N.E. 460, 464 (Ill. 1994). *See also People v. Seeburg Slot Machines,* 641 N.E.2d 997, 1003 (Ill. App. 1994) ("The fourth amendment exclusionary rule, which requires the suppression of evidence obtained as a result of an unlawful, warrantless search, applies in a civil forfeiture proceeding.").

on. *See One 1995 Corvette v. Mayor & City Council of Baltimore,* 724 A.2d 680, 684-85 (Md. 1999).

Janis had refused to extend the exclusionary rule to a civil suit to collect tax refunds against the United States. Excluding evidence from a search conducted in good faith by another jurisdiction's police officer based on a defective warrant would not further the purpose of the exclusionary rule, the Court said. 428 U.S. at 448. *Janis* noted that this concern does not apply to "intrasovereign" violations committed by police under the control of the jurisdiction. *Id.* at 455-56. But in *One 1995 Corvette,* the Maryland Court of Appeals noted that the lower court's reliance on *Janis* was out of touch with the nearly unanimous consensus that the exclusionary rule *does* apply in forfeiture cases. 724 A.2d at 684-85. It observed that 11 of 13 United States Courts of Appeal and 34 states "consistently accept the interpretation of *Plymouth Sedan* as applying the exclusionary rule to civil *in rem* forfeiture proceedings," and that "no court … completely rejects that interpretation, as the Court of Special Appeals did in the case below." 724 A.2d at 685. Yet the Fourth District Court of Appeal in *$241,000 U.S. Currency* depends heavily on the very rationale Maryland's highest court repudiated.

Finally, the legal foundation for *$241,000 U.S. Currency*'s holding—that the preponderance of the evidence standard tends to show that forfeiture is not punitive—no longer applies, because California's recent reforms (SB 443) increased the government's burden of proof. Now, in contested Health & Safety Code (drug forfeiture) cases involving property other than $40,000, or more in cash or negotiable instruments, the government must prove the grounds for forfeiture *beyond a reasonable doubt,* and it can proceed to forfeiture only after obtaining a criminal conviction. Cal. Health & Safety Code §§ 11488.4(i)(1) & (2). In larger money seizure cases, the standard is clear and convincing evidence and a criminal conviction is not required. *Id.* § 11488.4(i)(4).

Almost every jurisdiction has followed the *Ruelman / Plymouth Sedan* rule and rejected the notion that asset forfeiture is not intended as "penal."[7] Instead, courts recognize that civil

[7] *See, e.g., Nicaud v. State*, 401 So.2d 43, 45 (Ala. 1981) (exclusionary rule applies to civil forfeiture proceedings which "are clearly intended to be a deterrent to illegal drug dealing, and

asset forfeiture is a quasi-criminal proceeding, which means the exclusionary rule must apply.[8] The only exception is Texas, which declined to apply the exclusionary rule to an illegal search in a vehicle forfeiture case. *See State v. One 2004 Lincoln Navigator*, 494 S.W.3d 690 (Tex. 2016). Outside of Texas and California, every jurisdiction appears to apply the exclusionary rule *in rem* civil forfeiture proceedings.[9]

II. The canine alert did not provide probable cause to search Nguyen's luggage.

A canine's alert by itself has *never* been sufficient in itself to establish probable cause for forfeiture. *United States v. U.S. Currency, $30,060,* 39 F.3d 1039, 1042 (9th Cir. 1994). Instead, whether a dog alert provides probable cause requires an independent factual and a legal analysis.

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to aid the objectives of criminal law enforcement"); *State v. $19,238 U.S. Currency*, 755 P.2d 1166, 1170 (Ariz. App. 1987) (because "forfeiture proceedings are quasi-criminal in character, the exclusionary rule applies"); *Brown v. Eaton*, 164 N.E.3d 153, 160 (Ind. App. 2021) ("while forfeiture proceedings are civil in nature, there is a punitive aspect to such proceedings because the State uses them to confiscate property associated with criminal activity"); *State v. Ozarek*, 573 P.2d 209, 210 (N.M. 1978) (purely in rem proceedings are "quasi-criminal in nature" and the object, like criminal law, "is to penalize for the commission of an offense against law").

[8] *See, e.g., Miami-Dade Police Dept. v. $28,176 U.S. Currency*, 946 So.2d 1133, 1135 (Fla. App. 2006) ("Florida law is clear that the exclusionary rule applies to forfeiture proceedings"); *Idaho Dept. of Law Enforcement v. $34,000 U.S. Currency*, 824 P.2d 142, 145 (Idaho App. 1991) ("Even though it is a rule grounded in criminal law, the exclusionary rule of the fourth amendment applies to civil forfeiture proceedings"); *In re Flowers*, 474 N.W.2d 546, 548 (Iowa 1991) ("In establishing a right to forfeiture … the State may not rely on evidence obtained in violation of fourth amendment protections nor derived from such violations."); *State v. One 2008 Toyota Tundra*, 415 P.3d 449, 455 (Kan. App. 2018) ("Although forfeiture actions are civil in nature, the protections against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights are applicable") *Jefferson Parish v. Bayou Landing Ltd.*, 350 So.2d 158, 161 (La. 1977) (noting search and seizure provisions of the state and United States Constitution are not restricted to criminal cases); *Commonwealth v. Nine Hundred & Ninety-Two Dollars*, 422 N.E.2d 767, 769 n.2 (Mass. 1981) (forfeiture proceeding quasi-criminal).

[9] Other cases applying the exclusionary rule in civil forfeiture cases include *In re Forfeiture of U.S. Currency*, 420 N.W.2d 131, 135 (Mich. App. 1988); *Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 661 (Minn. 2014); *$20,800.00 in U.S. Currency v. State*, 115 So.3d 137, 141 (Miss. App. 2013); *State v. A Blue in Color, 1993 Chevrolet Pickup*, 116 P.3d 800, 802 (Mont. 2005); *State v. Spotts*, 595 N.W.2d 259, 261 (Neb. 1999); *One 1970 Chevrolet Motor Vehicle v. Nye Cnty.*, 518 P.2d 38, 39 (Nev. 1974); *State v. One 1990 Chevrolet Pickup*, 523 N.W.2d 389, 394 (N.D. 1994); *In re $75,000 U.S. Currency*, 101 N.E.3d 1209, 1216 (Ohio App. 2017); *State v. 192 Coin-Operated Video Game Machines*, 525 S.E.2d 872, 882 (S.C. 2000); *City of Walla Walla v. $401,333.44*, 208 P.3d 574, 576 (Wash. App. 2009); *State v. Scott*, 928 N.W.2d 629, 631 (Wisc. App. 2019).

As a ***factual*** matter, determining whether a canine alert is sufficiently reliable to provide probable cause requires the Court to consider whether all facts surrounding the alert would justify a reasonably prudent person to believe a search would reveal contraband or evidence. *Florida v. Harris*, 568 U.S. 237, 248 (2013). In *Harris*, a canine trained to detect controlled substances alerted on the defendant's truck on two separate traffic stops, but the subsequent search revealed no substances the canine had been trained to detect. *Id.* at 240. The Court held that when the state proves that the canine received extensive and ongoing training, the canine's alert can be one factor supporting probable cause for a search. *Id.* at 246-47. Before the evidence can be admitted, however, the defendant must have an opportunity to challenge the evidence of the dog's reliability either by cross-examining the testifying officer or by introducing the defendant's own facts or an expert witnesses. *Id.* at 247.[10]

As a ***legal*** matter, the question of whether a dog alert (or anything else) constitutes probable cause is always a question of law for the Court. *People v. Gotfried*, 107 Cal.App.4th 254, 263 (2003). In the case of canines trained to detect marijuana, which is now legal in California, canines are categorically unreliable.

In Colorado—where recreational marijuana is also legal—the state Supreme Court has held that, thanks to this change in law, "no matter how reliable his nose, [a canine] can now render a kind of false positive for marijuana." *McKnight*, 446 P.3d at 399 ¶ 3. Because the canines in that case had been "trained … based on the notion that marijuana is always contraband, when that is no longer true under state law," *id.*, the court concluded that a dog's alert "doesn't provide a yes-or-no answer to the question of whether illegal narcotics are present." *Id.* at 406 ¶ 36.

The *McKnight* Court noted that with the legalization of marijuana, Coloradans had acquired a reasonable expectation of privacy, at least with respect to the legal amount of possessable marijuana. *Id.* Thus a canine's alert—which inherently fails to take this quantitative

[10] A drug-detection dog's alert may be unreliable if affected by the dog's medical condition or inadequate training. *United States v. Jordan*, 455 F.Supp.3d 1247 (D. Utah 2020). Improper training renders a canine's alert unreliable, and does not provide any basis for establishing probable cause. *United States v. Esteban*, 283 F.Supp.3d 1115 (D. Utah 2017).

factor into consideration—could not give police probable cause under the Colorado Constitution's search and seizure provision. *Id.* at 411–12 ¶ 54–55. *Accord, People v. Gadberry*, 440 P.3d 449, 453 ¶ 15 (Colo. 2019) (because canine trained to detect marijuana provides the same alert for all other trained substances, alert does not provide probable cause).

This Court should apply the same rule. As a result of legalization of recreational amounts of marijuana in California, an officer no longer has probable cause to search based solely on the odor of marijuana. *Cf. Hall*, 57 Cal.App.5th at 952 (small amount of marijuana in plain sight did not give police probable cause to search vehicle).

In other words, even if the canine evidence were factually probative, it is insufficient *as a matter of law* to establish probable cause to search or seize. It is unnecessary to decide here whether a dog's alert might provide one factor for a probable cause finding supported by other admissible evidence, or whether the alert of a dog trained only to detect illegal quantities of marijuana might provide a basis for a probable cause finding, because here, the canine alert provided officers with no basis for believing that any crime was taking place—and therefore failed to establish probable cause either for a search, or for concluding that Nguyen's currency was subject to forfeiture.

In *United States v. $506,231 in U.S. Currency*, 125 F.3d 442 (7th Cir. 1997), police executed a search warrant, but did not find the items listed on the warrant. *Id.* at 444. However, they seized three unregistered guns and half a million dollars in cash which was stored in an unusual location and was in small denominations. *Id.* An informant claimed a large amount of cocaine was being delivered to the pizzeria, and a drug-detection canine identified trace amounts of narcotics on the currency after it was seized. *Id.* at 452. The government claimed there was probable cause to believe the currency was subject to forfeiture, *id.* at 446, but the court held that the dog alert was insufficient, *id.* at 452, because a substantial amount of *all* currency is contaminated with drugs. *Id.* at 453.

A canine's alert to currency with no other supporting evidence besides inconsistent stories and suspicious packaging is insufficient to establish probable cause for forfeiture. In *United States v. U.S. Currency, $30,060*, 39 F.3d at 1040, officers stopped a defendant for

running a stop sign and noticed he had a plastic bag containing $30,000 in bills held together by rubber bands. A drug detection dog detected traces of drugs, but no drugs were found. *Id.* The defendant maintained that he had earned the money, but when officers called references to the places of employment where he claimed to work, they could not verify his current employment. *Id*. The court, however, held that the dog alert, the suspicious packaging, and the defendant's inconsistent account of how he earned the money were *not* probable cause for forfeiture. *Id.* at 1041.

In this case, the fact that the dog alerted to Nguyen's property is insufficient both factually and legally. It is insufficient factually because there is no reason to believe the dog alerted (or was capable of alerting) only to illegal quantities of marijuana—and it is insufficient legally because the alert could not provide officers with grounds for believing any crime was occurring. And given that the alert fell below probable cause for a search, it also fell below probable cause for forfeiture purposes.

III. California's civil asset forfeiture law violates due process by providing police with an improper profit motive.

Due process prohibits "any procedure which would offer a *possible temptation* to the average man as judge to forget the burden of proof to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused." *Marshall*, 446 U.S. at 242 (citation omitted, emphasis added). Yet California's asset forfeiture laws allow proceeds from forfeiture to go directly to the agencies that seize the property, instead of to the state treasury. Indeed, the prosecuting agency receives ten percent and the law enforcement agency receives 65 percent of confiscated property. Cal. Health & Safety Code § 11489(b). Such a profit motive for forfeiture violates due process.

Due process demands that government officials be committed to serving the public interest, not their own. Direct financial incentives are particularly problematic. *See, e.g., Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972); *Tumey v. Ohio*, 273 U.S. 510, 532-33 (1927). In *Ward*, a citizen charged with traffic offenses claimed that trial before the village's mayor violated due process, since "[a] major part of village income is derived from the fines,

forfeitures, costs, and fees imposed by [the mayor] in his mayor's court." 409 U.S. at 58. The Court agreed, reasoning that even though no money went directly into the mayor's pocket, he would face institutional pressure "to maintain the high level of contribution." *Id.* at 60. This was true no matter whether the citizen could show actual bias, as due process protects against a financial incentive that would offer "a possible temptation to the average man." *Id.*

This same principle limits the financial incentives of police and prosecutors. In *Marshall*, 446 U.S. at 249–50, the Court acknowledged that due process applies to prosecutors, noting that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." It also made clear that a personal benefit is not required; due process would also be violated if the officer's "judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement." *Id*. at 250. And the Court stressed that this is true regardless of whether enforcement personnel are actually biased, so long as bias is a "realistic possibility." *Id*.

Other states' courts have found that forfeiture laws containing a profit motive like California's are unconstitutional. For example, the City of Albuquerque had a vehicle forfeiture ordinance under which, as in this case, all forfeited proceeds were retained by city officials running the forfeiture program. A federal court found this violated due process because it is plausible that the program's dependence on forfeiture revenues threatens officials' salaries, and unconstitutional "profit incentive exists when officials' level of enforcement can affect how much they are paid." *Harjo v. City of Albuquerque*, 326 F.Supp 3d 1145, 1166 (D.N.M. 2018). *See also Flora v. Sw. Iowa Narcotics Enforcement Task Force*, 292 F.Supp.3d 875, 884-85, 902-04 (S.D. Iowa 2018) (where police and prosecutors kept 90 percent of the proceeds, forfeiture program could violate due process). Here, the office prosecuting this case, the Alameda County District Attorney and Sheriff's Office, will keep 75 percent of the forfeited proceeds. The temptation to overzealously pursue forfeiture cases is more stark here than in *Harjo* and *Flora*, and so is the constitutional violation.

IV. Forfeiting Nguyen's cash would violate the United States and California Constitution's excessive fines clauses.

As recent United States Supreme Court precedent makes clear, forfeiture is punishment, and any punishment imposed must be proportional to the crime. *Timbs*, 139 S.Ct. at 686. In the case of an innocent owner, of course, *any* punishment would be disproportionate, as the Indiana Supreme Court recognized when *Timbs* was remanded. *See* 134 N.E.3d at 37-38 ("[I]f a claimant is entirely innocent of the property's misuse, that fact alone may render a use-based *in rem* fine excessive.")

The excessive fines clauses of the state and federal constitutions demand proportionality between a person's culpability and the amount of the fine. Under both federal and state law, courts consider four factors in evaluating whether a forfeiture violates the excessive fines clause: 1) the person's culpability; 2) the relationship between the harm caused by the person's acts and the amount of the forfeiture; 3) penalties imposed by similar statutes; and 4) the person's ability to pay. *People v. Kopp*, 38 Cal.App.5th 47, 97–98 (2019).

Here, the analysis is easy: the state has made *no* factual assertions, and produced *no* evidence that Nguyen committed any crime. Punishment without wrongdoing plainly violates the excessive fines clauses and contradicts the very foundation of the justice system.

CONCLUSION

The Court should *grant* Nguyen's motion for return of property.

DATED this 8th day of July 2021.

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FOR COURT USE ONLY

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CITY AND ZIP CODE: Oakland, CA 94612
BRANCH NAME: Rene C. Davidson Courthouse

PLAINTIFF/PETITIONER: The People of the State of California
DEFENDANT/RESPONDENT: $220,000.00 U.S. Currency

FACSIMILE TRANSMISSION COVER SHEET

CASE NUMBER: RG19-042687

TO THE COURT:

1. **Please file** the following transmitted documents in the order listed below:

Document name	No. of pages
BRIEF OF GOLDWATER INSTITUTE IN SUPPORT OF CLAIMANT'S NON-STATUTORY MOTION TO RETURN PROPERTY	14
TOTAL:	14

2. ☐ **Processing instructions** consisting of: _____ pages are also transmitted.

3. ☑ **Fee required** ☑ Filing fee ☑ Fax fee (Cal. Rules of Court, rule 10.815)
   a. ☑ **Credit card payment** I authorize the above fees and any amount imposed by the card issuer or draft purchaser to be charged to the following account:
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