IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

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Case No. 2017-CP-26-07411

(Appellate Case No. 2020-000092)

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Jimmy A. Richardson, II, Solicitor for the 15th Judicial Circuit,
on Behalf of the 15th Judicial Circuit Drug Enforcement Unit ..... Appellant,

v.

Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars
($20,771.00), U.S. Currency and Travis Green ..... Respondents.

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# REPLY BRIEF OF RESPONDENTS TO AMICUS CURIAE BRIEF OF SOUTH CAROLINA ATTORNEY GENERAL

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## ARGUMENT

The trial court correctly held that South Carolina's forfeiture statutes violate both the U.S. and South Carolina constitutions. The amicus brief submitted by the attorney general provides no basis to reverse that holding for several reasons. First, that brief raises policy arguments that are both incorrect and irrelevant. Second, its citation to RICO mistakes the origins of South Carolina's forfeiture statutes and conflates *in rem* and *in personam* proceedings. Third, its argument that affirmance would let criminals remove illicit property from the jurisdiction confuses the basic difference between a seizure and a forfeiture. Fourth, it fails to appreciate that facial challenges are commonplace and warranted when the text of the statute reveals a constitutional infirmity that affects every application, as is the case with South Carolina's forfeiture statutes. And fifth, its reliance on a single district court decision does not countermand the extensive argument and case law Respondents muster in their brief. Because the text of South Carolina's forfeiture statutes reveals several constitutional infirmities that infect every civil forfeiture proceeding in the state, this Court should affirm.

### I. Civil Forfeiture Is Neither Necessary Nor Effective in Fighting Crime and This Court Must Enjoin Unconstitutional Practices Regardless of Their Supposed Effectiveness.

Amicus argues that civil forfeiture is sound policy because it is useful and effective for fighting crime, and mischaracterizes the constitutional challenges raised below as requests for this Court to make "policy decisions." AG Amicus 2-9. But instead of offering any evidence of civil forfeiture's effectiveness in South Carolina, Amicus wrongly links the state's civil forfeiture statutes to federal RICO prosecutions and suggests that affirming the court below would somehow limit the state's ability to "adequately combat vast criminal organizations." *Id.* 4. It then claims this Court is impotent to act. Respondents rebut these arguments below.

First, civil forfeiture is ineffective at fighting crime, as it directs law-enforcement priorities to revenue generation instead of solving serious crimes. Second, civil forfeiture is not necessary to seize assets from criminal organizations, as demonstrated by RICO's *criminal* forfeiture provisions praised by Amicus. Third, Amicus' attempt to justify civil forfeiture based on the supposed necessity of preventing criminal assets from leaving the jurisdiction is a non sequitur that confuses seizure with forfeiture. Fourth, Amicus' claim that spending of forfeiture proceeds is tightly regulated is illusory. Finally, this Court is empowered to strike down laws and practices it finds unconstitutional, regardless of any allegations about their effectiveness.

### A. Civil forfeiture is an ineffective crime-fighting tool that directs law-enforcement priorities to generating revenue rather than solving crimes.

Despite the unsupported claims of Amicus, the best available evidence indicates that civil forfeiture is remarkably ineffective at fighting crime, and is instead primarily employed as a means of raising revenue.[1] The financial incentives created by modern civil forfeiture distort law enforcement priorities, directing police time and effort away from solving violent crimes, sometimes even reducing crime clearance rates.[2] In South Carolina, that distortion is embodied

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[1] *See* Brian D. Kelly, *Fighting Crime or Raising Revenue?*, Institute for Justice (June 2019), https://ij.org/wp-content/uploads/2019/06/Fighting-Crime-or-Raising-Revenue-7.20.2020-revision.pdf; *see also* Jefferson E. Holcomb et al., *Civil Asset Forfeiture Laws and Equitable Sharing Activity by the Police*, 17 *Criminology & Pub. Pol'y* 101 (2018); Jefferson E. Holcomb, et. al., *Civil asset forfeiture, equitable sharing, and policing for profit in the United States*, 39 J. Crim. Just. 273 (2011); Michael Preciado & Bart J. Wilson, *The Welfare Effects of Civil Forfeiture*, 4 Rev. Behav. Econ. 153 (2017); Bart J. Wilson & Michael Preciado, *Bad Apples or Bad Laws? Testing the Incentives of Civil Forfeiture*, Institute for Justice (Sept. 2014), https://ij.org/report/ bad-apples-or-bad-laws/.

[2] One study found: "Reallocation of police resources [to revenue generation] is associated with neglect of other important police functions, namely, the investigation of violent crimes" such that "a 1% increase in the share of own-source revenues from fees, fines, and forfeitures is associated with a statistically and substantively significant 6.1 percentage point decrease in the violent crime clearance rate[.]" Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, 56 Urb. Aff. Rev. 5, 8, 21 (2020).

by the week-long "Rolling Thunder" highway interdiction effort conducted annually by dozens of officers on I-85 and I-26.[3] In 2019, over 1,200 traffic stops during "Rolling Thunder" resulted in 202 citations for "following too closely" and hundreds of cars searched on the flimsiest bases, but just 40 arrests. *Id.* As Respondents noted in their initial brief, South Carolina law-enforcement representatives have admitted they would have no incentive to conduct such time-consuming interdiction efforts if police were not allowed to keep forfeiture proceeds. Init Br. 9. In other words, but for the financial incentive created by South Carolina's forfeiture statutes, police would spend their time pursuing other, more productive law-enforcement activities such as preventing or solving crimes more important than "following too closely." This highlights the due process problem that Respondents raise: the distribution of forfeiture proceeds under S.C. Code Ann. § 44-53-530 creates a strong financial incentive for police to continue seizing and forfeiting property regardless of the merits. *See* Init Br. 3–10.

### B. Amicus' citation to RICO misstates the history of civil forfeiture and shows that criminal forfeiture is an effective alternative for seizing criminal assets.

Amicus tries to suggest that invalidating South Carolina's civil forfeiture statutes would somehow inhibit the state's ability to seize assets from criminal organizations as federal agencies do under RICO. But RICO primarily involves *criminal* forfeiture, showing there is an alternative to civil forfeiture that Amicus praises as "wildly successful." AG Amicus 3. However, the increasing use of RICO forfeitures after a federal profit incentive was created does demonstrate the perverse effects of the profit incentive Respondents challenge here. Second, RICO is simply

[3] Nathaniel Cary, *Inside look: How SC cops swarm I-85 and I-26, looking for 'bad guys'*, Greenville News (Jan. 17, 2020, 3:58 PM), https://www.greenvilleonline.com/in-depth/news/2019/02/03/operation-rolling-thunder-sc-civil-forfeiture-interstate-95-interstate-26/2458314002/.

irrelevant to understanding the origins of South Carolina's civil forfeiture scheme, which arises from a completely different model statute.

First, Amicus confuses the history of modern civil forfeiture by tying it to RICO. But unlike *in rem* civil forfeiture, RICO created the first criminal *in personam* forfeiture provision. Karla R. Spaulding, "*Hit Them Where It Hurts": RICO Criminal Forfeitures and White Collar Crime*, 80 J. Crim. L. & Criminology 197, 199 (1989) ("The forfeiture provision . . . of the RICO Act was the first *in personam* forfeiture for violation of a criminal statute since 1790."); *see also Alexander v. United States*, 509 U.S. 544, 563 (1993) (Kennedy, J. dissenting) ("*[I]n personam* criminal forfeiture penalties like those authorized under § 1963 were unknown in the federal system until the enactment of RICO in 1970."). Indeed, the journal article Amicus cites on this point distinguishes between the criminal forfeiture RICO authorized and civil forfeiture: "RICO authorizes criminal forfeiture. Most of you in this room don't know what I mean when I say criminal forfeiture. The only kind of forfeiture you remember or know about is civil forfeiture . . . That's not what the criminal provisions of RICO are all about."[4] Although RICO did contain civil remedies that could be broadly characterized as forfeiture of interests in property—injunctions against investment in criminal enterprises, divestiture of investments, and dissolution of criminal enterprises—these are based in antitrust remedies, *see* Spaulding *supra* at 202 n.34 (quoting DOJ letter to Congress), and bear little relevance to modern civil forfeiture statutes.

But the history of RICO forfeitures illustrates the powerful effect financial incentives have on law-enforcement behavior. RICO forfeitures were quite rare until 1984, when a legal

[4] G. Robert Blakey, *Materials on RICO: Civil Overview*, *in* Techniques in the Investigation and Prosecution of Organized Crime 29 (G. Robert Blakely ed., 1980), https://www.ncjrs.gov/pdffiles1/Digitization/78839-78854NCJRS.pdf.

change let officials begin depositing federal forfeiture proceeds into a DOJ-controlled fund.[5] Notably, the profit incentive that Respondents challenge here is even stronger because, under South Carolina law, agencies keep at least 95% of what they seize and forfeit, rather than depositing those proceeds into a common fund used by all agencies. Init Br. 2–3, 6–8; Order 6–12.

Second, Amicus' invocation of RICO is irrelevant given that RICO is not the origin of South Carolina's civil forfeiture statutes. As the journal article cited by Amicus indicates, those statutes are actually based on an amended version of the Uniform Controlled Substances Act. David R. Fine & Raymond P. Pepe, Bennis v. Michigan *and Innocent Owners in Civil Forfeiture: Balancing Legitimate Goals with Due Process and Reasonable Expectations*, 5 Geo. Mason L. Rev. 595, 605 & n.91 (1997) (listing South Carolina's forfeiture statute as being based on "an amended version of Section 505 that includes the definition of 'assets' included in Section (a)(6) of the Model Drug Profits Act"). Thus, South Carolina's statute is "generally similar to the federal forfeiture provision codified in [18 U.S.C.] Section 881," a federal drug forfeiture statute that "is virtually silent with regard to procedural matters." *Id.* at 606. Nonetheless, Amicus' endorsement of RICO's criminal forfeiture provisions demonstrates there

[5] Prior to 1984, federal forfeiture proceeds were deposited into the general treasury and the "RICO Act forfeiture provisions were seldom invoked." Spaulding at 198; *see id.* at 211-112 (noting there were only 33 forfeitures under RICO from 1970 to September 1983). The Comprehensive Crime Control Act of 1984 created the DOJ Assets Forfeiture Fund, where forfeiture proceeds are deposited for the exclusive use of DOJ and participating law-enforcement agencies. *See* DOJ, The Fund, https://www.justice.gov/afp/fund. This new Fund created a financial incentive for federal agencies to prioritize forfeiture, and federal forfeiture activity exploded. In 1986, the Fund took in $93.7 million in revenue from federal forfeitures; by 2014, annual deposits had reached $4.5 billion. *See* Dick M. Carpenter II, et al., Policing for Profit, Institute for Justice, (2d ed., Nov. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

are effective alternatives to South Carolina's civil forfeiture statute that would achieve the state's desired policy goal of separating convicted criminals from their assets.

### C. Amicus' suggestion that civil forfeiture is necessary to prevent assets from leaving the jurisdiction confuses seizure with forfeiture.

Amicus claims that "[c]onfining forfeiture to criminal convictions and tying it to *in personam* jurisdiction would drastically undercut the ability of law enforcement to combat criminality" and would make it impossible "to prevent individuals from simply removing the property from the state . . . in order to retain possession." AG Amicus 5–6. But this is a non sequitur that confuses seizure—when law enforcement takes possession of property—with forfeiture, when the state acquires title to the property. Civil forfeiture is simply not necessary to seize property—property can be seized as evidence, for example, and it can also be seized for criminal forfeiture and held during the pendency of criminal proceedings until a conviction is obtained. Once a seizure has occurred, its owner cannot "simply remov[e]" the property from the state, no matter whether forfeiture proceeds either civilly or criminally.

### D. Amicus' argument that South Carolina law provides meaningful constraints on law-enforcement spending of forfeiture proceeds is illusory.

Amicus claims that "limits in the law" insulate South Carolina's forfeiture scheme from due process concerns because "forfeiture money must be used for drug enforcement." AG Amicus 7. But as Respondents have shown, the purported limitations suggested by Amicus are really no limits at all, and there is no meaningful oversight of these expenditures. Init Br. 12–15.

First, these limitations do not apply to the first $1,000 of every currency forfeiture, which law enforcement may keep and spend "for *any* public purpose of law enforcement," there is no required documentation on how the money is spent, nor is the expenditure subject to any audit. Init Br. 13–14 (quoting letter opinions by Amicus). Second, even expenditures "for drug enforcement" need not be used exclusively for drug enforcement so long as that is the "primary

intent" behind the expenditure. Init Br. 14 (quoting letter opinion by Amicus). Moreover, what counts as a "drug enforcement" expenditure is so broad as to encompass nearly any departmental expenditure, including the purchase of a gyroplane. *Id.* Furthermore, there is no real oversight of these expenditures, as there are no required audits or spending reports. *Id.* 14–15. As a result, South Carolina law-enforcement agencies have broad discretion to spend forfeiture proceeds in nearly any manner for their own institutional benefit without legislative oversight, creating an unconstitutional incentive to pursue forfeiture for institutional gain. *See, e.g.*, *Ward v. Vill. of Monroeville*, *Ohio*, 409 U.S. 57, 60 (1972); *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1195 (D.N.M. 2018) ("[T]here is a realistic possibility that the forfeiture program prosecutors' judgment will be distorted, because in effect, the more revenues the prosecutor raises, the more money the forfeiture program can spend.").

### E. This Court has the authority, and the duty, to strike down unconstitutional laws and practices.

Amicus invokes separation of powers and suggests that "modif[ying]" South Carolina's civil forfeiture statutes "ought to be carried out by the legislature not the courts." AG Amicus 8. But the court below did not "modify" the statutes; instead, it declared that they violated the United States and South Carolina constitutions. Respondents ask this Court to affirm that decision, not "modify" the statute. Declaring statutes unconstitutional is obviously within the power of this Court; the "judiciary's proper role [is] determining the constitutionality of laws, and the government's actions pursuant to those laws." *See, e.g.*, *Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 632, 767 S.E.2d 157, 163–64 (2014), *amended*, 415 S.C. 19, 780 S.E.2d 609 (2015). The legislature can then, if it wishes, replace those statutes with a constitutionally valid forfeiture scheme.

## II. The Trial Court Correctly Concluded That South Carolina's Forfeiture Statutes Facially Violate the Eighth Amendment and Article I, Section 15.

Amicus also asserts that facial challenges to statutes that impose excessive fines cannot exist, and that all challenges must be only as-applied to the particular facts at hand. AG Amicus 9. This is incorrect as a legal matter and unsupported by the case law. Indeed, facial challenges concerning deficiencies in a statute's terms are common in Eighth Amendment jurisprudence.

Amicus, just like appellant before it, cites no authority saying that facial challenges are categorically barred in the Eighth Amendment context. That failure is because no such authority exists. The first case Amicus cites—*United States v. Lippert*—does not say that facial challenges are prohibited; instead, after noting that "facial analysis of whether a purported civil penalty is punishment for Excessive Fines Clause purposes is desirable," it looked at the specific fine imposed and held it to be reasonable. 148 F.3d 974, 977 & n.2 (8th Cir. 1998).

And the second case Amicus puts forward in support—*Singletary v. Wilson*, 191 S.C. 153, 3 S.E.2d 802 (1939)—directly undercuts its position. In *Singletary*, the defendant claimed the statute's failure to prescribe a maximum fine rendered that statute unconstitutional on its face. This Court considered the argument, but concluded that a statutory maximum was not constitutionally required, noting that other courts had held "that the failure of a statute to fix a maximum fine does not render it unconstitutional under a provision forbidding excessive fines." *Id*. at 804. In other words, far from showing that facial challenges are categorically prohibited, *Singletary* evaluated a facial excessive fines challenge on the merits. It demonstrates that this Court will construe the text of statutes and hold them facially invalid when their terms do not pass constitutional muster.

This Court's willingness in *Singletary* to parse statutory text in weighing an Eighth Amendment facial challenge is far from unique. The U.S. Supreme Court did just that in *United*

*States v. Salerno*, 481 U.S. 739 (1987). Likewise, in *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002), the Nebraska Supreme Court evaluated a facial excessive fines challenge to a statute that required all those convicted of drunk driving pay for "alcohol assessments." And in *Wilson v. County of Orange*, 881 So. 2d 625, 628 (Fla. Dist. Ct. App. 2004), a Florida appellate court authorized a facial excessive fines challenge against state and county code enforcement statutes.

Neither Appellant nor Amicus address these cases. Nor do they address *State v. Yang*, 397 Mont. 486, 452 P.3d 897 (2019), the Montana Supreme Court case cited on page 37 of Respondents' brief. In *Yang*, the defendant argued that a statute imposing a mandatory 35 percent fine of the market value of drugs following a conviction was facially unconstitutional. The court noted that a "facial constitutional challenge is based on the defendant's allegation that the *statute* upon which the district court based her sentence is unconstitutional." *Id*. at 492. After construing the statute's terms, it agreed with Yang and held that since those terms removed "any ability of the trial court, through its mandatory nature, of protecting against an excessive fine," *id*. at 495, the statute facially violated the Eighth Amendment.

The argument in *Yang* reflects the core of Respondents' facial excessive fines challenge. As Respondents' brief shows, South Carolina's forfeiture statutes require that property be forfeited from owners absent any showing those owners did anything wrong. Init Br. 35–39. But punishing people by taking their property, absent any showing of personal culpability, violates the basic requirement that "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). This constitutional defect infects *all* forfeiture proceedings in South Carolina.

Because the statutes require South Carolina courts to order forfeiture absent any showing of fault on the owner's part, they violate the Eighth Amendment and Article I, Section 15 on their face.[6]

## III. The Statutory Text Demonstrates Why South Carolina's Forfeiture Statutes Facially Violate Due Process.

Laws are facially invalid when their terms reveal constitutional infirmities that pervade every application. That is the case with South Carolina's forfeiture statutes. As Respondents' brief shows, those statutes demand that *at least* 95% of all forfeiture proceeds go to the agencies responsible for the seizing and forfeiting. Init Br. 2–15. They require that property owners prove their own innocence, rather than require the government to prove the owner's personal culpability. Init Br. 15–26. And they give owners no way to ask for a prompt post-seizure hearing, meaning that if those owners want their property back, they must wait for the ultimate forfeiture proceeding or bring an entirely separate action. Init Br. 26–35. Those infirmities affect every single forfeiture action and are why the trial court held those statutes invalid on their face.

Amicus does not address these statutory deficiencies. Instead, it points to prior civil-forfeiture cases in South Carolina courts to assert that "courts confronted with similar questions have consistently upheld South Carolina's civil asset forfeiture statutes." AG Amicus 13. But in none of those cases did the property owner raise a constitutional challenge to South Carolina's forfeiture statutes.

[6] Because the statutes are facially unconstitutional in that they mandate forfeiture absent any showing of personal culpability, there was no need for the trial court analyze whether those statutes were unconstitutional in light of the particular facts of this case. *Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (stating that "in analyzing a facial challenge to the constitutional validity of a statute, a court 'considers only the text of the measure itself and not its application to the particular circumstances of an individual'") (citing 16 C.J.S. Constitutional Law § 163, at 161 (2015)).

Some of the cases Amicus cites involve pure questions of statutory construction. For instance, the Court of Appeals' decision in *Ducworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896 (Ct. App. 1995), interpreted South Carolina law to determine if a claimant had to prove to they lacked "actual knowledge" about their property's illicit use or whether they also had to prove that a "reasonable person" wouldn't have known of the use. Likewise, in *Farmer v. Florence County Sheriff's Office*, 401 S.C. 606, 738 S.E.2d 473 (2013), this Court interpreted the forfeiture statutes and held they put no duty on a sheriff's office to commence forfeiture proceedings.

Others concerned the propriety of an individual forfeiture. For instance, in *Moore v. Timmerman*, 276 S.C. 104, 276 S.E.2d 290 (1981), this Court held that the owner of a shotgun, who neither knew nor consented to its illegal use, was entitled to its return because he hadn't been given notice of the forfeiture proceeding. In *Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 470 S.E.2d 373 (1996), this Court interpreted the statutes in holding that the government's burden of proof in forfeiture proceedings was probable cause and rejected the owner's argument that forfeiture of his vehicle was an excessive fine. In *Pope v. Gordon*, 369 S.C. 469, 633 S.E.2d 148 (2006), this Court held that officials had failed to prove that money they seized were illegal drug transaction proceeds. And in *Gowdy v. Gibson*, 391 S.C. 374, 706 S.E.2d 495 (2011), this Court affirmed a lower court holding that money seized was in "close proximity" to drugs and "traceable" to illegal conduct, and that the alleged drug dealer's mother was not the money's true, innocent owner.

But in none of the South Carolina cases Amicus cites did a court actually consider—let alone reject—the due process arguments raised in Respondents' opening brief.

Other courts, however, have evaluated those type of due process arguments. In their brief, Respondents discuss both *Flora* and *Harjo* in more depth, as both show why South Carolina's

requirement that at least 95% of all forfeiture proceeds go to law enforcement violates due process. Init Br. 6–7, 12–13. Amicus attempts to sideline these cases by simply noting that they "address other statutes." AG Amicus 14. But while the opinions in *Flora* and *Harjo* are not binding on this Court, they are persuasive authority that this Court should consider.

Amicus also mischaracterizes the holdings in both cases. With respect to *Flora v. Southwest Iowa Narcotics Enforcement Task Force*, 292 F. Supp. 3d 875 (S.D. Iowa 2018), it describes the court's holding by saying that "civil forfeiture was held not facially invalid under due process." AG Amicus 14. But that description is misleading; as Respondents note in their brief, *Flora*'s actual holding was that the sharing arrangement the task force had entered into *was* unconstitutional because it dedicated the lion's share of forfeiture proceeds to the task force. *See* Init Br. 7. And as to *Harjo v. City of Albuquerque*, Amicus' suggestion that "the court held that the program's funding by forfeiture funds was not a due process problem and that civil asset forfeiture is constitutional," AG Amicus 14, is simply wrong. Amicus points the Court toward an earlier opinion in *Harjo* where the court noted that the text of Albuquerque's ordinance said the city council would independently appropriate forfeiture funds to law-enforcement agencies. *See Harjo v. City of Albuquerque*, 307 F. Supp. 3d 1163, 1207 (D.N.M. Mar. 30, 2018) (order on motion for judgment on the pleadings). But at summary judgment, when the evidence showed that the city council had ceded that control such that "forfeiture program officials are in de facto control of how its revenue is spent," the court held that that control violated due process. *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1195 (D.N.M. July 28, 2018).

Here, there is no pretense of legislative control. The text of South Carolina's forfeiture statutes makes it crystal clear that seizing and forfeiting agencies are entitled to at least 95% of what they seize and forfeit. *See* Init Br. 6 (discussing S.C. Code Ann. § 44-53-530(e) and (f)).

This is the exact type of dedicated funding scheme rejected in *Harjo*. This Court should reject it as well.

## IV. The Decision in *Pooler v. Wilson* Does Not Serve as a Useful Guide to This Court.

Despite the substantial briefing in this case, Amicus place almost all the weight of its argument on a single district court case, *Pooler v. Wilson*, 452 F. Supp. 3d 428 (D.S.C. 2020). It suggests that the holding in *Pooler* disposes of all the issues before this Court.

It does not. In that case, Pooler sued after police arrested Pooler's boyfriend in her home for intent to distribute narcotics and seized $104,000 hidden in a secret compartment underneath a bathtub. Pooler's state-court action alleged that the money was really hers, that she had earned that money as a landlord, and that officials had waited too long to bring forfeiture proceedings.

After the case was removed to federal court, Judge Norton granted the defendant's motion to dismiss on the basis of standing. The court recognized that although the money had been found in Pooler's home, it also noted that the money "was found in small bills, bound by rubber bands, hidden in a compartment under a bathtub, and surrounded by narcotics." *Id*. at 435. Given that Pooler presented no evidence that showed the money was hers, the court concluded that Pooler had no "legally cognizable interest" in the currency and thus lacked standing. *Id*.

Despite the dispositive nature of the court's standing holding, it went on to try to parse the exact nature of Pooler's constitutional challenge. It had difficulty doing so given that Pooler did "not specify which aspects of the statutes allegedly violate the Constitution." *Id*. at 436. It ultimately concluded that Pooler was challenging the statutes on innocent owner and excessive fines grounds and rejected each.

*Pooler* does not provide this Court with a reliable guide to resolving the questions now before it. With respect to Respondents' argument that South Carolina's failure to provide owners with prompt post-seizure hearings violates due process, *Pooler* is completely silent. The same is

true about Respondents' argument that South Carolina statutes give rise to an impermissible institutional financial incentive. The court expressly declined to address that issue after noting that "Pooler does not provide legal support for her contention." *Id*. at 437 n.4. With respect to Respondents' argument that South Carolina's statutes violate due process by forcing owners to prove their innocence, the *Pooler* decision does not cite any modern due process case law, let alone the most recent and pertinent constitutional case on this topic, *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). And with respect to Respondents' argument that the South Carolina statutes facially violate the Eighth Amendment's Excessive Fines clause, *Pooler* fails to consider *Indiana v. Timbs*, 139 S. Ct. 682 (2019). Indeed, *Pooler*'s entire discussion on the topic amounts to only two sentences.

These analytical gaps do not require this Court to impugn the federal court's decision in *Pooler*, to be sure. Indeed, the fact that the court's decision did not cite any modern due process cases is likely because the parties failed to invoke any. But these deficiencies illustrate why *Pooler* does not serve as a useful guide to resolving the arguments in this case. This Court should instead make up its own mind based on the arguments and case law cited by the parties. As Respondents' brief shows, that case law reveals intractable constitutional flaws that permeate South Carolina's forfeiture statutes. For that reason, this Court should affirm.

Dated: November 12, 2020

Respectfully Submitted:

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