Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICHARD A. DEVINE,
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER and TONY WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972) or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

2. In light of this Court's holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), may a court of appeals order a district court to enter permanent injunctive relief enjoining the application of a State statute based simply upon Plaintiffs' allegations in a complaint, where the parties are not at issue as no answer was filed in the district court and no evidence was ever heard in that court?

LIST OF PARTIES

The parties to the proceeding below were defendant/petitioner Richard A. Devine, in his official capacity as State's Attorney of Cook County, Illinois, defendants City of Chicago, Philip J. Cline, Superintendent of Police and plaintiffs/respondents Chermane Smith, Edmanuel Perez, Tyhesha Brunston, Michelle Waldo, Kirk Yunker and Tony Williams ("Plaintiffs").

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STATUTES AND RULES

Petitioner Richard A. Devine, State's Attorney of Cook County ("Petitioner" or "State's Attorney Devine") respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit filed on May 2, 2008.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Northern District of Illinois granting Petitioner's motion to dismiss. The Seventh Circuit's opinion is reported at 524 F.3d 834 (7th Cir. 2008) and is reprinted in the Appendix hereto at 1a. The Seventh Circuit's order denying the petition for rehearing is unpublished and is reprinted in the Appendix hereto at 13a The district court's order granting Petitioner's motion to dismiss is unpublished and is reprinted in the Appendix hereto at 12a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which petitioners seek review was issued on May 2, 2008. (App. 1a.) On May 16, 2008, Petitioner filed a petition for rehearing pursuant to Federal Rule of Appellate Procedure 40. On June 16, 2008, the United States Court of Appeals for the Seventh Circuit denied State's Attorney Devine's petition for rehearing. (App. 13a.)

This petition was timely filed within 90 days of the issuance of the June 16, 2008 order denying State's Attorney Devine's petition for rehearing. On July 3,

2008, the United States Court of Appeals for the Seventh Circuit granted Petitioner's motion to recall the case and stay the issuance of the mandate pending the filing of the subject petition in this Court.

The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

725 ILCS 150/5 (2008)

> Notice to State's Attorney. The law enforcement agency seizing property for forfeiture under the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*] shall, within 52 days of seizure, notify the State's Attorney for the county in which an act or omission giving rise to the forfeiture occurred or in which the property was seized of the seizure of the property and the facts and circumstances giving rise to the seizure and shall provide the State's Attorney with the inventory of the property and its estimated value. When the property seized for forfeiture is a vehicle, the law enforcement agency seizing the property shall immediately notify the Secretary of State that forfeiture proceedings are pending regarding such vehicle.

725 ILCS 150/6 (2008)

> Non-Judicial Forfeiture. If non-real property that exceeds $ 20,000 in value excluding the value of any conveyance, or if real property is seized under the provisions of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*], the State's Attorney shall institute judicial *in rem* forfeiture

proceedings as described in Section 9 of this Act [725 ILCS 150/9] within 45 days from receipt of notice of seizure from the seizing agency under Section 5 of this Act [725 ILCS 150/5]. However, if non-real property that does not exceed $ 20,000 in value excluding the value of any conveyance is seized, the following procedure shall be used:

(A) If, after review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure from the seizing agency, the State's Attorney shall cause notice of pending forfeiture to be given to the owner of the property and all known interest holders of the property in accordance with Section 4 of this Act [725 ILCS 150/4].

(B) The notice of pending forfeiture must include a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action.

(C)(1) Any person claiming an interest in property which is the subject of notice under subsection (A) of Section 6 of this Act [725 ILCS 150/6] may, within 45 days after the effective date of notice as described in Section 4 of this Act [725 ILCS 150/4], file a verified

claim with the State's Attorney expressing his or her interest in the property. The claim must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of the transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provision of law relied on in asserting the property is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the relief sought.

(2) If a claimant files the claim and deposits with the State's Attorney a cost bond, in the form of a cashier's check payable to the clerk

of the court, in the sum of 10 percent of the reasonable value of the property as alleged by the State's Attorney or the sum of $ 100, whichever is greater, upon condition that, in the case of forfeiture, the claimant must pay all costs and expenses of forfeiture proceedings, then the State's Attorney shall institute judicial *in rem* forfeiture proceedings and deposit the cost bond with the clerk of the court as described in Section 9 of this Act [725 ILCS 150/9] within 45 days after receipt of the claim and cost bond. In lieu of a cost bond, a person claiming interest in the seized property may file, under penalty of perjury, an indigency affidavit.

(3) If none of the seized property is forfeited in the judicial *in rem* proceeding, the clerk of the court shall return to the claimant, unless the court orders otherwise, 90% of the sum which has been deposited and shall retain as costs 10% of the money deposited. If any of the seized property is forfeited under the judicial forfeiture proceeding, the clerk of the court shall transfer 90% of the sum which has been deposited to the State's Attorney prosecuting the civil forfeiture to be applied to the costs of prosecution and the clerk shall retain as costs 10% of the sum deposited.

(D) If no claim is filed or bond given within the 45 day period as described in subsection (C) of Section 6 of this Act [725 ILCS 150/6], the State's Attorney shall declare the

property forfeited and shall promptly notify the owner and all known interest holders of the property and the Director of the Illinois Department of State Police of the declaration of forfeiture and the Director shall dispose of the property in accordance with law.

725 ILCS 150/9 (2008)

Judicial *in rem* procedures. If property seized under the provisions of the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], the Cannabis Control Act [720 ILCS 550/1 et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*] is non-real property that exceeds $ 20,000 in value excluding the value of any conveyance, or is real property, or a claimant has filed a claim and a cost bond under subsection (C) of Section 6 of this Act [725 ILCS 150/6], the following judicial *in rem* procedures shall apply:

(A) If, after a review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure by the seizing agency or the filing of the claim and cost bond, whichever is later, the State's Attorney shall institute judicial forfeiture proceedings by filing a verified complaint for forfeiture and, if the claimant has filed a claim and cost bond, by depositing the cost bond with the clerk of the

court. When authorized by law, a forfeiture must be ordered by a court on an action *in rem* brought by a State's Attorney under a verified complaint for forfeiture.

(B) During the probable cause portion of the judicial *in rem* proceeding wherein the State presents its case-in-chief, the court must receive and consider, among other things, all relevant hearsay evidence and information. The laws of evidence relating to civil actions shall apply to all other portions of the judicial *in rem* proceeding.

(C) Only an owner of or interest holder in the property may file an answer asserting a claim against the property in the action *in rem*. For purposes of this Section, the owner or interest holder shall be referred to as claimant.

(D) The answer must be signed by the owner or interest holder under penalty of perjury and must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provisions of Section 8 of this Act [725 ILCS 150/8] relied on in asserting it is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the precise relief sought.

(E) The answer must be filed with the court within 45 days after service of the civil *in rem* complaint.

(F) The hearing must be held within 60 days after filing of the answer unless continued for good cause.

(G) The State shall show the existence of probable cause for forfeiture of the property. If the State shows probable cause, the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture.

(H) If the State does not show existence of probable cause or a claimant has established by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act [725 ILCS 150/8], the court shall order the interest in the property returned or conveyed to the claimant and shall order all other property forfeited to the State. If the State does show existence of probable cause and the claimant does not establish by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act [725 ILCS 150/8], the court shall order all property forfeited to the State.

(I) A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding under this Act regardless of the pendency of an appeal from that conviction. However, evidence of the pendency of an appeal is admissible.

(J) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this Act; however, for good cause shown, on a motion by the State's Attorney, the court may stay civil forfeiture proceedings during the criminal trial for a related criminal indictment or information alleging a violation of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1

et seq.]. Such a stay shall not be available pending an appeal. Property subject to forfeiture under the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 et seq.] shall not be subject to return or release by a court exercising jurisdiction over a criminal case involving the seizure of such property unless such return or release is consented to by the State's Attorney.

(K) All property declared forfeited under this Act vests in this State on the commission of the conduct giving rise to forfeiture together with the proceeds of the property after that time. Any such property or proceeds subsequently transferred to any person remain subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing under the provisions of this Act that the transferee's interest is exempt under Section 8 of this Act [725 ILCS 150/8].

(L) A civil action under this Act must be commenced within 5 years after the last conduct giving rise to forfeiture became known or should have become known or 5 years after the forfeitable property is discovered, whichever is later, excluding any time during which either the property or claimant is out of the State or in confinement or during which criminal proceedings relating to the same conduct are in progress.

STATEMENT OF THE CASE

I. Background

Illinois' Drug Asset Forfeiture Procedure Act ("DAFPA" or the "Act") directs police departments to notify their jurisdiction's State's Attorney's Office within 52 days of the seizure of any property pursuant to the Illinois Controlled Substances Act, 720 ILCS 570/100 (2008), or the Cannabis Control Act, 720 ILCS 550/1 (2008). *See generally* 725 ILCS 150/5 (2008).

Upon receiving notice from a police department, the State's Attorney's Office (the "SAO") has 45 days to elect whether to initiate civil forfeiture proceedings. *See* 725 ILCS 150/6(A) (2008). If a forfeiture action is initiated, the SAO must provide notice to the owner of the property and all known interest holders before the 45 days elapse. *Id.* Pursuant to the Act, owners of personal property not exceeding $20,000 in value who wish to contest forfeiture (like Plaintiffs in this case) may file a verified claim and post a cost bond. Such action triggers a judicial proceeding in which the State must establish probable cause for forfeiture of the property. *See* 725 ILCS 150/6(C) (2008); 725 ILCS 150/9 (2008). Unless continued for good cause, this hearing must be convened within 60 days after the property owner files an answer to the complaint. 725 ILCS 150/9(G) (2008). One form of "good cause" that the Act recognizes is the pendency of related criminal charges. 725 ILCS 150/9(J) (2008).

In a significant number of cases, the SAO denies forfeiture requests and directs the return of property to the owner. If, however, the forfeiture request is approved, and the case involves either a vehicle of any value or non-real property worth $20,000 or less, the SAO sends formal notice of the pending forfeiture to the owner of the property and all known interest holders. As required by statute (725 ILCS 150/6), the notice includes a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action. In addition, the SAO sends a letter advising the owner and other interest holders that Assistant State's Attorneys are available to discuss the matter. Such meetings frequently occur, and as a result, the SAO either settles or rescinds the majority of the administrative forfeiture cases. If the action is rescinded, the property is returned to the owner.

While the Act does not expressly provide for a post-seizure/pre-forfeiture hearing, the manner in which the Act is applied by the Chicago Police Department (the "CPD") and the SAO shows that the owners of seized property are repeatedly given timely notice of the seizure and numerous opportunities to demonstrate that the property should be released. This is the case in both non-judicial forfeiture proceedings for personal property whose value does not exceed $20,000.00 that the SAO administratively conducts and judicial *in rem* forfeiture proceedings for property whose value exceeds $20,000.00.

Here, Plaintiffs filed a complaint alleging that their respective due process rights were violated because DAFPA did not mandate an immediate post-seizure probable cause hearing prior to the statutory judicial forfeiture proceeding. In this regard, Plaintiffs' class action complaint asked the district court to declare that DAFPA was unconstitutional as applied to Plaintiffs.

II. Proceedings Below

On November 22, 2006, Plaintiffs filed a class action complaint against State's Attorney Devine and defendants City of Chicago and Philip J. Cline, Superintendent of Police (the "City Defendants") (collectively "Defendants") alleging a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Section 1983 ("Section 1983"). The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343.

On February 16, 2007, the City Defendants filed a motion to dismiss Plaintiffs' Class Action Complaint. On February 20, 2007, State's Attorney Devine also filed a motion to dismiss this complaint. In these motions to dismiss, Defendants argued that Plaintiffs' proposed class action complaint should be dismissed based upon the Seventh Circuit's decision in *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994).

In *Jones*, the Seventh Circuit held that under *United States v. $8,850*, 461 U.S. 555, 564 (1983), district courts should apply the speedy trial test from *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the

delay in the initiation of a civil forfeiture proceeding violated due process. *Jones*, 38 F.3d at 324. The *Jones* plaintiffs argued that *$8,850* was distinguishable because it focused "on whether the length of delay in initiation of the actual forfeiture proceeding violates the requirements of due process." *Id.* In contrast, the *Jones* plaintiffs contended that due process required a preliminary determination of probable cause because the forfeiture proceeding would not occur for some time. *Id. Jones* concluded that under this Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986), this argument was legally untenable. *Id.*

Jones cited *Von Neumann* for the proposition that the Constitution does not require any interim procedure prior to the actual forfeiture proceeding. *Jones*, 38 F.3d at 324 *citing Von Neumann*, 474 U.S. at 249. In *Von Neumann*, this Court found that the Due Process Clause did not give the respondent a right to a prompt hearing on his petition for remission of his seized automobile pursuant to 19 U.S.C. § 1618 prior to the adjudication of the government's civil forfeiture complaint:

> We understand respondent to argue that his property interest in his car gives him a constitutional right to a speedy disposition of his remission petition without awaiting a forfeiture proceeding. We disagree. Implicit in this Court's discussion of timeliness in *$ 8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in his car.

Von Neumann, 474 U.S. at 249.

Jones followed *Von Neumann* and concluded:

> despite plaintiffs' attempt to otherwise characterize their grievance, the only possible basis for their claim is that the delay in initiation of the forfeiture proceeding itself was unconstitutionally lengthy, as that is the only hearing to which they are constitutionally entitled. *$ 8,850* therefore provides the only vehicle through which they might have been able to state a viable claim.

Jones, 38 F.3d at 324. *Jones* held that under *$8,850* and *Von Neumann*, the appropriate test for determining whether the delay in initiating a civil forfeiture proceeding violates the Due Process Clause is the four part speedy trial test from *Barker v. Wingo*.

On February 21, 2007, Plaintiffs filed a response to defendants' motions to dismiss, acknowledging that *Jones* was controlling precedent that defeated Plaintiffs' claim that the factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976) provided the proper analytical framework for determining whether the failure to provide an interim probable cause hearing post seizure but pre statutory forfeiture hearing violated the Due Process Clause. Plaintiffs conceded that "*Jones* is the governing precedent in this District and that *Jones* cannot be distinguished in any meaningful way from Plaintiffs' case." Plaintiffs argued that *Jones* conflicted with "*United States v. James Daniel Good Realty*, 510 U.S. 43 (1993) and *Krimstock v. Kelly*, 464 F.3d 246 (2nd Cir. 2006)" but "recognize[d] that the Court is currently

bound by *Jones*." On February 22, 2007, the district court granted Defendants' motions to dismiss, specifically referring to Plaintiffs' counsel's admission that the court was bound by *Jones*. (App. 12a.)

On May 2, 2008, the Court of Appeals for the Seventh Circuit issued an opinion reversing the decision of the district court. *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008); (App. 1a).[1] In *Smith*, the Seventh Circuit rejected its previous analysis from *Jones* and declined to follow *$8,850* and *Von Neumann*. In so doing, *Smith* and the case upon which it did rely, *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), have created a split with other circuits that have applied the *$8,850/Barker* test when determining whether a delay in initiating a civil forfeiture proceeding violates the Due Process Clause.

In marked contrast to *Jones*, *Smith* distinguished *$8,850* and *Von Neumann* on the grounds that the federal statute in *Von Neumann* allowed for the filing of a petition for remission while DAFDA did not provide property owners with a procedure for seeking their property prior to the statutory civil forfeiture hearing. *Jones* recognized the folly of this line of argument, noting that in *Von Neumann*, this Court recognized that under *$8,850*, "the forfeiture proceeding, without more, provides the postseizure hearing required by due process." *Von Neumann*, 474 U.S. at 249. While *Jones* followed *$8,850* and *Von Neumann*, *Smith* and *Krimstock* cannot be reconciled with these cases.

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1. The Seventh Circuit noted that *Smith* "signal[ed] a reversal of course from *Jones*" and, thus, the *Smith* opinion was circulated to the full court before release in accordance with Seventh Circuit Rule 40(e). *Smith*, 524 F.3d at 839; (App. 11a.).

Smith overruled *Jones* and remanded the instant case to the district court with instructions to enter injunctive relief against Defendants, even though the parties are at the pleading stage and Defendants have not yet answered Plaintiffs' class action complaint. The Seventh Circuit stated that "[t]he district court, with the help of the parties, should fashion appropriate procedural relief consistent with this opinion." *Smith*, 524 F.3d at 839; (App. 10a.).

SUMMARY OF THE ARGUMENT

From its inception as a nation, the United States has had authority "to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events." *United States v. Ursery*, 518 U.S. 267, 274 (1991). State governments have the same authority. *See, e.g.*, 725 ILCS 150/9 (2008).

In civil forfeiture cases, courts frequently consider what process is due to the owner of the seized property. In *$8,850*, for example, this Court declared that the most "apt analogy" to the process due the claimant was a criminal defendant's right to a speedy trial, which is analyzed with *Barker's* four-step balancing test. *$8,850*, 461 U.S. at 564. In *Von Neumann*, this Court further held that the Due Process Clause does not require any procedure prior to the actual forfeiture proceeding. *Von Neumann*, 474 U.S. at 249. When read together, *$8,850* and *Von Neumann* illustrate three basic principles — (1) the Due Process Clause does not require an interim post-seizure but pre-forfeiture hearing, (2) in determining whether a delay in initiating a civil forfeiture hearing violates due process, courts should

apply the four-part "speedy trial" test from *Barker v. Wingo* and (3) whether or not the claimant has a statutory right to seek remission of the seized property prior to the civil forfeiture hearing is irrelevant to the application of the *$8,850/Barker* analysis. *Smith* and *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), the Second Circuit case upon which *Smith* relies, both employ a due process analysis to delays in initiating civil forfeiture proceedings that cannot be squared with *$8,850* and *Von Neumann*.

In addition to conflicting with *$8,850* and *Von Neumann*, *Smith* and *Krimstock* also create a conflict among the circuits.[2] This case has significant national importance because it will clarify the proper legal standard for determining whether a delay in initiating a civil forfeiture proceeding violates due process.

REASONS FOR GRANTING THE PETITION

Smith applied the *Mathews v. Eldridge* factors to determine whether DAFPA violated the Due Process Clause and concluded that the statute was unconstitutional. In this regard, the Seventh Circuit stated "given the length of time which can result

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2. Other circuits have applied the *$8,850/Barker* speedy trial factors when analyzing claims that a delay in initiating a civil forfeiture proceeding violated due process. *See, e.g.*, *United States v. Turner*, 933 F.2d 240 (4th Cir. 1991); *United States v. Robinson*, 434 F.3d 357 (5th Cir. 2005); *United States v. Ninety-Three Firearms*, 330 F.3d 414 (6th Cir. 2003); *United States v. $18,505.10*, 739 F.2d 354 (8th Cir. 1984); *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085 (9th Cir. 1986); and *Nnadi v. Richter*, 976 F.2d 682 (11th Cir. 1992).

between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required." *Smith*, 524 F.3d at 838; (App. 10a.). This holding is expressly contrary to *$8,850* and *Von Neumann*.

Under *Von Neumann*, the constitutionality of a delay in initiating a civil forfeiture proceeding did not turn on the existence of a probable cause hearing (or some other mechanism, as contemplated in *Smith*) post-seizure but pre-forfeiture hearing. Instead, the due process analysis — like the analysis in *$8,850* — turns on the application of the *Barker* speedy trial factors. As this Court recognized in *$8,850*:

> The flexible approach of *Barker*, which "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," 407 U.S., at 530, is thus an appropriate inquiry for determining whether the flexible requirements of due process have been met. As we stressed in *Barker*, none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.

$8,850, 461 U.S. at 564-565 *citing Barker*, 407 U.S. at 530. *Mathews v. Eldridge* was decided seven years before *$8,850*. If it wished to do so, this Court could have

adopted the *Mathews v. Eldridge* due process factors in *$8,850*. It did not. Instead, the Court applied the flexible due process approach from *Barker*. Without any authority from this Court, the Seventh Circuit abandoned of the *$8,850/Barker* due process analysis. This ruling is contrary to both *$8,850* and *Von Neumann*. Moreover, in their abandonment of the *$8,850/Barker* due process analysis, *Smith* and *Krimstock v. Kelly* create a conflict with decisions from the Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits.

The Seventh Circuit also pronounced that:

> The district court, with the help of the parties, should fashion appropriate procedural relief consistent with this opinion. The hearing should be prompt but need not be formal. We leave it to the district court to determine the notice requirement and what a claimant must do to activate the process. We do not envision lengthy evidentiary battles which would duplicate the final forfeiture hearing. The point is to protect the rights of both an innocent owner and anyone else who has been deprived of property and, in the case of an automobile or personal property other than cash, to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending.

Smith, 524 F.3d at 838-839; (App. 10a.). In making this pronouncement, the Seventh Circuit ignored the procedural posture of this litigation. Defendants have

never answered Plaintiffs' complaint and Plaintiffs have offered no evidence to survive summary judgment or to succeed at trial. In directing the district court to fashion relief, the Seventh Circuit's ruling is contrary to this Court's holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) that a plaintiff's burden escalates at each successive stage of civil litigation. The current state of the record does not support the Seventh Circuit's instruction to enter permanent injunctive relief consistent with its opinion in *Smith*.

In accordance with the criteria set forth in Supreme Court Rule 10(a) and 10(c), this Court should grant this petition.

I. This Court Should Resolve The Significant Conflict In The Circuits Regarding The Issue Of Whether *$8,850/Barker* Or *Mathews v. Eldridge* Provides The Proper Analytical Framework For Determining Whether A Delay In Initiating A Civil Forfeiture Proceeding Violates The Due Process Clause.

The Seventh Circuit's efforts to distinguish the instant lawsuit from *$8,850* and *Von Neumann* rest on the most crimson of red herrings – the fact that DAFPA does not provide for an interim probable cause hearing that occurs post-seizure but pre-forfeiture hearing. *Von Neumann* disposes of this argument and shows that the existence or non-existence of such an interim hearing is irrelevant.

The plaintiffs in *Jones* rested their due process argument on the fact that DAFPA did not provide for

an interim probable cause hearing. *Jones* outlined this argument and explained that it was untenable under *$8,850* and *Von Neumann*:

> [Plaintiffs argue] that their case poses a question distinct from that addressed in *$ 8,850* and therefore requires analysis under a different framework. Whereas *$ 8,850* focuses on whether the length of delay in initiation of the actual forfeiture proceeding violates the requirements of due process, they reason, their case asks whether, in light of the fact that the forfeiture proceeding will not occur for some time, they are entitled to a preliminary determination of probable cause.
>
> We need look no further than the Supreme Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986), to dispose of this argument. In that case, the plaintiff complained that a 36-day delay by customs officials in acting on a petition for remission of a seized automobile deprived him of due process. The Court rejected Von Neumann's argument, after reviewing the *$ 8,850/Barker* factors. *See id.* at 250-51. The Court's reliance on those factors puts to rest the plaintiffs' suggestion in this case that *$ 8,850* applies only to delay in initiation of the forfeiture proceeding itself and does not extend to other types of hearing. As plaintiffs do here, Von Neumann argued that due process entitled him to an additional, preliminary hearing, and

> the Court found that *$ 8,850* provided the appropriate vehicle for assessing his claim.

Jones, 38 F.3d at 324.

In determining whether application of a forfeiture statute to a particular defendant violates due process, the proper inquiry under this Court's jurisprudence is not whether a forfeiture statute provides for an interim hearing. Instead, courts should focus on the delay in initiation of a civil forfeiture proceeding and apply the *$8,850/Barker* test to determine whether such a delay violates due process. *Jones* was faithful to this analytical approach. *Smith* and *Krimstock* are not.

A. *$8,850* And *Von Neumann* Establish The Analytical Framework For Determining Whether A Civil Forfeiture Statute Violates The Due Process Clause.

In *$8,850*, this Court considered whether an 18-month delay in the filing of a civil forfeiture proceeding, following the seizure of United States currency by Customs officers, violated the claimant's due process right to a meaningful hearing at a meaningful time. *$8,850*, 461 U.S. at 562. This Court declared that the most "apt analogy" to the process due the claimant was a criminal defendant's right to a speedy trial, which is analyzed with *Barker's* four-step balancing test. *Id.* at 564. *Barker*, this Court reasoned, "provides an appropriate framework for determining whether the delay . . . violated the due process right to be heard at a meaningful time." *Id.*

The *Barker* test requires consideration of the following four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right and (4) the prejudice to the defendant. *Id.* No one factor by itself necessarily points to an undue delay; rather, the factors are "guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." *Id.* at 565. Because due process is a "flexible" concept, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), this Court stressed that the *Barker* analysis cannot be applied generally, but must be conducted "on an *ad hoc* basis." *$8,850*, 461 U.S. at 564.

The rationale for utilizing the *Barker* test was a simple one: the concerns of undue delay, both pretrial and pre-forfeiture, are analogous. The *$8,850/Barker* analysis was not an aberration and this Court has not abandoned the analysis. The *Barker* analysis provided the rationale for the Court's *Von Neumann* opinion, and has been faithfully followed by federal circuit courts for over twenty years. *See United States v. Von Neumann*, 474 U.S. 242 (1986). It is *Krimstock* and now *Smith* that have created a split among the circuits.

In *Von Neumann*, the plaintiff claimed his due process rights were violated by customs officials' 36-day delay in ruling on his petition for remission of an automobile seized at the border between the United States and Canada. *Von Neumann*, 474 U.S. at 245-47. The plaintiff further argued that due process required "a speedy disposition of his remission petition without

awaiting a forfeiture proceeding." *Id.* at 249. This Court unambiguously disagreed, stating:

> Implicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car.

Id. This Court concluded that remission proceedings are "not *necessary* to a forfeiture determination, and therefore are not constitutionally required." *Id.* (emphasis in original); *see also Willis v. United States*, 787 F.2d 1089, 1094 (7th Cir. 1986)(Drug Enforcement Agency's remissions proceedings are a "matter of grace" not attended by due process requirements).

The Seventh Circuit's opinion that due process requires a "prompt post-deprivation hearing" is no different than Von Neumann's due process argument regarding the "speedy disposition of his remission petition." *See Von Neumann*, 474 U.S. at 249. However, this Court specifically rejected that argument.

In *Smith*, the Seventh Circuit acknowledged "[a]ll in all, we agree with *Krimstock*. The private interest involved, particularly in the seizure of an automobile, is great." *Smith*, 524 F.3d at 838; (App. 8a.). *Smith* may agree with *Krimstock* but neither case can be squared with *$8,850* and *Von Neumann*.

B. *Smith* Cannot Be Harmonized With Controlling Precedent, *$8,850* And *Von Neumann.*

Smith rejected the *$8,850/Barker* speedy trial factors and instead relied on the due process analysis from *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Smith*, 524 F.3d at 836, 837. Relying on *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), *Smith* applied the *Mathews* factors to determine whether the delay in initiating a civil forfeiture proceeding for a seized automobile violates due process. The *Mathews* factors are the "private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose." *Smith*, 524 F.3d at 837 *citing Good*, 510 U.S. at 53; (App. 5a-6a.). The *Mathews* factors, unlike the *Barker* speedy trial factors, do not focus the inquiry on the delay in initiating the proceeding, the defendant's assertion of his right and prejudice to the defendant. Moreover, and cardinally, *Mathews* does not support the Seventh Circuit's rejection of the due process framework articulated in *$8,850*.

Smith, however, notes that *Mathews* has been applied in various different contexts and, thus, could be applied to a due process claim based upon the delay of initiating a civil forfeiture proceeding. *See Smith*, 524 F.3d at 837, n. 2; (App. 6a.). This position suffers from a fatal flaw — although *Mathews* was decided seven years before *$8,850*, this Court chose not to utilize the

Mathews analysis in reaching its decision in *$8,850*. Rather, the Court specifically applied the *Barker* speedy trial test. *Smith* simply ignored the fact that *$8,850* applied a due process analysis distinct from the one employed in *Mathews*.[3]

Smith attempted to distinguish *$8,850* and *Von Neumann* but its analysis rings hollow. *Smith* stated:

> The *Krimstock* court properly, we think, distinguished *Von Neumann* and *$8,850*. *$8,850* concerns the speed with which the civil forfeiture proceeding itself is begun—a different question from whether there should be some mechanism to promptly test the validity of the seizure. At first glance, *Von Neumann* seems on point, but there are significant differences between that case and ours. *Von Neumann* involved proceedings for remission or mitigation under U.S. customs laws, not forfeiture under state law.

Smith, 524 F.3d at 837; (App. 7a.). The reasoning in *Smith* is simply contrary to *$8,850* and *Von Neumann*. *Smith* may hold that "the speed with which the civil forfeiture proceeding itself is begun [is] a different question from whether there should be some mechanism

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3. In any event, *Mathews* has never been a "one-size-fits-all" solution to due process analysis. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 66 (1993) (Rehnquist, C.J., dissenting). As this Court stated in *Dusenberry v. United States*, 534 U.S. 161, 168 (2002), "we have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims."

to promptly test the validity of the seizure" but *Von Neumann* held otherwise. Indeed, *Von Neumann* held that the existence or non-existence of this alternative mechanism is simply irrelevant to the due process analysis. *Von Neumann*, 474 U.S. at 249. The only relevant inquiry is whether the delay in initiating the civil forfeiture proceeding violated due process. *Id.* Consequently, the fact that *Von Neumann* involved proceedings for remission or mitigation under federal customs laws and not forfeiture under state law is wholly irrelevant to the question of whether the *Barker* speedy trial factors or the *Mathews* factors should be applied in a due process claim regarding a delay in a civil forfeiture proceeding for a seized automobile.

In part, *Smith* relied upon the importance of the automobile in modern society as a basis for its decision to overrule *Jones* and to decline to apply the due process analysis from *$8,850* and *Von Neumann*. *Smith*, 524 F.3d at 838; (App. 8a.). In so doing, *Smith* once again disregarded *Von Neumann*. Like this case, *Von Neumann* involved a party alleging that the failure to have a prompt hearing subsequent to the seizure of his automobile but before the civil forfeiture hearing violated due process.

In *Von Neumann*, the Ninth Circuit "noted that the propriety of the length of the delay may turn on the nature of the item that has been seized, and reemphasized the point made in its earlier opinion that 'special hardships [are] imposed on persons deprived of the use of their automobiles . . . '." *Von Neumann*, 474 U.S. at 248 *citing Von Neumann v. United States*, 729 F.2d 657, 661 (9th Cir. 1984). This Court rejected this

position and held that Von Neumann's property interest in the automobile did not give him a constitutional right to a speedy disposition of his remission petition. Instead, this Court applied the *$8,850/Barker* factors and held that the delay in responding to the remission petition did not violate due process.

Smith did not distinguish *$8,850* or *Von Neumann* and, in the end, did little more than ignore these decisions. *Smith* primarily relied on *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), a case which, in turn, relied on *Good*. *Good* does not support the decision of the Second and Seventh Circuits to deviate from *$8,850* and *Von Neumann*.

It is significant to note that *Good* did not reject *$8,850*. To the contrary, *Good* carefully identified the narrow issue before the Court in the following manner:

> [t]he governmental interest we consider here is not some general interest in forfeiting property but the specific interest in seizing real property before the forfeiture hearing. The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action.

Good, 510 U.S. at 56. *Good*, therefore, addressed a different question than *$8,850* (*i.e.*, the seizure of real property as opposed to personal property) and ultimately found "no pressing need," *id.* at 56, ruling that due process requires advance notice and a hearing before the government may seize real property. *Id.* at 46.

Good reasoned that a citizen's right to possession of his real property is of far greater import than one's right to personal property. This Court labeled Good's interest in his property, "a private interest of historic and continuing importance." *Id.* at 53-54. This Court reinforced the point, stating:

> [t]he seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment. It gives the government a right to prohibit sale, but also the right to evict occupants, to modify the property, to condition occupancy, to receive rents, and to supercede the owner in all rights pertaining to the use, possession, and enjoyment of the property.

Id. at 54. In addition, real property (unlike personal property) cannot move or be hidden from reach in an effort to frustrate the government's interest. *Id.* at 52 *comparing Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (seizure of yacht without pre-deprivation notice and hearing did not violate due process because seizure permitted *in rem* jurisdiction over the vessel, pre-seizure notice would allow for its concealment or destruction, and the seizure was not initiated by self-interested parties). Consequently, the Court ruled that absent a showing of exigent circumstances, the Due Process Clause requires notice and a meaningful opportunity to be heard prior to the seizure of real property subject to civil forfeiture. *Good*, 510 U.S. at 62.

In reaching its conclusion in *Good*, this Court used the *Mathews* due process analysis but did so only after citing *$8,850* and explaining that there exist "extraordinary situations" in which a valid government interest justifies an exception to the ordinary requirement of notice and a pre-deprivation hearing. *Id.* at 53. *Mathews*, the Court stated, "provides guidance" as to whether "the seizure of real property for purposes of civil forfeiture justifies such an exception." *Id.*

Pursuant to the *Mathews* analysis utilized in *Good*, the Due Process Clause mandates notice and a pre-deprivation hearing when the government seeks to seize real property with an eye toward civil forfeiture. *Id.* at 62. However, *$8,850*, *Jones* and the instant lawsuit all address requests for a prompt hearing *after* governmental seizure of *personal* property. Because *Good* addressed neither post-deprivation hearings nor the seizure of personal property, *Good* did not contravene this Court's earlier decision in *$8,850*. *Good* is inapposite and does not support the decisions in either *Smith* or *Krimstock*.

Like *Smith*, *Krimstock* misread *Good* and ignored *$8,850*. *Krimstock* concerned a challenge to a New York City ordinance allowing for the seizure of motor vehicles suspected of being instrumentalities of misdemeanor offenses such as driving while intoxicated. *Krimstock*, 306 F.3d at 44. The relevant ordinance provided for a post-seizure civil forfeiture proceeding that, in practice, routinely occurred "months or even years after the seizure." *Id.* at 45. After the district court granted the defendant's motion to dismiss the complaint, the Second

Circuit reexamined the issue in detail. *Id.* The Second Circuit characterized both *$8,850* and *Von Neumann* as "customs" cases, *Krimstock*, 306 F.3d at 52 and n. 12, and stated, "a speedy trial and a prompt retention hearing are not parallel in this context." *Id.* at 53.

The Second Circuit repeatedly relied upon *Good*, and inexplicably claimed that *Good* mandates the *Mathews* analysis "to evaluate the adequacy of process offered in post-seizure, pre-judgment deprivations of property in civil forfeiture proceedings." *Id.* at 60. *Good*, however, simply does not speak to post-seizure situations but instead dealt exclusively with whether a *pre*-deprivation hearing was necessary before seizure of *real* property. *Good*, 510 U.S. at 62. Unlike *Good*, *$8,850* considered whether the delay in initiating forfeiture proceedings for personal property violated the Due Process Clause.

The Second Circuit, however, failed to recognize that *$8,850* and *Von Neumann* (and not *Good*) provided the proper analytical framework for considering a due process challenge to a statute or ordinance that provides for a post-seizure forfeiture proceeding. Like *Smith*, *Krimstock* is a flawed decision built upon faulty underpinnings. In rejecting the application of the *$8,850/Barker* speedy trial factors in favor of the *Mathews* due process factors, *Smith* and *Krimstock* have created a split among the circuits.

C. *Smith* And *Krimstock* Create A Split Among The Circuits.

Other than *Smith* and *Krimstock*, federal circuits have readily embraced *$8,850* as the seminal case defining how due process claims based on the delay in the initiation of judicial forfeiture proceedings would be analyzed.

In *United States v. Turner*, 933 F.2d 240 (4th Cir. 1991), for example, the United States brought an action for the civil forfeiture of a 1963 Chevrolet Corvette. The defendant claimed that the 16-month delay between the seizure of the automobile and the government's filing of a civil forfeiture action constituted an unreasonable delay that violated his right to due process. In assessing this due process claim, the Fourth Circuit applied the *$8,850/Barker* speedy trial factors and concluded that the delay did not violate due process. *Turner*, 933 F.2d at 246.

In *United States v. Robinson*, 434 F.3d 357 (5th Cir. 2005), the defendant argued that a seven month delay between the government's seizure of cash and the government's issuance of notice of the civil forfeiture proceeding violated due process. The Fifth Circuit noted that just as there is no obvious bright line dictating when a post-seizure hearing must occur, "there is no obvious bright line as to when the government must first notify a party of its intent to forfeit seized funds." *Robinson*, 434 F.3d at 364 *citing $8,850*, 461 U.S. at 562. The Fifth Circuit applied the *$8,850/Barker* speedy trial factors to determine whether the government's delay in providing notice of a civil forfeiture proceeding violated due process.

In *United States v. Ninety-Three Firearms*, 330 F.3d 414 (6th Cir. 2003), the United States filed a civil *in rem* forfeiture action, under 18 U.S.C. § 924(d), for the forfeiture of ninety-three firearms involved in a violation of 18 U.S.C. § 922(g)(1), five years after the seizure of the firearms. The owner of the seized property argued that the government's delay in bringing the judicial forfeiture action violated his right to due process. The Sixth Circuit applied the *$8,850/Barker* speedy trial factors to determine whether this delay violated due process.

In *United States v. $18,505.10*, 739 F.2d 354 (8th Cir. 1984), the owners of the seized property argued that the delay of the government in instituting a forfeiture action against cash and several items of personal property violated the Due Process Clause. Likewise, in *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085 (9th Cir. 1986), the owner of Canadian currency argued that a 14 month delay in the institution of a forfeiture proceeding against the currency violated the Due Process Clause. In resolving these due process claims, both the Eighth and Ninth Circuits applied the *$8,850/Barker* speedy trial factors.

In *Nnadi v. Richter*, 976 F.2d 682 (11th Cir. 1992), the Eleventh Circuit heard an appeal of the district court's order compelling the Customs Service to return the claimant's car, seized pursuant to 19 U.S.C. § 1595 as property used to aid the introduction of illegal drugs into the United States. In considering whether the delay in initiating a civil forfeiture proceeding for the car violated due process, the Eleventh Circuit applied the *$8,850/Barker* speedy trial factors.

The majority of circuits follow *$8,850* and *Von Neumann*. *Smith* and *Krimstock* have created a split between the Second and Seventh Circuits and the Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits. This Court should grant this petition in order to resolve the conflict among the circuits that *Smith* has created.

II. Contrary To *Lujan*, The Seventh Circuit Directed The District Court To Enter Injunctive Relief Even Though No Answer Has Been Filed And No Proof Adduced.

Plaintiffs have alleged that DAFPA is unconstitutional as applied in each of their cases. Indeed, paragraphs 7 and 8 of Plaintiffs' complaint allege that the City, acting in conjunction with the State's Attorney, did not provide Plaintiffs with "a prompt post-seizure hearing to determine probable cause" and "continue to detain their property" in violation of the Due Process Clause. (Complaint, ¶¶ 7-8) Such claims are, by definition, individualized, as each individual plaintiff presents a completely different factual case.

For example, plaintiff Chermane Smith claims that her vehicle was seized on or about January 19, 2006 (Complaint, ¶ 25), while plaintiff Kirk Yunker claims his cash was confiscated on September 26, 2006 (Complaint, ¶ 29) — a difference of over eight months. Plaintiffs Smith, Edmanuel Perez, Tyhesha Brunston, and Michelle Waldo all claim that forfeiture actions have been filed and are pending against them (Complaint, ¶¶ 25-28) but plaintiffs Yunker and Tony Williams assert that no such action has been filed. (Complaint, ¶¶ 29-30). Some of the named plaintiffs contend they were never

charged with a criminal offense (Smith, Perez, Brunston, Waldo), while others state that they were (Yunker and Williams). (Complaint, ¶¶ 25-30). None of these claims have advanced beyond the pleading stage, as the district court granted Defendants' motions to dismiss. Nonetheless, on the non-existent record in this matter, the Seventh Circuit directed "[t]he district court, with the help of the parties, [to] fashion appropriate procedural relief consistent with this opinion." *Smith*, 524 F.3d at 838; (App. 10a.).

This Court has recognized:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." (citation omitted) In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." (citation omitted).

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). The portion of *Smith* directing the district court to enter injunctive relief based upon a record that consists of nothing more than Plaintiffs' allegations is not consistent with the above principles articulated in *Lujan*.

Defendants filed 12(b)(6) motions to dismiss this as applied constitutional challenge based upon *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994). On February 22, 2007, the district court granted these 12(b)(6) motions to dismiss stating, "[a]s plaintiffs' counsel admits, this court is bound by the decision in *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994)." (App. 12a.).

Because of this procedural posture, this case does not currently have any kind of factual record, much less a fully developed one. The imposition of injunctive relief below at this stage of the litigation surely should not stand.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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