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In the Utah Supreme Court

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Kyle Savely,

Claimant-Appellant,

v.

Utah Highway Patrol  
and  
Utah Department of Public Safety,  
Defendants-Appellees.

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Brief of The Libertas Institute as *Amicus Curiae* Supporting  
Appellant

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On Appeal from Dismissal of Petition for Return of Property in the  
Third District Court – Summit County  
The Honorable Kara Pettit Presiding

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## Table of Contents

Table of Authorities .....	iv
Statement of the Issues .....	1
Determinative Provisions .....	1
Statement of Case and Facts .....	1
Summary of Argument.....	2
Argument.....	4
1. A Brief History of Federal Civil Asset Forfeiture: from Inauspicious Maritime Origins to a Juggernaut in the War on Drugs. ....	6
2. Utah’s Statutory Reforms were Intended to Stop the Federal Forfeiture Juggernaut. ....	13
2.1 Initiative B was Designed to Divert Civil Forfeitures into a State System with Greater Protections for Property Owners .....	13
2.2 The 2004 Amendments to Forfeiture and Disputation of Property Act Strengthened, not Weakened, the Protections Offered by Initiative B.....	19
3. Title 24 of the Utah Code Confers on the State Courts In Rem Jurisdiction Over Assets Seized for Forfeitures. ....	20
3.1 Utah Code Ann. §24-4-108(4) Directly Confers In Rem Jurisdiction to State Courts over Property Seized for Forfeiture .....	22
3.2 Utah Code Ann. §24-4-114 Strongly Implies that State Courts Are Imbued with In Rem Jurisdiction and the Moment of Seizure.....	24
4. Practical Consequences.....	25
4.1 Holding that the Notice of Intent of Forfeiture Does Not Imbue State Courts with in rem Jurisdiction Would Work a Manifest Injustice on a Property Owners Legitimate Due Process Expectations. ....	25
4.2 Initiative B Was to End Policing for Profit; Ruling for UHP Allows It to Continue Unchecked.....	26

Conclusion .....	27
Addenda .....	32

## Table of Authorities

### Cases

<i>Calero-Toledo v. Pearson Yacht Leasing Co.</i> , 416 U. S. 663 (1974) .	5, 6
<i>Commonwealth v. Rufo</i> , 429 Mass. 380, 708 N.E.2d 947 (Mass. 1999) .....	22
<i>In re \$ 490,920 in United States Currency</i> , 911 F. Supp. 720 (S.D.N.Y. 1996) .....	22
<i>Kennard v. Leavitt</i> , 246 F. Supp. 2d 1177 (D. Utah 2002) .....	18
<i>Leonard v. Texas</i> , 580 U.S. ___, 137 S. Ct. 847 (2017) (Thomas, J., respecting denial of certiorari) .....	3, 5, 6, 12
<i>Scarabin v. DEA</i> , 966 F.2d 989 (5th Cir. 1992) .....	22
<i>United States v. Brig Malek Adhel</i> , 2 How. 210 (1844) .....	5
<i>United States v. Kama</i> , 394 F.3d 1236 (9th Cir. 2005) (Ferguson, C.J., concurring specially) .....	22

### Statutes

21 U.S.C. § 801 .....	7
21 U.S.C. § 881 .....	7
Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1837 .....	8
Massachusetts General Laws Annotated 276, Section 3 .....	22
Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768.....	7
Utah Code Ann. § 24-1-103 .....	3, 20, 21
Utah Code Ann. § 24-2-102 .....	20
Utah Code Ann. § 24-4-103 .....	24, 25
Utah Code Ann. § 24-4-108 .....	21
Utah Code Ann. § 24-4-114 .....	17, 21, 23
Utah Code Ann. § 24-4-116 .....	25

Utah Code Ann. § 24-4-117 .....	25
<b>Constitutional Provisions</b>	
U.S. Const. amend. IV .....	24
U.S. Const. amend. V .....	24
U.S. Const. amend. XIV, § 1 .....	24
Utah Const. art. I, § 14.....	24
Utah Const. art. I, § 7.....	24
<b>Case Record</b>	
<i>Opening Brief of Appellant</i> .....	3
<i>Transcript of Oral Arguments on Motion to Reconsider and Set Aside</i> ..	4
<b>Legislative Materials</b>	
Rep. Stephen Urquhart, S.B. 175, Utah House Floor Debate, March 2, 2004 .....	19
S.B. 175, 2004 General Session (enacted) <i>available at</i> <a href="https://le.utah.gov/~2004/bills/static/SB0175.html">https://le.utah.gov/~2004/bills/static/SB0175.html</a> .....	19
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<b>Other Authorities</b>	
2016 Democratic Party Platform <i>available at</i> <a href="http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016_DNC_Platform.pdf">http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016_DNC_Platform.pdf</a> .....	11
Annemarie Bridy, <i>Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy</i> , 46 Ariz. St. L.J. 683 (2014) .....	6, 9, 10
<i>Ballot Questions</i> , Deseret News, Nov. 8, 2000 <i>available at</i> <a href="https://www.deseretnews.com/article/792138/Ballot-questions.html">https://www.deseretnews.com/article/792138/Ballot-questions.html</a> .....	13
Butler, Drahozal & Shepherd, <i>Economic Analysis for Lawyers</i> (3d ed. 2014) .....	9

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David Callahan, Editorial, <i>Forfeiture Victim Speaks</i> , S.L. Trib., Nov. 5, 2000, at AA3.....	16
Dick Carpenter et al., <i>Policing for Profit</i> (2nd Ed. 2015) available at <a href="http://ij.org/report/policing-for-profit/">http://ij.org/report/policing-for-profit/</a> (last visited Oct. 9, 2017) .....	passim
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Eric Moores, Note, <i>Reforming the Civil Asset Forfeiture Reform Act</i> , 51 <i>Ariz. L. Rev.</i> 777 (2009) .....	7
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Jefferson E. Holcomb et al., <i>Civil asset forfeiture, equitable sharing, and policing for profit in the United States</i> , 39 <i>Journal of Criminal Justice</i> 273 (2011).....	9
Jennifer Dobner, <i>Change in law would protect innocent from asset forfeiture</i> [sic], <i>Deseret News</i> , Sept. 24, 2000 available at <a href="https://www.deseretnews.com/article/784470/Change-in-law-would-protect-innocent-from-asset-forfeiture.html">https://www.deseretnews.com/article/784470/Change-in-law-would-protect-innocent-from-asset-forfeiture.html</a> .....	15
John Enders, <i>Forfeiture Law Casts a Shadow on Presumption of Innocence: Legal system: Government uses the statute to seize money and property believed to be linked to narcotics trafficking. But critics say it short-circuits the Constitution.</i> , <i>L.A. Times</i> , Apr. 18, 1993 available at <a href="http://articles.latimes.com/1993-04-18/local/me-24209_1_forfeiture-law">http://articles.latimes.com/1993-04-18/local/me-24209_1_forfeiture-law</a> .....	10
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Republican Platform 2016 <i>available at</i> <a href="https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL%5b1%5d-ben_1468872234.pdf">https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL%5b1%5d-ben_1468872234.pdf</a> .....	11
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## **Statement of the Issues**

*Amicus Curiae* incorporates the statement of “Issue, Preservation and Standards of Review” set forth in Appellant’s Opening Brief.

## **Determinative Provisions**

The following determinative provisions of Utah’s Forfeiture and Disposition of Property Act, as codified in Utah Code Ann. § 24-1-101, *et. seq.*, are attached verbatim as Addendum A:

Utah Code Ann. § 24-1-103

Utah Code Ann. § 24-2-102

Utah Code Ann. § 24-4-103

Utah Code Ann. § 24-4-108

Utah Code Ann. § 24-4-114

Utah Code Ann. § 24-4-116

Utah Code Ann. § 24-4-117

## **Statement of Case and Facts**

*Amicus Curiae* incorporates the “Statement of the Case” set forth in Appellant’s Opening Brief and Addenda.

## Summary of Argument

This is a case of first impression. It sits at the jurisdictional intersection of federal and state forfeiture laws. The parties have correctly noted that the first court to exercise in rem jurisdiction in a forfeiture case does so to the exclusion of all other courts. Thus, the pivotal issue is determining when a court obtains in rem jurisdiction over asset forfeitures under Utah's Forfeiture and Disputation of Property Act. Appellant Savely argues that seizure by a state agent under color of state law is sufficient to imbue state courts with jurisdiction; appellees Utah Highway Patrol and Utah Department of Public Safety (hereafter "UHP") contended below that jurisdiction falls to the first court where a filing involving the asset is made. Although perhaps not for the exact reason Appellant contends, reading the statute in light of its historical and legal context indicates that Appellant reached the correct conclusion.

The relevant passages of Utah's Forfeiture and Disputation of Property Act derive from a 2000 citizen initiative known as "Initiative B." Initiative B was a response to the explosive rise in the use of civil asset forfeiture during the 1980s and 1990s as part of the War on Drugs. Under reformed federal laws designed to empower law enforcement against drug dealers, federal agencies could keep 100% of the proceeds of everything they seized. This gave them a direct financial incentive to seize property; in the first six years of these new laws federal asset forfeitures increased over 2000%, and they

have increased ever sense. Additionally, local law enforcement agencies could participate in “equitable sharing,” giving them a similar financial motive to seize assets. Initiative B was intended to end “policing for profit” and give Utahns refuge from abuses of both state and federal civil asset forfeiture.

By examining the statute’s historical context and placing the actual language of the statute in its legal context, the clear meaning of the statute becomes apparent. Among its provisions, the statute says that, “[p]roperty held for forfeiture is considered to be in the custody of the district court.” Courts in the early 2000s would have understood this phrase as imbuing state courts with in rem jurisdiction at the moment a state agent seizes property under the color of state law. This interpretation of the statute is the only one that is textually and historically faithful.

*Amicus curiae* further asks the Court to consider the real-world implications of its ruling. Financial incentives are powerful and Utah’s law was intended to minimize the distorting and corrupting effects of “policing for profit” by local law enforcement. Upholding the court below would allow state agencies to easily circumvent the restrictions imposed upon them by state forfeiture law. The question is simply what rules will property owners in Utah live under: increased protections under state law or lower standards under federal law. This Court should adopt a textually and contextually faithful reading of Utah’s Forfeiture and Disposition of Property Act:

when a state agent seizes assets under color of state law, state courts automatically acquire in rem jurisdiction over the forfeiture.

### **Argument**

Modern civil forfeiture laws have “led to egregious and well-chronicled abuses.” *Leonard v. Texas*, 580 U.S. \_\_\_, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting denial of certiorari). When Initiative B was passed in 2000, Utahns sought to restrain such abuses. Utah’s Forfeiture and Disputation of Property Act did so by shifting the bulk of forfeitures from federal courts into state courts and giving property owners additional protections in the state system. It was a prescient move putting Utah ahead of a coming wave of public opposition against a practice that allows police to seize property with limited judicial oversight and retain it for their own use. This case is about the continued viability of Utah’s reforms.

The case presents an issue of first impression: when do state courts obtain in rem jurisdiction over assets under Utah’s Forfeiture and Disputation of Property Act? It is a simple legal question with far-reaching consequences.

Appellant Savely argues that seizure by a state agent under color of state law is sufficient to imbue state courts with jurisdiction. *Opening Brief of Appellant*, at 6. While this conclusion is correct and cites multiple statutory provisions, this argument fails to address statutory language which could plausibly be read as requiring a court action before jurisdiction is obtained. *See Utah Code Ann. § 24-1-*

103(1) (“A state district court has jurisdiction over any action filed in accordance with this title ...”). The argument also fails to consider additional language in the statute that directly justifies Appellant’s position.

Appellee Utah Highway Patrol, by contrast, argued below that neither seizure by a state agent nor issuance of notice of forfeiture were sufficient to place in rem jurisdiction with the state courts: “something” more like a search warrant, court order, or petition would have to actually be filed in or by the court. *Transcript of Oral Arguments on Motion to Reconsider and Set Aside*, 16:17-21 (“I should clarify, it should be either the court does something as in a search warrant or some sort of order or there’s something actually initiated in the court such as filing the petition, you know, filing a petition for forfeiture.”); *see also id.* at 15:6-15 (“The problem with the intent to seize form is that in itself doesn’t actually initiate the actual forfeiture proceeding....”). This argument is wrong because it manufactures a conflict with federal law where none exists and, more importantly, it ignores statutory provisions that govern when in rem jurisdiction falls to the state courts. Through this argument, UHP obtained an outcome in the lower court that flies in the face of the stated purposes of Utah’s forfeiture laws.

Because the statute does not contain a single provision that neatly answers the question presented, this Court is tasked with determining the effect of the statutory language that does exist.

*Amicus curiae* contends that in this case the only way to do so is to consider the entire language of the statute in light of the historical and legal context which led to the adoption of Utah's Forfeiture and Disputation of Property Act as well as the potential consequences of the Court's ruling. This brief discusses that history and context, identifies the purposes of Initiative B, discusses the statutory language used and how that language has been interpreted by other courts, and discusses the real-world consequences of the choice before the Court.

**1. A Brief History of Federal Civil Asset Forfeiture: from Inauspicious Maritime Origins to a Juggernaut in the War on Drugs.**

The conceptual basis for civil asset forfeiture is the legal fiction that property can be guilty of a crime. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 684 (1974) ("The vessel was 'treated as the offender,' without regard to the owner's conduct, 'as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.'" (quoting *United States v. Brig Malek Adhel*, 2 How. 210, 233 (1844))). The Supreme Court has justified its constitutional treatment of civil forfeiture largely by reference to a historical practice existing at the time of the founding. *Leonard*, 137 S. Ct. at 848 (citations omitted). English maritime law of the era provided for forfeiture of objects used in violation of customs and revenue laws. *Id.* (citations omitted). This was done without regard to the guilt or innocence of the property owners. *Id.*

at 849; Dick Carpenter et al., *Policing for Profit* 10 (2nd Ed. 2015) (citation omitted).<sup>1</sup>

The practice continued in the United States, when the First Congress adopted similar laws “subjecting ships and cargos involved in customs offenses to forfeiture.” *Leonard*, 137 S. Ct. at 848. Although the laws were upheld by early cases, forfeiture was limited to the maritime context: admiralty, customs, and piracy. Carpenter et al., *Policing for Profit* 10 (citation omitted); *see also Leonard*, 137 S. Ct. at 849. In other words, the practice was limited to circumstances where *in personam* proceedings were exceedingly difficult or impossible because property owners were outside the jurisdiction of the United States. Carpenter et al., *Policing for Profit* 10 (citation omitted). As such, the statutes permitted *in rem* proceedings, which often proceeded civilly instead of criminally. *Leonard*, 137 S. Ct. at 849 (citations omitted).

For over 150 years, the practice remained comparatively limited. Carpenter et al., *Policing for Profit* 10 (citation omitted). While the nineteenth century saw some expansion of forfeiture during the Civil War, and the early twentieth century saw a brief expansion during Prohibition, the modern practice of civil asset forfeiture is a creature of the War on Drugs. *See Annemarie Bridy, Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 *Ariz. St. L.J.* 683, 694-95 (2014) (“Civil forfeiture in the

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<sup>1</sup> Available at <http://ij.org/report/policing-for-profit/> (last visited Oct. 9, 2017).

United States dates from colonial times, but it was seldom called upon until its meteoric rise in the enforcement of federal drug laws beginning in the 1980s.” (citations omitted)).

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which authorized the government to seize drugs and property used to manufacture, store, and transport drugs. 21 U.S.C. §§ 801, 881(a); *see* Eric Moores, Note, Reforming the Civil Asset Forfeiture Reform Act, 51 Ariz. L. Rev. 777, 780-82 (2009) (giving a brief history of civil asset forfeiture). This was followed by legislation broadening forfeiture laws to include, in 1978, the proceeds of drug transactions, and in 1984, real property. *See* Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768 (codified as amended in scattered sections of 21 U.S.C.); 21 U.S.C. § 881(a)(7) (authorizing forfeiture of real property used, or intended to be used, to commit or facilitate a federal drug felony); Moores, 51 Ariz. L. Rev. at 781-82. In all, since the beginning of the War on Drugs, forfeiture laws have been applied to a wide range of situations: more than 400 federal statutes, covering a lengthy list of different crimes, now enable the use of forfeiture against one’s property. Libertas Institute, Civil Asset Forfeiture: The Legalization of Theft at 2;<sup>2</sup> John R. Emshwiller and Gary Fields, Federal Asset Seizures Rise, Netting Innocent with

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<sup>2</sup> Available at [http://libertasutah.org/policy-papers/civil\\_asset\\_forfeiture.pdf](http://libertasutah.org/policy-papers/civil_asset_forfeiture.pdf) (last visited Oct. 9, 2017).

Guilty, *The Wall Street Journal*, Aug. 22, 2011.<sup>3</sup>

Furthermore, in 1984 Congress passed the Comprehensive Crime Control Act, which created the Department of Justice's Assets Forfeiture Fund for depositing forfeiture proceeds for federal agency use. Pub. L. No. 98-473, § 310, 98 Stat. 1837 (1984). With this fund, federal law enforcement agencies could divvy up seized assets and cash for their own use. Many states followed the federal government's lead by passing similar laws of their own. Carpenter et al., *Policing for Profit* 10. And even where state law did not authorize forfeiture, the equitable sharing provisions of the federal law allowed state agencies to likewise obtain a direct financial stake in the forfeiture process. *See id.* at 25-30 (explaining how state agencies employ equitable sharing to sidestep state law and use federal forfeiture to obtain the proceeds of a forfeiture); *see also* U.S. Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, April 2009.<sup>4</sup>

With these changes not only could law enforcement seize the suspected proceeds of crime and property purchased with the proceeds of crime, but for the first time they obtained direct financial benefit from forfeitures. This economic incentive for agencies to seize assets has come to be known as "policing for profit." *See* Jefferson E.

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<sup>3</sup> Available at <https://www.wsj.com/articles/SB10001424053111903480904576512253265073870> (last visited Oct. 9, 2017).

<sup>4</sup> Available at <https://www.justice.gov/criminal-afmls/file/794696/download> (last visited Oct. 9, 2017)

Holcomb et al., *Civil asset forfeiture, equitable sharing, and policing for profit in the United States*, 39 *Journal of Criminal Justice* 273, 275 (2011) (“Perhaps the most significant criticism of asset forfeiture has focused on the purported financial incentives for law enforcement agencies to ‘police for profit’” (citations omitted)). Given that economic theory tells us that economic incentives are realized, it is no wonder that law enforcement quickly scaled up the use of civil asset forfeiture. See Butler, Drahozal & Shepherd, *Economic Analysis for Lawyers* 3 (3d ed. 2014) (“the crucial point of economics is that incentives matter”); *id.* at 5 (“Economic actors are assumed to maximize their well-being subject to constraints.”); see also Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 *San Diego L. Rev.* 79 (1996) (“This Article uses economic analysis to show how civil forfeiture creates perverse incentives for law enforcement officials and encourages abuses.”); Carpenter et al., *Policing for Profit* 10 (“In allowing agencies to keep some or all of what they forfeit, civil forfeiture laws permit, if not encourage, law enforcement to police for profit. And agencies have responded with zeal.”)

“In 1985, its first year, the fund ingested \$27 million in assets seized under federal law. By 1991, annual deposits had grown to \$644 million—an increase of over 2,000%.” Bridy, 46 *Ariz. St. L.J.* at 695. And by 2014, deposits had increased over 4000% to \$4.5 billion. Carpenter et al., *Policing for Profit* 10 (equivalent to “2,107

percent in inflation-adjusted dollars”).

As the money accumulated into the 1990s, criticism of these new forfeiture powers mounted. *See, e.g.,* Tamara Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami. L. Rev. 911, 921 (1991) (calling federal forfeiture a “legal juggernaut, crushing every due process claim thrown in its path”); John Enders, *Forfeiture Law Casts a Shadow on Presumption of Innocence: Legal system: Government uses the statute to seize money and property believed to be linked to narcotics trafficking. But critics say it short-circuits the Constitution.*, L.A. Times, Apr. 18, 1993.<sup>5</sup> Statistics began showing that “equitable sharing led to over-enforcement in the area of drug crime and under-enforcement in other areas.” Bridy, 46 Ariz. St. L.J. at 696-97 (citations omitted). Both academic literature and case law are now replete with examples of overreaching and abuse. *Id.* at 700-03 (discussing several such cases).

Overreaching and abuse led to a concerted reform effort. As a result, Congress modestly reformed federal asset forfeiture law through the Civil Asset Forfeiture Reform Act of 2000. Carpenter et al., *Policing for Profit* 2, 10 (citation omitted). It was in this context that Utah’s citizens passed Initiative B, which is discussed below.

The federal reforms, however, did little to stop the forfeiture juggernaut. As noted above, federal forfeiture is bringing in more

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<sup>5</sup> Available at [http://articles.latimes.com/1993-04-18/local/me-24209\\_1\\_forfeiture-law](http://articles.latimes.com/1993-04-18/local/me-24209_1_forfeiture-law) (last visited Oct. 9, 2017).

money than ever. But while it is a popular tool for law enforcement, it is increasingly unpopular with nearly everyone else. Indeed, that opposition has achieved rare bipartisan consensus, with both the Democratic and Republican platforms in 2016 backing reformation and restriction of forfeiture laws. Republican Platform 2016, pg 15 (Civil asset forfeiture “has become a tool for unscrupulous law enforcement officials, acting without due process, to profit by destroying the livelihood of innocent individuals, many of whom never recover the lawful assets taken from them... We call on Congress and state legislatures to enact reforms to protect law-abiding citizens against abusive asset forfeiture tactics.”);<sup>6</sup> 2016 Democratic Party Platform, pg 14 (“And we will reform the civil asset forfeiture system to protect people and remove perverse incentives for law enforcement to ‘police for a profit.’”).<sup>7</sup>

Since 2014, twenty-five states plus Washington, D.C., have followed Utah’s early efforts and reformed their own forfeiture laws. Institute for Justice, *Civil Forfeiture Reforms on the State Level*.<sup>8</sup> Three states have ended the practice outright. *Id.* But perhaps the most important indicator of forfeiture’s precarious legal position is that a

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<sup>6</sup> Available at [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT\\_12\\_FINAL%5b1%5d-ben\\_1468872234.pdf](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL%5b1%5d-ben_1468872234.pdf) (last visited Oct 3, 2017)

<sup>7</sup> Available at [http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016\\_DNC\\_Platform.pdf](http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016_DNC_Platform.pdf) (last visited Oct. 9, 2017)

<sup>8</sup> Available at <http://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/> (last visited Oct. 9, 2017)

sitting Supreme Court justice is openly questioning whether the modern incarnation of federal forfeiture is compatible with constitutional norms: Justice Thomas recently issued a searing indictment of the federal civil asset forfeiture regime and called on the judiciary to reconsider its flawed approach. *See Leonard*, 137 S. Ct. at 847-850. That call continued a nearly quarter-century long practice of voicing concern regarding civil forfeiture's modern incarnation. *See Nick Sibilla, Justice Thomas' Long History of Criticizing Asset Forfeiture, The Federalist Society Blog.*<sup>9</sup>

Utah's Initiative B, and the rest of Utah's forfeiture laws, must be read in light of the history of asset forfeiture. That history has led to a wave of reform across the nation and growing concern by the judiciary. It is relevant to the intent and meaning of the law as well as the consequences Utahns face if the state system is not able to give them greater protections than the federal system, as was intended by Initiative B and subsequent amendments.

## **2. Utah's Statutory Reforms were Intended to Stop the Federal Forfeiture Juggernaut.**

### **2.1 Initiative B was Designed to Divert Civil Forfeitures into a State System with Greater Protections for Property Owners**

Initiative B was intended to play Utah's Dr. Jekyll to the federal Mr. Hyde version of forfeiture. The ballot measure asked the following question:

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<sup>9</sup> Available at <http://www.fed-soc.org/blog/detail/justice-thomas-long-history-of-criticizing-asset-forfeiture> (last visited Oct. 9, 2017)

Shall a law be amended to:

- (1) forbid forfeiture (seizure and sale) of property involved in crime where an innocent owner neither knew of nor consented to the crime;
- (2) create uniform procedures to protect property owners where forfeiture is sought by the government;
- (3) require government to prove property is subject to forfeiture, and to reimburse owners for damage to property in custody;
- (4) require distribution of forfeiture proceeds, after deductions for court costs and victim losses, to schools instead of counties or the state;
- (5) clarify valuation methods for forfeited property, and require tracking and reporting of all money from its sale?

*Id.* at 47. Sixty-nine percent of Utahns answered yes. Office of Lt. Gov., Election Results – 2000 General Election;<sup>10</sup> *see also* *Ballot Questions*, Deseret News, Nov. 8, 2000.<sup>11</sup>

As a citizen’s initiative, Initiative B’s legislative history and intent are not contained in committee discussions and floor debates. Rather, the Initiative’s text, the official ballot materials, and local news articles published near in time to the election establish the electorate’s understanding of and purposes in approving Initiative B. See Utah Voter Information Pamphlet, General Election November 7, 2000, [hereafter Utah Voter Guide].<sup>12</sup> These sources make clear that

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<sup>10</sup> Available at [https://elections.utah.gov/Media/Default/Documents/Election\\_Results/General/2000Gen.pdf](https://elections.utah.gov/Media/Default/Documents/Election_Results/General/2000Gen.pdf) (last visited Oct. 9 2017).

<sup>11</sup> Available at <https://www.deseretnews.com/article/792138/Ballot-questions.html> (last visited Oct 9, 2017).

<sup>12</sup> Available at <https://elections.utah.gov/Media/Default/Historical%20VIPs/2000%20VIP.compressed.pdf> (last visited Oct. 9, 2017).

Initiative B was intended to (a) protect property owners, especially innocent owners, under a state system with heightened due process; (b) remove incentives to police for profit; and (c) severely limit the ability of state agencies to opt-out of state forfeiture requirements through participation in federal equitable sharing programs.

Voters intended Initiative B to stop forfeiture abuse, especially vis-à-vis innocent owners. Voters were told the law would “forbid forfeiture (seizure and sale) of property involved in crime where an innocent owner neither knew of nor consented to the crime.” *Utah Voter Guide* at 47. The initiative would “protect[] innocent owners” because “the government – not you – would be required to prove that your property is subject to forfeiture” *Id.* at 49.

Initiative B would “make[] the government accountable and create[] uniform procedures to treat people fairly and equally.” *Id.* at 49 “Arguments For.” This was important because there was “no legislative oversight of the forfeiture process.” *Id.*

These protections were especially important to voters because of accounts of forfeiture abuse perpetrated against residents of Utah and other states. *See, e.g.,* Jeff Wright, Op-Ed, *Initiative B protects our liberties*, *Deseret News*, Nov. 1, 2000, (“Rep. Henry Hyde, R-Ill., stated during hearings [last year], ‘Unfortunately, I think I can say that our civil asset seizure laws are being used in terribly unjust ways and are depriving innocent citizens of their property with nothing that can be called due process. This is wrong and it must be

changed.”)<sup>13</sup>; Jennifer Dobner, *Change in law would protect innocent from asset forfeiture* [sic], *Deseret News*, Sept. 24, 2000 (“In one Juab County case, a 19-year-old man lost almost all of a \$50,000 trust fund and his new pickup truck because a Utah Highway Patrol trooper found drug paraphernalia on a passenger in the truck.”)<sup>14</sup>; Judy Fahys, *Activists, Police at Odds on Property Seizure Initiative*, *S.L. Trib.*, Aug 14, 2000, at B1 (“Wilson remembers leaving the local FBI office seven years ago, head in a spin, after the agency refused to release his white Porsche convertible from impoundment because of a federal fraud indictment that had, as it turned out, snared an acquaintance who had been test-driving the rare sportster. Wilson never was convicted of a crime. Nor was he charged with one. Still, it cost him roughly \$20,000 and 18 months -- car payments, insurance and impoundment fees included -- to get back his car.”); *id.* (“A Connecticut couple lost their home after drugs were found in a grandson’s room;” “a Florida auto supplier nearly lost his family business after a drug task force, convinced it was receiving drug money, seized the company's checking account after a Colombian customer had used a money exchanger to deposit \$2,500 into the account;” and “[a] woman wound up losing her car after a speeding

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<sup>13</sup> Available at <https://www.deseretnews.com/article/790955/Initiative-B-protects-our-liberties.html> (last visited Oct. 9, 2017).

<sup>14</sup> Available at <https://www.deseretnews.com/article/784470/Change-in-law-would-protect-innocent-from-asset-forfeiture.html> (last visited Oct. 9, 2017).

stop in Louisiana. Police, who had arrested and strip-searched her, justified seizing her Lincoln Town Car by saying they suspected she was hiding drugs in a 2 1/2-inch- deep compartment built into that model.”); David Callahan, Editorial, *Forfeiture Victim Speaks*, S.L. Trib., Nov. 5, 2000, at AA3 (author describing his personal experience where an officer seized the author’s truck and held it over fourteen months despite testifying that the truck was not used or alleged to have been used in any crime).

The general consensus of these many editorials and articles supporting the Initiative was that “Every Utahn who believes she or he has the right to the fruits of their labor and effort, who believes that the state exists to serve the people rather than the people to serve the state, and who believes the liberties enshrined in the federal Constitution are worthwhile and deserve continued nourishment, should vote yes on Initiative B on Tuesday.” The Salt Lake Tribune, Editorial, *Yes on Initiative B*, S.L. Trib., Nov 4, 2000, at A14.

Voters also intended Initiative B to “ensure[] the integrity of law enforcement” by removing police’s “incentive to abuse to forfeiture.” *Utah Voter Guide* at 49. In other words, it would stop “policing for profit.” *Id.* at 50 “Rebuttal to.” Voters were given specific examples explaining how the incentive to police for profit was real. For example, forfeitures had increased 700% between 1998 and 1999 alone. *Id.* at 49 “Arguments For.” “Reform of asset forfeiture

[was] badly needed” to “take[] away the financial incentives that encourage the all too human propensity toward corruption and abuse.” The Salt Lake Tribune, Editorial, *Yes on Initiative B*, S.L. Trib., Nov 4, 2000, at A14. The initiative did so by directing forfeiture revenues to courts, victims, and schools. *Utah Voter’s Guide* at 49 “Arguments For;” *id.* at 47 (the law would “require distribution of forfeiture proceeds, after deductions for court costs and victim losses, to schools instead of counties or the state”).

Finally, in passing Initiative B voters intended for Utahns to reap the benefit of these new procedural protections, not for state agents to do an end run around them by participating in federal equitable sharing. To achieve this end, the Initiative created “uniform procedures to protect property owners where forfeiture is sought by the government.” *Utah Voter Guide* at 47. Under these procedures, forfeitures by state agents were to be generally confined to state court. In state court property would receive protections not available in federal court and state agencies would not be allowed to directly profit from the forfeitures they obtained. Additionally, there would be a high bar for transfer to federal court which could be met only by a showing that the forfeiture was interstate in nature and sufficiently complex, that the property could only be forfeited under federal law, or that state forfeiture proceedings would unduly burden state prosecutors or law enforcement. Utah Code Ann. § 24-4-114.

In sum, “Initiative B would make government accountable and

establish legislative oversight for the first time.” *Id.* at 50 “Rebuttal to.”

## **2.2 The 2004 Amendments to Forfeiture and Disputation of Property Act Strengthened, not Weakened, the Protections Offered by Initiative B**

After losing the public battle against Initiative B, law enforcement agencies fought the new law in court. Ultimately, they lost the court battle, *Kennard v. Leavitt*, 246 F. Supp. 2d 1177 (D. Utah 2002), but some agencies continued to openly flaunt the law.

A January, 2003, state auditor report found “that law enforcement agencies [in Weber, Salt Lake, and Davis] counties kept more than \$237,000 in forfeited revenue for law enforcement rather than depositing the funds in the education account.” Scott G. Bullock, *Ending "Policing for Profit": IJ Represents Utah Citizens Fighting Forfeiture Abuse*, 12:4 Law and Liberty Newsletter (Inst. for Justice), August 2003.<sup>15</sup> Only after facing lawsuit did the counties back down and surrender the misappropriated funds. Scott G. Bullock, *IJ Helps End Utah's Prosecution for Profit*, 12:5 Law and Liberty Newsletter (Inst. for Justice), October 2003.<sup>16</sup>

Ultimately, law enforcement turned to the State Legislature to reverse the will of the voters. In response, the Legislature passed S.B. 175. The purpose of the bill was to “increase[] innocent owner

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<sup>15</sup> Available at <http://ij.org/ll/august-2003-volume-12-number-4/ending-policing-for-profit-ij-represents-utah-citizens-fighting-forfeiture-abuse/> (last visited Oct. 9, 2017).

<sup>16</sup> Available at <http://ij.org/ll/october-2003-volume-12-number-5/ij-helps-end-utahs-prosecution-for-profit/> (last visited Oct. 9, 2017).

protections” and “repeal[] the provision for depositing forfeiture proceeds in the Uniform School Fund” and “create[] a restricted account for specified state forfeiture funds, and provide[] that funds in the account shall be appropriated to the Commission on Criminal and Juvenile Justice.” S.B. 175, 2004 General Session (enacted).<sup>17</sup> In other words, Initiative B’s protections were left intact, even strengthened, by the changes. And although S.B. 175 allowed police to access forfeited funds, they cannot do so directly but must request it from a restricted account. As the bill’s sponsor put it, “[t]he goal of the bill [was] to maintain and strengthen the property rights as instituted by Initiative B ... We want to maintain and even strengthen those property rights....” Rep. Stephen Urquhart, S.B. 175, Utah House Floor Debate, March 2, 2004.

The pertinent fact about these amendments is not that they were undertaken at the behest of law enforcement, but rather that despite law enforcement opposition to Initiative B the Legislature intended to “maintain and strengthen the property rights as instituted by Initiative B” even while permitting limited law enforcement use of these assets with oversight.

### **3. Title 24 of the Utah Code Confers on the State Courts In Rem Jurisdiction Over Assets Seized for Forfeitures.**

Authority for state agents to seize property is statutorily controlled. *See* Utah Code Ann. § 24-2-102 “Grounds for seizing

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<sup>17</sup> Available at <https://le.utah.gov/~2004/bills/static/SB0175.html> (last visited Oct. 9, 2017).

property.” Property may be seized pursuant to a warrant. *Id.* at § 24-2-102(1). Or it may be seized without a warrant (a) incident to arrest; (b) when the property is subject to a court injunction or forfeiture order; or (c) when the property is dangerous to health, evidence of a crime, the instrument of a crime, or the proceeds of a crime. *Id.* at § 24-2-102(2).

The parties agree that property seized pursuant to a state court warrant is subject to the in rem jurisdiction of the state courts. They disagree over the jurisdictional status of property seized without a warrant.

The current version of the statute directly describes jurisdiction once: “A state district court has jurisdiction over any action filed in accordance with this title.” *Id.* at § 24-1-103(1). At first glance, this passage seems to indicate that state district courts have jurisdiction only after forfeiture action is filed in court. But if that were the case, Appellee UHP would likewise be wrong in conceding that a court-ordered warrant grants jurisdiction because a warrant is not an “action” any more than an arrest warrant is criminal indictment or information. In other words, Appellant’s concession that limiting jurisdiction to after a forfeiture action is filed is too restrictive. Furthermore, the fact that the district court has jurisdiction over “any filed action” says nothing about which court has jurisdiction between seizure and the time an action is filed.

The key to understanding § 24-1-103(1), and reconciling the

entirety of Title 24, is two-fold. First, § 24-1-103(1) applies to situations where a forfeiture action was commenced against a non-seized property or a property originally seized for evidentiary or investigative purposes, but does not control jurisdiction for seized assets. Second, this section does not refer to in rem jurisdiction at all. The rest of the section states that jurisdiction granted the district court is “regarding: (a) all interests in property if the property is within this state at the time the action is filed; and (b) a claimant’s interests in the property, if the claimant is subject to the personal jurisdiction of the district court.” *Id.* In other words, the section is granting state courts subject matter jurisdiction over interests in the property, not in rem jurisdiction over the property itself.

Given the absence of language explicitly discussing in rem jurisdiction, we must look to the entirety of Title 24’s text to understand in rem jurisdiction under the act. And reading the entirety of the act shows that jurisdiction is gained over property seized for forfeiture at the moment of seizure. This can be inferred most readily from two provisions, Utah Code Ann. § 24-4-108 and § 24-4-114.

### **3.1 Utah Code Ann. §24-4-108(4) Directly Confers In Rem Jurisdiction to State Courts over Property Seized for Forfeiture**

In a direct grant of jurisdiction, Utah Code Ann. § 24-4-108(4) states that “Property held for forfeiture is considered to be in the custody of the district court.” Although this passage is often

overlooked because it seems to speak in terms of custody and not jurisdiction, it was reasonable language for drafters to use to grant State courts in rem jurisdiction over seized assets. This is because state and federal courts in the early 2000s would have understood the phrase as a legal term of art imbuing state courts with in rem jurisdiction at the moment a state agent seizes property under the color of state law.

For example, in *United States v. Kama*, 394 F.3d 1236, n2. (9th Cir. 2005) (Ferguson, C.J., concurring specially), the court noted that: “The Fifth Circuit has held that, where a state statute places items seized by local law enforcement under judicial control, seizure by state police itself constitutes an assertion of in rem jurisdiction over the seized item.” (citing *Scarabin v. DEA*, 966 F.2d 989, 993-94 (5th Cir. 1992)).

In *In re \$ 490,920 in United States Currency*, 911 F. Supp. 720, 725 (S.D.N.Y. 1996), a New York State court found that a New York statute conferred in rem jurisdiction where it provided that seized items be held “in the custody of the court.”

And in *Commonwealth v. Rufo*, 429 Mass. 380, 708 N.E.2d 947, 949 (Mass. 1999) the Massachusetts Supreme Court found that a Massachusetts statute conferred in rem jurisdiction where it provided that seized evidence be held “under the direction of the court” and “disposed of as the court or justice orders.” (citing Massachusetts General Laws Annotated 276, Section 3).

These cases show that language granting a court control over seized property is a grant of in rem jurisdiction. There is no magical incantation required, just common-sense language giving the court control over the property. Such language exists in Utah's statute: assets seized for forfeiture are "in the custody of the district court." Thus, the explicit language of Utah's statute places items seized by a state agent for forfeiture into the in rem jurisdiction of the state courts.

### **3.2 Utah Code Ann. §24-4-114 Strongly Implies that State Courts Are Imbued with In Rem Jurisdiction and the Moment of Seizure**

Utah Code Ann. § 24-4-114 provides additional evidence that state courts have in rem jurisdiction at the time of seizure.

The section places certain restrictions on agencies that have seized property and held it for forfeiture:

Seizing agencies or prosecuting attorneys authorized to bring forfeiture proceedings under this chapter may not directly or indirectly transfer property held for forfeiture and not already named in a criminal indictment to any federal agency or any governmental entity not created under and subject to state law unless the court enters an order, upon petition of the prosecuting attorney, authorizing the property to be transferred.

Utah Code Ann. § 24-4-114(1)(a). This subsection is clearly designed to prevent state agencies from side-stepping state protections through the use of federal equitable sharing. Unless the seized property is already named in a federal indictment, the property cannot be transferred without a petition and court authorization. This assumes that state courts have jurisdiction over forfeited assets at the moment

of seizure. If the property were not in the jurisdiction of the court, there would be no basis to require a court order before the transfer.

A major flaw with the State's argument is that it places seized property into a temporary jurisdictional limbo. Seized property – much like Schrodinger's cat – would not be subject to any identifiable due process until someone takes some court action. In other words, just like opening the box determines whether the cat is alive or dead, it is the filing of an action in court that crystalizes which procedural due process property will receive. But this is problematic because an essential tenet of constitutional law is that property must be seized *pursuant* to due process. *See, e.g.*, U.S. Const. amend. IV; U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; Utah Const. art. I, § 7; Utah Const. art. I, § 14. Seizing property without a known, identifiable process is the exact sort of state action Initiative B was meant to prevent.

#### **4. Practical Consequences**

##### **4.1 Holding that the Notice of Intent of Forfeiture Does Not Imbue State Courts with in rem Jurisdiction Would Work a Manifest Injustice on a Property Owners Legitimate Due Process Expectations.**

Utah Code Ann. § 24-4-103 requires a seizing agency to serve a notice of intent to seek forfeiture on known claimants. The notice “shall describe the: (i) date of the seizure; (ii) property seized; (iii) claimant's rights and obligations under this chapter, including the availability of hardship relief in appropriate circumstances; and (iv) statutory basis for the forfeiture, including the judicial proceedings

by which property may be forfeited under this chapter.” *Id.* at § 24-4-103(1)(b). In other words, property owners are specifically notified of their rights, obligations, and judicial remedies under *state law*. UHP’s position that the notice does not put jurisdiction with state courts would allow the expectations created by that notice to be frustrated. A property owner told by a state agent that a specific course of proceedings would govern the forfeiture could suddenly be surprised by another agency swooping in at the last moment and imposing a wholly different set of forfeiture proceedings without going through the expected transfer proceedings. Frustrating the justified due-process-expectations of the property owner would work a manifest injustice on the property owner.

#### **4.2 Initiative B Was to End Policing for Profit; Ruling for UHP Allows It to Continue Unchecked**

Initiative B took great pains to end policing for profit.

Originally, the measure prevented law enforcement from using any part of forfeited assets by directing all proceeds to the Unified School Fund. *Utah Voter Guide* at 48. The 2004 amendments allowed police to once again use forfeited assets, but subject to severe restrictions: proceeds would be deposited into a restricted account, Utah Code Ann. § 24-4-116, and only obtainable indirectly through a State Asset Forfeiture Grant program, *see id.* at § 24-4-117. The grant program allows agencies to apply for forfeited assets, requires agencies to demonstrate need and ability to appropriately use the funds, declares permissible and impermissible uses of the funds, and necessitates

permission of the applying agency's governing legislative body. *Id* at § 24-4-117. By disallowing the direct assumption and use of forfeited assets, as well as placing restrictions and oversight on their use, Utah law minimizes the incentive for law enforcement to initiate forfeiture for profit motives.

Federal law, however, does not contain these restrictions. And the equitable sharing program permits agencies to obtain direct access to 80% of the proceeds of the forfeited assets. John Worrall, Office of Cmty. Oriented Policing Servs., U.S. Dep't of Justice, Problem-Oriented Guides for Police Response Guide Series No. 7: Asset Forfeiture 8 (2008).<sup>18</sup> Under UHP's vision of the statute, state agencies can seize property under state law, ignore state law protections by turning the seizure over to the federal government without a court ordered transfer, and then receive the proceeds back with no strings attached, cleansed by federal forfeiture proceedings. At best this resembles forum shopping and, at worst, money laundering. This is exactly the result that Title 24 was intended to prevent. If state courts are not granted jurisdiction at the moment of seizure, state agencies can effectively nullify all the protections put in place by Initiative B and its amendments.

### **Conclusion**

Federal Civil Asset Forfeiture has become a juggernaut that arguably exceeds constitutional boundaries. In response to abuses

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<sup>18</sup> Available at <https://www.hSDL.org/?abstract&did=682384> (last visited Oct. 9, 2017).

and overreach, numerous states, including Utah, enacted reforms to tame the beast. In Utah, voters did so with specific intent to curtail the twin problems of policing for profit and weak due process in the federal regime. Under Title 24 of the state code, police are required to give owners of seized assets notice of their rights, obligations, and recourses under state law. Furthermore, the law gives custody of assets seized for forfeiture to the state district courts and then directs that those assets are only subject to the orders of the state court and may only be transferred to the federal system under a limited set of circumstances.

Perhaps what makes the objectionable forms of civil asset forfeiture so viscerally repulsive is that they fly in the face of the rule of law itself. Without a predetermined set of rules governing who can take property, under what circumstances, and with what oversight, seizures can become arbitrary. To the property owner it feels like governmentally sanctioned theft. *See, e.g.,* Sarah Stillman, Taken, *The New Yorker*, Aug 12 & 19, 2013;<sup>19</sup> Conor Friedersdorf, Jeff Sessions Treads on the Property Rights of Americans, *The Atlantic*, Jul. 19, 2017 (referring to asset forfeiture as “highway robbery perpetrated against American citizens by their own government”).<sup>20</sup> Title 24 is a valiant effort to set out a complete set of

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<sup>19</sup> Available at

<https://www.newyorker.com/magazine/2013/08/12/taken> (last visited Oct. 4, 2014).

<sup>20</sup> Available at

<https://www.theatlantic.com/politics/archive/2017/07/jeff-sessions->

procedures delineating the permissible boundaries of asset forfeiture in Utah. While certain passages, particularly those respecting the various forms of jurisdiction, could have been drafted more explicitly, reading the Act as a whole makes it clear that the intent and purpose was to have state agents act under state law with state protections administered by state courts. Regardless of whether it is because the seizure gives state courts in rem jurisdiction or because the issuance of a notice of intent by a state agent gives state court in rem jurisdiction, the outcome is that state courts have in rem jurisdiction.

Allowing state agencies acting under the color of state law to seize property and then opt-out of state restrictions at their discretion makes a mockery of the rule of law and the procedures laid out by Title 24. It makes state agents a law unto themselves.

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[treads-on-the-property-rights-of-americans/533979/](#) (last visited Oct. 9, 2017).

**PROOF OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Brief of The Libertas Institute as *Amicus Curiae* Supporting Appellant was sent via e-mail to the following

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## CERTIFICATE OF COMPLIANCE

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This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

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DATED October 9, 2017.

/s/ Adam Pomeroy

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ADAM R. POMEROY

# Addenda

# Addendum A

Utah Code § 24-1-103

**24-1-103. Jurisdiction and venue.**

(1) A state district court has jurisdiction over any action filed in accordance with this title regarding:

(a) all interests in property if the property is within this state at the time the action is filed; and

(b) a claimant's interests in the property, if the claimant is subject to the personal jurisdiction of the district court.

(2)

(a) In addition to the venue provided for under Title 78B, Chapter 3, Part 3, Place of Trial -- Venue, or any other provisions of law, a proceeding for forfeiture under this title may be maintained in the judicial district in which:

(i) any part of the property is found; or

(ii) a civil or criminal action could be maintained against a claimant for the conduct alleged to constitute grounds for forfeiture.

(b) A claimant may obtain a change of venue under Section 78B-3-309.

*Available at* <https://le.utah.gov/xcode/Title24/Chapter1/24-1-S103.html>

Utah Code Ann. § 24-2-102

**24-2-102. Grounds for seizing property.**

(1) Property may be seized by a peace officer or any other person authorized by law upon process issued by a court having jurisdiction over the property in accordance with the Utah Rules of Criminal Procedure relating to search warrants or administrative warrants.

(2) Property may be seized under this chapter when:

- (a) the seizure is incident to an arrest;
- (b) the property seized is the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this title; or
- (c) the peace officer or other person authorized by law has probable cause to believe that the property:
  - (i) is directly or indirectly dangerous to health or safety;
  - (ii) is evidence of a crime;
  - (iii) has been used or was intended to be used to commit a crime; or
  - (iv) is proceeds of a crime.

*Available at* <https://le.utah.gov/xcode/Title24/Chapter2/24-2-S102.html>

Utah Code Ann. § 24-4-103

**24-4-103. Initiating forfeiture proceedings -- Notice of intent to seek forfeiture.**

(1)

- (a) Within 30 days from the date that property is seized, an agency seeking to forfeit property shall serve a notice of intent to seek forfeiture upon any claimants known to the agency.
- (b) The notice of intent to seek forfeiture shall describe the:
  - (i) date of the seizure;
  - (ii) property seized;
  - (iii) claimant's rights and obligations under this chapter, including the availability of hardship relief in appropriate circumstances; and
  - (iv) statutory basis for the forfeiture, including the judicial proceedings by which property may be forfeited under this chapter.
- (c) The notice of intent to seek forfeiture shall be served by:
  - (i) certified mail, return receipt requested, to the claimant's known address; or
  - (ii) personal service.
- (d) The court may void any forfeiture made without notice under Subsection (1)(a), unless the agency demonstrates:
  - (i) good cause for the failure to give notice to the claimant; or
  - (ii) that the claimant had actual notice of the seizure.

(2)

(a) Once the agency has served each claimant with a notice of intent to seek forfeiture, but no later than 60 days from the date that property is seized, the agency shall present a written request for forfeiture to the prosecuting attorney.

(b) The written request shall:

(i) describe the property to be forfeited; and

(ii) include a copy of all reports, supporting documents, and other evidence necessary for the prosecuting attorney to determine the legal sufficiency for filing a forfeiture action.

*Available at* <https://le.utah.gov/xcode/Title24/Chapter4/24-4-S103.html>

Utah Code Ann. § 24-4-108

**24-4-108. Release of property held for forfeiture on certain grounds.**

- (1) After the seizing agency gives notice that the property is to be held for forfeiture, a person or entity may not alienate, convey, sequester, or attach that property until the court issues a final order of dismissal or an order of forfeiture regarding the property.
- (2) The seizing agency or the prosecuting attorney may authorize the release of property held for forfeiture to a claimant if retention of actual custody is unnecessary.
- (3) With the consent of a court of competent jurisdiction, the prosecuting attorney may discontinue forfeiture proceedings and transfer the action to another state or federal agency that has initiated forfeiture proceedings involving the same property.
- (4) Property held for forfeiture is considered to be in the custody of the district court and subject only to:
  - (a) the orders and decrees of the court having jurisdiction over the property or the forfeiture proceedings; and
  - (b) the acts of the agency that possesses the property or the prosecuting attorney pursuant to this chapter.
- (5)
  - (a) A claimant may obtain release of property held for forfeiture by posting with the district court a surety bond or cash in an amount equal to the current fair market value of the

property as determined by the court or by the parties' stipulation.

(b) The district court may refuse to order the release of the property if:

- (i) the bond tendered is inadequate;
- (ii) the property is contraband or is retained as evidence; or
- (iii) the property is particularly altered or designed for use in conduct giving cause for forfeiture.

(c) If a surety bond or cash is posted and the court later determines that the property is subject to forfeiture, the court shall order the forfeiture of the surety bond or cash in lieu of the property.

(6) A claimant is entitled to the immediate release of property held for forfeiture pending the final determination of forfeiture if:

(a) the claimant had a possessory interest in the property at the time of seizure;

(b) continued possession by the agency or the state pending the final disposition of the forfeiture proceedings will cause substantial hardship to the claimant, such as:

- (i) preventing the functioning of a legitimate business;
- (ii) preventing any individual from working;

- (iii) preventing any child from attending elementary or secondary school;
    - (iv) preventing or hindering any person from receiving necessary medical care;
    - (v) hindering the care of an elderly or disabled dependent child or adult;
    - (vi) leaving any individual homeless; or
    - (vii) any other condition that the court determines causes a substantial hardship;
  - (c) the hardship from the continued possession of the property by the agency outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and
  - (d) determination of substantial hardship under this Subsection (6) is based upon the property's use prior to the seizure.
- (7) After the seizing agency gives notice that the property is to be held for forfeiture, a claimant may file a motion for hardship release:
  - (a) in the court in which forfeiture proceedings have commenced; or
  - (b) in any district court having jurisdiction over the property, if forfeiture proceedings have not yet commenced.

(8) The motion for hardship release shall also be served upon the prosecuting attorney or the seizing agency within 10 days after filing the motion.

(9) The court shall render a decision on a motion for hardship filed under this section not later than 20 days after the date of filing, or 10 days after service upon the prosecuting attorney or seizing agency, whichever is earlier, unless this period is extended by the agreement of both parties or by the court for good cause shown.

(10)

(a) If the claimant demonstrates substantial hardship pursuant to this section, the court shall order the property immediately released to the claimant pending completion of proceedings by the government to obtain forfeiture of the property.

(b) The court may place conditions on release of the property as it finds necessary and appropriate to preserve the availability of the property or its equivalent for forfeiture.

(11) The hardship release under this section does not apply to:

(a) contraband;

(b) currency or other monetary instrument or electronic funds; or

(c) property that is likely to be used to commit additional illegal acts if returned to the claimant.

(12)

(a) The court may order property that is held for forfeiture to be sold, as allowed by Subsection (13), leased, rented, or operated to satisfy a specified interest of any claimant, or to preserve the interests of any party on motion of that party.

(b) The court may enter orders under Subsection (12)(a) after written notice to persons known to have an interest in the property, and after an opportunity for a hearing.

(13)

(a) A sale may be ordered under Subsection (12) when the property is liable to perish, waste, or be significantly reduced in value, or when the expenses of maintaining the property are disproportionate to its value.

(b) A third party designated by the court shall dispose of the property by commercially reasonable public sale and distribute the proceeds in the following order of priority:

(i) first, for the payment of reasonable expenses incurred in connection with the sale;

(ii) second, for the satisfaction of any interests, including those of interest holders, in the order of their priority as determined by Title 70A, Uniform Commercial Code; and

(iii) third, any balance of the proceeds shall be preserved in the actual or constructive custody of the

court, in an interest-bearing account, subject to further proceedings under this chapter.

*Available at* <https://le.utah.gov/xcode/Title24/Chapter4/24-4-S108.html>

Utah Code Ann. § 24-4-114

**24-4-114. Transfer and sharing procedures.**

(1)

(a) Seizing agencies or prosecuting attorneys authorized to bring forfeiture proceedings under this chapter may not directly or indirectly transfer property held for forfeiture and not already named in a criminal indictment to any federal agency or any governmental entity not created under and subject to state law unless the court enters an order, upon petition of the prosecuting attorney, authorizing the property to be transferred.

(b) The court may not enter an order authorizing a transfer under Subsection (1)(a) unless:

(i) the conduct giving rise to the investigation or seizure is interstate in nature and sufficiently complex to justify the transfer;

(ii) the property may only be forfeited under federal law; or

(iii) pursuing forfeiture under state law would unreasonably burden prosecuting attorneys or state law enforcement agencies.

(c) A petition to transfer property to a federal agency under this section shall include:

(i) a detailed description of the property seized;

- (ii) the location where the property was seized;
- (iii) the date the property was seized;
- (iv) the case number assigned by the seizing law enforcement agency; and
- (v) a declaration that:
  - (A) states the basis for relinquishing jurisdiction to a federal agency;
  - (B) contains the names and addresses of any claimants then known; and
  - (C) is signed by the prosecutor.

(d) The court may not authorize the transfer of property to the federal government if the transfer would circumvent the protections of the Utah Constitution or of this chapter that would otherwise be available to the property owner.

(e)

- (i) Prior to granting any order to transfer pursuant to this section, the court shall give any claimant the right to be heard with regard to the transfer by the mailing of a notice to each address contained in the declaration.
- (ii) If no claimant objects to the petition to transfer property within 10 days of the mailing of the notice, the court shall issue its order under this section.
- (iii) If the declaration does not include an address for a claimant, the court shall delay its order under this

section for 20 days to allow time for the claimant to appear and make an objection.

(f)

(i) If a claimant contests a petition to transfer property to a federal agency, the court shall promptly set the matter for hearing.

(ii)

(A) The court shall determine whether the state may relinquish jurisdiction by a standard of preponderance of the evidence.

(B) In making the determination, the court shall consider evidence regarding hardship, complexity, judicial and law enforcement resources, and any other matter the court determines to be relevant.

(2) All property, money, or other things of value received by an agency pursuant to federal law, which authorizes the sharing or transfer of all or a portion of forfeited property or the proceeds of the sale of forfeited property to an agency:

(a) shall be used in compliance with federal laws and regulations relating to equitable sharing;

(b) may be used for those law enforcement purposes specified in Subsection 24-4-117(9); and

(c) may not be used for those law enforcement purposes prohibited in Subsection 24-4-117(10).

(3) A state or local law enforcement agency awarded any equitable share of property forfeited by the federal government may only use the award money after approval of the use by the agency's legislative body.

*Available at* <https://le.utah.gov/xcode/Title24/Chapter4/24-4-S114.html>

Utah Code Ann. § 24-4-116

**24-4-116. Criminal Forfeiture Restricted Account.**

- (1) There is created within the General Fund a restricted account known as the "Criminal Forfeiture Restricted Account."
- (2) Proceeds from forfeited property and forfeited money through state forfeitures shall be deposited into the account.
- (3) Money in the account shall be appropriated to the commission for implementing the program under Section 24-4-117.

*Available at* <https://le.utah.gov/xcode/Title24/Chapter4/24-4-S116.html>

Utah Code Ann. § 24-4-117

**24-4-114. Transfer and sharing procedures.**

(1)

(a) Seizing agencies or prosecuting attorneys authorized to bring forfeiture proceedings under this chapter may not directly or indirectly transfer property held for forfeiture and not already named in a criminal indictment to any federal agency or any governmental entity not created under and subject to state law unless the court enters an order, upon petition of the prosecuting attorney, authorizing the property to be transferred.

(b) The court may not enter an order authorizing a transfer under Subsection (1)(a) unless:

(i) the conduct giving rise to the investigation or seizure is interstate in nature and sufficiently complex to justify the transfer;

(ii) the property may only be forfeited under federal law; or

(iii) pursuing forfeiture under state law would unreasonably burden prosecuting attorneys or state law enforcement agencies.

(c) A petition to transfer property to a federal agency under this section shall include:

(i) a detailed description of the property seized;

- (ii) the location where the property was seized;
- (iii) the date the property was seized;
- (iv) the case number assigned by the seizing law enforcement agency; and
- (v) a declaration that:
  - (A) states the basis for relinquishing jurisdiction to a federal agency;
  - (B) contains the names and addresses of any claimants then known; and
  - (C) is signed by the prosecutor.
  - (d) The court may not authorize the transfer of property to the federal government if the transfer would circumvent the protections of the Utah Constitution or of this chapter that would otherwise be available to the property owner.

(e)

- (i) Prior to granting any order to transfer pursuant to this section, the court shall give any claimant the right to be heard with regard to the transfer by the mailing of a notice to each address contained in the declaration.
- (ii) If no claimant objects to the petition to transfer property within 10 days of the mailing of the notice, the court shall issue its order under this section.

(iii) If the declaration does not include an address for a claimant, the court shall delay its order under this section for 20 days to allow time for the claimant to appear and make an objection.

(f)

(i) If a claimant contests a petition to transfer property to a federal agency, the court shall promptly set the matter for hearing.

(ii)

(A) The court shall determine whether the state may relinquish jurisdiction by a standard of preponderance of the evidence.

(B) In making the determination, the court shall consider evidence regarding hardship, complexity, judicial and law enforcement resources, and any other matter the court determines to be relevant.

(2) All property, money, or other things of value received by an agency pursuant to federal law, which authorizes the sharing or transfer of all or a portion of forfeited property or the proceeds of the sale of forfeited property to an agency:

(a) shall be used in compliance with federal laws and regulations relating to equitable sharing;

(b) may be used for those law enforcement purposes specified in Subsection 24-4-117(9); and

(c) may not be used for those law enforcement purposes prohibited in Subsection 24-4-117(10).

(3) A state or local law enforcement agency awarded any equitable share of property forfeited by the federal government may only use the award money after approval of the use by the agency's legislative body.

*Available at* <https://le.utah.gov/xcode/Title24/Chapter4/24-4-S117.html>

# Addendum B

IN THE THIRD DISTRICT COURT, SILVER SUMMIT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

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KYLE SAVELY,	:	Case No. 170500070
	:	
Plaintiff,	:	Appellate Court Case No. 20170266
	:	
v	:	
	:	
CONTENTS OF THE NAUTICA	:	
CASE, et al.,	:	
	:	
Defendants.	:	With Keyword Index

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MOTIONS TO RECONSIDER AND SET ASIDE - MARCH 31, 2017

BEFORE

JUDGE KARA PETTIT

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CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER  
1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

1 I think - and I think going back to the point of  
2 which court is asserting jurisdiction first is kind of  
3 important and I think that kind of addresses - the two cases  
4 the Court wanted me to address, the Scarabin on the Fifth  
5 Circuit and the U.S. vs. \$506,000 from the Seventh Circuit.

6 THE COURT: Right.

7 MR. BOLANDER: And here's the - with my research,  
8 this particular situation - there's not a lot of case law. A  
9 situation where the federal, where the DEA obtains a seizure  
10 warrant to obtain, to assert jurisdiction over the property  
11 when there isn't any forfeiture proceedings initiated in  
12 state court. There's not a lot of case law and the only one  
13 I found was the one I cited, the one that district court case  
14 from Missouri, the matter of whatever it was, seizure warrant  
15 for the \$(inaudible). But these two cases, so the Scarabin -  
16 there's one aspect to the cases that petitioner cited, the  
17 Scarabin, especially Scarabin is all those cases where the  
18 federal court said we lack jurisdiction because the state  
19 court had jurisdiction, and I think almost all of them, one  
20 of two things was present, one was there was an actual state  
21 forfeiture proceeding as in, like the state actually filed  
22 forfeiture proceedings in court or -

23 THE COURT: Actually that's not - lots of them were  
24 not that actually.

25 MR. BOLANDER: The other situation though is where

1 you had a state court issuing a search warrant to obtain the  
2 property, and that's what happened in Scarabin. In fact I  
3 think the language in Scarabin is by virtue of issuing the  
4 search warrant that procured the seized funds - and that case  
5 - that's why I -

6 THE COURT: Actually I think both of those were.  
7 The Ninth Circuit case and the Fifth Circuit case were both -

8 MR. BOLANDER: Yeah, I think that one -

9 THE COURT: - search warrants.

10 MR. BOLANDER: I believe - let me see here. I  
11 think there are a couple for sure. Those two for sure are  
12 ones where the state court had issued a search warrant to go  
13 obtain the property and I think that's a little bit  
14 distinguishable from this case because in that case the state  
15 court actually did some sort of action and the action was I'm  
16 issuing a seizure warrant, go obtain this property.

17 THE COURT: Well, it wasn't a seizure warrant.

18 MR. BOLANDER: Sorry, seizure - search warrant.

19 THE COURT: It was a search warrant and pursuant to  
20 the search they found, you know, the proceeds that they then  
21 seized.

22 MR. BOLANDER: Right, and I think that's  
23 distinguishable from this case because in this case there was  
24 no action by this Court until its ruling last month in  
25 February when the petitioner filed the petition to release

1 the property. I think that's the big distinction is there's  
2 nothing that happened in this Court like the - and I think  
3 this goes also to the question of the state when they seized,  
4 when the trooper seized it they provided the petitioner with  
5 the intent to seize form.

6 The problem with the intent to seize form is that  
7 in itself doesn't actually initiate the actual forfeiture  
8 proceeding. That happens later, has to happen, you know,  
9 within 75 days after the seizure. But the importance of the  
10 intent is that's sort of the prerequisite in order to  
11 initiate the forfeiture proceedings in state court. Without  
12 that then the court may dismiss it, I think there's like two  
13 exceptions that they can't. But basically, that the  
14 prerequisite but that in itself doesn't actually start the  
15 actual proceeding to do that.

16 THE COURT: Right.

17 MR. BOLANDER: And so I think that's the difference  
18 is nothing happened in this court until this Court ruled on  
19 the petitioner's motion to return the property. I think  
20 that's distinguishable from cases where the state court  
21 initially issued the search warrant in the first place where  
22 it did some sort of affirmative act - you know, some sort of  
23 an action or order, something you can point to that says this  
24 Court exercised jurisdiction. I suppose in this case where  
25 there was no exercise of jurisdiction, and that's why I think

1 Judge Benson's opinion in Kennard vs. Leavitt makes a lot of  
2 sense for this case. It goes back to the simple question, it  
3 goes back to the simple criteria which is the court defers to  
4 assert jurisdiction, you know, actually do something to  
5 assert jurisdiction over the property, has jurisdiction and I  
6 think that, I think Judge Benson's logic is the way to kind  
7 of reconcile the concurrent jurisdictions, is which Court  
8 were - actually did something in this case -

9 THE COURT: Well, so did something but the Court is  
10 not doing anything when the state decides to file the  
11 petition, right? You're saying that if the state had  
12 actually filed a forfeiture petition, then the court would  
13 have done something?

14 MR. BOLANDER: Prior -

15 THE COURT: It's not actually a court doing  
16 anything, it's the state, right?

17 MR. BOLANDER: I should clarify, it should be  
18 either the court does something as in a search warrant or  
19 some sort of order or there's something actually initiated in  
20 the court such as filing the petition, you know, filing a  
21 petition for forfeiture. Again, had that happened in this  
22 case before the federal court issued its seizure warrant then  
23 I would, I would be of the opinion that this court would have  
24 jurisdiction. But since that didn't happen and the federal  
25 court issued its seizure warrant first, that conferred -

1 because there was no filing in state court or any sort of  
2 search warrant that sort of asserted jurisdiction over the  
3 property, at that point the federal court was the first one  
4 to obtain jurisdiction. And by that, it resolves this issue  
5 of DPS kind of being in between two courts ordering  
6 jurisdiction, which one, you know, did something or which one  
7 - or which court actually has a proceeding before it to  
8 consider that would confer jurisdiction. And -

9 THE COURT: So your view is that if the court had  
10 issued, if the state court had issued a search warrant, say,  
11 you know, the trooper wanted to conduct a search of the  
12 vehicle and didn't feel like he could do it without applying  
13 for a search warrant and the state issued a search warrant  
14 then he searched the vehicle pursuant to that search warrant,  
15 the state would have in rem jurisdiction then?

16 MR. BOLANDER: I think so because at that point  
17 what you have is an order from this court saying search the  
18 vehicle, you're looking, for whatever you're looking for. I  
19 think that would have conferred jurisdiction to this court.  
20 But again, this was a warrantless search, he had probable  
21 cause to think, you know, to search the vehicle and that's  
22 what happened.

23 So what I'm saying is this particular case, we're  
24 asking for, our motion to set aside is based on really narrow  
25 grounds. I want to be clear. We're not asking for an order

1 that says the state, you know, DPS is free to, you know,  
2 ignore state law when it doesn't want to comply. We're  
3 saying these, this is kind of an unusual situation where a  
4 federal court has come in - 'cause typically these cases, at  
5 least for the last year or two, these cases are almost always  
6 resolved, I think the vast majority are - stay in state  
7 court. This is one of the few where a federal, few limited  
8 circumstances where a federal court has come in with a  
9 seizure warrant. The fact that there wasn't any search  
10 warrant from this court, there wasn't any proceedings  
11 initiated prior to the seizure warrant, I think that, I  
12 think, I believe and I'm going along with Judge Benson's  
13 logic that that confers jurisdiction to the federal court.  
14 And even - and with jurisdiction to the federal court, I mean  
15 keep in mind too, the petitioner still has his full due  
16 process rights in federal court. I mean he can certainly  
17 contest the seizure warrant which, you know, based on his  
18 filings he's pretty much ready to do and even then if the  
19 federal, if the DEA - or sorry, I guess it's the U.S.  
20 Attorney's Office that would do the forfeiture, initiate  
21 forfeiture, he still has a full, a second bite at the apple  
22 to contest the lawfulness of the forfeiture.

23           So at this point, you know, we believe the federal  
24 court asserted jurisdiction with its seizure warrant and to  
25 resolve this conflict of who has jurisdiction, they first

1 asserted jurisdiction and the Court should set aside and let  
2 it play out in federal court.

3 THE COURT: Okay. So the language of, and you may  
4 have addressed this, but can you address it again if you  
5 have, the language of the statute that says property held for  
6 forfeiture is considered to be in the custody of the district  
7 court and subject only to the orders and decrees of the court  
8 having jurisdiction over the property. How do you - so...

9 MR. BOLANDER: Two ways to read that. One is the  
10 court having jurisdiction, in this case I'd argue it's the  
11 federal court the one having jurisdiction and -

12 THE COURT: But if the property is in the custody  
13 of the district court? Address that.

14 MR. BOLANDER: Well, that's the problem. If you  
15 read it, again, if - I think it goes back to what the Court  
16 was asking at the very beginning when I started talking was  
17 the conflict, the conflict is with that reading a federal  
18 court could never exercise jurisdiction unless basically it  
19 was one of its own, unless it was a federal officer seizing  
20 under federal law. I think that, I think that creates a  
21 conflict in situations like this where the federal court or  
22 the DEA and U.S. Attorney's Office obviously has an interest  
23 in this case and by simply saying by operation of law,  
24 federal courts always have, we'll have to always get a  
25 turnover order. I think that essentially preempts any sort