



## **BACKGROUNDER IN RE ONE 2011 INFINITI G37**

### **Executive Summary**

On March 4, 2015, police seized Massachusetts grandmother Malinda Harris’s Infiniti G37, based on their suspicion that her son, Trevice, was trafficking illegal drugs. At the time, Malinda had no idea that her son had been engaged in any illegal activities. Trevice owned a convenience store where Malinda occasionally helped out. Malinda had purchased the car in 2011, and she allowed her son to use the car because he only owned a motorcycle. Trevice fled Massachusetts after the 2015 seizure. On December 30, 2018, Trevice was tragically killed in Youngstown, Ohio.

There is no evidence showing why police seized Malinda’s Infiniti in March 2015. Nothing in the record explains the lengthy delay in which law enforcement apparently did nothing. In January 2020, approximately *five years* after taking her car, the Berkshire County, Massachusetts, District Attorney’s Office finally filed a legal complaint seeking legal authority to sell her car and keep the proceeds for itself and the Berkshire County Law Enforcement Task Force.

The Goldwater Institute is defending Malinda Harris in this forfeiture case to protect the private property rights of all Massachusetts residents against the state’s unjust and unconstitutional asset forfeiture laws.

Although some states have made significant improvements to their civil forfeiture laws, Massachusetts lags behind almost every other state and the federal government. A recent comprehensive study gives Massachusetts an “F” with respect to its civil asset forfeiture rules.<sup>1</sup> Innocent owners—whose property is used by someone else to commit a crime—are still required to prove themselves innocent, rather than the government being required to prove them guilty. Not only that, but Massachusetts law allows the police or prosecutors to take property upon a mere “probable cause” standard, making that state one of exceedingly few places in the United States where law enforcement can take property even if it is more likely than not that the property was *not* involved in a crime. There is no legal requirement that the value of a forfeiture be remotely proportional to the crime allegedly committed, and law enforcement agencies can still keep 100% of forfeiture proceeds for their own use. .

### **The Problem**

By using civil forfeiture, the police can take, keep, and profit from someone’s property without even charging the owner with a crime—much less convicting them of one. That is because Massachusetts law enforcement can use civil forfeiture to seize property based simply on “probable cause to institute the

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<sup>1</sup> *Policing for Profit, The Abuse of Civil Asset Forfeiture*, Institute for Justice (3rd ed., December 2020), <https://ij.org/report/policing-for-profit-3/?state=MA>

action.”<sup>2</sup> Unlike criminal forfeiture, the government is not required to prove that any crime occurred. In fact, in Massachusetts and many other states, no one even has to be *charged* with a crime for property to be confiscated.

That makes it easy—and lucrative—for the government to take and keep property, regardless of whether the owner is guilty or innocent. Hundreds of millions of dollars are forfeited in just this way every year across America.<sup>3</sup> Massachusetts confiscated at least \$327 million between 2000 and 2019.<sup>4</sup> Law enforcement officials even claim that they are reliant on money they take from their citizens, including innocent people, to fund their basic operations. But depending on confiscations from citizens who aren’t charged with a crime is a dangerous principle that threatens the liberty of all Americans.

Once property is seized, it is up to the owner to hire a lawyer and go to court to attempt to get his or her property back. No attorney is provided by the government, which means the property owner will need to spend thousands of dollars to even get into court. Furthermore, unlike in criminal cases, the government does not have to prove its case “beyond a reasonable doubt.” It must merely show that it had probable cause to initiate the forfeiture petition, which shifts the burden to the property owner to “prov[e] the property is not forfeitable.”<sup>5</sup>

The U.S. Supreme Court has even said that states may seize property from people who were unaware that their property was being used for a crime.<sup>6</sup> Fortunately, Massachusetts state law does not allow the property of an innocent owner to be taken “unless the owner thereof knew or should have known that such conveyance or real property was used in and for the business of unlawfully manufacturing, dispensing, or distributing controlled substances.”<sup>7</sup> A property owner is also entitled to a jury trial on whether their property should be forfeited.<sup>8</sup>

Still, Massachusetts law presumes that owners are guilty and requires them to prove their innocence—even though proving a negative is notoriously difficult. And if the owner is lucky enough to get property back, whoever held it still gets a paycheck because the government and their tow companies can charge owners hundreds or even thousands of dollars just for the “privilege” of having confiscated and held their property.

Like many laws, civil forfeiture was designed to address one problem and metastasized in ways its creators never imagined. It started as a way to stop organized crime and punish criminals who were beyond the reach of the law, either because they were beyond the jurisdiction of the government (like pirates) or because they were part of a vast criminal enterprise (like drug lords).<sup>9</sup> Massachusetts adopted its civil forfeiture laws to take the profit out of the sale of illegal drugs so that the mafia and

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<sup>2</sup> M.G.L.A. 94C § 47(d).

<sup>3</sup> *Policing for Profit, The Abuse of Civil Asset Forfeiture*, Institute for Justice (3rd ed., December 2020), <https://ij.org/report/policing-for-profit-3/pfp3content/introduction/>.

<sup>4</sup> *Policing for Profit, The Abuse of Civil Asset Forfeiture*, Institute for Justice (3rd ed., December 2020), <https://ij.org/report/policing-for-profit-3/?state=MA>

<sup>5</sup> M.G.L.A. § 47(d).

<sup>6</sup> *Bennis v. Michigan*, 516 U.S. 442 (1996).

<sup>7</sup> M.G.L.A. §47(c)(3).

<sup>8</sup> *Massachusetts v. One 1972 Chevrolet Van*, 431 N.E.2d 209 (Mass. 1982).

<sup>9</sup> Alan Nicgorski, *The Continuing Saga of Civil Forfeiture, The ‘War On Drugs,’ and the Constitution*, 91 Nw. U. L. Rev. 374, 380-83 (1996); Charlena Toro, *From Piracy to Prostitution—State Forfeiture of an Innocent Owner’s Property*, 11 BYU J. Pub. L. 209, 225 (1997).

gangs would be forced out of the business. It has now dissolved into an asset-focused cash grab that looks a little too much like extortion.

Civil forfeiture was never meant to be used to take property from innocent owners or from people who have not been convicted or even charged with a crime. But that is exactly what happens, every day.<sup>10</sup> The worst part is that victims of asset forfeiture are often the poor, who can least afford the loss of what little property they have—and who do not typically have the financial capacity to protect themselves in court.<sup>11</sup>

### **Harris is Fighting for the Property Rights of All Massachusetts Residents**

Malinda Harris endured the tragedy of burying her own child. At the time of his death, Trevice Harris was 37. After being lured to an apartment building in Youngstown, Ohio, he was robbed, beaten, and tortured. He then was forced into his car, driven to a dark alley, and shot in the head. It is hard enough to be a single mother, and it is utterly devastating to suffer the loss of a child. To Malinda, any further punishment feels like Trevice is being murdered again.

When she finally received notice in October 2020 that state officials sought to forfeit her Infiniti and Trevice's other property, she resolved to fight back, so she can leave something behind for Trevice's two young girls. She looked in vain for a lawyer to take on the fight, a problem made all the more difficult because of the COVID-19 pandemic. And although the state held onto her property for almost five years without providing any kind of hearing or due process, when it finally did file the necessary court documents, the County gave her only 20 days to respond.

She called the District Attorney's Office and asked for three months to find help. As it was, everywhere she looked, the doors were being shut. Despite sitting on her property for half a decade, and sitting on the complaint for more than nine months (the lawsuit should have been served within 90 days), the Berkshire County District Attorney only gave her two additional months, an extension that ended right after the Christmas and New Year's holidays. The fear and uncertainty of her situation—one shared by the thousands of innocent people who have had their property taken by the government and forced to fight for their rights on an unequal playing field—nearly broke her.

Malinda, however, knew she had to fight for her grandchildren. The impact of the forfeiture on her and her family, on top of everything else, is an unnecessary tragedy. Unfortunately, civil asset forfeiture abuse often hits the most vulnerable the hardest.

### **The Law**

Both the Massachusetts and U.S. Constitutions protect the rights of property owners against abusive civil forfeiture. The Goldwater Institute is bringing five separate defenses based on the constitutional provisions identified below.

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<sup>10</sup> Scott G. Bullock, *Policing for Profit: First Edition, The Abuse of Civil Asset Forfeiture*, Institute for Justice (March 2010), <https://ij.org/report/policing-for-profit-first-edition/>

<sup>11</sup> Jennifer McDonald, "Civil Forfeiture Hurts America's Poor," *Spotlight on Poverty & Opportunity*, (April 10, 2019), <https://spotlightonpoverty.org/spotlight-exclusives/civil-forfeiture-hurts-americas-poor/>

The first is that the government violated the Fourth and Amendment to the United States Constitution and the prohibition against unreasonable search and seizure in the Massachusetts Constitution by seizing Malinda's car without probable cause, and it violated the Due Process clauses of both the state and federal constitutions by its unreasonable five-year delay in filing and serving its Complaint for Forfeiture. Courts have thrown out forfeiture cases when the government delayed for as little as 18 months.<sup>12</sup> Harris is asking the judge to throw out the forfeiture petition in this case because of the unexplained 58-month delay in filing the forfeiture complaint and a 68-month delay before serving Harris.

Second, Massachusetts unconstitutionally places the burden of proof in innocent-owner cases on property owners to prove their innocence, rather than on the government to prove their guilt.

Third, Massachusetts violates the Due Process Clauses of the state and federal constitutions by providing prosecutors with an unconstitutional, impermissible profit incentive. Like most jurisdictions, Massachusetts allows the police and prosecutors to keep the net proceeds of confiscated property. At least two federal courts have ruled that similar financial bias on the part of the police and prosecutors may constitute a due process violation.<sup>13</sup>

Fourth, Massachusetts violates the state and federal constitutions by permitting the state to forfeit property without a criminal conviction or even proof that a crime occurred. In a criminal case, the government must prove the accused guilty of a crime. If it cannot, the accused goes free. This is flipped in civil forfeiture cases: An innocent owner of property is presumptively guilty until she proves herself innocent.<sup>14</sup> That burden (including substantial legal costs) often results in owners simply abandoning their rightful claims to seized property. And if they do not fight civil forfeiture, and the vast majority of citizens do not fight, the government wins by default.

Fifth, forfeiture of Malinda's Infiniti G37 violates the Excessive Fines Clause of the Massachusetts and United States Constitutions. Forfeiture is a form of punishment, meaning the punishment must fit the crime.<sup>15</sup> Massachusetts does not allege any criminal conduct on Malinda's part, nor does it allege her car was even used in her son's alleged drug dealing. So the seizure of her automobile is obviously excessive.

In Massachusetts, the District Attorney must file a separate civil action to start the judicial forfeiture process, and in cases like this, the property owner is entitled to a trial by jury. Malinda looks forward to presenting her case to a jury.

### Case Logistics

The defendant in this case is Malinda Harris, a Massachusetts resident.

The plaintiff in this case is the Commonwealth of Massachusetts.

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<sup>12</sup> *United States v. One 1984 Nissan 300 ZX*, 711 F.Supp 1570 (N.D. Ga. 1989).

<sup>13</sup> *Harjo v. City of Albuquerque*, 307 F.Supp.3d 1163, 1208 (D.N.M. 2018) (city's self-funded forfeiture program creates unconstitutional profit incentive); *Sourovelis v. City of Philadelphia*, 103 F.Supp.3d 694, 709 (E.D. Pa. 2015) (Defendants' retention of forfeited property and monetary proceeds may constitute a violation of due process).

<sup>14</sup> Luis Suarez, *Guilty Until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense*, 5 Tex. A&M. J. Prop. L. 1001, 1013 (2019).

<sup>15</sup> *Timbs v. Indiana*, 139 S.Ct. 682 (2019), *on remand*, *State v. Timbs*, 134 N.E.3d 12 (Ind. 2019).

In addition to the return of her Infiniti G37, Malinda Harris seeks to prove that it is unconstitutional to require innocent owners to prove their innocence, rather than requiring the government to prove their guilt. She seeks to prove that the impermissible financial incentive is unconstitutional. She seeks to have the forfeiture complaint dismissed because of the unreasonable delays by the Berkshire County District Attorney in seeking forfeiture. She also seeks to prove that the attempted forfeiture of his vehicle violates the Excessive Fines Clauses of the Massachusetts and U.S. Constitutions.

The District Attorney filed this action in January 2020, but did not serve Malinda Harris until October 2020. Malinda Harris has asked District Attorney Andrea Harrington to return her automobile. The Berkshire County agreed to return her car, but then reneged, leaving Harris no choice but to take on the Berkshire County District Attorney and the Berkshire County Law Enforcement Task Force (the entity that seized her car).

### **The Legal Team**

**Stephen Silverman** is a Senior Attorney at the Goldwater Institute.

**Martha Astor** is a Staff Attorney at the Goldwater Institute.

**The Goldwater Institute** opened in 1988, with the blessing of its namesake. Its early years focused on defending liberty in Barry Goldwater's home state of Arizona. Today, the Goldwater Institute is a national leader for constitutionally limited government, with hundreds of legislative and court victories to its name. In 2016 in Arizona, the Goldwater Institute successfully challenged home-sharing regulations and spearheaded the nation's first state home-sharing law to protect people's rights to share their homes, while allowing government to enforce reasonable rules against nuisances.