

**FLORIDA DISTRICT COURT OF APPEAL
THIRD DISTRICT**

**Case No. 3D2026-1363
Consolidated with 3D2026-1364; 3D2026-1365; 3D2026-1366;
3D2026-1367; 3D2026-1368; 3D2026-1369; 3D2026-1370**

L.T. CASE Nos. 25-15452-CA-01; 25-15459-CA-01;
25-15471-CA-01; 25-15495-CA-01; 25-15496-CA-01;
25-15499-CA-01; 25-15557-CA-01; 25-17753-CA-01

**SH AMERICAS, LLC, ET AL.,
FUTURE SMART DISTRIBUTION, INC., ET AL.,
5G INTERNATIONAL TRADING CORP., ET AL.,
BEST MOBILE, LLC, ET AL.,
SKYWIRE COMMUNICATIONS, INC.,
Appellants,**

v.

**MIAMI-DADE COUNTY SHERIFF'S OFFICE,
Appellee.**

On Appeal from a Final Order of the Circuit Court for the
Eleventh Judicial Circuit in and for Miami-Dade County,
Case No. 2025-015557-CA-01, and sixteen consolidated forfeiture
actions before Judge Ariana Fajardo Orshan

**BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE
IN SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Given the reduced due process protections in the context, the “limitations” imposed by this agreement are inadequate.....	3
II. Given the lesser due process protections available in forfeiture cases generally, the court should be <i>more</i> vigilant against mercenary prosecution.	9
III. The <i>Sparger-Withers</i> theory of allowing mercenary prosecutions of forfeiture cases is unpersuasive.	15
CONCLUSION	25
CERTIFICATE OF SERVICE	26
CERTIFICATE OF COMPLIANCE	28

TABLE OF AUTHORITIES

Cases

<i>Barnett Bank of Alachua County, N.A. v. Steinberg</i> , 632 So.2d 233 (Fla. Dist. Ct. App. 1994)	12
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	19, 22
<i>Born v. State</i> , 397 P.2d 924 (Okla. App. 1964)	23
<i>Carillon Community Residential v. Seminole County</i> , 45 So.3d 7 (Fla. Dist. Ct. App. 2010).....	9
<i>Commonwealth v. One 2011 Infiniti G37</i> , No. 2076CV00007 (Berkshire Cnty. Super. Ct. filed Jan. 10, 2020)	1
<i>Connolly v. State</i> , 366 So.3d 1142 (Fla. Dist. Ct. App. 2023)	21
<i>Cont'l Grain Co. v. The FBL-585</i> , 364 U.S. 19 (1960)	11
<i>County of Santa Clara v. Superior Ct.</i> , 235 P.3d 21 (Cal. 2010)	3, 4, 5, 9
<i>Culley v. Marshall</i> , 601 U.S. 377 (2024)	1, 16
<i>Department of Law Enforcement v. Real Property</i> , 588 So.2d 957 (Fla. 1991).....	2
<i>Dowis v. State</i> , 578 So.2d 860 (Fla. Dist. Ct. App. 1991).....	24
<i>E. St. Louis v. Monsanto Co.</i> , 720 F. Supp.3d 686 (S.D. Ill. 2024) ...	4
<i>Garron v. State</i> , 528 So.2d 353 (Fla. 1988).....	21
<i>In re Forfeiture of \$8,489.00</i> , 603 So.2d 96 (Fla. Dist. Ct. App. 1992)	11
<i>In re McKinney</i> , 948 N.E.2d 1154 (Ind. 2011).....	14

<i>Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority</i> , 795 So.2d 940 (Fla. 2001)	2, 10
<i>M.W. v. Davis</i> , 756 So.2d 90 (Fla. 2000)	10
<i>Meister v. People</i> , 31 Mich. 99 (1875)	20, 23
<i>Merck Sharp & Dohme Corp. v. Conway</i> , 861 F. Supp.2d 802 (E.D. Ky. 2012)	3, 5, 9
<i>Milborn’s Case</i> , 77 Eng. Rep. 420 (K.B. 1609)	18
<i>N. Fla. Women’s Health & Counseling Servs., Inc. v. State</i> , 866 So.2d 612 (Fla. 2003)	12
<i>People v. Lee Chuck</i> , 20 P. 719 (Cal. 1889)	20
<i>Randolph v. Randolph</i> , 146 Fla. 491 (1941)	18
<i>Routh v. Routh</i> , 565 So.2d 709 (Fla. Dist. Ct. App. 1990)	23
<i>Routly v. State</i> , 590 So.2d 397 (Fla. 1991)	21
<i>Sec. & Exch. Comm’n v. Jarkesy</i> , 603 U.S. 109 (2024)	16
<i>Sparger-Withers v. Taylor</i> , No. 1:21-cv-02824-JRS-CSW, 2024 WL 473719 (S.D. Ind. Feb. 7, 2024)	passim
<i>State v. Glosson</i> , 462 So.2d 1082 (Fla. 1985)	7, 8, 13
<i>State v. Lead Industries Ass’n</i> , 951 A.2d 428 (R.I. 2008) .	3, 4, 5, 6, 9
<i>State v. Williams</i> , 623 So.2d 462 (Fla. 1993)	10
<i>Taylor v. State</i> , 612 So.2d 626 (Fla. Dist. Ct. App. 1993), <i>aff’d</i> , 634 So.2d 1075 (Fla. 1994)	8
<i>Thalheim v. State</i> , 20 So. 938 (Fla. 1896)	24
<i>The Florida Bar v. Cox</i> , 794 So.2d 1278 (Fla. 2001)	19

<i>United States v. 817 N.E. 29th Drive</i> , 175 F.3d 1304 (11th Cir. 1999)	11
<i>United States v. All Assets of Statewide Auto Parts, Inc.</i> , 971 F.2d 896 (2d Cir. 1992)	11
<i>United States v. Certain Real & Pers. Prop.</i> , 943 F.2d 1292 (11th Cir. 1991)	11
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024)	17
<i>United States v. Roberson</i> , 897 F.2d 1092 (11th Cir. 1990)	9
<i>United States v. Ross</i> , 161 F.4th 100 (2d Cir. 2025)	1
<i>United States v. Sanders</i> , No. 22-2290, 2023 WL 8183302 (4th Cir. Nov. 27, 2023)	1
<i>United States v. U.S. Coin & Currency</i> , 401 U.S. 715 (1971)	12
<i>Van Lent v. Everglades Found., Inc.</i> , 400 So.3d 64 (Fla. Dist. Ct. App. 2024)	24
<i>Young v. U.S. ex rel. Vuitton et Fils S.A.</i> , 481 U.S. 787 (1987)	25

Statutes

1 Stat. 1 (1776)	16
------------------	----

Rules

Rule of Professional Conduct 4-1.5(f)(3)(B)	6
Rule of Professional Conduct 4-5.4	6, 7
Rule of Professional Conduct 4-5.4(c)	6
Rule of Professional Conduct 4-5.4(d)	6

Other Authorities

Barth, <i>Criminal Prosecution in American History: Private or Public?</i> , 67 S.D. L. Rev. 119 (2022)	20
Green, <i>Why Should Prosecutors “Seek Justice”?</i> , 26 Fordham Urb. L.J. 607 (1999)	19
Greenberg & Litman, <i>The Meaning of Original Meaning</i> , 86 Geo. L.J. 569 (1998).....	16
Harmon, <i>Federal Programs and the Real Costs of Policing</i> , 90 NYU L. Rev. 870 (2015)	15
<i>John Adams: Revolutionary Writings 1755-1775</i> (Wood, ed. 2011) .	16
Karlan, <i>Contingent Fees and Criminal Cases</i> , 93 Colum. L. Rev. 595 (1993)	7
MacKinnon, <i>Contingent Fees for Legal Services</i> (1964)	22
Model Code of Professional Responsibility, American Bar Ass'n Rule EC 7-13	23
Model Code of Professional Responsibility, American Bar Ass'n Rule EC 7-14	23
Sandefur & Sandefur, <i>Cornerstone of Liberty: Property Rights in 21st-Century America</i> (2016)	1
Sandefur, <i>Predators, Not Protectors: How Asset Forfeiture Undermines the Legitimacy of Government</i> , Goldwater Inst. (Mar. 23, 2021).....	1, 2, 14
Sharswood, <i>Essay on Professional Ethics</i> (1884)	19, 20
<i>Standards Relating to the Prosecution Function and the Defense Function: The Prosecution Function</i> § 2.3 cmt. at 62 (Am. Bar. Ass’n 1971)	23

Ubbelohde, <i>The Vice-Admiralty Courts and the American Revolution</i> (1960)	16
Ward, <i>Private Prosecution—The Entrenched Anomaly</i> , 50 N.C. L. Rev. 1171 (1972).....	21

INTEREST OF AMICUS CURIAE

Goldwater Institute (“GI”) was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates cases and files amicus briefs when its or its clients’ objectives are directly implicated. Among GI’s priorities is the reining in of abusive asset-forfeiture practices, and to that end, GI has represented parties and appeared as amicus curiae in cases across the country involving forfeiture. *See, e.g., United States v. Ross*, 161 F.4th 100 (2d Cir. 2025); *United States v. Sanders*, No. 22-2290, 2023 WL 8183302 (4th Cir. Nov. 27, 2023); *Culley v. Marshall*, 601 U.S. 377 (2024); *Commonwealth v. One 2011 Infiniti G37*, No. 2076CV00007 (Berkshire Cnty. Super. Ct. filed Jan. 10, 2020). GI scholars have also published extensively about the abuses of asset forfeiture. *See, e.g., Sandefur & Sandefur, Cornerstone of Liberty: Property Rights in 21st-Century America* (2016); Sandefur,

Predators, Not Protectors: How Asset Forfeiture Undermines the Legitimacy of Government, Goldwater Inst. (Mar. 23, 2021).¹

INTRODUCTION AND SUMMARY OF ARGUMENT

The use of contingency counsel to prosecute forfeitures violates a crucial legal principle of even-handedness and justice—a principle that ethically binds prosecutors. The court below concluded otherwise, theorizing that the agreement between contingency counsel and the Sheriff’s Office provides “limitations”—i.e., oversight—to ensure objectivity and impartiality. Actually, those “limitations” are far too weak to accomplish that.

This is especially problematic, given that forfeiture cases are already subject to lax due process standards; if anything, contingency counsel should be required to meet higher standards to compensate. Here, applying the tests of *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991), and *Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority*, 795 So. 2d 940, 949 (Fla. 2001), it is plain that the contingency-prosecution arrangement violates due process.

¹ <https://www.goldwaterinstitute.org/policy-report/predators-not-protectors/>.

Nor is the purported “Originalist” argument adopted by *Sparger-Withers v. Taylor*, No. 1:21-cv-02824-JRS-CSW, 2024 WL 473719 (S.D. Ind. Feb. 7, 2024), at all persuasive. That decision ignored the way public prosecution has transformed in the years since the founding and committed other fallacies. This Court should not be similarly misled.

ARGUMENT

I. Given the reduced due process protections in the context, the “limitations” imposed by this agreement are inadequate.

The Circuit Court, relying on *Merck Sharp & Dohme Corp. v. Conway*, 861 F. Supp. 2d 802 (E.D. Ky. 2012), *County of Santa Clara v. Superior Ct.*, 235 P.3d 21 (Cal. 2010), and *State v. Lead Industries Ass’n*, 951 A.2d 428 (R.I. 2008), concluded that as long as government officials impose “limitations” on contingency counsel, due process is satisfied. Opinion at 16. But even assuming those cases establish the right standard, the agreement here falls short of what they found acceptable.

The arrangement in *Merck* was constitutional because “the government attorney or prosecutor”—that is, *non*-contingency counsel—“retain[ed] ‘full control over the course of the litigation.’”

861 F. Supp.2d at 815 (citation omitted). In *County of Santa Clara*, the court approved a contingency arrangement because “all critical discretionary decisions” were “made by the public entities’ government attorneys rather than by private counsel.” 235 P.3d at 38. And *Lead Industries* emphasized the need for “exacting limitations” on the discretion of contingency counsel, to ensure that “the Office of Attorney General retains ***absolute and total control over all critical decision-making.***” 951 A.2d at 475 (emphasis in original).²

With those standards in mind, consider the agreement here. The Circuit Court said it imposes two “limitations”: (1) that the county sheriff’s office request prosecution in writing, and (2) that settlements of forfeiture cases be approved by the head of the sheriff’s office. Opinion at 10. That’s all. Those supposed limitations are so threadbare, in fact, that the court used heavily qualified language to describe them: “The retainer agreement *does not explicitly set forth all*

² That case did not define “critical decision-making,” but other courts have said it requires that non-contingency counsel retain “complete control over the course and conduct of the case,” hold “a veto power ... over any decisions made by outside counsel,” and be “personal[ly] involve[d] ... in overseeing the litigation.” *E. St. Louis v. Monsanto Co.*, 720 F. Supp. 3d 686, 692 (S.D. Ill. 2024).

the restrictions [required by the constitution],” it admitted, but “*seems to indicate*” that the sheriff’s office initiates cases, and “*it appears* that [the private attorney] does not have the discretion” *Id.* at 16 (emphasis added).

These “limitations” are nowhere near what *Merck*, *Santa Clara*, and *Lead Industries* required. Unlike in *Merck*, 861 F. Supp. 2d at 815, contingency counsel has total control over the litigation. Contrary to *Santa Clara*, 235 P.3d at 38, the agreement does not subordinate contingency counsel to the control and supervision of public officials. And opposite to *Lead Industries*, 951 A.2d at 475, contingency counsel makes *all* critical discretionary decisions.

In short, the alleged “limitations” are inadequate. They only require the *sheriff’s office*—not a disinterested prosecutorial service—to request prosecution and approve settlements. But the sheriff’s office is not an impartial party; it stands to gain financially from successful forfeitures. The two purported limitations do not, therefore, defuse the potential risks of bias or other improprieties, because contingency counsel still has a financial motivation to prosecute litigation.

What's more, if the "limitations" *did* actually give the sheriff's office "absolute and total control over all [contingency counsel's] critical decision-making," *Lead Industries*, 951 A.2d at 475 (emphasis removed), the arrangement would violate Rules 4-5.4(c) and (d) of the Rules Regulating the Florida Bar.

Rule 4-5.4(d) prohibits an attorney from agreeing to an arrangement where her legal judgment is made subordinate to the decisions of non-lawyers. And Rule 4-5.4(c) forbids an attorney from "partnership with a nonlawyer [where] . . . the activities of the partnership consist of the practice of law." Yet the court below interpreted the "limitations" in the agreement as creating the kind of *supervisory oversight* necessary to ensure that contingency counsel acts in a disinterested, public capacity (the *opposite* of merely being a zealous advocate for a private client). If that were true, then the arrangement would violate Rule 4-5.4, because the sheriff is not an attorney, so the "limitations" would mean the attorney's legal judgment is subordinated to that of the sheriff, which would constitute a partnership for the practice of law.³

³ Of course, Rule 4-1.5(f)(3)(B) forbids attorneys from accepting contingency fees to represent criminal defendants. The rule doesn't

But, of course, the purported limitations do *not* violate the Rules—precisely because they don’t actually give the sheriff’s office control over contingency counsel’s critical decision-making. Instead, they’re just the ordinary requirements that apply to all *private* attorneys working for *private* clients—i.e., that clients must give permission for the filing of a lawsuit and the settling of a lawsuit. In short, the “limitations” don’t violate Rule 4-5.4 only because they are *insufficient* to ensure that contingency counsel is acting in a genuinely public character, as due process requires.

Even aside from that, the purported “limitations” are insufficient. In *State v. Glosson*, 462 So. 2d 1082 (Fla. 1985), the court said due process is violated when the government pays informants to bring charges, and to testify, with their payment contingent on conviction. The court said it “[could] imagine few

extend to prosecutions, because the rule was drafted with the assumption that prosecutions would be brought exclusively by salaried prosecutors—not because the concerns about bias and motivation underlying the prohibition are somehow nonexistent on that side of a case. “The reason we do not see [contingency] arrangements in criminal cases might thus be ascribed in part to the unique ethical role of prosecutors.” Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 595, 606 (1993). While forfeiture cases are formally civil, in substance they are criminal.

situations with more potential for abuse of a defendant's due process right[s]," in part because such arrangements gave informants "an enormous financial incentive . . . to make criminal cases." *Id.* at 1085. By contrast, in *Taylor v. State*, 612 So. 2d 626 (Fla. 1st DCA 1993), payment to an informant did not violate due process where it was not contingent on conviction and did not create an incentive encouraging prosecution—and where, importantly, the defendant had an opportunity to cross-examine witnesses about their potential financial stake in the outcome. *See id.* at 629–30 ("[T]he matter of the fee arrangement . . . was thoroughly explored below and was a matter of credibility for the jury to determine.").

Here, the arrangement has fewer "limitations" than the arrangements in either *Glosson* or *Taylor*. The informant in *Glosson* could not initiate legal proceedings and had no say in settling a case. He was not an attorney able to bring motions, issue subpoenas, etc. Here, the attorney is paid a contingency—and is also in the driver's seat of the lawsuit. Whereas in *Taylor*, the defendant could cross-examine the informant about his financial stake in the outcome, to enable the jury to judge bias and credibility, there is *no* such right here, since a prosecuting attorney is virtually never subject to being

called as a witness. *United States v. Roberson*, 897 F.2d 1092, 1098 (11th Cir. 1990).

Thus, even assuming that *Merck*, *Santa Clara*, and *Lead Industries* set forth the applicable test, the agreement here fails it. The two “limitations” are so far from guaranteeing disinterested, public control that the Circuit Court itself said it “does not explicitly set forth all the [necessary] restrictions” and only “*appears*” to limit the contingency counsel’s discretion in *only two respects*: the initiation and settlement of cases. Opinion at 16 (emphasis added). That’s far below what other courts have required.

II. Given the lesser due process protections available in forfeiture cases generally, the court should be *more* vigilant against mercenary prosecution.

Even if the two “limitations” were meaningful, they don’t satisfy due process. Since due process protections are already drastically reduced in the asset forfeiture context, any agreement of this sort should, if anything, be far *more* restrictive of contingency counsel’s power, to ensure fundamental fairness.

Due process is “flexible,” of course, *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010), meaning that “the extent of procedural due process protections varies with the

character of the interest and nature of the proceeding involved.” *M.W. v. Davis*, 756 So. 2d 90, 97 (Fla. 2000). Courts typically strike this balance by considering the following factors: (1) “the propriety of the state’s purpose”; (2) “the nature of the party being subjected to state action”; (3) what individual right is being targeted; (4) the “nexus” between the mechanism the state is using and its goal; (5) “whether less restrictive alternatives were available”; and (6) whether people are being treated “in a fundamentally unfair manner in derogation of their substantive rights.” *Real Prop.*, 588 So. 2d at 960. Another consideration is (7) “the probable value, if any, of additional or substitute procedural safeguards.” *Keys Citizens for Responsible Gov’t*, 795 So. 2d at 949.⁴

The court below failed to consider these factors. It also failed to consider the fact that because forfeiture cases are subject to *less* stringent due process protections than other types of proceedings, there should be *greater* protections in *other* aspects of those proceedings to ensure fundamental fairness.

⁴ Moreover, Florida courts have specifically “rejected” the leniency federal courts have employed when reviewing cases involving financial rewards for conviction. *See, e.g., State v. Williams*, 623 So. 2d 462, 464 (Fla. 1993).

Consider how relaxed the due-process protections are in forfeiture cases. The burden of proof is lower. *In re Forfeiture of \$8,489.00*, 603 So. 2d 96, 97 (Fla. 2d DCA 1992). There is no right to counsel. *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 n.14 (11th Cir. 1999). In federal court, there's no presumption of innocence. *United States v. Certain Real & Pers. Prop.*, 943 F.2d 1292, 1296 (11th Cir. 1991). In other words, the due-process protections in forfeiture cases are far below those in criminal cases, thanks to the “archaic . . . animistic . . . irrational and atavistic” fiction that the property is the defendant. *Cont'l Grain Co. v. The FBL-585*, 364 U.S. 19, 23 (1960) (cleaned up).

That's just why due-process protections in *other* aspects of forfeiture proceedings ought to be *increased*, to ensure fundamental fairness. As the Second Circuit has noted, “the government’s increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes” is “enormously troubl[ing],” and courts should therefore “preserve some modicum of due process” through a “courageous and sensitive application of their discretionary powers.” *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992).

With that in mind, consider the factors that must be balanced:

(1) *the propriety of the state's action*: while combatting crime is certainly proper, “forfeitures are considered harsh exactions,” *Real Prop.*, 588 So. 2d at 961, and the ethical propriety of doing so through mercenary prosecution is dubious;

(2) *the nature of the party being subjected to state action* is a property owner whose assets can be seized without the protections afforded in regular criminal proceedings and who may well be innocent of any wrongdoing⁵;

(3) *the right being targeted*: the right to private property is a fundamental right, *Barnett Bank of Alachua County, N.A. v. Steinberg*, 632 So. 2d 233, 234 (Fla. 1st DCA 1994), as is the right to fundamental fairness, *see N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 635 (Fla. 2003) (“[E]ach of the personal liberties enumerated in the Declaration of Rights is a fundamental right.”);

⁵ While innocent owners have a defense against forfeiture, many choose not to take advantage of it, not because they're guilty, but because doing so is costly and requires the waiver of Fifth Amendment rights. *See, e.g., United States v. U.S. Coin & Currency*, 401 U.S. 715, 721-23 (1971) (referring to the Hobson's choice between contesting forfeiture and waiving Fifth Amendment rights).

(4) *the nexus between means and ends*: this is perhaps the government's weakest point, for the very existence of a professional prosecutorial service shows that there are substantial downsides to mercenary prosecution (bias, prejudice, and undue zealotry);

(5) *the availability of less restrictive alternatives*: obviously, the availability of full-time prosecutors who are not financially interested in the outcome proves that there are readily available alternatives; indeed, many other states already ban for-profit prosecutions;

(6) *fundamental fairness*: the risk to fundamental fairness by a prosecutorial service that has a profit motive is obvious—it creates “an enormous financial incentive . . . to make criminal cases,” *Glosson*, 462 So. 2d at 1085; and

(7) *other benefits of alternatives*: the use of for-profit counsel in forfeiture undermines the credibility of the legal system in general.

These factors counsel firmly against the validity of a contingency arrangement such as this one. An arrangement of this sort is likely to increase the risk of biased prosecutions and to encourage counsel to target defendants with large assets instead of those who have most egregiously broken the law. It's likely to render prosecution less amenable to just settlements and less sensitive to

considerations of justice. A government prosecutor in a forfeiture case is ethically bound to return property, or decline a forfeiture, if justice so requires. An attorney with a financial stake is less likely to abide by this duty.

Practical experience supports these concerns. In one infamous Indiana case in 2011, that state's supreme court found that a contingency counsel engaged in egregious ethical misconduct, seeking to profit from forfeitures. *See In re McKinney*, 948 N.E.2d 1154 (Ind. 2011). Because "prosecutorial discretion in how to proceed with the criminal case was held by one who stood to reap personal financial gain if the defendant agreed to the forfeiture of his or her assets," the result was "an environment in which, at the very least, the public trust in his ability to faithfully and independently represent the interests of the State was compromised." *Id.* at 1161.

Moreover, private enforcement is likely to encourage public cynicism toward the justice system, because it lends plausibility to the perception that forfeiture is a realm where officers are predators instead of objective keepers of the peace. *See generally* Sandefur, *Predators, Not Protectors: How Asset Forfeiture Undermines the*

Legitimacy of Government, Goldwater Inst. (Mar. 23, 2021).⁶ Social scientists use the term “legal cynicism” to describe the public belief that a system of justice is antagonistic to the public’s interests and only serves the interests of political officials. Such cynicism has costs “closely analogous to the costs of fear of crime,” because it discourages citizens from calling the police when trouble arises. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 923 (2015). Ensuring greater disinterested and public accountability of prosecutors will help avoid conveying the impression that the legal system is a for-profit venture that disregards the public’s actual needs.

III. The *Sparger-Withers* theory of allowing mercenary prosecutions of forfeiture cases is unpersuasive.

One precedent which the Circuit Court cited was the Federal District Court’s unpublished decision *Sparger-Withers*, *supra*. But the purportedly “Originalist” analysis in *Sparger-Withers* was deeply flawed, and this Court should not repeat those errors.

⁶ <https://www.goldwaterinstitute.org/policy-report/predators-not-protectors>.

First, *Sparger-Withers* erred in its facile assumption that whatever occurred in 1787 must necessarily satisfy due process.⁷ But Originalist scholars disavow that notion. They contend that “original practices are [not] necessarily constitutional,” and indeed that “any argument purporting to demonstrate generally that original meaning entails the constitutionality of original practices cannot be valid.” Greenberg & Litman, *The Meaning of Original Meaning*, 86 Geo. L.J. 569, 574, 586 (1998). Simply put, Originalists do not claim that

⁷ The court’s history also ignored the fact that forfeiture was regarded as a shocking abuse in early American history, and was one of the leading reasons for the American Revolution. See generally *Culley v. Marshall*, 601 U.S. 377, 398-99 (2024) (Gorsuch, J., concurring). The Stamp Act, the Townshend Duties, and other taxes and trade restrictions were objectionable to the American founders in large part because they were enforced in juryless “admiralty” courts, which operated *in rem*—meaning that property owners were not entitled to the presumption of innocence or a jury. See generally Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (1960). What’s more, customs officials and informants *shared a portion of the revenues derived from forfeited assets*, see *id.* at 40-41—which is what the Declaration of Independence means when it complains that the King had “sent hither swarms of officers to harass our people and eat out their substance.” 1 Stat. 1, 2 (1776). Forfeiture in admiralty courts was objectionable precisely because it failed to accord due process of law. See generally *Sec. & Exch. Comm’n v. Jarkesy*, 603 U.S. 109, 145-50 (2024) (Gorsuch, J., concurring). John Adams, in fact, called it “the most grievous” of all the British government’s infringements on colonial liberties. *John Adams: Revolutionary Writings 1755-1775* at 126 (Wood, ed. 2011).

just because something went on in 1787 means it automatically satisfies due process of law.

In fact, *United States v. Rahimi*, expressly repudiated that idea, when it said that “the appropriate analysis involves considering whether the challenged regulation is consistent with *the principles* that underpin our regulatory tradition.” 602 U.S. 680, 692 (2024) (emphasis added). Because courts must both “[d]iscern[] *and develop[]* the law,” they do not search history for “a ‘dead ringer’ or a ‘historical twin’” to the rule challenged in a particular case, but reason by analogy, to comprehend the *principles* involved. *Id.* (emphasis added). To do otherwise would be to assume that whatever practices existed at the time of ratification are *ipso facto* constitutional, and that would “suggest a law trapped in amber,” which the Court has rejected. *Id.* at 691.

In short, even assuming Originalism is the right way to interpret the Constitution, it’s more rational to assume that previous generations were just as capable of violating due process as we are. *Sparger-Withers* thus erred in hastily concluding that because private prosecution of crimes was commonplace in the founding era, it *ipso facto* satisfies due process.

Sparger-Withers' second error was in disregarding critical parts of the history it purported to rely upon. Specifically, the court violated the rule of *cessante rationae, cessat ipsa lex*—when the reason for the law changes, the law must change. *Randolph v. Randolph*, 146 Fla. 491, 495 (1941) (“When the reason for any rule of law ceases, the rule should be discarded.”); *Milborn’s Case*, 77 Eng. Rep. 420, 421 (K.B. 1609) (“For now the Act hath changed the reason of the law, and therefore the law itself is changed.”). In other words, even under an Originalist approach, when the principles derived from original sources depend on certain premises, and those premises were later changed or abandoned, the consequence is likely to be that the original principles now operate differently in practice.

Sparger-Withers ignored the *cessante rationae* principle, and in particular, ignored the way in which the nature of prosecution has changed since the founding. Consequently, it committed what one might call the “amber” fallacy—ignoring changes in facts and failing to reason by analogy and principle.

Actually, while private prosecution was common in early American history, the advent of a professional prosecutorial service in the centuries that followed transformed the nature of that office—

as the Supreme Court recognized, *The Florida Bar v. Cox*, 794 So. 2d 1278 (Fla. 2001), when it observed that today, “prosecutors are held to the highest standard because of their unique powers and responsibilities,” and specifically that they are “representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Id.* at 1285 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

This famous requirement that a prosecutor see that justice is done originated in the mid-nineteenth century, with the professionalization of the prosecutor’s office. *See generally* Green, *Why Should Prosecutors “Seek Justice”?*, 26 Fordham Urb. L.J. 607, 612-18 (1999). In his 1884 *Essay on Professional Ethics*, legal scholar George Sharswood remarked upon the fact that prosecutors were now largely elected by the general public, meaning that “[p]ublic prosecutions are carried on by a public officer.” *Id.* at 93. That, in turn, meant that it was generally improper for “gentlemen to engage [in prosecution of crimes] on behalf of private interests or feelings.” *Id.* Sharswood argued because only “rarely [can] a criminal

prosecution [be] pursued for a valuable private end,” that “as the Commonwealth has its own officers, [prosecution] may well, in general, be left to them.” *Id.* at 93-94. And because “[t]he office of the Attorney-General is a public trust,” both the Attorney General and any individual to whom she delegates authority must “*stand[] as impartial as a judge.*” *Id.* at 94 (emphasis added).

In the decades that followed, courts began describing the prosecutor as being “the representative of law and justice, [with a duty to] . . . be fair and impartial,” *People v. Lee Chuck*, 20 P. 719, 723 (Cal. 1889), or having “a duty of impartiality not altogether unlike that of the judge himself,” *Meister v. People*, 31 Mich. 99, 104 (1875), as distinguished from private litigants prosecuting cases for private concerns.

So, as legal historian Jonathan Barth concludes, the late nineteenth century witnessed “a major shift” in the prosecutor’s role. *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. Rev. 119, 173 (2022). Courts came to view prosecutors as “seek[ing] truth and not simply a conviction, something that a private attorney could never adhere to because he was financially [interested in the outcome].” *Id.* at 170.

These changes were mirrored by changes in the prosecutor's legal obligations. When the prosecutor came to represent the public at large, rather than a particular individual, the prosecutor acquired a "duty to seek justice and not merely 'win.'" *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988). That includes such duties as the duty to affirmatively seek out evidence favorable to the defendant, *Connolly v. State*, 366 So. 3d 1142, 1148-49 (Fla. 3d DCA 2023), and "to correct testimony he or she knows is false," *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). These principles were all unknown in the era when prosecution was carried on by private, for-profit counsel.

In other words, the structure of the prosecutorial office has changed since 1776 in ways that have important due-process implications. As prosecutorial duties "have taken on new dimensions," that office ceased to be merely an advocacy position; prosecutors are now "officer[s] of the state who should have no private interest in the prosecution and who [are] charged with seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain." Ward, *Private Prosecution—The Entrenched Anomaly*, 50 N.C. L. Rev. 1171, 1173 (1972).

Sparger-Withers ignored these developments. It simply concluded that because in early history, “there was no belief that the prosecutor . . . in a criminal case had any special duty to justice in the abstract,” therefore there was no due process violation in the prosecutor having a private financial stake in the outcome. 2024 WL 473719, at *6.

Perhaps most importantly, by the time *Florida’s* Constitution (and its due process clause) was adopted in 1968, the idea that the prosecutor represents “a sovereignty whose obligation to govern impartially,” and that her “interest, therefore, in a criminal prosecution is not that [she] shall win a case, but that justice shall be done,” was generally accepted. *Berger*, 295 U.S. at 88.

Indeed, in his treatise *Contingent Fees for Legal Services*, published four years before the Constitution was adopted, F.B. MacKinnon wrote that there were “so few cases” on the question of contingency fees for criminal prosecutions that the question seemed to have been fully resolved: such fees are “against public policy because [they] tend[] to bring about conviction regardless of the prosecutor’s primary duty to see that justice [is] done.” *Id.* at 52.

And just one year after the Constitution was adopted, the American Bar Association adopted its Model Code of Professional Responsibility, including Rule EC 7-13, which declared that the public prosecutor has a "duty . . . to seek justice, not merely to convict," and Rule EC 7-14, that "[a] government lawyer in a civil action . . . should not use his position . . . to bring about unjust settlements or results."⁸ See also *Standards Relating to the Prosecution Function and the Defense Function: The Prosecution Function* § 2.3 cmt. at 62 (Am. Bar Ass'n 1971) (contingency fees "for prosecuting attorneys raise serious ethical and perhaps constitutional problems, are totally unacceptable under modern conditions, and should be abolished promptly.").

Florida courts have long maintained that prosecutions should "not inure to the benefit of a private individual," *Routh v. Routh*, 565 So. 2d 709, 710 (Fla. 5th DCA 1990), because to reward private

⁸ At almost the same time, an Oklahoma court, reviewing decisions in many other states, concluded that "the Constitutional right of a person charged with a crime to be prosecuted by a fair and impartial prosecutor" weighed heavily against "allow[ing] those who have a direct pecuniary interest in convicting a prisoner to take an active part in his trial." *Born v. State*, 397 P.2d 924, 942 ¶¶ 54-55 (Okla. App. 1964) (quoting *Meister*, 31 Mich. at 107).

interests for pressing public charges “improperly skews the decision making process.” *Dowis v. State*, 578 So. 2d 860, 861 (Fla. 5th DCA 1991). In *Thalheim v. State*, 20 So. 938, 943 (Fla. 1896), the court remarked on the then-recent changes in the prosecutorial office, while holding as a statutory matter that a prosecutor could bring on as co-counsel private attorneys who worked for the business the defendant was criminally accused of embezzling from. There were “strong” reasons to resist this tactic, the court said, but it would not be a problem *as long as* the public prosecutor exercised sufficient “control . . . over the proceedings” to ensure “that the accused will not be made the innocent victim of overzealous prosecution by private persons.” *Id.*

More recently, in *Van Lent v. Everglades Found., Inc.*, 400 So. 3d 64 (Fla. 3d DCA 2024), this Court upheld a trial court’s decision to deputize private counsel for a party as the prosecutor of a contempt charge. It acknowledged that there were real “concerns” with the practice but found it acceptable in the context of that case because the attorney “was not given the extraordinary and plenary powers of a special prosecutor.” *Id.* at 77-78. Judge Miller, in a “dubitante” concurrence, elaborated: “any private attorney appointed

to prosecute an indirect criminal contempt charge should be as impartial as a public prosecutor,” she wrote, and that should be enforced by “a bright-line rule ‘that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor.’” *Id.* at 81 (quoting *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987)). To “appoint[] a private prosecutor with this type of extraneous interest ‘create[s] at least the appearance of impropriety.’” *Id.* at 81-82 (quoting *Young*, 481 U.S. at 806).

However that may be, it’s clear that *Sparger-Withers* misapplied Originalism in concluding that because prosecution was once done by private counsel, the government can today outsource forfeiture to attorneys who are paid part of what they seize. Even assuming that Florida’s constitution is compatible with the use of private, for-profit prosecutors, they must be subjected to meaningful restrictions not present here.

CONCLUSION

The judgment of the circuit court should be *reversed*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed and served electronically this 22nd day of October 2026 on:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus curiae brief, to which this Certificate is attached, complies with the applicable font and word-count requirements of Florida Rules of Appellate Procedure 9.045 and 9.370. It is formatted in Bookman Old Style 14-point typeface and contains 4994 words, excluding those not included in the word-count limitation in rule 9.045(e).

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