

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 32 MAP 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

JUSTEN IRLAND; SMITH AND WESSON 9MM
SEMI-AUTOMATIC PISTOL, SERIAL #PDW0493,

Appellee.

BRIEF OF AMICUS CURIAE,
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

Appeal from the January 13, 2017 Order of the
Commonwealth Court *en banc* at Docket No. 448 C.D.
2015, Reversing the Order of the
Court of Common Pleas of Adams County at Docket No.
CP-01-CR-0000224-2014

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Statement of Interest of Amicus Curiae

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of over 1.6 million members. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty and equality embodied in the United States Constitution and civil rights laws. The ACLU of Pennsylvania is one of its state affiliates, with over 52,000 members throughout Pennsylvania. The ACLU and ACLU of Pennsylvania have appeared many times as amicus curiae in federal and state courts at all levels, including both civil and criminal proceedings, in cases in which government action threatened civil rights or constitutional rights. The special interest and the expertise of the ACLU of Pennsylvania with respect to civil asset forfeiture are substantial.

The ACLU of Pennsylvania seeks to appear as amicus curiae in this appeal to call this Court's attention to the many ways in which Pennsylvania's civil forfeiture laws have been abused to take property from innocent people—disproportionately low-income people and people of color—with few procedural safeguards. Amicus seeks to impress upon the Court how the Commonwealth's assertion of a new blanket forfeiture power, unsupported by statute, will permit the Commonwealth to take and keep any property it claims is “derivative” of a crime, regardless of the nature or severity of the offense. We respectfully submit this

amicus brief in the hope that the participation of the ACLU of Pennsylvania will assist the Court in resolving the significant issues of public importance implicated by the Commonwealth Court's opinion.

INTRODUCTION

The Commonwealth asserts that it has the “common law” power, without legislative authorization, to forfeit *any* property so long as law enforcement believes it was involved in the commission of *any* offense—no matter how minor.

The Commonwealth’s “common law forfeiture” theory is unlimited in scope and unworkable in practice. Under the Commonwealth’s theory, any property can be subject to forfeiture so long as it bears some loosely-defined nexus to an offense—even a minor summary offense. So, for example, if a person plays his or her radio loudly in a public park, the state may forfeit the radio due to its nexus in creating a noise violation.¹ If a person drinks alcohol in his or her car, the state may forfeit the car due to its relationship to an open container violation.² If a bicyclist commits a traffic violation, the state may forfeit the bicycle.³ The Court should be wary of any rule that would give the government sweeping powers to take and keep property without safeguards to prevent this power from being abused.

¹ 18 Pa. Cons. Stat. Ann. § 5503(a)(2).

² 75 Pa. Cons. Stat. Ann. § 3809(a).

³ 75 Pa. Cons. Stat. Ann. § 3501.

Recognizing such a broad “common law” power to forfeit property is also virtually certain to disproportionately impact poor people and people of color, unjustly depriving many vulnerable people of their property. Like many states, Pennsylvania’s civil forfeiture statutory scheme traces its origin to the War on Drugs and federal law. Like its federal counterpart, Pennsylvania’s forfeiture laws have been used aggressively and have high rates of default due to Pennsylvania’s low burden of proof on the government and few procedural protections for property owners. Pennsylvania’s civil asset forfeiture laws incentivize law enforcement to aim civil forfeiture enforcement efforts at people who are unable or unlikely to fight back, particularly the poor or people of color who are unrepresented by counsel. And indeed, studies have shown that people of color disproportionately bear the burden of civil forfeiture enforcement in Pennsylvania. Vastly expanding law enforcement’s authority to forfeit property, as the Commonwealth asks this Court to do, would only amplify the inequalities and injustices that already occur as a result of statutorily authorized forfeiture.

Moreover, the Commonwealth’s position is unsupported by history, and inconsistent with the well-established notion that forfeitures are disfavored. Even prior to the enactment of Pennsylvania’s new consolidated forfeiture statute, 42 Pa. Cons. Stat. Ann. § 5803, which went into effect on July 1, 2017, civil asset forfeiture was the subject of extensive regulation by the General Assembly. But

under the Commonwealth's expansive interpretation of "common law forfeiture," the statutes authorizing the use of civil forfeiture to take property connected with certain offenses, subject to certain procedural safeguards, would be rendered largely superfluous because the "common law" power to forfeit property would extend to *every* offense, without property owners having the benefit of the statutory safeguards. Because a limitless "common law" power to forfeit property is inconsistent with the legislative enactments regulating forfeiture and runs counter to the presumption against forfeitures, the Court should recognize that, even assuming the Commonwealth ever had a "common law" civil forfeiture power (which the Commonwealth Court correctly concluded it did not), the legislature's extensive regulation of civil forfeiture has superseded the common law, and no such power exists today.

In sum, the Court should affirm the Commonwealth Court's ruling recognizing that in Pennsylvania, law enforcement's power to take and keep property does not extend beyond what is authorized by statute.

STATEMENT OF FACTS

The present appeal arises in the context of property forfeiture connected to a minor summary offense which resulted in a \$200 fine, even though the forfeiture was not authorized by statute. On November 7, 2013, Justen Irland was driving on a road in Adams County when a driver began tailgating him. In response, Irland displayed a handgun to the other driver, presumably to persuade the other driver to stop tailgating. Somebody contacted the authorities, and the police confiscated Irland's handgun. Irland was charged with simple assault, harassment, disorderly conduct as a third degree misdemeanor, and disorderly conduct as a summary offense. On August 25, 2014, Irland entered a guilty plea only to disorderly conduct as a summary offense⁴ and was ordered by the trial court to pay a \$200 fine.

On December 10, 2014, Irland filed a motion to return the handgun, but on February 4, 2015, the Commonwealth filed a motion for forfeiture and destruction of the handgun based on a theory of "common law" (*i.e.*, non-statutory) forfeiture.

⁴ See 18 Pa. Cons. Stat. Ann. § 5503(a)(4), which, in pertinent part, states:

A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he . . . creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

On March 9, 2015, the trial court denied Irland's motion and ordered that the handgun be destroyed. Irland appealed to the Commonwealth Court.

Reversing the trial court's opinion, the Commonwealth Court held that there is "no such thing as common law forfeiture in Pennsylvania." *Commonwealth v. Irland*, 153 A.3d 469 (Pa. Commw. Ct. 2017). The Commonwealth Court determined that absent statutory authority, the Commonwealth does not have authority to seek, nor does the trial court have authority to order, forfeiture of an individual's property. Accordingly, the court held the Commonwealth lacked the authority to seize Irland's handgun.

The Commonwealth appealed the Commonwealth Court's decision, and on July 18, 2017, this Court granted allocatur to the present appeal.

ARGUMENT

I. THE COMMONWEALTH’S EXPANSIVE VIEW OF “COMMON LAW FORFEITURE” OPENS THE DOOR TO ABSURD AND HARSH RESULTS.

The Commonwealth claims for itself the “common law” power to forfeit anything law enforcement deems “derivative contraband”—property that in itself is legal to possess, but which has a nexus to some illegal activity. The Commonwealth’s broad interpretation of asset forfeiture doctrine would allow for the forfeiture, without statutory authorization, of property connected not just to felonies, but also to any misdemeanor or minor summary offense such as the “disorderly conduct” charge to which Irland plead guilty.

For example, if a person furnishes alcoholic beverages to minors at her home, she commits a summary offense under 18 Pa. Cons. Stat. Ann. § 6310.7. Under the Commonwealth’s suggested interpretation of the law, it could theoretically invoke “common law forfeiture” to forfeit her house.⁵ If a minor

⁵ Some potential uses of the “common law forfeiture” power that the Commonwealth asks this Court to recognize might violate the Excessive Fines Clause of the Eighth Amendment. *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 848 (Pa. 2014) (citing *Austin v. United States*, 509 U.S. 602, 622 (1993)). However, because owners whose property is taken through civil forfeiture have no right to counsel, constitutional defenses are seldom raised in civil forfeiture proceedings. The vast majority of civil forfeitures in Pennsylvania occur by default, without the presentation of evidence or argument to a judge. Testimony Presented to Senate Judiciary Committee by Professor Louis S. Rulli, University of Pennsylvania Law School (October 20, 2015) at 20,

purchases, consumes, possesses, or transports alcohol—on her first offense—in her car in violation of 18 Pa. Cons. Stat. Ann. § 6308, the Commonwealth could invoke common law forfeiture to take her car. If a family discards or abandons a refrigerator or icebox on their lawn, a summary offense under 18 Pa. Cons. Stat. Ann. § 6502, the Commonwealth could seek to forfeit the home. And if a family moves its mobile home to evade taxes in violation of 18 Pa. Cons. Stat. Ann. § 7501, the Commonwealth may be able to forfeit the mobile home. These hypotheticals are, of course, extreme. But the reality is that the Commonwealth’s suggested approach to asset forfeiture opens the door to such harsh practices and does not provide any limiting principles or reliable safeguards against abuse.

Critically, abusive asset forfeitures are not confined to hypotheticals. The cases that the Commonwealth itself relies on are replete with such examples. In *Estate of Peetros ex rel. Peetros v. County Detectives & District Attorney’s Office*, the Commonwealth invoked common law forfeiture to forfeit books due to their alleged connection to transactions that violated state usury laws—even though the

<http://www.senatorgreenleaf.com/wp-content/blogs.dir/39/files/2015/10/Testimony-of-Louis-Rulli.pdf>. And because the Commonwealth’s claimed “common law” forfeiture power would not necessarily be subject to the few safeguards against abusive forfeiture practices that are contained in Pennsylvania’s civil forfeiture statutes, property owners are even less likely to have a meaningful opportunity to challenge overreaching or unconstitutional uses of “common law” forfeiture.

property owner was never formally charged. 492 A.2d 6 (Pa. Super. Ct. 1985). In *Commonwealth v. Salamone*, the Commonwealth forfeited a man's airplane after he flew too close to an urban international airport while under the influence of drugs and alcohol. 897 A.2d 1209 (Pa. Super. Ct. 2006). In *Commonwealth v. One 1990 Dodge Ram Van*, the Commonwealth invoked common law forfeiture to take a man's van because of criminal activity perpetrated inside the van. 751 A.2d 1235, 1235 (Pa. Commw. Ct. 2000).⁶ In *Commonwealth v. One 2001 Toyota Camry*, the Commonwealth forfeited the defendant's vehicle because he drove it to meet with a co-conspirator, who turned out to be an undercover police officer. 894 A.2d 207, 211 (Pa. Commw. Ct. 2006).⁷ Even though the only nexus to the crime was the mere act of driving the vehicle to meet about a crime that did not involve the vehicle, the Commonwealth argued that the "transportation of the criminal to the situs of the crime is materially no different than transporting illicit goods." *Id.*

The Commonwealth urges a view of "common law forfeiture" that is unlimited in scope. Under the Commonwealth's theory, any property can be subject to forfeiture for any offense—even minor offenses such as the "disorderly conduct" summary offense for which Mr. Irland was fined \$200—so long as there

⁶ Overruled by *Irland*, 153 A.3d at 469.

⁷ Overruled by *Irland*, 153 A.3d at 469.

is some loosely-defined nexus to the alleged offense. The Commonwealth offers no limiting principle. Absent legislative authorization, the Court should reject a reading of history and precedent that would expand the Commonwealth's power to take and keep property well beyond the already expansive uses of forfeiture permitted by statute.

II. AFFIRMING THE COMMONWEALTH COURT WILL HELP CHECK THE ABUSES OF POWER THAT HAVE THRIVED UNDER EXPANSIVE CIVIL FORFEITURE DOCTRINE THAT AROSE AS PART OF THE WAR ON DRUGS.

The emergence of “common law forfeiture” in Pennsylvania, *i.e.*, asset forfeiture without legislative authorization, was part of a national trend beginning in the 1970's of expanding the government's power to take and keep property as part of the War on Drugs. However, in recent years, there has been an increasing recognition of the abuses of power that have thrived under legal frameworks that give the government broad authority to forfeit property with few procedural safeguards.

In systems like Pennsylvania's that allow the government to forfeit property through civil, rather than criminal, proceedings, and to keep the proceeds from forfeiture, law enforcement has an incentive to aggressively pursue forfeiture and to aim forfeiture enforcement efforts at people who are unlikely to fight back—particularly poor people and people of color who are unrepresented by counsel. Endorsing an approach to asset forfeiture that includes virtually unchecked

“common law forfeiture” would only exacerbate these injustices.

A. Civil Asset Forfeiture Laws Give Law Enforcement Agencies a Financial Incentive to Use Asset Forfeiture Aggressively Against Property Owners Who Are Least Likely to Contest the Forfeiture.

Nationwide, civil forfeiture was intended to combat offenses like drug trafficking and organized crime. But it has turned into a weapon that law enforcement deploys aggressively to take billions of dollars of property each year with a tenuous connection to crime, often from innocent people, and disproportionately from people of color who are not represented by counsel.⁸ The history of federal civil forfeiture, characterized by documented governmental abuse and failed reform efforts, provides important context for the Court’s interpretation of Pennsylvania law and consideration of the broad “common law forfeiture” powers sought by the Commonwealth.

Forfeiture was employed sporadically until Congress expanded its reach in the 1970’s and 1980’s for use as a weapon in the War on Drugs. As the Commonwealth Court observed, Pennsylvania courts never recognized the existence of “common law forfeiture” until the 1980’s, when this concept first

⁸ For additional information on national forfeiture patterns and their consequences, see the *Amicus* briefs filed in this Court by ACLU of Pennsylvania and other *amici* in *Commonwealth v. \$34,440.00 U.S. Currency*, No. 102 MAP 2016 and *Commonwealth v. Real Property and Improvements Commonly Known as 416 S. 62nd St., Philadelphia, PA, and 1997 Chevrolet and Contents Seized from James Young*, Nos. 29 & 30 EAP 2015.

emerged amidst the national trend of aggressively expanding state police power during the War on Drugs. *See Irland*, 153 A.3d at 480 (noting that until the 1980's, forfeiture cases in Pennsylvania involved statutes).

One of the more significant forfeiture developments as part of the War on Drugs came when Congress began earmarking forfeiture income exclusively for law enforcement, instead of depositing forfeited funds in the United States Treasury. Consequently, the Department of Justice's federal asset forfeiture fund grew from \$338 million in 1996 to more than \$2.0 billion by 2010.⁹ Nearly every state followed suit.

Under Pennsylvania's civil asset forfeiture laws, law enforcement has a direct pecuniary incentive to forfeit as much property as possible. One hundred percent of the proceeds from forfeiture go to the law enforcement agencies charged with making decisions about whether to pursue forfeiture. 42 Pa. Cons. Stat. § 5803(e)-(l).¹⁰ Pennsylvania law enforcement agencies reported taking in more

⁹ *See* Christopher Ingraham, *In tough times, police start seizing a lot more stuff from people*, The Washington Post (Nov. 10, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/10/report-in-lean-times-police-start-taking-a-lot-more-stuff-frompeople/>.

¹⁰ Formerly codified at 42 Pa. Cons. Stat. Ann. § 6801(e)-(g).

than \$13 million from property forfeited under the Controlled Substances Forfeiture Act in 2014–2015.¹¹

Forfeiture proceeds supplement the budgets allocated to law enforcement agencies by the legislature. Indeed, Pennsylvania law actually prohibits the legislature from reducing any agency’s appropriated budget in reliance on expected forfeiture revenues. 42 Pa. Cons. Stat. § 5803(g).¹² Civil forfeiture gives police and prosecutors the power to raise their own revenues and use the new funds as they see fit. In this way, civil asset forfeiture thwarts the democratic process, circumventing the legislature and the transparency, accountability, and oversight functions that are built into the normal budgeting process.

As Judge Pellegrini observed, law enforcement’s pecuniary interest in the outcome of a civil forfeiture case undermines the overarching goals of the criminal laws:

[An] overriding governmental interest is to instill confidence in the criminal justice system. The present forfeiture regime severely undermines that confidence because of the inherent conflict of interest that a district attorney has in seeking forfeiture to fund his or her expenditures that the Commissioners or Council have chosen not to fund.

¹¹ See Office of the Pennsylvania Attorney General, *Asset Forfeiture Report, Fiscal Year 2014–15 (Controlled Substances)*.

¹² Formerly codified at 42 Pa. Cons. Stat. Ann. § 6801(f), (k).

1997 Chevrolet, 106 A.3d at 878 (Pellegrini, J., concurring).

B. People of Color Disproportionately Bear the Burden of Pennsylvania’s Aggressive Civil Forfeiture Laws.

Law enforcement’s direct financial stake in the outcome of a forfeiture proceeding also creates a strong incentive to pursue forfeitures that will not be challenged. Contested litigation can be expensive and time-consuming, but the cost of filing a forfeiture case that ends in default is minimal. In Philadelphia, an analysis of several years of court records revealed that the District Attorney’s office robo-signed and filed the same boilerplate petition in every cash forfeiture case, making the additional cost of prosecuting each unchallenged forfeiture case negligible.¹³

Enforcement strategies directed at people unlikely to challenge forfeitures are, in turn, likely to affect low-income communities of color disproportionately. First, in Pennsylvania, poor people—those with the least ability to hire an attorney to challenge a forfeiture—are disproportionately likely to be people of color.¹⁴

¹³ Scott Kelly, American Civil Liberties Union of Pennsylvania, *Guilty Property—How Law Enforcement Takes \$1 Million in Cash from Innocent Philadelphians Every Year—and Gets Away With It* (June 2015), <http://www.aclupa.org/forfeiture> (hereinafter “ACLU-PA, *Guilty Property*”) at 8.

¹⁴ *Poverty Rate by Race/Ethnicity*, Henry J. Kaiser Family Foundation, <http://kff.org/other/state-indicator/povertyrate-by-raceethnicity/> (13% of Pennsylvanians live in poverty, including 9% of white Pennsylvanians, 25% of African-American Pennsylvanians, and 29% of Hispanic Pennsylvanians).

Similarly, focusing forfeiture enforcement on low-income neighborhoods is also likely to disproportionately affect people of color.¹⁵

In 2014, *The Washington Post* examined 400 federal forfeiture cases where property owners were at least partially successful in challenging the forfeitures of their property as part of an aggressive highway interdiction effort. The majority of these property owners were people of color.¹⁶

Studies also consistently reveal racial disparities in whose property is targeted for forfeiture in Pennsylvania. Indeed, the racial disparities among Pennsylvania's forfeiture victims are even more pronounced than the racial disparities in arrest rates for offenses punishable by forfeiture.

For example, in Philadelphia, African-American people make up only 44% of the city's population, and 60% of those arrested for forfeitable offenses.¹⁷ But a 2015 study found that African-American people comprised 63% of owners subject to forfeiture, raising the question of whether law enforcement bias affects civil

¹⁵ See Sean Reardon et al., *Neighborhood Income Composition by Race and Income, 1990-2009*, *The Annals of the American Academy of Political and Social Science* 660(1), 78-97 (2015) (African-American and Hispanic families are much more likely to reside in lower income neighborhoods than families of the same income level but of another race).

¹⁶ See Michael Sallah, Robert O'Harrow Jr., Steven Rich, & Gabe Silverman, *Stop and Seize*, *The Washington Post* (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

¹⁷ ACLU-PA, *Guilty Property*, *supra* note 13, at 10 & n.44.

forfeiture enforcement.¹⁸ The disparity was even more pronounced for property owners who had lost property to forfeiture even though they had not been convicted of a crime related to the forfeiture: approximately 70% of these innocent owners were African-American.¹⁹ In Montgomery County, African-American people make up 9% of the population, and 37% of those arrested for offenses punishable by forfeiture.²⁰ Yet a 2015 study found that a staggering 53% of property owners faced with forfeiture were African-American.²¹ Likewise, a 2015 study found that in Cumberland County, which is only 3% African-American, African-Americans made up 15% of those arrested for forfeitable offenses and 36% of property owners targeted for forfeiture.²² That means that in Cumberland

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 10 & n.46. Approximately 37% of Philadelphia's forfeitures of cash were not supported by a related criminal conviction, meaning that the property owner was never proven guilty of a crime punishable by forfeiture. ACLU-PA, *Guilty Property*, *supra* note 13, at 4, 9 & n.8.

²⁰ Scott Kelly, American Civil Liberties Union of Pennsylvania, *Broken Justice—An Investigation of Civil Asset Forfeiture in Montgomery County*, 6 & n.22. (October 2015), <http://www.aclupa.org/forfeiture>.

²¹ *Id.* at 6.

²² Scott Kelly, American Civil Liberties Union of Pennsylvania, *Forfeiture in the Shadows—An Investigation of Civil Asset Forfeiture in Cumberland County*, 5 & n.24 (December 2015), <http://www.aclupa.org/forfeiture>.

County, African-American people were eighteen times more likely to be the targets of civil forfeiture than people of other races.²³

Scrutiny of modern civil asset forfeiture practices by investigative reporters and reform advocates has confirmed that civil forfeiture has strayed far from its intended purpose, ensnaring innocent people and disproportionately impacting poor people of color—easy targets for a practice that takes place with little court oversight. The abuse of civil forfeiture for pecuniary gain has led two former leaders of the Department of Justice’s Asset Forfeiture Office to argue that civil forfeiture should now be abolished.²⁴

This Court should reject the Commonwealth’s request to recognize a limitless “common law” power to forfeit property beyond the scope of what the legislature has already authorized. Broadening the government’s power to include the power to forfeit property for *every* offense without requiring the government to follow even the minimal safeguards built into the statutory scheme would expand the potential for civil forfeiture to be used unfairly against the most vulnerable

²³ *Id.* at 5-6 & n.25.

²⁴ See John Yoder & Brad Cates, *Government Self-Interest Corrupted a Crime-Fighting Tool into an Evil*, The Washington Post (Sept. 18, 2014), https://www.washingtonpost.com/opinions/abolish-the-civil-asset-forfeiture-program-wehelped-create/2014/09/18/72f089ac-3d02-11e4-b0ea-8141703bbf6f_story.html (“The program began with good intentions but now, having failed in both purpose and execution, it should be abolished”).

Pennsylvanians who are least likely to fight back, and disproportionately against people of color.

III. THE GENERAL ASSEMBLY’S EXTENSIVE STATUTORY REGULATION OF CIVIL FORFEITURE SUPERSEDES ANY “COMMON LAW FORFEITURE” POWER THAT MAY HAVE EXISTED AT THE FOUNDING.

The Commonwealth’s position—that it possesses the authority to forfeit property for any crime—is inconsistent with Pennsylvania’s statutory framework regulating civil forfeiture, and undermines the legislature’s decision to authorize civil forfeiture as a penalty for only specified offenses. *See* 42 Pa. Cons. Stat. Ann. § 5803. Therefore, even if non-statutory asset forfeiture had long historical support in Pennsylvania—which it does not—common law forfeiture would still have been abrogated by the extensive statutory regulation of civil forfeiture in Pennsylvania dating back to the 1980’s.

When the legislature extensively regulates in a particular area or enacts a comprehensive legislative scheme, the statute supersedes conflicting common law. *See, e.g., Sternlicht v. Sternlicht*, 876 A.2d 904, 912 (Pa. 2005) (holding that “where the Legislature expressly provides a comprehensive legislative scheme, these provisions supersede the prior common law principles”); *In re D.L.H.*, 2 A.3d 505, 514 (Pa. 2010) (statute requiring life-saving medical treatment for incompetent individuals abrogated the common law right to refuse medical treatment); *Commonwealth v. Clopton*, 289 A.2d 455, 459 (Pa. 1972) (observing

that the legislature clearly intended to preempt a field where it enacted a statute that overlapped with common law). A common law doctrine may not, after a statutory pronouncement on the same subject, continue to develop in a manner inconsistent with the statute. *Sternlicht*, 876 A.2d at 912 (citing N. Singer, Sutherland Statutory Construction § 50:01 (6th ed. 2000)). In cases of conflict between legislation and the common law, legislation will govern because it is the latest expression of the law. *Id.*

If a statute is silent about whether it supersedes common law, the court must effectuate the intent of the legislature. *Metro. Prop. & Liab. Ins. Co. v. Ins. Com'r*, 535 A.2d 588, 591 (Pa. 1987) (examining the legislature's intent after noting that the statute had no explicit language showing a clear intent to supersede common law). Pennsylvania courts look to several factors, including whether the common law "frustrates" the purpose of the statute, to determine whether the statute abrogates prior common law. *Id.* (observing that upholding the common law would "frustrate [the] . . . rationale" of the legislature); *Clopton*, 289 A.2d at 459 (upholding legislative intent and abrogating common law because the two interpretations were irreconcilable). To determine legislative intent, courts also examine "the circumstances under which [the statute] was enacted . . . the consequences of a particular interpretation . . . and contemporaneous legislative

history.” *Metro. Prop. & Liab. Ins. Co.*, 535 A.2d at 591 (citing the Statutory Construction Act, 1 Pa. Cons. Stat. § 1921).

When faced with broad common law and conflicting narrow statutory law, Pennsylvania courts have held that common law is preempted. In *Clopton*, the Court faced two competing definitions of attempted murder—a new criminal statute which narrowed the definition, versus the old, very broad, common law definition. 289 A.2d at 459. The Court concluded that by enacting the statute and remaining silent as to various types of common law attempted murder, the legislature meant to preempt, and thus narrow the scope of common law attempted murder. *Id.* Similarly, in *Commonwealth v. Dzvonick*, the Court considered the legislature’s preemption of the common law crime of “attempt to commit mayhem” with “assault with intent to maim.” 297 A.2d 912, 917 (Pa. 1972). The Commonwealth argued that, even if the defendant’s acts fell short of statutorily-proscribed conduct, the defendant could nevertheless be liable for a common law offense. The Court disagreed and held that the legislature “pre-empted the area [of law] and ousted the court of common law jurisdiction.” *Id.*

Pennsylvania enacted a statute authorizing civil forfeiture of property used in connection with drug crimes in 1988, modeled on the federal civil forfeiture

laws.²⁵ Although the Controlled Substances Forfeiture Act was the most widely-used civil forfeiture statute in Pennsylvania, and contained the most detail concerning the procedures to be followed, Pennsylvania also had dozens of other statutes that authorized civil forfeiture penalties.²⁶

The Pennsylvania General Assembly amended its civil forfeiture statutes in 2016, consolidating Pennsylvania's various civil forfeiture statutes into one comprehensive statutory framework. 42 Pa. Cons. Stat. § 5803. Although the new law did little to change the procedures that apply to civil forfeitures in Pennsylvania, the new statute points to (and updates and consolidates) the many statutes that already authorized civil forfeiture as a penalty.

The new law provides a comprehensive overview of civil forfeiture in Pennsylvania, and leaves no room for doubt that the legislature has extensively regulated civil forfeiture for decades, demonstrating that Pennsylvania long ago superseded any common law forfeiture power that may have existed at the founding.

²⁵ Formerly codified at 42 Pa. Cons. Stat. § 6801 *et seq.*

²⁶ *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 4116 (“Copying; recording devices”); 18 Pa. Cons. Stat. Ann. § 4119 (“Trademark counterfeiting”); 18 Pa. Cons. Stat. Ann. § 5513 (“Gambling devices”); 30 Pa. Cons. Stat. Ann. § 927 (“Forfeiture of fish and devices”); 75 Pa. Cons. Stat. Ann. § 4909 (“Transporting foodstuffs in vehicles used to transport waste”).

Despite the comprehensive scope of the statute, nowhere in the new scheme does the legislature authorize the seizure of property connected to minor summary offenses. The legislature *could* have acted at any point, including in the 1980's or in the 2016 updating of Pennsylvania's civil forfeiture statutes, to authorize civil forfeiture as a penalty for summary offenses, but it did not. Rather, by specifying the grounds when forfeiture is authorized, the Court should infer a legislative intent to limit and, similar to *Clopton* and *Dzvonick*, preempt common law.²⁷

The two approaches to asset forfeiture endorsed by the legislature and by the Commonwealth—one that authorizes civil forfeiture as a penalty for only specified offenses, and one that recognizes a limitless “common law” power to forfeit property for *any* offense, respectively—are irreconcilable. Specifically, Pennsylvania's statutory enumeration of the offenses punishable by forfeiture would be rendered superfluous if, as the Commonwealth asserts, the government has the virtually limitless power to forfeit property with a connection to any crime, regardless of legislative authorization. The Court should affirm the ruling below in recognition of the fact that Pennsylvania's extensive regulation of civil forfeiture

²⁷ Although the trial court ruled in favor of the Commonwealth, the trial court's opinion nonetheless supports *Amicus*'s view of legislative intent. In its decision, the trial court stated that if the legislature truly intended to replace the common law, it would have done so in a comprehensive forfeiture statute. In fact, after the trial court's decision, the state legislature *did* pass a comprehensive forfeiture statute—Section 5803.

since the 1980's has plainly abrogated any common law forfeiture that may have existed.

IV. THE COURT SHOULD AFFIRM THE COMMONWEALTH COURT'S RULING IN LIGHT OF THE STRONG PRESUMPTION AGAINST ASSET FORFEITURE.

Recognizing that forfeitures must be grounded in statutory authority is also consistent with the canon of construction that civil forfeiture is strongly disfavored. Due to civil forfeiture's potential to undermine individual and property rights, as well as the potential for constitutional violations, Pennsylvania courts strongly disfavor the use of asset forfeiture. *Farmers' & Mechanics' Nat. Bank v. Dearing*, 91 U.S. 29 (1875). Indeed, this Court recently recognized that “forfeitures are not favored; they should be enforced only when within both the letter and spirit of the law.” *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 177–78 (Pa. 2017) (citing *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939)).

Because the Commonwealth in this case is seeking the power to use civil forfeiture in the absence of legislative authorization, the Commonwealth's interpretation of history and legal precedent are flatly *inconsistent* with both the “letter” and “spirit” of Pennsylvania's statutes. Accordingly, this Court's analysis should rest on a presumption against the broad “common law” forfeiture power that the Commonwealth asks this Court to recognize. As detailed above, the

presumption against forfeiture is entirely warranted here: The Commonwealth's position not only encroaches upon the legislature's comprehensive forfeiture scheme, but will lead to or exacerbate abusive practices of asset forfeiture.

CONCLUSION

Amicus respectfully requests that the Court affirm the decision below.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Rules 531(b)(3) and 2135(d) of the Pennsylvania Rules of Appellate Procedure, I, Patrick M. Hromisin, hereby certify that the foregoing Brief of ACLU of Pennsylvania as *Amicus Curiae* complies with the applicable word count limit. This certificate is based on the word count of the word processing system used to prepare the brief.



Patrick M. Hromisin

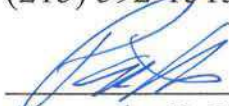
CERTIFICATION PURSUANT TO Pa. R.A.P. 531(b)(2)

Pursuant to Rule 531(b)(2) of the Pennsylvania Rules of Appellate Procedure, the undersigned counsel hereby certify that: (a) no person or entity other than the ACLU of Pennsylvania or its counsel paid in whole or part for the preparation of the foregoing Brief of ACLU of Pennsylvania as Amicus Curiae; and (b) no person or entity other than the ACLU of Pennsylvania or its counsel authored in whole or part the foregoing Brief of ACLU of Pennsylvania as Amicus Curiae.

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