CAUSE NO. _____

AMEAL WOODS and JORDAN DAVIS, on behalf of themselves all others similarly situated, *Plaintiffs*, v. HARRIS COUNTY; KIM OGG, in her official capacity as Harris County District Attorney; and ANGELA BEAVERS, in her official capacity as Chief of the Asset Forfeiture Division, Harris County District Attorney's Office, *Defendants.*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS _____ JUDICIAL DISTRICT

PLAINTIFFS' PROVISIONAL MOTION FOR CLASS CERTIFICATION OR LEAVE TO CONDUCT CLASS DISCOVERY

TO THE HONORABLE JUDGE OF SAID COURT:

Named Plaintiffs Ameal Woods and Jordan Davis respectfully move this Court to certify a class of individuals who, like them, have had their property seized by Harris County without probable cause and seen it detained for weeks, months, or years without notice or an opportunity to be heard by a judge. In most cases, Harris County goes on to seek civil forfeiture of the property, forcing owners to hire a lawyer and contend with unconstitutional procedures set by Texas law—including a requirement that innocent owners bear the burden of proving their innocence—and unconstitutional policies and practices set by the county, including near-uniform reliance on vague allegations, form affidavits, and witnesses lacking personal knowledge. Motivating all of this, Harris County has an unconstitutional financial incentive to seize and forfeit property without

probable cause because, under Texas law, police and prosecutors keep 100 percent of the proceeds from property they successfully seize and forfeit.

Ameal and Jordan provisionally move the Court to certify a class under Rules 42(a) and (b)(2) of the Texas Rules of Civil Procedure.[1] They propose the following class definition for Counts 1–5 of their Original Petition and Application for Class Certification:

> All people who own (or partly own) property seized in Harris County between August 30, 2016, and the date of class certification, when all of the following conditions are met: (a) Harris County has filed a civil-forfeiture petition on behalf of the State of Texas; (b) the civil-forfeiture petition incorporates an affidavit that exhibits hallmarks of a form affidavit used by Harris County police and prosecutors or was written by someone who was not present at the time and place of seizure; and (c) the owner (or part owner) of the property has not been criminally charged with a forfeitable offense in connection with the seizure.

They also seek to certify a subclass for resolution of Count 6 (the "Innocent Owner Subclass"). They propose the following definition for the subclass:

> All people who meet the conditions for membership in the principal class who also meet at least one of the following conditions: (a) the person was not present at the time and place of seizure; or (b) the state's civil-forfeiture petition incorporates an affidavit which, on its face, does not allege the person committed a specific act or omission on which forfeiture can be based.

And they ask that they be named class representatives and that their *pro bono* counsel, the Institute for Justice, be appointed to represent the class. *See* Tex. R. Civ. P. 42(g).

[1] Named Plaintiffs file this "provisional" motion for class certification because they anticipate that Harris County will take steps to "pick off" Ameal and Jordan by returning their property and, thus, undermine their ability to pursue class-wide relief. *See Growden v. Good Shepherd Health Sys.*, 550 S.W.3d 716, 723–24, 727 (Tex. App.—Texarkana 2018, no pet.) (holding that named plaintiffs' class claims can relate back to when their motion for class certification was filed where the government attempts to moot a case by picking off plaintiffs). If the Court does not grant this provisional motion, Named Plaintiffs request that it grant their alternative motion for leave to conduct class discovery and later permit them to file a renewed motion that will relate back to today and the filing of this provisional motion.

In the alternative, Named Plaintiffs urge the Court to grant them leave to conduct class discovery, *see* Tex. R. Civ. P. 190.4, at the conclusion of which they should be permitted to file a renewed motion for class certification relating back to this provisional motion.

INTRODUCTION

Named Plaintiffs Ameal Woods and Jordan Davis are a Mississippi couple who had $42,300 seized by law enforcement on a freeway outside of Houston in May 2019. Ex. 1: Aff. of A. Woods ¶¶ 5, 25–41; Ex. 2: Aff. of J. Davis ¶ 5, 18–19. Ameal was carrying this money in cash—$6,500 of it belonging to his wife Jordan—because he was on the way to purchase a 52-foot trailer, and possibly a tractor, for the trucking operation he runs with his brother Aalonzo. Woods Aff. ¶¶ 6, 8, 10, 13–15; Davis Aff. ¶¶ 6–7. All the seized cash was lawfully earned and intended for the lawful purpose of buying trucking equipment. Woods Aff. ¶¶ 13, 17; Davis Aff. ¶¶ 8–9. Based on his research, Ameal expected to pay between $3,000 and $9,000 on a used trailer and between $25,000 and $35,000 on a used tractor. Woods Aff. ¶ 9. If he was lucky, he would return home with a used tractor-trailer that would help grow his small business.

As Ameal approached Houston on Westbound Interstate 10, he was pulled over by a Harris County Sheriff's deputy, allegedly for driving too close to a tractor-trailer. *Id.* ¶¶ 25–26. Ameal had no drugs; he was not arrested; he was not issued a ticket or even a warning; and he has not been charged with any crime. *Id.* ¶¶ 38–40, 48. The deputy seemed focused on finding money. *Id.* ¶ 31. He even allowed Ameal to keep a loaded gun the deputy knew was tucked between the driver's seat and center console. *Id.* ¶ 37. Ameal readily told the deputy he had a substantial amount of cash, more than $6,000 of which belonged to Jordan. *Id.* ¶¶ 29, 32. The deputy called Jordan and confirmed Ameal's story. Woods Aff. ¶¶ 33; Davis Aff. ¶¶ 18–22. Nevertheless, he seized all the cash and sent Ameal on his way. Woods Aff. ¶¶ 35, 40–41.

Soon after the seizure, the Harris County District Attorney's Office filed a civil-forfeiture petition, in June 2019, alleging that the couple's money is in some way connected to a boilerplate list of seven separate drug crimes. *See* Ex. 3: Aff. of K. Morton ¶ 99 & Ex. 83 (the "petition"). The petition, on its face, shows the lack of probable cause for the seizure and attempted forfeiture of Ameal and Jordan's money. For example, the petition relies exclusively on a form affidavit from a peace officer who was not present during the seizure. *See id.* Nowhere does the petition or affidavit allege the elements of any specific forfeitable offense, *see id.*, and Ameal and Jordan have not been charged with any crime, *see* Pls.' Orig. Pet. ("Pet.") ¶ 103. The county's forfeiture petition does not allege that Jordan was involved, in any way, in a forfeitable offense. *See* Morton Aff. ¶ 99 & Ex. 83.

But the civil-forfeiture proceeding will still be no cake walk. Under Section 59.02(c)(1) of the Texas Code of Criminal Procedure, Jordan now bears the burden of intervening in the forfeiture case, proving her ownership of her $6,500, and proving she is innocent of all the vague and unspecified conduct alleged against her husband. If she fails to carry her burden, her money will be permanently forfeited, and 100 percent of the proceeds will go to the Harris County District Attorney's Office (as the prosecution) and Harris County Sheriff's Office (as the seizing agency). Every year for the last three years, the Sheriff's office has paid its officers around $2.3 million in salaries and overtime—all of which came from forfeiture proceeds. Pet. ¶¶ 14, 204.

Ameal and Jordan have filed this affirmative case to challenge the constitutionality of Harris County's seizure and forfeiture practices. Their Original Petition alleges five counts applicable to the principal class, one count applicable to a subclass of innocent owners like Jordan,

and eight individual counts.[2] This motion addresses the class claims. The six class counts broadly challenge Harris County's policies and practices of (1) unreasonably seizing property from putative class members and initiating forfeiture proceedings without probable cause connecting the property to a crime; or (2) depriving putative class members—innocent and suspect alike—of procedural and substantive due process.

Specifically, Named Plaintiffs' first class count alleges that Harris County has a policy and practice of seizing property based on mere suspicion of criminal activity, in violation of Article I, § 9 of the Texas Constitution. *See* Pet. ¶¶ 189–208. The second count alleges a policy and practice of failing to provide post-seizure hearings, thereby denying property owners any means of promptly challenging a police officer's probable-cause determination, in violation of the procedural and substantive due process protections of Article I, § 19 of the Texas Constitution. *See* Pet. ¶¶ 209–17. The third count alleges that the county has a policy and practice of filing forfeiture petitions based on hearsay testimony, in violation of Article I, §§ 9 and 19 of the Texas Constitution. *See* Pet. ¶¶ 218–22. The fourth count alleges that the county has a policy and practice of filing forfeiture petitions that use cut-and-paste, nonspecific allegations in violation of Article I, §§ 9 and 19 of the Texas Constitution. *See* Pet. ¶¶ 223–28. The fifth class count alleges that Section § 59.06(c) of the Texas Code of Criminal Procedure creates an unconstitutional financial incentive for law enforcement to seize property without probable cause and for prosecutors to seek forfeiture without an evidentiary basis for doing so because Section 59.06(c) authorizes police and prosecutors to keep 100 percent of the proceeds of seizures and forfeitures, in violation of the procedural and substantive due process protections of Article I, § 19 of the Texas Constitution. *See*

[2] Six of the individual counts mirror the class counts, one mirrors the subclass count, and one has no class-wide equivalent.

Pet. ¶¶ 229–41. The sixth and final class count alleges that Texas's requirement that property owners asserting innocence in civil-forfeiture proceedings prove their own innocence, *see* Tex. Code Crim. Proc. § 59.02(c)(1), violates the procedural and substantive due process protections of Article I, § 19 of the Texas Constitution. *See* Pet. ¶¶ 242–49.

To redress and prevent these systemic constitutional violations, Named Plaintiffs seek class-wide declaratory and injunctive relief based on Rule 42(b)(2) of the Texas Rules of Civil Procedure. They and the putative class members seek a Court order: (1) declaring unlawful and unconstitutional Defendants' policy and practice of violating rights guaranteed by Article I, §§ 9 and 19 of the Texas Constitution; (2) enjoining Defendants from continuing their unconstitutional policies and practices; (3) declaring unconstitutional the "innocent owner burden" imposed by Section 59.02(c)(1); (4) declaring Section 59.06(c) unconstitutional because it allows police and prosecutors to keep, for their own benefit, all the proceeds of civil-forfeiture cases; and (5) awarding $1 in nominal damages to the Named Plaintiffs and each putative class member. *See* Pet. at Prayer ¶¶ E–U.

STATEMENT IN SUPPORT OF CLASS CERTIFICATION

Named Plaintiffs Ameal Woods and Jordan Davis submit this Statement in accordance with Rule 42 of the Texas Rules of Civil Procedure.

I. Named Plaintiffs Propose a Workable Class Definition.

Named Plaintiffs move to certify a class with the following definition for the resolution of Counts 1–5 of their Original Petition and Application for Class Certification:

> All people who own (or partly own) property seized in Harris County between August 30, 2016, and the date of class certification, when all of the following conditions are met: (a) Harris County has filed a civil-forfeiture petition on behalf of the State of Texas; (b) the civil-forfeiture petition incorporates an affidavit that exhibits hallmarks of a form affidavit used by Harris County police and prosecutors or was written by someone who was not present at the time and place of seizure;

> and (c) the owner (or part owner) of the property has not been criminally charged with a forfeitable offense in connection with the seizure.

Pet. ¶ 27.

Named Plaintiffs also seek to certify a subclass (the "Innocent Owner Subclass") for the resolution of Count 6 with the following definition:

> All people who meet the conditions for membership in the principal class who also meet at least one of the following conditions: (a) the person was not present at the time and place of seizure; or (b) the state's civil-forfeiture petition incorporates an affidavit which, on its face, does not allege the person committed a specific act or omission on which forfeiture can be based.

See Pet. ¶ 28.

II. Named Plaintiffs Are Members of the Proposed Class.

A. Principal class.

Named Plaintiffs fall squarely within the proposed class definition because:

- Harris County seized their property after August 30, 2016 (*see* Morton Aff. ¶ 99 & Ex. 83);
- Harris County has filed a civil-forfeiture petition on behalf of the State of Texas (*id.*);
- the civil-forfeiture petition incorporates an affidavit that both exhibits hallmarks of a form affidavit and was written by someone who was not present at the time and place of seizure (*id.*); and
- neither of them has been charged with a forfeitable crime in connection with the seizure of their property. *See* Pet. ¶ 103.

In their Original Petition, Named Plaintiffs allege that Harris County's property-seizure and civil-forfeiture practices violate their rights under Article I, §§ 9 and 19 of the Texas

Constitution in several ways, *see* Pet. ¶¶ 250–94, and these are precisely the same constitutional claims that Named Plaintiffs assert on behalf of the proposed class, *see id.* ¶¶ 189–249.

B. Innocent Owner Subclass.

Named Plaintiff Jordan Davis is a member of both the proposed principal class and the proposed subclass. As shown above, she meets all the conditions for membership in in the principal class and, additionally, she was not present at the time and place of the seizure and the state's civil-forfeiture petition incorporates an affidavit which, on its face, does not allege she committed a specific act or omission on which forfeiture can be based. *See* Pet. ¶ 28. Jordan also challenges the innocent owner burden imposed on her by Section 59.02(c)(1) of the Texas Code of Criminal Procedure. Like all putative members of the subclass, she is subject to the statute's unconstitutional burden-shifting because she asserts her innocence. In Texas, no property owner should have to prove their innocence to maintain custody of their lawful possessions. Because due process does not permit the government to require an innocent person to prove their own innocence, Section 59.02(c)(1) violates Article I, § 19 of the Texas Constitution. This is precisely the constitutional claim that Jordan asserts on behalf of herself and the entire Innocent Owner Subclass.

III. Class Certification Is Appropriate Under Rule 42(a).

A. The proposed class is sufficiently numerous.

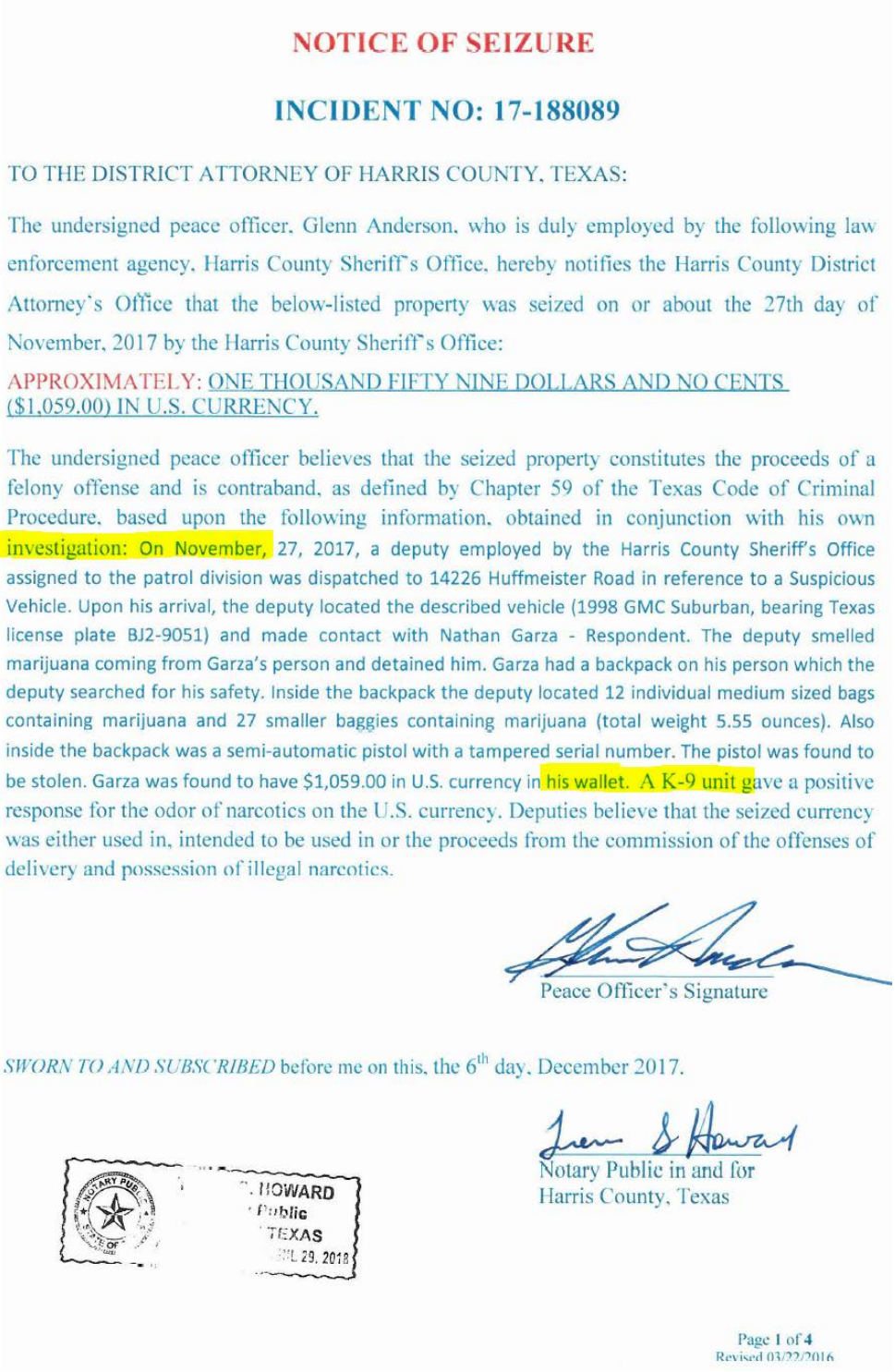
Certification is appropriate because the proposed class is sufficiently numerous that the joinder of all members would be impracticable. *See* Tex. R. Civ. P. 42(a)(1). Although Texas law does not set a minimum number of putative members necessary to meet Rule 42(a)(1)'s numerosity requirement, it is appropriate to look to federal law for guidance. "Texas Rule 42 is patterned after the federal class action rule," so that, in Texas courts, "reference to federal case law in the absence of Texas case law is appropriate." *See, e.g.*, *Adams v. Reagan*, 791 S.W.2d 284, 288 (Tex. App.—

Fort Worth 1990, no writ). Fifth Circuit cases hold that "any class consisting of more than forty members 'should raise a presumption that joinder is impracticable.'" *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (quoting 1 *Newberg on Class Actions* § 3.05 at 3–25 (3d ed. 1992)).

Here, the proposed class is as large or larger than the class in *Mullen*. Including the pending civil-forfeiture case seeking title to Named Plaintiffs' money, from June 1, 2016, until June 1, 2021, Harris County filed at least 113 forfeiture petitions incorporating an affidavit that both (1) exhibits the hallmarks of a form affidavit used by Harris County police and prosecutors and (2) was written by someone who was not present at the time and place of seizure. Morton Aff. ¶¶ 4–12.

The use of a form affidavit is plain on the face of all 113 of these forfeiture petitions. *See id.* ¶¶ 8–12. All 113 include a footer reading "Revised 3/22/2016." *Id.* ¶ 8. This appears to be the most recent version of the affidavit, written five-and-a-half years ago. *Id.* In 79 of these affidavits, the last two sentences are either identical or nearly identical. *Id.* ¶ 11; *see, e.g.*, *id.* ¶ 99 Ex. 83 at 4. These copy-and-pasted statements make material allegations. The first sentence is verbatim identical in all 79, alleging that a dog alerted on property sometime after seizure. *Id.* ¶ 11. The second sentence is nearly identical in all 79, stating what deputies "believe" about seized currency. *Id*. In at least one instance, the affiant neglected to change the font of the case-specific allegations

that he typed into the form affidavit, so the fonts of the boilerplate language and case-specific language do not match (highlighted below):



NOTICE OF SEIZURE

INCIDENT NO: 17-188089

TO THE DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS:

The undersigned peace officer, Glenn Anderson, who is duly employed by the following law enforcement agency, Harris County Sheriff's Office, hereby notifies the Harris County District Attorney's Office that the below-listed property was seized on or about the 27th day of November, 2017 by the Harris County Sheriff's Office:

APPROXIMATELY: ONE THOUSAND FIFTY NINE DOLLARS AND NO CENTS ($1,059.00) IN U.S. CURRENCY.

The undersigned peace officer believes that the seized property constitutes the proceeds of a felony offense and is contraband, as defined by Chapter 59 of the Texas Code of Criminal Procedure, based upon the following information, obtained in conjunction with his own investigation: On November, 27, 2017, a deputy employed by the Harris County Sheriff's Office assigned to the patrol division was dispatched to 14226 Huffmeister Road in reference to a Suspicious Vehicle. Upon his arrival, the deputy located the described vehicle (1998 GMC Suburban, bearing Texas license plate BJ2-9051) and made contact with Nathan Garza - Respondent. The deputy smelled marijuana coming from Garza's person and detained him. Garza had a backpack on his person which the deputy searched for his safety. Inside the backpack the deputy located 12 individual medium sized bags containing marijuana and 27 smaller baggies containing marijuana (total weight 5.55 ounces). Also inside the backpack was a semi-automatic pistol with a tampered serial number. The pistol was found to be stolen. Garza was found to have $1,059.00 in U.S. currency in his wallet. A K-9 unit gave a positive response for the odor of narcotics on the U.S. currency. Deputies believe that the seized currency was either used in, intended to be used in or the proceeds from the commission of the offenses of delivery and possession of illegal narcotics.

Peace Officer's Signature

SWORN TO AND SUBSCRIBED before me on this, the 6th day, December 2017.

Notary Public in and for
Harris County, Texas

HOWARD
Public
TEXAS
29, 2018

Page 1 of 4
Revised 03/22/2016

Id. ¶ 45 Ex. 29 at 3.

Notably, the final two sentences, including the allegation of a dog alert, are in the same font as the boilerplate language in the affidavit, *not* the font for the additional facts the affiant typed in. *See id.* Many similar mistakes by affiants underline the boilerplate nature of the affidavits supporting these forfeiture petitions. For example, in one affidavit the standard two concluding sentences appear verbatim, even though the affidavit alleges earlier that the dog alert had already taken place at the time of the seizure:

NOTICE OF SEIZURE

INCIDENT NO: 1812-06719

TO THE DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS:

The undersigned peace officer, Gregory Nason, who is duly employed by the following law enforcement agency, Harris County Sheriff's Office, hereby notifies the Harris County District Attorney's Office that the below-listed property was seized on or about the 20th day of December, 2018 by the Harris County Sheriff's Office:

APPROXIMATELY: TWENTY ONE THOUSAND NINE HUNDRED NINETY DOLLARS AND NO CENTS ($21,990.00) IN U.S. CURRENCY.

The undersigned peace officer believes that the seized property constitutes the proceeds of a felony offense and is contraband, as defined by Chapter 59 of the Texas Code of Criminal Procedure, based upon the following information, obtained in conjunction with his own investigation: On Thursday, December 20, 2018, Deputies with the Harris County Sheriff's Office conducted a traffic stop on a white, 2015, Volkswagen Passat, bearing temporary license plate 20466G3 at the 2400 blk. of Sawyer Heights, Harris County, for multiple traffic infractions. Deputies identified the driver by his Texas driver's license as Alejandro Pena-Respondent and the passenger identified himself as Jesus Esquivel-Respondent. Mr. Pena and Mr. Esquivel were both very nervous during this traffic stop, hands shaking, voice cracking and avoiding eye contact. Both individuals were detained at this time for officer safety. Mr. Pena gave voluntary consent for deputies to search his vehicle. A K-9 Unit conducted a free air sniff around the exterior of the vehicle prior to the search. The K-9 alerted on the presence of the odor of narcotics emitting from the vehicle. Deputies searched the vehicle and discovered the following: a green backpack on the backseat floorboard that contained U.S. Currency and a 9mm handgun, McDonalds paper bag that contained U.S. Currency, .38 caliber handgun under the front passenger seat and a cardboard box in the trunk containing 13.5lbs of Cocaine and 28lbs of Methamphetamines. The total in U.S. Currency was $21,990.00 dollars. Mr. Pena and Mr. Esquivel were both arrested for Possesion of a Controlled Substance with the Intent to Deliver. A K-9 Unit gave a positive response for the odor of narcotics on the U.S. Currency. Deputies believe that the seized currency was either used in, intended to be used in or the proceeds from the commission of the offenses of illegal activity.

Id. ¶ 91 Ex. 75 at 3.

In another affidavit, the copy-and-pasted sentence that alleges that deputies believe seized currency is connected to illegal activity appears in a forfeiture case about a vehicle (not currency):

NOTICE OF SEIZURE

INCIDENT NO: 2012-04383

TO THE DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS:

The undersigned peace officer, Gregory Nason, who is duly employed by the following law enforcement agency, Harris County Sheriff's Office, hereby notifies the Harris County District Attorney's Office that the below-listed property was seized on or about the 11th day of December 2020 by the Harris County Sheriff's Office:

VEHICLE: Black, 2012 Dodge Charger, Vehicle Identification Number: 2C3CDXCT3CH109251

The undersigned peace officer believes that the seized property constitutes the proceeds of a felony offense and is contraband, as defined by Chapter 59 of the Texas Code of Criminal Procedure, based upon the following information, obtained in conjunction with his own investigation: On Friday, December 11, 2020, Deputies with the Harris County Sheriff's Office received intel about multiple vehicles "street takeover group" doing donuts in the parking lot of Village at West Oaks Shopping Mall located at 2306 Sate Highway 6 South, Harris County. Deputies witnessed on location a black, 2012, Dodge Charger, bearing Texas paper tags 94857N4 doing multiple donuts within the parking lot. A Donut is when the operator of a motor vehicle knowing/willing breaks traction of the rear tires by revving its engine up to high RPM and causes the vehicle to swing uncontrollably in one direction or another, creating skid marks and a large cloud of smoke from its rear wheels. Justin Natamazo who was on location and witnessed the reckless driving of the black Charger had to move his vehicle out of the pathway from fear of being struck and possible injured by such reckless actions of the driver. Deputies conducted a traffic stop on the black charger within the parking lot. The driver and front passenger were both identified. The driver who was identified by his Texas Driver's License as Felicien Mvuyekure-Respondent. Mr. Mvuyekure was arrested for Deadly Conduct. The listed vehicle showed to be registered to Felicien Mvuyekure. Deputies believe that the seized currency was either used in, intended to be used in or the proceeds from the commission of the offenses of illegal activity.

Id. ¶ 120 Ex. 104 at 4.

Similar mistakes in other affidavits firmly establish that a form affidavit is being used as a matter of course, and that affiants are sometimes unfamiliar with the factual circumstances of a particular seizure. In two such instances, the date at the top of the affidavit says that the seizure

took place on September 1, 2018, but the body of the affidavit indicates that the seizure took place substantially after (on September 13, 2018, and August 1, 2018, respectively):

NOTICE OF SEIZURE

INCIDENT NO: 1809-03754

TO THE DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS:

The undersigned peace officer, Gregory Nason, who is duly employed by the following law enforcement agency, Harris County Sheriff's Office, hereby notifies the Harris County District Attorney's Office that the below-listed property was seized on or about the 1st day of September, 2018 by the Harris County Sheriff's Office:

APPROXIMATELY: TWO THOUSAND FOUR HUNDRED FOURTEEN DOLLARS AND NO CENTS ($2,414.75) IN U.S. CURRENCY.

The undersigned peace officer believes that the seized property constitutes the proceeds of a felony offense and is contraband, as defined by Chapter 59 of the Texas Code of Criminal Procedure, based upon the following information, obtained in conjunction with his own investigation: On Thursday, September 13, 2018, Deputies with the Harris County Sheriff's Office observed a male operating a stolen vehicle (Black, 2015, BMW 650I) at the 8400 blk. of Harwin, Harris County,

Id. ¶ 82 Ex. 66 at 3.

NOTICE OF SEIZURE

INCIDENT NO: 1809-00011

TO THE DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS:

The undersigned peace officer, Gregory Nason, who is duly employed by the following law enforcement agency, Harris County Sheriff's Office, hereby notifies the Harris County District Attorney's Office that the below-listed property was seized on or about the 1st day of September, 2018 by the Harris County Sheriff's Office:

APPROXIMATELY: TWO THOUSAND FIVE HUNDRED TWENTY FIVE DOLLARS AND NO CENTS ($2,525.00) IN U.S. CURRENCY.

The undersigned peace officer believes that the seized property constitutes the proceeds of a felony offense and is contraband, as defined by Chapter 59 of the Texas Code of Criminal Procedure, based upon the following information, obtained in conjunction with his own investigation: On Friday, August 1, 2018,

Id. ¶ 81 Ex. 65 at 3.

The nearly identical language and formatting of these 113 affidavits establish that Named Plaintiffs are far from alone in having their property seized and potentially forfeited based on a

form—and a form that is rarely adjusted and recklessly adopted to individual factual circumstances.

Particularly alarming is the fact that, in 80 of 113 cases (70%), the affiant is the same person—Officer Gregory Nason of the Harris County Sheriff's Office. *Id.* ¶ 13; *see also* Pet. ¶¶ 127, 270–81. Officer Nason is the affiant in Ameal and Jordan's case. Morton Aff. ¶ 99 Ex. 83 at 4. In another 26 cases, the affiant was Officer Glenn Anderson. *Id.* ¶ 14. Not one of the 113 forfeiture petitions was supported by the testimony of someone who was present at the time and place of the seizure. *Id.* ¶ 9.

The extreme commonality of just these 113 cases suggests the number of putative class members far exceeds 40 and likely exceeds twice that number. The current composition of the proposed class is objectively ascertainable using the same methods Named Plaintiffs have used above.

Another thing is clear even from this limited sample: Absent intervention from this Court, Harris County will continue to unconstitutionally seize and forfeit property from scores if not hundreds of new individuals every year, without probable cause, without due process, and often with the same affiant relying on identical hearsay testimony in some two-thirds of cases. Thus, the proposed class includes many present and future members who are readily identifiable. With nearly 100 putative class members already identified, and more to come, joinder of the individual property owners is impractical if not impossible. *See* 1 *Newberg on Class Actions* § 3:15 (5th ed. 2011) ("When discussing the practicability of joining future claimants, courts generally state that the numerosity requirements are relaxed due to the difficulty in determining the number and identity of these future claimants."); *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) ("Smaller classes are less objectionable where, as in the case before us, the plaintiff is seeking

injunctive relief on behalf of future class members as well as past and present members."); *accord J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019).

With so many ongoing forfeiture proceedings already showing similar constitutional infirmities, it is reasonable to assume there are many more people who would qualify as members of the proposed Innocent Owner Subclass. *See* Pet. ¶ 166 (defining the subclass). What we do know is there are many cases that look a lot like this case. In our limited sample of 113 forfeiture cases, 95 (84%) involved the seizure of nothing but cash. Morton Aff. ¶ 15. In the remaining 18 cases, a vehicle was seized (in some cases cash was seized as well). *Id.* ¶ 16. Given that it is so common for individuals to drive vehicles belonging to their friends, family, and acquaintances, and given that many individuals transporting large amounts of cash will, like Ameal, have money with them that belongs to someone else, it is reasonable to assume that present and future cases will involve the property of innocent-owner claimants like Jordan. As with the proposed principal class, the current composition of the proposed Innocent Owner Subclass should be objectively ascertainable based on a review of county and court records.

B. Named Plaintiffs' claims present common questions of law and fact.

Certification is also appropriate because there are "questions of law or fact common to the class." Tex. R. Civ. P. 42(a)(2). The "threshold for commonality is not high," requiring "at least one issue of law or fact that inheres in the complaints of all class members." *Union Pac. Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 74 (Tex. 2003) (cleaned up).

Named Plaintiffs' class-wide claims for injunctive relief and nominal damages rely on legal arguments that apply equally to all members of the proposed class. Common questions include, but are not limited to:

1. Do Defendants have a policy or practice of manufacturing probable cause to justify the seizure and detention of property using boilerplate affidavits, inadmissible hearsay, and conjecture?
2. Do Defendants' policies and practices violate Article I, § 9 of the Texas Constitution?
3. Does the distribution of 100 percent of forfeiture proceeds to prosecutors and the seizing law enforcement agency create a financial incentive to seize and forfeit property without probable cause to believe the property and its owner can be connected to a specific forfeitable offense?
4. Alternatively, does the distribution of 100 percent of forfeiture proceeds to prosecutors and the seizing law enforcement agency create a financial incentive for Harris County to deprive people of their property without due process, in violation of Article I, § 19 of the Texas Constitution?
5. Does the burden of proof that Tex. Code Crim. Proc. § 59.02(c)(1) places on innocent owners of seized property violate Article I, § 19 of the Texas Constitution?

Questions 1–4 are class-wide questions and Question 5 applies to the proposed Innocent Owner Subclass. Each of these questions represents a discrete issue of law that recurs weekly if not daily when another property owner is subjected to the county's unconstitutional behavior. Put differently, a class-wide resolution of this case is desirable because it likely to generate "common answers apt to drive the resolution of litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis and citation omitted).

C. Named Plaintiffs' claims are typical of the proposed class.

For similar reasons, Named Plaintiffs' constitutional claims are typical of the proposed class. *See* Tex. R. Civ. P. 42(a)(3). "The test for typicality is not demanding," and "named

representatives need not suffer precisely the same injury as the other class members." *Lon Smith & Assocs., Inc. v. Key*, 527 S.W.3d 604, 626 (Tex. App.—Fort Worth 2017, pet. denied) (cleaned up). All that is required is "a nexus between the injury suffered by the representatives and the injury suffered by the other members of the class," and that the claims be "based on the same legal theory." *Id.* This case easily clears the low bar for typicality.

Named Plaintiffs have already demonstrated that Harris County has a policy and practice of manufacturing probable cause based on boilerplate affidavits and facially deficient evidence, such as hearsay from affiants with no personal knowledge of the facts and circumstances of a given case. Every putative class member (including Named Plaintiffs) is subject to the challenged policy and practice, and each putative class member would rely on the same constitutional principles to challenge that policy and practice. Indeed, in many cases, the form affidavits used to support the forfeiture are virtually identical, alleging many of the same facts, using the same language and same font, and more than two-thirds of sampled forfeiture cases rely on the hearsay testimony of the same affiant. *See* Morton Aff. ¶¶ 36–42 Ex. 20–26, 47–51 Ex. 31–35, 53–56 Ex. 37–40, 59–64 Ex. 43–48, 67–70 Ex. 51–54, 72 Ex. 56, 74–124 Ex. 58–108, 126–27 Ex. 110–11.; *see also* Pet. ¶¶ 127, 270–81. In these circumstances, the typicality requirement is easily satisfied. There is a strong nexus between the injuries suffered by Ameal and Jordan and those suffered by the putative class members, and everyone can bring the same constitutional claims based on the same legal theories.

Named Plaintiff Jordan Davis, as an innocent owner whom Harris County does not allege committed any crime, is made to bear the burden of proof under Section 59.02(c)(1). Pet. ¶¶ 289–91. If the innocent owner burden violates due process and cannot be applied to Jordan, it equally cannot be applied to anyone else whose property is seized and potentially forfeited under similar

circumstances. Each putative subclass member is a claimant to property subject to forfeiture who has been, or will be, required to prove his or her own innocence, and each putative subclass member would invoke the same constitutional principles to challenge the unconstitutional burden-shifting required by the statute. The typicality requirement is therefore satisfied because there is a strong nexus between the injury suffered by Jordan and those suffered by the putative subclass members and because everyone would rely on the same constitutional claims based on the same legal theory.

D. Named Plaintiffs and their counsel will adequately represent the interests of the proposed class.

Finally, class certification is appropriate because Named Plaintiffs and their counsel will fairly and adequately represent the interests of the proposed class and Innocent Owner Subclass. *See* Tex. R. Civ. P. 42(a)(4). This requirement is satisfied because Named Plaintiffs' interests are closely aligned with the interests of putative class members: Named Plaintiffs belong to the proposed class; like all of its putative members, they have been injured by the state's and Harris County's unconstitutional forfeiture practices; and they have a strong personal interest in remedying these violations of their constitutional rights so that they can recover their property.

Named Plaintiff Jordan Davis's interests are also closely aligned with the interests of the proposed Innocent Owner Subclass: Jordan belongs to the subclass; her property will be forfeited unless she can carry the (unconstitutional) burden to prove her innocence; and she has a strong interest in remedying this constitutional violation so that she can recover her property.

1. Named Plaintiffs' claims are not presently or potentially in conflict with the proposed class.

Named Plaintiffs' interests do not conflict with the interests of the putative class members. There are no "antagonistic interests between class members and unnamed members." *Neff v. VIA*

Metro. Transit Auth., 179 F.R.D. 185, 195 (W.D. Tex. 1998). Every putative member of the class—including Named Plaintiffs—has, by definition, experienced Harris County's policies and practices of unconstitutionally seizing and forfeiting property based on mere suspicion, supported only by cookie-cutter affidavits, the testimony of the same handful of affiants with no personal knowledge, or all those things. Further, every putative member of the subclass—including Jordan—has been subjected, under Texas law, to the unconstitutional requirement that those who assert their innocence must prove their innocence or see their property forfeited. Jordan seeks relief from these policies and practices, and vindication of her constitutional rights will vindicate the rights of the entire subclass. *See* Pet. ¶¶ 243–49.

Named Plaintiffs thoroughly understand the potential advantages and disadvantages to them individually if this case goes forward as a class action. They hope the Court will allow it.

2. Counsel are well-qualified to represent the proposed class.

Counsel for Named Plaintiffs will fairly and adequately represent the proposed class. They are represented *pro bono* by Wesley Hottot and Arif Panju of the Institute for Justice ("IJ"). IJ is a 501(c)(3) non-profit, public-interest law firm founded in 1991. IJ litigates constitutional cases nationwide. Since 2008, IJ's office in Austin, Texas, has brought constitutional cases in state court based on the state constitution. The undersigned lawyers have experience litigating complicated constitutional cases in Texas and class-action lawsuits around the county, including civil-rights cases involving similar claims in federal courts in Chicago; Detroit; and Philadelphia. Mr. Hottot recently handled a civil-forfeiture case in the U.S. Supreme Court as counsel of record for the petitioner—a case in which he argued and won a unanimous reversal. *See Timbs v. Indiana*, 139 S. Ct. 682 (2019). Mr. Hottot and Mr. Panju are also familiar with Texas constitutional law. They have both worked in IJ's Texas office (Mr. Panju is now its managing attorney). Together they won *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), which

struck down the state requirement that eyebrow threaders obtain a conventional cosmetology education and pass conventional exams.

Accordingly, IJ and the undersigned are well-qualified to represent the proposed class.

IV. Class Certification Is Appropriate Under Rule 42(b)(2).

Class certification is appropriate under Rule 42(b)(2) because Named Plaintiffs are seeking injunctive and declaratory relief that would apply to all members of the proposed class. This is a constitutional challenge to Harris County's policies and practices for seizure and civil forfeiture, making it precisely the type of case that should be litigated as a class action. Constitutional challenges are particularly well-suited to certification under Rule 42(b)(2) because, by definition, constitutional relief applies to many people. *Compaq Comput. Corp. v. Lapray*, 135 S.W.3d 657, 664 (Tex. 2004) (noting that Rule 42(b)(2) "derives from its federal parallel, Rule 23(b)(2)" which "was added to the federal rules in 1966 primarily to facilitate the bringing of class actions in the civil rights area" (cleaned up)). Harris County's policy and practice of relying on vague allegations, form affidavits, and witnesses lacking personal knowledge to seize and even forfeit property is especially appropriate for class-wide injunctive and declaratory relief. Today, just about anyone who drives a car, carries cash, or loans a vehicle to a friend or family member in Harris County is at risk of being caught up in the county's unconstitutional procedures. But, if Named Plaintiffs and the putative class members are successful, that risk will disappear for everyone.

The Original Petition and this motion together show how Harris County "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Tex. R. Civ. P. 42(b)(2).

Rule 42(b)(2) claims also must be "cohesive," meaning there are few if any issues beside the constitutional questions outlined above. *Compaq*, 135 S.W.3d at 670. The outcome of this case turns not on the unique facts of particular cases, but on the constitutionality of Harris County's systemic policies and practices. The county's conduct has subjected Named Plaintiffs and every putative member of the class to identical deprivations of their constitutional rights. The same boilerplate allegations, form affidavits, and hearsay testimony that have denied Named Plaintiffs' control over their property were used identically to deny the putative class members' control of their property. A class-wide constitutional challenge to those policies and practices is, therefore, cohesive enough to satisfy Rule 42(b)(2).

Moreover, Named Plaintiffs challenge Harris County's policies and practices, not individual decisions depending on the facts and circumstances of each individual case. If the Named Plaintiffs are successful in challenging those policies and practices, relief would apply broadly to the proposed class (and all of Harris County) because the putative class members have all suffered the same injuries and would benefit from the same relief. In other words, if Harris County's seizure and forfeiture practices are constitutional, they apply uniformly to everyone; if, however, they are ruled unconstitutional, declaratory and injunctive relief would transform the status quo for every property owner in the county. The proposed class thus satisfies Rule 42(b)(2) and, with that, Named Plaintiffs have fulfilled all requirements for class certification.

V. Putative Class Members Should Receive Notice.

Notice is not required in a Rule 42(b)(2) class action, but "the court may direct appropriate notice to the class." *See* Tex. R. Civ. P. 42(c)(2)(A). To afford putative class members the opportunity to participate, Named Plaintiffs propose that Defendants be required to include notice of this lawsuit with other legally required notice forms that they send to current and future members

of the class. After all, Defendants are already legally required to send notices to putative class members in connection with the seizure and attempted forfeiture of their property. *See* Tex. Code Crim. Proc. § 59.04. These class-wide notice should be drafted by agreement of the parties (with the Court's intervention only if the parties cannot agree) and they should briefly explain that a class-action lawsuit is pending challenging the constitutionality of Harris County's policies and practices for seizure and civil forfeitures of property.

VI. Under The Circumstances, Named Plaintiffs Cannot Satisfy Local Rule 3.3.6.

Under the local rules, movants are generally required to confer with their opponents before filing a motion with the Court. Named Plaintiffs should be excused from this requirement under the circumstances of this case. First, they are filing this provisional motion for class certification precisely because they fear that Harris County will immediately take steps to try and deprive this Court of jurisdiction over their proposed class claims. *See* n.1 *above*. Second, this provisional motion is being filed with the Original Petition and, therefore, counsel do not know the identity of opposing counsel and cannot meet and confer with them. Named Plaintiffs anticipate that this motion will be opposed. Regardless, they will make diligent efforts to meet and confer with Defendants' counsel once Defendants identify the lawyers who represent them.

CONCLUSION

This Court should grant this Provisional Motion for Class Certification pursuant to Rules 42(a) and (b)(2) of the Texas Rule of Civil Procedure. The Court should name Ameal Woods and Jordan Davis as class representatives and appoint their *pro bono* counsel to represent the class pursuant to Rule 42(g). If this Court denies this provisional motion, Named Plaintiffs respectfully request an order authorizing precertification class discovery and, when class discovery is complete,

the opportunity to file a renewed motion for class certification relating back to this provisional motion.

RESPECTFULLY SUBMITTED this 30th day of August, 2021.

INSTITUTE FOR JUSTICE

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