

No. 24-01278

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

GERALD NOVAK and ADAM WENZEL,
Plaintiffs – Appellants - Petitioners,

v.

WILLIAM L. FEDERSPIEL,
in his official and personal capacities;
Defendant – Appellee

On Appeal from the United States District Court
for the Eastern District of Michigan – Northern Division
Honorable Thomas L. Ludington, District Court Judge

**PETITION FOR REHEARING *EN BANC*
AND FOR PANEL HEARING**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
BASIS FOR PANEL REHEARING AND REHEARING EN BANC.....	1
BACKGROUND	2
ARGUMENT	3
I. Fourth Amendment	3
A. Unreasonable Seizures.....	4
B. Other Circuits Have Found a Fourth Amendment Violation Creating a Circuit Split.....	5
C. <i>Jacobsen</i> Requires Justification for Ongoing Interference of Possessory Interests.....	6
D. A Strong History Supports Actionable Protections Against Prolong Dispossession	7
E. <i>Fox</i> was Wrongly Decided under the Fourth Amendment	8
II. Procedural Due Process	10
A. <i>Culley</i> Requires a Timely Post-Seizure Forfeiture Hearing, Which Was Not Provided.....	11
B. The Panel Incorrectly Shifted the Burden to Plaintiffs to Initiate Forfeiture Proceedings	13
C. Sheriff Federspiel’s Failure to Follow Michigan Law Deprived Novak and Wenzel of Any Due Process	15
D. The Panel’s Error Warrants Reconsideration	17
CONCLUSION	17
RELIEF REQUESTED	18

CERTIFICATE OF COMPLIANCE.....	20
CERTIFICATE OF SERVICE.....	21

TABLE OF AUTHORITIES

CASES

<i>Asinor v. District of Columbia</i> , 111 F.4th 1249 (D.C. Cir. 2024)	1, 3, 4, 5, 7, 10
<i>Brewster v. Beck</i> , 859 F.3d 1194 (9th Cir. 2017)	1, 4, 5, 10
<i>Case v. Eslinger</i> , 555 F.3d 1317 (11th Cir. 2009)	4
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985)	17
<i>Culley v. Marshall</i> , 601 U.S. 377 (2024)	11, 12, 15
<i>Denault v. Ahern</i> , 857 F.3d 76 (1st Cir. 2017)	4
<i>Fox v. Bd. of Regents of Univ. of Mich.</i> , 375 Mich. 238 (1965)	14
<i>Fox v. Van Oosterum</i> , 176 F.3d 342 (6th Cir. 1999)	1, 3, 4, 9
<i>Hahn v. Star Bank</i> , 190 F.3d 708 (6th Cir. 1999)	12, 14
<i>Lee v. City of Chicago</i> , 330 F.3d 456 (7th Cir. 2003)	4
<i>Mom’s Inc. v. Willman</i> , 109 F. App’x 629 (4th Cir. 2004)	4
<i>Mullane v. Cent. Hanover Bank & Tr. Co.</i> , 339 U.S. 306 (1950)	12, 17

<i>Novak v. Federspiel</i> , No. 24-1278, 2025 WL 4495417 (6th Cir. June 20, 2025)	2
<i>Savoy v. United States</i> , 604 F.3d 929 (6th Cir. 2010)	15
<i>Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.</i> , 363 F.3d 177(2d Cir. 2004)	4
<i>Sovereign News Co. v. United States</i> , 690 F.2d 569 (6th Cir. 1982)	15
<i>United States v. Chambers</i> , 192 F.3d 374 (3d Cir. 1999)	15
<i>United States v. Erpenbeck</i> , 682 F.3d 472 (6th Cir. 2012)	15, 16
<i>United States v. Francis</i> , 646 F.2d 251 (6th Cir. 1981)	15
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984)	1, 4, 5, 8, 10
<i>United States v. Jones</i> , 565 U.S. 400 (2012)	9
<i>United States v. Place</i> , 462 U.S. 696 (1983)	5
<i>United States v. Puig</i> , 419 F.3d 700 (8th Cir. 2005)	16

COURT RULES

FRAP 40.....	3
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STATUTES

42 U.S.C. § 1983	3
M.C.L. § 600.4704.....	10
M.C.L. § 600.4705.....	11, 12, 13
M.C.L. § 600.4707.....	10, 13, 14, 16

SECONDARY SOURCES

3 W. Blackstone, <i>Commentaries on the Laws of England</i> (1769).....	8
Maureen E. Brady, <i>The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection</i> , 125 YALE L. J. 946 (2016)	8
<i>Policing for Profit: The Abuse of Civil Asset Forfeiture</i> (3d ed.), INSTITUTE FOR JUSTICE	17-18

BASIS FOR PANEL REHEARING AND REHEARING EN BANC

Pursuant to revised Rule 40, Petitioners Gerald Novak and Adam Wenzel respectfully request 1.) panel rehearing to address errors in the affirmance of the dismissal of the procedural due process claim and 2.) rehearing en banc to overrule *Fox v. Van Oosterum*, 176 F.3d 342 (6th Cir. 1999), which erroneously holds that a law enforcement agency's retention of non-forfeited private property after a lawful seizure does not implicate the Fourth Amendment.

For nearly a decade, innocent owners Novak and Wenzel have been deprived of their private personal property without any process, a result that *Culley* and *Jacobsen* cannot countenance. As to the petition for en banc review, *Fox* – as mandatorily relied upon in the Panel in this case – conflicts with *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017) and *Asinor v. District of Columbia*, 111 F.4th 1249 (D.C. Cir. 2024), which modernly recognizes such ongoing and continuing retention as a Fourth Amendment violation. The decision is equally in tension with the teaching of *United States v. Jacobsen*, 466 U.S. 109 (1984). Overruling *Fox* is appropriate to align the Sixth Circuit with the more recent

understanding of Fourth Amendment protections and sister circuits' interpretations after *Jacobsen*.

BACKGROUND

The Panel's decision succinctly outlines the background of the case—

In 2017, the Saginaw County Sheriff's Office seized fourteen firearms in connection with a domestic-violence incident at a cabin in Merrill, Michigan. Officers arrested the perpetrator, Benjamin Heinrich, who admitted that he took one of the firearms from the cabin's bedroom and aimed it at his child's mother to force her out of the house. Heinrich pleaded guilty in state court, completed one year of probation, and was discharged from supervision in January 2019. All fourteen firearms remain in Sheriff William Federspiel's custody at the sheriff's office.

Heinrich's uncle, Gerald Novak, apparently owns the cabin where the firearms were stored. He and Adam Wenzel (Heinrich's distant cousin) claim that Novak owns twelve of the firearms and Wenzel owns the other two, and that Federspiel has refused to return them. They admit, however, that they do not have any documents proving their ownership. They also maintain that they had no part in Heinrich's crime.

Novak v. Federspiel, No. 24-1278, 2025 WL 4495417 (6th Cir. June 20, 2025). Novak and Wenzel have sought to recover the firearms that Defendant Sheriff Federspiel currently and continuously retains claiming a lack of documented ownership. Yet, at the same time, the Sheriff has never initiated any forfeiture proceedings or provided notice

of any process to otherwise justify continued post-conviction possession of the firearms in his governmental control. Petitioners sued under 42 U.S.C. § 1983, alleging various violations of the United States Constitution.

ARGUMENT

I. Fourth Amendment

Rehearing en banc is warranted because the two-member majority *Fox* decision creates both an intra-circuit and inter-circuit conflict and involves a question of exceptional importance. See FRAP 40(b)(2). *Fox* holds that the Fourth Amendment does not apply to the continued retention of lawfully seized property. Such conflicts with Judge Clay's thoughtful dissent in *Fox* itself (176 F.3d at 354-358),¹ and also with the Ninth, Fourth, and D.C. Circuits' decisions in *Brewster*, *Willman*, and *Asinor*.² This issue profoundly affects individuals' constitutional rights to

¹ Judge Clay's dissenting critique that has gained serious traction in sister circuits, further reinforcing the need for en banc review.

² Judge Karen LeCraft Henderson's concurring opinion in *Asinor* surveyed precedents and observed the Ninth Circuit (and possibly the Fourth Circuit) found a proper Fourth Amendment while five other circuits have held in precedential opinions that the Fourth Amendment does not support a claim for the government's retention of legally seized property" with "most of the contrary opinions have considered the issue only in passing" and "none... discussed relevant Supreme Court

be secure in their private personal effects against unreasonable *continued* seizures, particularly when the government retains property without justification after all investigatory or criminal proceedings have fully concluded.

A. Unreasonable Seizures

The Fourth Amendment guarantees that the right of the people to be secure in their effects from any “unreasonable” seizures. U.S. Const. Amend. IV. While a seizure of personal effects incident to a lawful arrest is reasonable, the *continued retention* of such personal property can *become* unreasonable by the passage of time. As the D.C. Circuit in *Asinor* observes, “the Fourth Amendment [still] governs what happens after the government initially seizes property.” 111 F.4th at 1255 (citing *Jacobsen*, 466 U.S. 109). In *Jacobsen*, the Supreme Court recognized that a seizure’s reasonableness depends on the length of the ongoing interference with

precedent or competing definitions of ‘seizure.’” *Asinor*, 111 F.4th at 1261-1262 (Henderson, J., concurring) (citing and surveying *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017); *Mom’s Inc. v. Willman*, 109 F. App’x 629, 637 (4th Cir. 2004); *Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017); *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004); *Fox*, 176 F.3d at 351; *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003); *Case v. Eslinger*, 555 F.3d 1317, 1330 (11th Cir. 2009)).

possessory interests. 466 U.S. at 124. A lawful and otherwise reasonable initial seizure can “*become* unreasonable because its length unduly intruded upon constitutionally protected interests.” *Id.* at 124, fn.25 (emphasis added). *Fox*’s holding that retention can never become a Fourth Amendment issue is in direct tension with the lesson of *Jacobsen*, particularly at Footnote 25.³

B. Other Circuits Have Found a Fourth Amendment Violation Creating a Circuit Split

In *Brewster*, the Ninth Circuit reviewed the LAPD’s 30-day vehicle impound policy. It explained “a seizure is justified under the Fourth Amendment only to the extent that the government’s justification holds force.” 859 F.3d at 1197. “Thereafter, the government must secure a new justification to continue the detention else “cease the seizure.” *Id.* When

³ Judge Karen LeCraft Henderson compellingly argues that this Circuit’s *Fox* decision (and the Seventh Circuit’s *Lee* decision) focused on the wrong Supreme Court precedent. This Circuit placed heavy reliance on *United States v. Place*, 462 U.S. 696 (1983). But “*Jacobsen* broadened *Place*.” *Asinor*, 111 F.4th at 1263 (Henderson, J., concurring). The Supreme Court “added to *Place* in *Jacobsen*, which connection neither *Fox* nor *Lee* discussed.” *Id.* The Supreme Court “unequivocally held that what the government does with seized property *can* sometimes violate the Fourth Amendment even though the property has already been lawfully detained.” *Id.* at 1264 (citing *Jacobsen*, 466 U.S. at 125, cleaned up and emphasis added).

it fails to cease in light of a lack of justification, a Fourth Amendment violation occurs.

In *Asinor*, the DC Metropolitan Police seized personal property (i.e. effects), including cell phones. The arrestees, once released and largely never charged, were unable to get their phones back from law enforcement despite repeated calls and requests. Like here, no one is disputing that the police may initially seize personal property held by the arrestee without a warrant. The *Asinor* majority properly held that the Fourth Amendment governs the government's continued possession of property post-seizure, a position Judge Henderson's concurrence reinforces by critiquing Fox's reliance on outdated precedent.

In short, the question is whether the Fourth Amendment governs "the government's *continued* possession of the property" after all possible lawful uses have ceased. *Asinor*, 111 F.4th at 1251. The DC Circuit, contrary to this Circuit, held it does. And it was correct to do so.

C. *Jacobsen* Requires Justification for Ongoing Interference of Possessory Interests

In *Jacobsen*, the Supreme Court addressed the Fourth Amendment implications of the government's continued dispossession of private property. A FedEx employee discovered white powder in a damaged

package and notified the DEA, who seized it. The agency agents conducted a field test, confirming the powder was cocaine, and retained it without a warrant. The Court held that the initial seizure was lawful, as it was supported by probable cause after the private search revealed the powder. However, the *Jacobsen* Court emphasized that a seizure, even if lawful at its inception, can later violate the Fourth Amendment if its “manner of execution unreasonably infringes possessory interests.” 466 U.S. at 124. Specifically, the Court noted that a seizure’s length could render it unreasonable. While the field test in *Jacobsen* was deemed reasonable because it destroyed only a trace amount of the powder, the decision established that prolonged retention of property without justification can constitute an unreasonable seizure. This principle is critical for circumstances (like the instant case) involving continued perpetual dispossession, requiring the government to justify ongoing interference with an individual’s possessory interests under the Fourth Amendment.

D. A Strong History Supports Actionable Protections Against Prolong Dispossession

Jacobsen rationale is historically sound as *Asinor* provides the compelling historical background to support the viability of the Fourth

Amendment to provide protections from never-ending governmental dispossession. The Fourth Amendment was not a newly-created right for the republic but rather conceptualized as a codification of a pre-existing right in early America. *Id.* at 1253. More pointedly, any “prolonged, unauthorized possession of a person’s property” at that time “would have been actionable at common law even if the initial taking had been lawful.” *Id.* at 1254 (citing 3 W. Blackstone, *Commentaries on the Laws of England* 145, 150–51 (1765)). The Fourth Amendment’s formulation of the right grew out of Antifederalist criticism of British officers’ “tak[ing] and carry[ing] away” personal property without cause. *Id.* at 1253 (citing Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L. J. 946, 987-994, 991 & fn.205 (2016), available at <https://www.yalelawjournal.org/article/the-lost-effects-of-the-fourth-amendment>).

E. *Fox* was Wrongly Decided under the Fourth Amendment

Fox’s holding that retention is not a Fourth Amendment issue ignores both the serious formalization of the right as one of constitutional import as well as the pedigree of the formalization of the right against official dispossession. *Fox* also incorrectly ignores the historical context,

which supports the view that the Fourth Amendment protects *against* prolonged, unjustified retention of private personal property.⁴ By concentrating only on the moment of taking, *Fox* mistakenly held that “the Fourth Amendment protects an individual’s interest in retaining possession of property but not the interest in regaining possession of property.” 176 F.3d at 351. That was in error. While the government has an interest in preventing firearms from returning to dangerous contexts, indefinite retention without process, especially for innocent owners, is disproportionate and violates the Fourth Amendment’s reasonableness standard.

Overruling *Fox* based upon the rationale of *Brewster* and *Asinor* would correctly revive Novak and Wenzel’s proper Fourth Amendment-based claims within this Circuit. Incentivizing law enforcement to indefinitely retain property without justification undermines the public’s trust in the justice system. The sheriff deputies’ initial seizure of the

⁴ To the extent there is any doubt, the Supreme Court has reconfirmed the same. In *United States v. Jones*, 565 U.S. 400 (2012), it was reaffirmed that the Fourth Amendment, by its own parallel constitutional test, protects possessory interests in property. *Jones* further supports the view that indefinite retention of non-forfeited property is an ongoing seizure.

firearms belonging to innocent owners has never been part of this challenge, but the continued retention after the third-party criminal case concluded has, especially when accomplished without forfeiture proceedings or other sufficient justifications. Such constitutes a “meaningful interference with [Petitioners’] possessory interests” in violation of the Fourth Amendment. *Jacobsen*, 466 U.S. at 113; *Brewster*, 859 F.3d at 1197; *Asinor*, 111 F.4th at 1255. The Sheriff’s refusal to return the firearms, coupled with a policy of retaining them “the longer we keep them, the better” (RE 13-5, PageID # 1377) is unreasonable under the Fourth Amendment. Rehearing en banc would allow this Court to correct the compelled dismissal of the Fourth Amendment claim premised on *Fox* and ensure legal correction for Petitioners from now close to decade long dispossession of their private property.

II. Procedural Due Process

Panel rehearing is warranted under the procedural due process claim because it was wrongly decided in light of recent U.S. Supreme Court precedent. The Court’s conclusion that Novak and Wenzel were not denied constitutionally adequate process fails to apply the Supreme Court’s “baseline protection of the Due Process Clause” reiterated in

Culley v. Marshall, 601 U.S. 377 (2024), and overlooks Sheriff Federspiel’s failure to comply with mandatory state-law notice requirements under Michigan’s *Omnibus Forfeiture Act* (OFA), M.C.L. §§ 600.4704, 600.4707. The Panel held that Novak and Wenzel “have not been denied constitutionally adequate process” because they received “actual notice of the seizure” and failed to pursue a motion hearing under M.C.L. § 600.4705(1). That conclusion is legally erroneous for three reasons: (1) *Culley v. Marshall* requires a timely *hearing*, not just notice; (2) it incorrectly shifts the burden to Petitioners to initiate such a timely hearing; and (3) it overlooks Sheriff Federspiel’s failure follow Michigan law, which would have resulted in both appropriate notice and a timely hearing.

A. *Culley* Requires a Timely Post-Seizure Forfeiture Hearing, Which Was Not Provided

In *Culley*, the Supreme Court held that due process in civil forfeiture cases requires, at a minimum, “a timely forfeiture hearing” to challenge the government’s retention of seized property. 601 U.S. at 393. The Court emphasized that while a pre-seizure hearing is not required when property is seized for criminal investigations, post-seizure process must include a hearing to determine the propriety of continued retention,

particularly after the criminal proceedings conclude. *Id.* at 386, 393. This requirement ensures that innocent owners, like Novak and Wenzel, are not indefinitely deprived of their property without an opportunity to contest the government's actions.

Here, the Panel acknowledged that the initial seizure of the fourteen firearms did not require pre-deprivation process due to the need for “quick action” in a domestic assault investigation. However, the Court erred in concluding that the unprovided post-seizure process was adequate. The record is undisputed that Sheriff Federspiel provided *no* post-seizure hearing after the conclusion of Heinrich's criminal case. RE 94-4, PageID # 2914. The Panel's mistaken reliance on “actual notice” of the seizure does not satisfy *Culley's* mandate for a timely hearing. Notice alone is insufficient; due process requires both notice *and* an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950); *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999) (due process violated when the state fails to apply an adequate remedy).

The suggestion that Novak and Wenzel could have pursued an expedited hearing under M.C.L. § 600.4705(1) ignores the practical reality that no such hearing was offered or scheduled by the Sheriff, who

was statutorily obligated to initiate the forfeiture process under the OFA. The Panel's reliance on M.C.L. § 600.4705(1) erroneously assumes Wenzel and Novak could self-initiate a hearing, ignoring the OFA's mandate that the government schedule such proceedings, a requirement *Culley* reinforces as a due process baseline. *Culley* instead clarifies that the government bears the responsibility to provide a timely hearing, not the property owner to demand one sua sponte. 601 U.S. at 393. By affirming the district court without addressing the absence of a post-seizure hearing, the Court misapplied *Culley* and failed to recognize a clear due process violation.

B. The Panel Incorrectly Shifted the Burden to Plaintiffs to Initiate Forfeiture Proceedings

The *Novak* decision faults two innocent owners for failing to pursue a motion hearing under M.C.L. § 600.4705(1) or to follow the state circuit court's guidance to file a forfeiture proceeding. This reasoning is legally erroneous because Michigan's OFA does not ever permit private citizens to initiate forfeiture proceedings. M.C.L. § 600.4707(4) explicitly states that only the attorney general, prosecuting attorney, or city/township attorney may institute a civil action for forfeiture. The assumption that Plaintiff-Petitioners could have commenced such proceedings

misinterprets the plain language of Michigan law and places an unconstitutional burden on innocent owners to navigate a process they are statutorily barred from ever initiating.

Furthermore, the Panel's reliance on the state circuit court's advisory⁵ suggestion to file a forfeiture claim overlooks the fact that this directive was legally incorrect, as later confirmed by the state district court's recognition that the Heinrich criminal case was "dead" and that a claim-and-delivery action was the appropriate remedy. RE 67-8, PageID # 2551. The suggestion that the failure to follow this erroneous guidance negates Novak and Wenzel's due process claim also conflicts with *Hahn*, which mandates that due process is nevertheless violated when the state fails to apply an adequate remedy, even if one exists in theory. 190 F.3d at 716. By blaming Novak and Wenzel for not pursuing an unavailable or misdirected process, the Panel improperly shifted the burden from the Sheriff, who failed to provide any process (despite being required to do so under the OFA) to the Petitioners, who were left without notice or a

⁵ Michigan's 10th Circuit Court found itself to be without subject matter jurisdiction over the dispute. Thus, its advisory insights (later confirmed to be in error by the 70th District Cour, which had jurisdiction) are of no legal effect. See *Fox v. Bd. of Regents of Univ. of Mich.*, 375 Mich. 238, 242-243 (1965).

hearing.

C. Sheriff Federspiel's Failure to Follow Michigan Law Deprived Novak and Wenzel of Any Due Process

The Panel correctly acknowledged that Sheriff Federspiel “has not sought formal forfeiture of the guns,” Opinion at 7, and he also failed to provide any notice under M.C.L. § 600.4707. Yet, the Panel concluded that Petitioners’ “actual notice of the seizure” sufficed because they learned of the seizure through other means. *Id.* (citing *United States v. Erpenbeck*, 682 F.3d 472, 476 (6th Cir. 2012)). This conclusion is erroneous because it is mistaken as to what must be noticed. Both *Culley* and *Erpenbeck* require notice of the intent to forfeit and an opportunity for timely hearing, not just the seizure. 601 U.S. at 389; 682 F.3d at 475. This is because the general rule is that the government must either return property after criminal proceedings or seek forfeiture. *Savoy v. United States*, 604 F.3d 929, 932 (6th Cir. 2010); see also *Sovereign News Co. v. United States*, 690 F.2d 569, 577 (6th Cir. 1982) (same); *United States v. Francis*, 646 F.2d 251, 262 (6th Cir. 1981) (same); *United States v. Chambers*, 192 F.3d 374, 376 (3d Cir. 1999) (“It is well settled that the government is permitted to seize evidence for use in investigation and trial, but that such property must be returned once criminal proceedings

have concluded, unless it is contraband or subject to forfeiture.”). Noticing seizure alone and then doing nothing in perpetuity is neither of these options. Again, the burden to move is on the government, and had Federspiel complied with Michigan law by initiating forfeiture proceedings, Novak and Wenzel would have received both proper notice of the proceedings, M.C.L. § 600.4707(1), and a timely hearing, M.C.L. § 600.4707(4). Instead, *nothing* was provided.

Closer examination of *Erpenbeck* (a case never even cited by the Sheriff) shows why the Panel’s reliance on it is misplaced. In *Erpenbeck*, actual notice sufficed because the property owner was a party to the criminal case and had direct knowledge of the forfeiture proceedings being pressed against him. 682 F.3d at 476 (citing *United States v. Puig*, 419 F.3d 700, 703-704 (8th Cir. 2005)) (discussing notice of intent to forfeit). Here, Novak and Wenzel are unconnected, innocent third parties with no involvement in Heinrich’s criminal case, and the Sheriff provided no notice to them of any kind, let alone notice of forfeiture proceedings that never occurred. The absence of notice prevented Novak and Wenzel from accessing the statutory process, violating the fundamental due

process principle that “notice and opportunity for hearing appropriate to the nature of the case” must precede deprivation. *Mullane*, 339 U.S. at 313; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

D. The Panel’s Error Warrants Reconsideration

The Panel’s affirmance of the district court’s summary dismissal of the procedural due process claim constitutes a clear error of law and directly conflicts with a decision of the United States Supreme Court. The failure to apply *Culley*’s requirement for a timely post-seizure forfeiture hearing, its erroneous imposition of a burden on Petitioners to initiate unavailable forfeiture proceedings, and its overlooking of the Sheriff’s complete failure to provide notice under M.C.L. §§ 600.4704 and 600.4707 misalign the decision with controlling precedent and the undisputed record.

CONCLUSION

The issues in this case are of exceptional importance to warrant en banc review, as law enforcement’s indefinite retention of private property without process, as incentivized by *Fox*, affects countless innocent owners nationwide, with billions in seizures annually often lacking timely hearings or notice. *Policing for Profit: The Abuse of Civil Asset Forfeiture*

(3d ed.), INSTITUTE FOR JUSTICE, *available at* <https://ij.org/report/policing-for-profit-3/>. For nearly a decade, innocent owners Gerald Novak and Adam Wenzel have suffered a clear injustice due to Sheriff Federspiel's willful inaction, a result the Sixth Circuit's misapplication of *Culley* and reliance on *Fox* perpetuate. These errors conflict with Supreme Court precedent and the modern protections recognized by sister circuits in *Brewster* and *Asinor*. Rehearing en banc and panel rehearing are essential to align this Circuit with controlling authority, restore constitutional protections, and address a pervasive issue affecting innocent owners across this circuit. This case presents the ideal vehicle to address a pervasive issue affecting countless innocent owners in this circuit, ensuring that constitutional protections keep pace with modern realities.

RELIEF REQUESTED

WHEREFORE, Petitioners Gerald Novak and Adam Wenzel, by counsel, hereby requests, pursuant to Rule 40, that this Court 1.) grant their *Petition for Rehearing En Banc* to overrule *Fox* for the reasons outlined herein; and 2.) grant their *Petition for Panel Rehearing* to correct the alleged errors on the procedural due process claim as outlined herein.

Date: July 4, 2025

s/ Philip L. Ellison

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CERTIFICATE OF COMPLIANCE

This Petition has been prepared in proportional typeface using Century Schoolbook 14-point font. The Petition, including headers and footnotes and signature block, contains 3,649 words according to the Word Count feature in the Microsoft Word program, being less than 3,900 words.

Date: July 4, 2025

s/ Philip L. Ellison
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CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of and a copy of such filing to counsel of record at their email address(es) of record.

Date: July 4, 2025

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0162p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GERALD NOVAK; ADAM WENZEL,

Plaintiffs-Appellants,

v.

WILLIAM L. FEDERSPIEL, in his official and personal
capacities,

Defendant-Appellee.

No. 24-1278

Appeal from the United States District Court for the Eastern District of Michigan at Bay City.
No. 1:21-cv-12008—Thomas L. Ludington, District Judge.

Argued: December 11, 2024

Decided and Filed: June 20, 2025

Before: KETHLEDGE, LARSEN, and MATHIS, Circuit Judges.

COUNSEL

ARGUED: Philip L. Ellison, OUTSIDE LEGAL COUNSEL PLC, Hemlock, Michigan, for Appellants. Douglas J. Curlew, CUMMINGS, MCCLOREY, DAVIS & ACHO, P.L.C., Livonia, Michigan, for Appellee. **ON BRIEF:** Philip L. Ellison, OUTSIDE LEGAL COUNSEL PLC, Hemlock, Michigan, for Appellants. Douglas J. Curlew, CUMMINGS, MCCLOREY, DAVIS & ACHO, P.L.C., Livonia, Michigan, for Appellee.

OPINION

PER CURIAM. Gerald Novak and Adam Wenzel claim they own fourteen firearms seized in a criminal investigation that ended years ago. Sheriff William Federspiel refused to turn the firearms over to Novak and Wenzel because he contends they have not proven that they

own them. So they sued Federspiel under 42 U.S.C. § 1983 and under Michigan law, asserting various federal constitutional claims and state constitutional and statutory claims. The district court granted summary judgment to Federspiel on all claims and denied Novak and Wenzel's motion for partial summary judgment. The district court should have allowed Novak and Wenzel to proceed with their: (1) federal takings claims against Federspiel in his official capacity, (2) Second Amendment claims against Federspiel in his official capacity, and (3) state-law claim-and-delivery action. We thus affirm in part and vacate in part.

I.

In 2017, the Saginaw County Sheriff's Office seized fourteen firearms in connection with a domestic-violence incident at a cabin in Merrill, Michigan. Officers arrested the perpetrator, Benjamin Heinrich, who admitted that he took one of the firearms from the cabin's bedroom and aimed it at his child's mother to force her out of the house. Heinrich pleaded guilty in state court, completed one year of probation, and was discharged from supervision in January 2019. All fourteen firearms remain in Sheriff William Federspiel's custody at the sheriff's office.

Heinrich's uncle, Gerald Novak, apparently owns the cabin where the firearms were stored. He and Adam Wenzel (Heinrich's distant cousin) claim that Novak owns twelve of the firearms and Wenzel owns the other two, and that Federspiel has refused to return them. They admit, however, that they do not have any documents proving their ownership. They also maintain that they had no part in Heinrich's crime.

Novak and Wenzel have sought to recover the firearms through two separate state-court proceedings and the present federal action, which is now on appeal for the third time.

The first state proceeding was a claim-and-delivery (i.e., replevin) action against the Sheriff's Office and Federspiel in a Michigan circuit court. The state circuit court dismissed the case without prejudice and directed the plaintiffs to instead file a claim for return of their property under Michigan's forfeiture laws in state district court.

So Novak and Wenzel filed suit in state district court. But rather than following the circuit court's guidance to initiate forfeiture proceedings, they reasserted claim and delivery, and this time, against the Sheriff's Office only. The district court granted summary disposition for the defendant, finding that the Sheriff's Office was not a proper party and that governmental immunity barred the claim. Novak and Wenzel appealed the decision and lost.

During the pendency of the state appeal, Novak and Wenzel filed this suit in federal district court alleging federal constitutional and state-law violations against Federspiel in his personal and official capacities. After a series of stays and interlocutory appeals,¹ Novak and Wenzel filed an amended complaint alleging: (1) Fifth Amendment temporary and permanent takings claims; (2) inverse-condemnation claims under Michigan law; (3) Fourteenth Amendment procedural-due-process claims; (4) procedural-due-process claims under Michigan law; (5) Fourteenth Amendment substantive-due-process claims; (6) substantive-due-process claims under Michigan law; (7) Second Amendment right-to-bear-arms claims, (8) right-to-bear-arms claims under Michigan law; (9) Fourth Amendment unlawful-seizure claims, (10) unlawful-seizure claims under Michigan law; and (11) claim and delivery under Michigan law.

Novak and Wenzel moved for partial summary judgment on their Fifth Amendment temporary takings claim against Federspiel in his official capacity only. They simultaneously filed a motion for discovery to seek additional evidence for their claims brought under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Federspiel moved for summary judgment on all claims.

The district court denied Novak and Wenzel's motions and granted summary judgment to Federspiel. For the federal claims, the court held that qualified immunity protected Federspiel in his personal capacity and that, in any event, Novak and Wenzel had not established constitutional violations. For the state-law claims, the court found that Michigan law does not recognize a

¹See *Novak v. Federspiel*, No. 21-cv-12008, 2021 WL 5198521 (E.D. Mich. Nov. 9, 2021), *rev'd and remanded*, No. 21-1722, 2022 WL 3046973 (6th Cir. Aug. 2, 2022); *Novak v. Federspiel*, 646 F. Supp. 3d 878 (E.D. Mich. 2022), *reconsideration denied*, 644 F. Supp. 3d 378 (E.D. Mich. 2022), *motion for relief from judgment denied*, 645 F. Supp. 3d 722 (E.D. Mich. 2022), and *appeal dismissed*, No. 22-2088, 2023 WL 8613874 (6th Cir. July 10, 2023) (order).

cause of action to sue municipal officials for constitutional torts, and that Novak and Wenzel could not establish the elements of claim and delivery.

Novak and Wenzel timely appealed.²

II.

We review grants of summary judgment and qualified immunity de novo. *Puskas v. Delaware County*, 56 F.4th 1088, 1093 (6th Cir. 2023); *Robertson v. Lucas*, 753 F.3d 606, 614 (6th Cir. 2014) (citation omitted). We view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *Palma v. Johns*, 27 F.4th 419, 427 (6th Cir. 2022).

III.

We first review the federal constitutional claims Novak and Wenzel brought under 42 U.S.C. § 1983 against Federspiel in his individual and official capacities. “To succeed on a § 1983 claim, a plaintiff must first identify a constitutional right, then show that a person acting under the color of state law deprived him of that right.” *Susselman v. Washtenaw Cnty. Sheriff’s Off.*, 109 F.4th 864, 870 (6th Cir. 2024) (citation omitted).

Federspiel asserts that qualified immunity bars the claims for damages against him in his personal capacity. Qualified immunity shields government officials sued in their personal capacity from liability for civil damages unless: “(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time.” *District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018) (internal quotation marks omitted). “For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Mercer v. Athens County*, 72 F.4th 152, 164 (6th Cir. 2023) (quotation omitted). “[T]he plaintiff has the burden of showing that the defendant is not entitled to qualified immunity.” *Mosier v. Evans*, 90 F.4th 541, 546 (6th Cir. 2024) (citation omitted).

²Novak and Wenzel do not challenge on appeal the district court’s disposition of their Michigan law procedural-due-process, substantive-due-process, right-to-bear-arms, and unlawful-seizure claims.

Novak and Wenzel also sued Federspiel in his *official* capacity. To prevail on these claims (i.e, *Monell* claims), Novak and Wenzel must “show *both* a constitutional violation and a municipal policy that directly caused the violation.” *Hardrick v. City of Detroit*, 876 F.3d 238, 243 (6th Cir. 2017).

A. Takings Claims

First, Novak and Wenzel alleged that by retaining the firearms after Heinrich’s criminal case concluded, Federspiel caused the unconstitutional taking of their property, either temporarily or permanently. The Takings Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, provides that “private property [shall not] be taken for public use, without just compensation.” U.S. Const. amend. V; *Sheetz v. County of El Dorado*, 601 U.S. 267, 276 (2024). The government commits a taking when it “physically takes possession of property without acquiring title to it.” *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021). The essential question in a takings case “is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner’s ability to use his own property.” *Id.* at 149. “A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it.” *Knick v. Township of Scott*, 588 U.S. 180, 185 (2019). “The Takings Clause generally vests the right to compensation solely in the party with a property interest at the time of the taking.” *CHKRS, LLC v. City of Dublin*, 984 F.3d 483, 492 (6th Cir. 2021); *see Andrews v. City of Mentor*, 11 F.4th 462, 469 (6th Cir. 2021) (“[N]o takings claim can proceed without a valid property interest.”).

As an initial matter, Federspiel is entitled to qualified immunity in his individual capacity on Novak’s and Wenzel’s takings claims. We have “held that individual liability for takings claims is not clearly established.” *O’Connor v. Eubanks*, 83 F.4th 1018, 1022 (6th Cir. 2023) (per curiam) (internal quotation marks omitted).

That leaves Novak’s and Wenzel’s takings claims against Federspiel in his official capacity. For Novak and Wenzel to obtain summary judgment on their takings claims, they must establish ownership of the subject firearms at the time of the taking. *See CHKRS, LLC*, 984 F.3d

at 492. And conversely, Federspiel would need to establish the opposite, as a matter of law, to obtain summary judgment on the ground that they did not own the firearms. *See id.* Here, Novak and Wenzel have submitted affidavits stating that they own the firearms in question. These affidavits create a genuine issue of material fact as to the ownership of the firearms. But the affidavits do not put that fact beyond dispute, and Novak's and Wenzel's credibility is for a factfinder to evaluate. *See, e.g., Davis v. Gallagher*, 951 F.3d 743, 750 (6th Cir. 2020). Novak and Wenzel otherwise lack evidence that establishes their ownership of the firearms as a matter of law.

We thus vacate the district court's grant of summary judgment to Federspiel on the official-capacity takings claims and the claims for injunctive relief. On remand, we see no reason why the parties would be precluded from pursuing discovery related to those claims.

B. Procedural-Due-Process Claims

We next review Novak's and Wenzel's procedural-due-process claims. The Fourteenth Amendment's Due Process Clause bars States from "depriv[ing] any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)). A procedural-due-process claim requires proof of the following two elements: "(i) deprivation by state action of a protected interest in life, liberty, or property, and (ii) inadequate state process." *Reed v. Goertz*, 598 U.S. 230, 236 (2023). When the "necessity of quick action renders pre-deprivation process impossible or impracticable," post-deprivation process may suffice. *Johnson v. City of Saginaw*, 980 F.3d 497, 508 (6th Cir. 2020) (internal quotation marks omitted).

Here, the circumstances surrounding the firearms' initial seizure did not require pre-deprivation process. In investigating the allegation of domestic assault against Heinrich that precipitated the seizure of the firearms, law enforcement needed to act quickly to preserve evidence and safeguard the victim and her infant child. Holding a pre-deprivation hearing,

particularly when police had no idea who owned the guns and no one present claimed ownership, would have been impossible or impracticable.

Federspiel has not sought formal forfeiture of the guns but has held them for the owner to claim them. Thus, the notice requirements under Michigan's forfeiture statute do not apply. See Mich. Comp. Laws § 600.4707. Still, Novak and Wenzel argue that they did not receive adequate process because Federspiel failed to provide notice of the seizure, either directly or by publication, pursuant to Michigan's forfeiture statute. Even so, that failure did not prevent Novak and Wenzel from receiving *actual* notice of the seizure, which suffices. See *United States v. Erpenbeck*, 682 F.3d 472, 476 (6th Cir. 2012). They further complain that when they, "two blue-collar lay-persons, started to ask [Federspiel] how can they get their firearms back, they were not directed to the criminal court." D. 12 at p.50. Even if it were incumbent on Federspiel to provide such direction, Novak and Wenzel received actual notice of the available process when the state circuit court directed them to bring a forfeiture claim in criminal court.

Novak and Wenzel also argue that they have been deprived of their right to a hearing to assert their ownership. But they have not yet had a meaningful hearing because they have failed to follow the proper procedures themselves. First, even after receiving notice of the seizure, they never pursued the expedited hearing available under Michigan's forfeiture statute. See Mich. Comp. Laws § 600.4705(1). Second, after the state circuit court dismissed their first claim-and-delivery action, they ignored that court's guidance to file a forfeiture proceeding and instead filed the same action in district court. If they had the impression that they could not proceed under forfeiture without Federspiel initiating it, the state circuit court's directive should have caused them to reconsider that view. Third, they named the Sheriff's Office and not Federspiel as the defendant in their second state proceeding, even though the first state court had already corrected that error. Naming the wrong defendant prevented the district court from proceeding on the merits because the Sheriff's Office was not a proper party. Fourth, rather than filing a new complaint against the proper defendant in the proper court with the proper claims, they appealed the state district court's decision unsuccessfully and filed this case in federal court. They cannot now claim that Federspiel deprived them of a process that they could have pursued on their own. *Shoemaker v. City of Howell*, 795 F.3d 553, 560 (6th Cir. 2015).

Viewing the facts in the light most favorable to Novak and Wenzel, we conclude that they have not been denied constitutionally adequate process.

C. Substantive-Due-Process Claims

Alongside their procedural claim, Novak and Wenzel also argue that Federspiel violated their substantive-due-process rights. Substantive due process “bar[s] certain government actions” depriving individuals of life, liberty, or property interests “regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986). “When the conduct in question has been taken by an executive officer, the action violates substantive due process only if it can be characterized as ‘arbitrary, or conscience shocking, in a constitutional sense.’” *Handy-Clay v. City of Memphis*, 695 F.3d 531, 547 (6th Cir. 2012) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998)). “[T]his characterization applies to only the most egregious official conduct.” *Id.* (internal quotation marks omitted).

Novak and Wenzel have not shown that Federspiel engaged in arbitrary, conscience-shocking, or egregious conduct. Recall that Novak and Wenzel contest only the retention, not the initial seizure, of the firearms. When Novak and Wenzel requested the return of the guns, Federspiel denied their request because, in his view, they did not prove ownership of the firearms. Nothing about this rises to the level of a substantive-due-process violation. Refusing to give firearms that were seized in connection with a criminal investigation to individuals who cannot substantiate their ownership—particularly when it is the alleged perpetrator’s relatives—is not conduct “so ‘brutal’ and ‘offensive’ that it did not comport with traditional ideas of fair play and decency.” *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).

Because Federspiel’s action “d[id] not deprive [Novak and Wenzel] of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest.” *Cooperrider v. Woods*, 127 F.4th 1019, 1041 (6th Cir. 2025) (quotation omitted). Novak and Wenzel made no attempt to show that Federspiel’s action “was not rationally related to a legitimate state interest.” *Id.* (quotation omitted).

Novak and Wenzel also argue that Federspiel violated their substantive-due-process rights because he “intentionally (or at least negligently) failed to follow the expressed procedural requirements” of Michigan’s forfeiture statute by not initiating forfeiture proceedings. D. 12 at p.53. But that would be a *procedural* violation, not a substantive one. And as we already explained, Novak and Wenzel cannot prove a procedural-due-process violation.

D. Second Amendment Claims

Novak and Wenzel next challenge the grant of summary judgment to Federspiel on their Second Amendment claims. The Second Amendment, applicable to the States through the Fourteenth Amendment, provides that “the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II; *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (plurality opinion). In *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), the Supreme Court “clarified the analytical framework that applies to Second Amendment challenges.” *United States v. Williams*, 113 F.4th 637, 644 (6th Cir. 2024). Under *Bruen*’s two-step approach, we must first determine whether “the Second Amendment’s plain text covers an individual’s conduct.” *Bruen*, 597 U.S. at 24.

The Second Amendment’s plain text protects the right to “keep” arms. The Supreme Court has said that this term protects a person’s right to own guns for personal use. *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008). At issue here is whether this right to own guns includes the right to possess—that is to “keep”—the guns that a person lawfully owns.

The right to keep or bear firearms would mean little if an individual lacked any presumptive right to keep or bear his own firearms. See *Frein v. Penn. State Police*, 47 F.4th 247, 254 (3d Cir. 2022). In that event, one might ask, whose firearms would one keep or bear? The district court, for its part, said the Second Amendment did not apply here because Federspiel had not interfered with Novak’s or Wenzel’s ability to buy or own other guns. But that reasoning has neither any limiting principle nor any basis in the caselaw; to the contrary, it conflates *Bruen*’s two steps into one.

The right to keep or bear one’s own firearms is quintessentially conduct that falls within the text of the Second Amendment. The relevant questions here, rather, are twofold. First,

whether these plaintiffs in fact owned these guns. And second, if so, whether Federspiel's possession of them has been "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. The district court can address those questions as necessary on remand.

We vacate the district court's grant of summary judgment to Federspiel on the official-capacity Second Amendment claims.³

E. Fourth Amendment Claims

Novak and Wenzel argue that Federspiel's refusal to return the firearms violated their Fourth Amendment rights. But as they recognize, our precedent forecloses their Fourth Amendment claim. In *Fox v. Van Oosterum*, we held that a police officer's refusal to return the plaintiff's driver's license did not pose a Fourth Amendment issue because "[o]nce th[e] act of taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies." 176 F.3d 342, 351 (6th Cir. 1999). Because the Fourth Amendment does not apply to *retaining* property, Novak and Wenzel's argument fails as a matter of law.

IV.

We consider next Novak's and Wenzel's state-law claims. They assert that the district court erred in rejecting their inverse-condemnation and claim-and-delivery causes of action. We agree with them on the claim-and-delivery action but disagree with them on the inverse-condemnation action.

A. Inverse-Condensation Claims

Novak and Wenzel bring an inverse-condemnation claim, under the Michigan Constitution, against Federspiel. They argue that the district court improperly rejected their claim. But because Novak and Wenzel invited the error, we reject their argument.

We have explained that "the doctrine of invited error is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit

³Novak and Wenzel waived their individual-capacity Second Amendment claims against Federspiel.

from the legal consequences of having the ruling set aside.” *In re Bayer Healthcare & Merial Ltd. Flea Control Prods. Mktg. & Sales Pracs. Litig.*, 752 F.3d 1065, 1072 (6th Cir. 2014) (quotation omitted). The invited-error doctrine “prevents a party from inducing a court to follow a course of conduct and then at a later stage of the case us[ing] the error to set aside the immediate consequences of the error.” *Id.* (alteration in original) (internal quotation marks omitted).

In their amended complaint, Novak and Wenzel framed their inverse-condemnation claim as a *Bauserman*⁴ constitutional claim. And in response to Federspiel’s summary-judgment motion, they stated that their “*Bauserman* claims are properly dismissed.” R. 94, PageID 2870. Because Novak and Wenzel purported to bring a *Bauserman* inverse-condemnation claim and then invited the district court to dismiss their *Bauserman* claims, they are not entitled to relief from the district court’s purported error.

B. Claim-and-Delivery Actions

We now reach Novak’s and Wenzel’s actions for claim and delivery. A claim-and-delivery action is Michigan’s statutory version of the common-law claim of replevin. *Whitcraft v. Wolfe*, 384 N.W.2d 400, 402 n.1 (Mich. Ct. App. 1985). “[A]n action for claim and delivery seeks the return of property wrongfully taken and held and allows damages for the period of wrongful detention.” *O’Connor v. State*, 9 N.W.3d 351, 360–61 (Mich. Ct. App. 2023); Mich. Comp. Laws § 600.2920(1); Mich. Ct. R. 3.105(A)(1) (“Claim and delivery is a civil action to recover [] possession of goods or chattels which have been unlawfully taken or unlawfully detained[.]”). The action “may not be maintained . . . by a person who, at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained.” Mich. Comp. Laws § 600.2920(1)(c).

Federspiel is not entitled to summary judgment on the claim-and-delivery action. A reasonable jury could find that Novak and Wenzel own the firearms at issue and that Federspiel has unlawfully kept those firearms after Novak and Wenzel requested their return.

⁴*Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855 (Mich. 2022).

Federspiel argues that he is entitled to governmental immunity from the claim-and-delivery action. Michigan's Governmental Tort Liability Act (GTLA) immunizes government agencies and officials from compensatory damages arising from tort claims. *In re Bradley Est.*, 835 N.W.2d 545, 554–55 (Mich. 2013); Mich. Comp. Laws § 691.1407. Because Novak and Wenzel have waived any claim for damages for their claim-and-delivery action, the GTLA does not apply.

Federspiel also argues that the claim-and-delivery action is barred by res judicata. The res judicata doctrine “bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.” *Adair v. State*, 680 N.W.2d 386, 396 (Mich. 2004) (citation omitted). Novak and Wenzel's prior state-court lawsuits were dismissed for lack of jurisdiction and based on governmental immunity. Those are not merits dispositions for purposes of res judicata. *See In re Quinney's Est.*, 283 N.W. 599, 602 (Mich. 1939) (“While a dismissal on the ground the court has no jurisdiction of the subject matter is a conclusive determination of want of jurisdiction, it is no adjudication of the merits and will not bar another action for the same cause.”); *Bd. of Cnty. Rd. Comm'rs for Cnty. of Eaton v. Schultz*, 521 N.W.2d 847, 851 (Mich. Ct. App. 1994) (per curiam) (suits dismissed due to governmental immunity are not a decision on the merits for claim-preclusion purposes).

V.

For these reasons, we **AFFIRM** the district court's denial of Novak and Wenzel's motion for partial summary judgment. We **AFFIRM IN PART** and **VACATE IN PART** the district court's grant of summary judgment to Federspiel. Specifically, we **AFFIRM** the district court's grant of summary judgment to Federspiel as to the individual-capacity takings claims, the procedural-due-process claims, the substantive-due-process claims, the Fourth Amendment claims, and the inverse-condemnation claims. We **VACATE** the grant of summary judgment to Federspiel as to the official-capacity and injunctive-relief takings claims, the official-capacity Second Amendment claims, and the claim-and-delivery action, and we **REMAND** to the district court for further proceedings consistent with this opinion.