



**The Council
of State
Governments**

CSG MIDWEST

DECEMBER 6, 2023

TESTIMONY TO KANSAS LEGISLATURE 2023
SPECIAL COMMITTEE ON
CIVIL ASSET FORFEITURE

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The Council of State Governments

Promoting Excellence in State Government

Identification and tracking of emerging trends

Exchange of innovative solutions

Multi-state problem solving

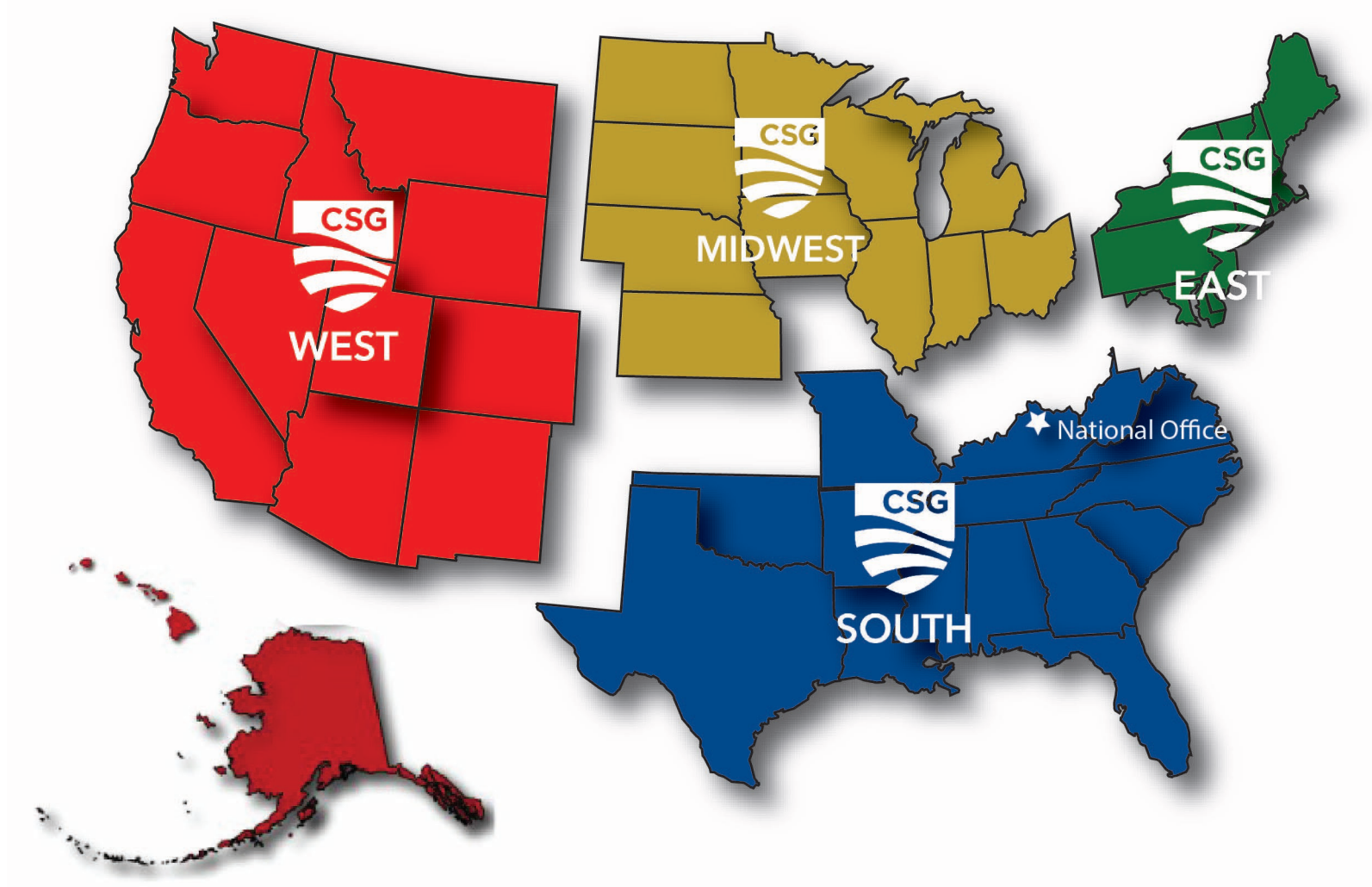
Leadership training

Advancing and protecting the role of states



MIDWEST

CSG's Regional Structure



CSG MIDWEST

Regional Groups of State Officials



**Midwestern Radioactive
Materials Transportation
Project
(DOE Grant)**



**Midwest Interstate
Passenger Rail Commission
(MIPRC)**



**Great Lakes-St. Lawrence
Legislative Caucus (GLLC)**



**Midwestern Legislative
Conference**

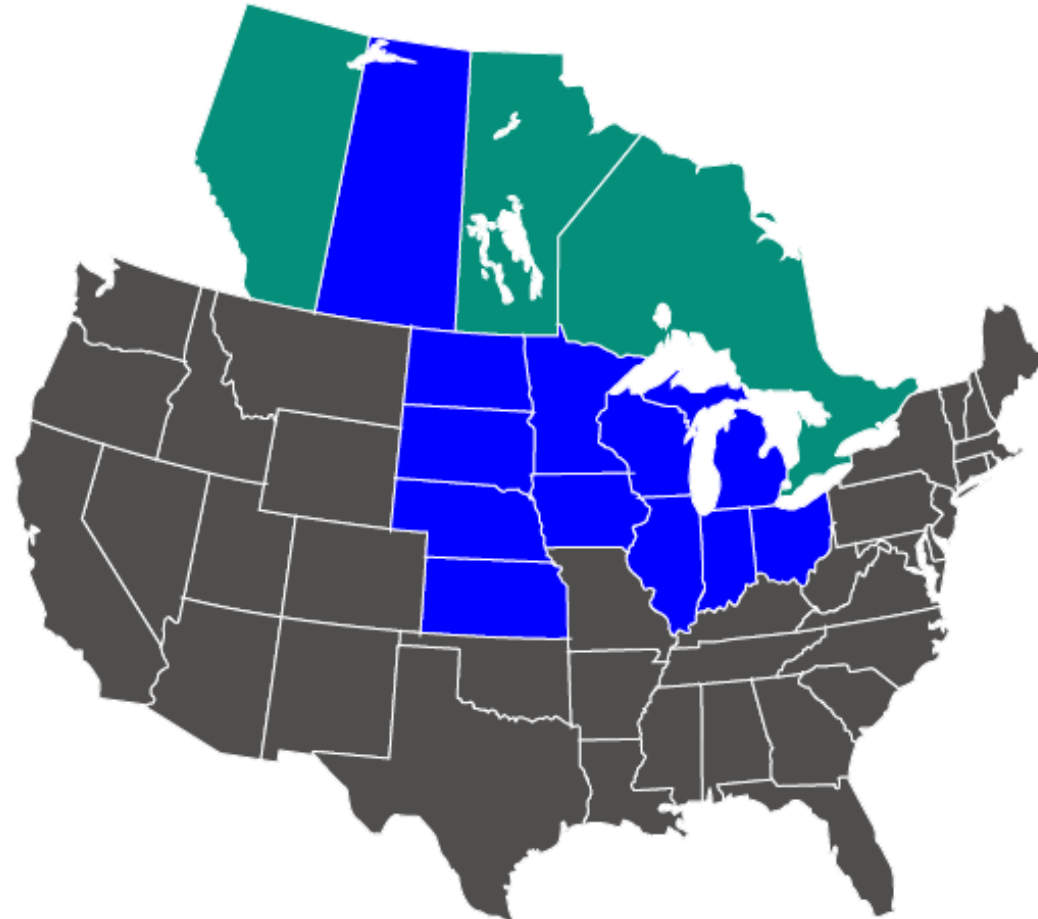


MIDWEST

MIDWESTERN LEGISLATIVE CONFERENCE

11 States

4 Provinces



Members of MLC

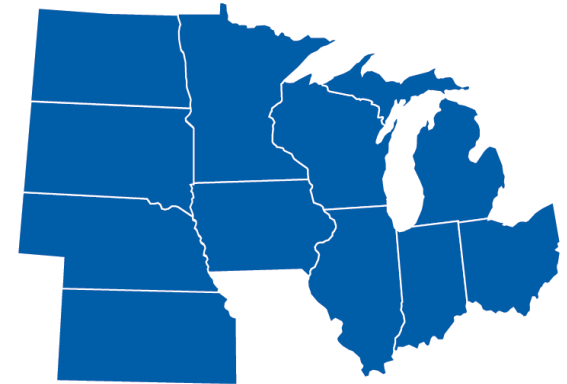
Affiliate members of MLC



MIDWEST

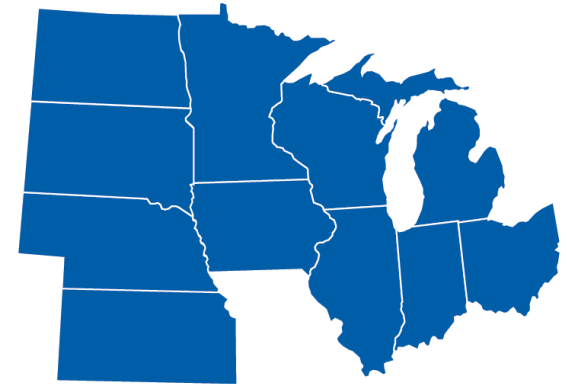
OVERVIEW OF PRESENTATION

- What changes have other states in the Midwest made to their laws on civil asset forfeiture?
 - New laws enacted in every Midwestern state over past 10 years
 - Review of each of those new laws
- Some of the big questions being addressed in the legislative discussions that led to these new laws:
 - Should our state allow for civil asset forfeiture by the government?
 - Should our state change the standard/burden of proof for assets to be forfeited?
 - Does the civil asset forfeiture process need to be changed to ensure due process rights?
 - Should the process be changed for “innocent property owners” in forfeiture proceedings?
 - Should more reporting and public disclosure be required of law enforcement?
 - Should the state define or change how proceeds from civil asset forfeiture actions can be used?



OVERVIEW OF TERMS

- Civil asset forfeiture
 - Independent of criminal prosecution
 - Government files a civil action against the property, not the individual, that is related to a criminal offense
 - Property often may be seized, and ultimately forfeited, (in most states) minus a criminal charge or conviction of a person
 - Forfeiture laws vary by state, but each law generally allows the government to keep seized cash and property, then destroy the property, or sell it and keep proceeds
- Overview of standards of proof
 - Probable cause
 - Preponderance of evidence
 - Clear and convincing evidence
 - Beyond reasonable doubt
- “Innocent owner defense”
 - No knowledge of illegal activity
 - States have varying processes in place for “innocent owners” to get their property back after it has been seized by government





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REVIEW OF RECENT LAWS AND LEGISLATIVE TRENDS IN THE MIDWEST

ILLINOIS

- **HB 303 of 2017 passed with near-unanimous support**

1. Increase burden of proof for government

- Higher standard is now “preponderance of evidence” to show property is subject to forfeiture (had been probable cause)
- Even higher standard, “clear and convincing evidence,” if related criminal case results in acquittal or a non-indictment

2. Change the forfeiture process

- Possession of small amount of drugs is not a legal basis for property forfeiture; small sums of cash (under \$500 in drug possession cases and under \$100 in other cases) are exempt from forfeiture
- New protections for property owners in asset forfeiture cases
 - Remove “cost bonds” for property owner to have cases heard
 - Ensure property owners get written notice of forfeiture proceedings and understand steps they can take to have property returned to them
 - Quicker timeline for adjudication of cases brought by property owners
 - Burden of proof now on government in forfeiture proceedings to show that property owner is “legally accountable” or should have “reasonably known” about criminal conduct; separate “innocent owner” hearings require claimant to show innocence by “preponderance of evidence”

3. Require more reporting by law enforcement agencies

- Report total number of asset seizures/value of all property seized; provide information for public, searchable State Police database; report how money from asset forfeitures is used
- State may withhold money from agencies that don’t comply with reporting requirements



INDIANA

- **SB 99 of 2018 passed unanimously**

1. Ensure due process rights of property owners (court ruling had struck down part of state's civil asset forfeiture process)

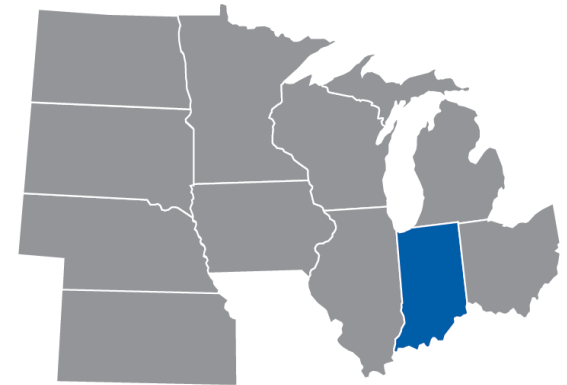
- Require prosecuting attorney to file an affidavit of probable cause no later than seven days after property is seized; property must be returned if court does not find probable cause
- Establish a procedure for owner of real property to obtain provisional custody of the seized property pending a final forfeiture determination
- Expedite civil forfeiture proceedings:
 - Prosecutors must file a forfeiture action within 21 days of receiving a demand for return from the owner, or within 90 days if no demand is made
 - Standard of proof remains preponderance of evidence at hearings determining whether assets/property are subject to forfeiture

2. Establish new reporting requirement for prosecutors

- Report to Prosecuting Attorneys Council the date when property was seized, the type of property seized, and whether forfeiture was filed in state court or via federal government; Council must report findings to legislature

3. Define use of funds from assets seized

- Pay any outside counsel (In Indiana, outside counsel can be employed by prosecutors in forfeiture cases)
- Most remaining funds go to state general fund, general fund of the law enforcement unit that conducted seizure, or a county law enforcement drug task force fund; remaining funds go into state's common school fund



IOWA

- **SF 446 of 2017 passed with near-unanimous support**

1. Change legal standards

- For cases involving property valued at under \$5,000, a criminal conviction related to the forfeiture (not necessarily conviction of the property owner) must occur before property is permanently forfeited via civil court proceeding
- In other cases (\$5,000 and over), standard of proof has been raised to “clear and convincing evidence” for property to be subject to forfeiture
- Stronger burden-of-proof protections for “innocent property owners”: Government must show “clear and convincing evidence” that the property can be forfeited by showing that “innocent owner” exemption does not apply

2. Create judicial “proportionality review”

- Amount/value of property forfeited cannot be “grossly disproportionate to the severity of the offense”

3. Establish new reporting requirements for law enforcement

- Require agencies to report value and disposition of seized property
- Provide itemized list of spending from forfeited property
- List open to public inspection during normal business hours



MICHIGAN

- **SB 2, HB 4001 and HB 4002 (2019) passed with near-unanimous support**

1. Change legal standards

- For cases involving property valued at \$50,000 or under, require a criminal conviction in offense related to the forfeiture (not necessarily conviction of property owner) or guilty plea before property is forfeited via civil court proceeding
 - A subsequently signed state law allows for civil asset forfeiture by airport authorities for currency/property valued at more than \$20,000; criminal conviction not required
- Require government to notify individuals if their property has been seized
- Place burden on government to prove that forfeiture is justified; if it is not, property must be returned to owner within 14 days.

2. Law from 2015 on burden-of-proof and reporting requirements

- Raise burden-of-proof standard from “preponderance of evidence” to “clear and convincing evidence” (for drug crimes) before property can be forfeited (see above for more recent changes)
- Local/state agencies must submit annual reports to Michigan State Police on property seizures and forfeitures; State Police gathers information for an annual, publicly available report on its website



MINNESOTA

- **HF 63 of 2021 passed (part of omnibus budget bill)**

1. Require more transparency and reporting by law enforcement/prosecutors

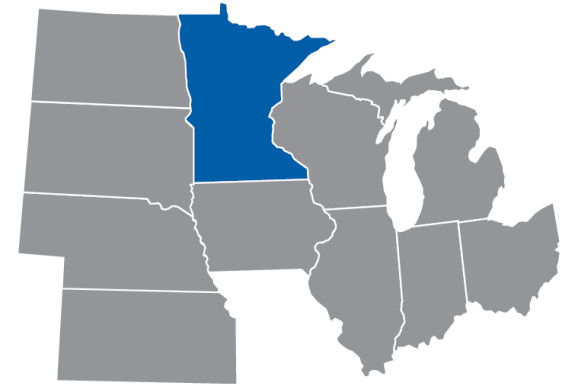
- Provide state auditor with information in 15 different categories related to each forfeiture
- Provide written reports to the auditor on total amount of money or proceeds from the sale of forfeited property and the manner in which the money and proceeds were used
- Auditor must provide this information annually to the legislature and on a publicly available website

2. Waive filing fees for owners requesting judicial determinations of forfeiture

3. Restrict vehicle forfeitures to for innocent owners of vehicles in DWI cases

4. Law from 2014

- Criminal conviction is required for asset forfeiture in certain types of cases (controlled substance offenses and drive-by shootings), though property associated with controlled substance offenses that does not exceed \$50,000 may be administratively forfeited



NEBRASKA

- **LB 1106 of 2016 passed by vote of 38-8-3**

1. Abolish civil asset forfeiture (replaced with criminal forfeiture only)

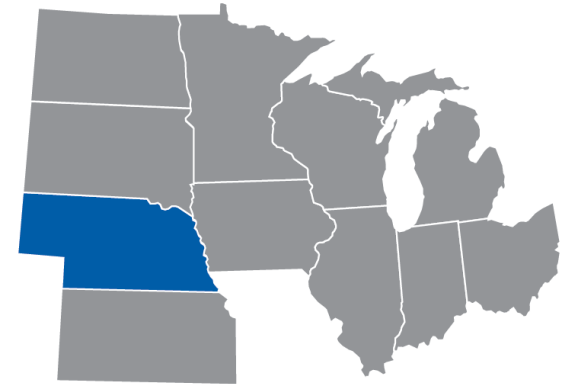
- One of four U.S. states, and only one in Midwest, to abolish (Maine, North Carolina and New Mexico are the others, according to Institute of Justice)
- Criminal conviction required before property can be forfeited

2. Bar state/local agencies from transferring property to federal government for forfeiture unless property is worth more than \$25,000

- Intent is to narrow agencies' use of federal program in which forfeited assets are shared/proceeds shared between state and federal law enforcement authorities

3. New reporting and disclosure requirements

- File annual reports detailing property seizures (date, type, monetary value)
- For traffic stops, document race/ethnicity of person who had property forfeited



NORTH DAKOTA

- **HB 1286 passed (43-4 in Senate, 55-37 in House)**

1. Increase the burden of proof on government

- Higher standard is now “clear and convincing evidence” to show property is subject to forfeiture
- Require criminal conviction or guilty plea to initiate forfeiture proceedings unless:
 - Individual has died or fled jurisdiction, been granted immunity or reduced sentence, or abandoned property or
 - Property has been shown, beyond a reasonable doubt, to have been used in commission of a crime or constituted the proceeds of criminal activity

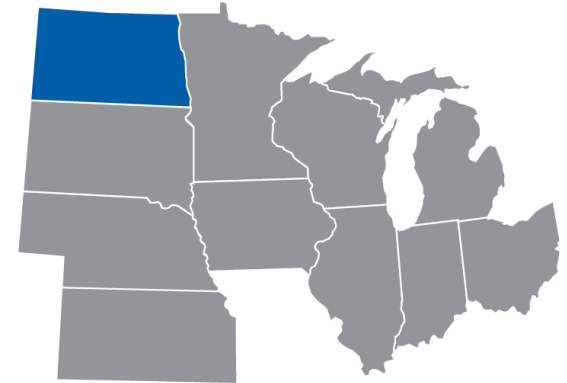
2. Require political subdivisions to create Civil Asset Forfeiture Fund controlled by local governing body

3. Prevent “excessive forfeitures”

- Homestead may not be forfeited
- Vehicle valued at less than \$2,000 may not be forfeited
- Court determines whether forfeiture is excessive based on several factors: a) value of property; b) extent of property owner’s participation in criminal offense; c) extent to which property was used in commission of the crime; and 4) severity of crime

4. Require reporting/data collection

- Attorney general must annually collect information on forfeitures from law enforcement agencies; information is provided to legislature and governor’s office



OHIO

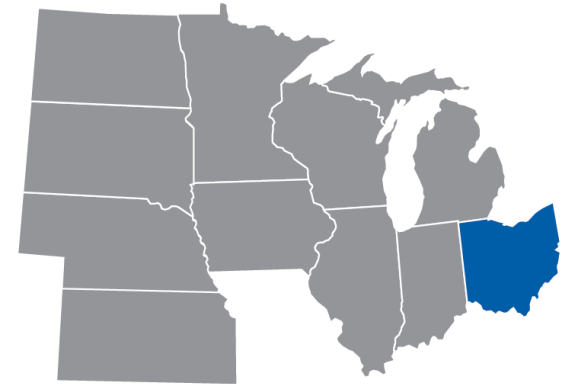
- **HB 347 of 2017 passed (31-0 in Senate, 81-10 in House)**

1. Increase the burden of proof for government to make property subject to forfeiture

- Higher standard is now “clear and convincing evidence” that property is connected to crime and subject to forfeiture (standard had been “preponderance of evidence”)
- Require criminal conviction to forfeit property valued at under \$15,000 (adjusted for inflation) unless:
 - Property is abandoned
 - Individual fled jurisdiction
- Shift burden of proof in forfeiture cases: instead of “innocent property owner” having to prove exemption under innocence-owner defense, government must show otherwise (“clear and convincing” evidence)

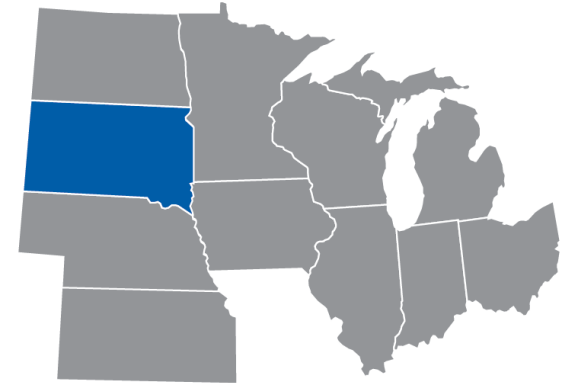
2. Bar transfer of seized property, valued at under \$100,000, to the federal government

- Intent is to narrow use of federal program in which forfeited assets are shared/proceeds shared between state and federal law enforcement authorities



SOUTH DAKOTA

- **HB 1328 of 2022 passed with near-unanimous support**
 1. Increase reporting/disclosure requirements on law enforcement
 - Provide information to state attorney general on all property seized or forfeited
 - State attorney general must provide searchable public website with details on each property seized or forfeited (date, descriptions of property, value of property, related criminal charges, whether innocence-owner sought to regain property, etc.)



WISCONSIN

- **SB 61 of 2018 passed (22-10 in Senate; near-unanimous voice vote in Assembly)**

1. Require criminal charge to seize property/criminal conviction in forfeiture proceeding

- Charge must be issued within six months of property seizure (extensions granted if court determines probable cause has been shown)
- Conviction required on criminal offense that was basis of forfeiture, with exceptions if “clear and convincing evidence is shown that:
 - Defendant has died, fled or been deported
 - Defendant has been granted immunity to testify
 - Property has been unclaimed for nine months or is a drug identified as contraband

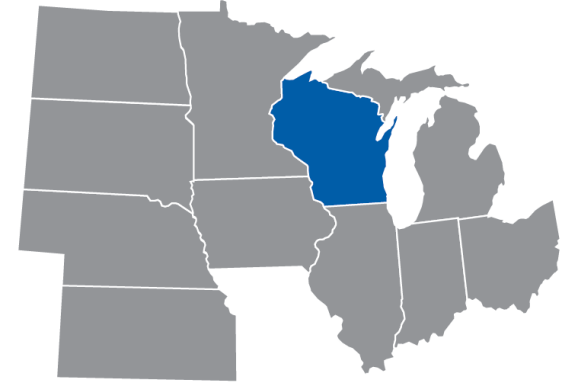
2. Establish new safeguards for property owners

- Create timeline for adjudication of cases involving return of property; return property to owner before final judgment in certain instances (if final order will likely return property, if property is needed for owner to pay for legal representation, etc.)
- “Innocent owner”: Government must prove that owner does not qualify for “innocent owner exemption” by showing clear and convincing evidence that owner had “actual or constructive knowledge of underlying crime”
- Proportionality review conducted by courts to ensure forfeiture is not “grossly disproportional or unconstitutionally excessive”
- Attorney fees may be awarded to property owner if law enforcement arbitrarily and capriciously pursued forfeiture

3. Revise how proceeds from forfeitures can be used

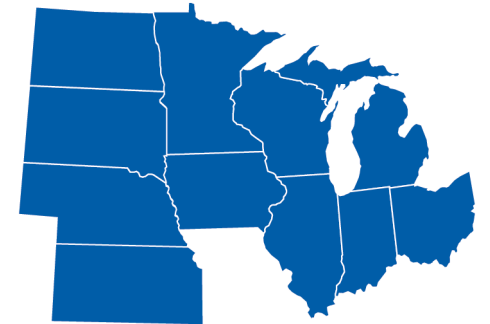
- Law enforcement agency retains up to 50% of proceeds for publicly reported actual forfeiture expenses; remaining proceeds go to state school fund
 - If property is money, 100% goes to school fund in non-drug-related crimes and 50% goes to school fund in drug-related crimes

4. Require criminal conviction in related case before state/local law enforcement receive any proceeds from transfer of seized property to federal government



SUMMARY OF RECENT LAWS & LEGISLATIVE TRENDS

- Should our state allow for civil asset forfeiture by the government?
 - Yes, in most Midwest states, with exception of Nebraska (abolished civil asset forfeiture)
- Should our state change the standard/burden of proof for property/assets to be forfeited?
 - Burden of proof has been raised in many states; most common change has been to “clear and convincing evidence” that property is tied to criminal activity and subject to forfeiture (e.g., Iowa, Michigan, North Dakota and Ohio)
 - Conviction in crime related to forfeiture sometimes now required in certain cases in order for property to be subject to forfeiture (e.g., Iowa, Michigan, Minnesota, North Dakota, Ohio and Wisconsin)
- Should the process be changed for “innocent property owners” in forfeiture cases?
 - Changes have included shifting burden of proof from innocent property owners to government (e.g., Iowa, Ohio and Wisconsin)
- Should more reporting and public disclosure be required of law enforcement/prosecutors?
 - Common reform in most new state laws in Midwest
- Should the state define or change how proceeds from civil asset forfeiture actions can be used?
 - Wisconsin is most notable example, requiring proceeds go to state school fund
- Other changes
 - Proportionality review (e.g, Iowa and Wisconsin)
 - Limited law enforcement from transferring seized property to federal government, or to get proceeds from these transfers (e.g. Ohio, Nebraska, North Dakota and Wisconsin)





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Questions?

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