No. 26-91

In the Supreme Court of the United States

RICHARD STUART ROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* GOLDWATER INSTITUTE AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Goldwater Institute is a nonprofit, nonpartisan public policy foundation headquartered in Phoenix, Arizona. Established in 1988, Goldwater is devoted to advancing the principles of limited government, economic freedom, and individual liberty. Through its Scharf-Norton Center for Constitutional Litigation, Goldwater litigates cases and files amicus briefs to defend these constitutional guarantees. Goldwater has represented parties and appeared as amicus curiae in asset-forfeiture cases in federal and state courts across the country.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the Government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

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[1] In accordance with Rule 37.2, all counsel of record received timely notification of *amici*'s intent to file this brief. No party's counsel authored any part of this brief, and no one other than *amici,* their members, and their counsel made any monetary contribution intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

Civil asset forfeiture poses a grave threat to individual liberty: It permits the Government to seize property from people who have not been convicted of any crime, forcing them to incur substantial litigation expenses simply to reclaim what is rightfully theirs. Recognizing these dangers—and a growing trend of overzealous forfeiture actions—Congress enacted the Civil Asset Forfeiture Reform Act (CAFRA) to hold the Government accountable and ensure that innocent property owners who successfully recover their property are made whole. CAFRA entitles property owners ("claimants") who "substantially prevai[l]" in forfeiture actions to recover attorney fees. 28 U.S.C. § 2465(b)(1). Congress's choice of the modifier "substantially"—along with contrasting language elsewhere in CAFRA—makes plain that eligibility for fees extends beyond claimants who obtain a merits judgment in their favor. Eligibility extends to claimants—like Petitioner—who challenge the Government's forfeiture action and regain possession of their property.

The Second Circuit's decision undermines CAFRA's protections by permitting the Government to evade them. The court held that CAFRA fees are available only if the claimant satisfies the "prevailing party" standard for plaintiffs, which requires a favorable judicial order on the merits. Not only is that standard drawn from a different statutory context, it cannot be reconciled with CAFRA's text, this Court's precedents, or Congress's fee-shifting purpose.

First, the Second Circuit disregarded Congress's decision to award fees not only to claimants who "prevai[l]," but to the broader set of claimants who "*substantially* prevai[l]." 28 U.S.C. § 2465(b)(1) (emphasis added). As a matter of grammar and precedent, that qualifier confirms that fee eligibility turns on the claimant's meaningful success in recovering property, not on whether the claimant secured a favorable judgment. Consistent with that ordinary understanding, lower courts have long interpreted "substantially prevail" in similar statutes to encompass parties who obtained their desired relief without a court-ordered judgment. When Congress adopts language with a settled judicial meaning, it presumably "brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 73 (2012) (same).

Second, the decision below erroneously imports this Court's prevailing-party standards for parties who prosecute affirmative claims, rather than applying the standards that govern parties who defend against the Government's claims. While a *plaintiff* must obtain final relief on the merits to prevail, *see Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 605 (2001), the Court has rejected that standard with respect to *defendants*, *see CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 422 (2016). Instead, a defendant need only "prevent" the plaintiff or prosecutor from obtaining affirmative relief. *Id.* at 431. Applying that framework, claimants prevail under CAFRA when they achieve their "primary objective": the return of their property. *Id.* at 431. Accordingly, a claimant who recovers property after mounting a defense is entitled to fees, especially when that defense leads the Government to dismiss its forfeiture claim.

Third, the decision below produces untenable practical consequences. By insulating the Government from fee liability whenever it voluntarily abandons a forfeiture action, the Second Circuit's rule hollows out CAFRA's deterrent force. The Second Circuit's rule invites the Government to pursue speculative or weak forfeiture actions because it can avoid paying fees by dismissing the action just before suffering defeat. That result shifts the cost of the improper forfeiture onto the individuals Congress sought to protect under CAFRA.

This case illustrates the problem: After incurring more than $100,000 to defend against a concededly unlawful forfeiture action, Richard Ross threatened to move for summary judgment. *See* Pet.App.77a; Gov't C.A. Br. 4; D.Ct. Dkt. 61-2, at 62, 65. The Government then dismissed its case and subsequently contended that the eleventh-hour dismissal foreclosed any entitlement to CAFRA fees. Mr. Ross is not alone. As numerous examples illustrate, the Government frequently pursues forfeiture until doing so is no longer tenable, moving to voluntarily dismiss cases at a late stage.

A faithful application of CAFRA's text and this Court's precedents would have entitled Mr. Ross and other claimants like him to fees for their successful efforts to reclaim their property—they "substantially prevail[ed]" against the Government's attempt to forfeit it. But the Second Circuit has turned CAFRA's protection into a paper promise. Its decision is not an isolated error. Other circuits have embraced the same mistaken approach, further undermining Congress's effort to protect property owners from unjustified forfeiture. This Court should grant the petition.

ARGUMENT

I. Text and Precedent Confirm that a Claimant "Substantially Prevails" When the Government Returns the Contested Property.

A claimant "substantially prevails" under CAFRA when the Government voluntarily dismisses its forfeiture action and returns the claimant's property after the claimant has presented a defense. The Second Circuit reached the opposite conclusion by misreading this Court's precedent and CAFRA's text. *First*, the court failed to give weight to Congress's decision to award fees not only to claimants who "prevai[l]," but also to those who "*substantially* prevai[l]." 28 U.S.C. § 2465(b)(1) (emphasis added). That modifier reflects Congress's intentional choice to condition CAFRA fees on the claimant's practical success in avoiding forfeiture, not the procedural mechanism by which that success occurs. *Second*, the Second Circuit disregarded this Court's cases establishing different standards for prevailing *plaintiffs* and prevailing *defendants*. Forfeiture claimants are functionally defendants rather than plaintiffs; the Government seizes property and files suit against the seized property, at which point the claimant mounts a defense. And the Government is analogous to a plaintiff; it controls whether to proceed with its claim to the forfeited property. Just as a defendant in a Title VII suit prevails when a plaintiff gives up his suit, so too can a claimant prevail when the Government stops litigating a forfeiture action.

A. By Requiring Claimants Only to "*Substantially* Prevail," Congress Made Fees Available Under CAFRA When the Government Returns the Contested Property.

Congress did not rely solely on the ordinary meaning of "prevail" when establishing whether a forfeiture claimant is entitled to a fee award. Rather, it specified that claimants need only "*substantially* prevai[l]." 28 U.S.C. § 2465(b)(1). This qualifier confirms that fee-eligibility turns on the substance of the claimant's success—that is, whether the claimant ultimately succeeded in recovering his property—and not whether he achieved that goal in a particular procedural form. When the Government voluntarily dismisses a forfeiture action and returns the claimant's property, the claimant has "substantially prevail[ed]" under CAFRA and is entitled to fees. Mr. Ross is therefore entitled to fees.

1. The Second Circuit's conclusion that a claimant must obtain a judgment in his favor to be eligible for CAFRA fees ignores the plain language and structure of the statute. Pet.App.26a–38a.

To begin, as a matter of grammar, a litigant who "substantially prevails" need not have satisfied every requirement associated with "prevailing." The word "substantially" means "consisting of or relating to substance" or "largely *but not wholly* that which is specified." *Substantial*, *Merriam-Webster Collegiate Dictionary* 1174 (10th ed. 1993) (emphasis added); *see also Substantially*, *Oxford English Dictionary* (2d ed. 1989) ("In all essential characters or features; in regard to everything material; in essentials; to all intents and purposes; in the main"); *Substantially*

Justified, *Black's Law Dictionary* (7th ed. 1999) ("Of conduct, a position, etc.," requiring only a "*reasonable* basis in law and in fact" (emphasis added)). By authorizing fees whenever a claimant "substantially prevails," CAFRA directs courts to focus on the substance of the result achieved, and confirms that fee eligibility turns on meaningful success, not complete success—however that concept is defined. Thus, even if a claimant needed a judgment on the merits to prevail in the fullest sense, Congress nonetheless authorized fees for claimants "who have enjoyed some success but have not prevailed in a judgment on the merits." *Lackey v. Stinnie*, 604 U.S. 192, 205 (2025). In the context of CAFRA, "substantially" means that courts should therefore look to whether a claimant obtained the "substance" of his objective in the forfeiture action—to recover his property.

Widespread, historical use and interpretation of the phrase "substantially prevails" confirms this is the correct interpretation of CAFRA. When Congress enacted CAFRA in 2000, courts consistently interpreted "substantially prevailed" in the fee-shifting provisions of the Freedom of Information Act and the Privacy Act to focus on the substance of the litigant's success over its form. As these courts explained, plaintiffs "substantially prevailed" under these statutes whenever they obtained the relief they sought—whether or not a court order compelled that relief. *See Reinbold v. Evers*, 187 F.3d 348, 362–63 (4th Cir. 1999) (collecting cases). Thus, a plaintiff could recover fees even "where the government, after commencement of the litigation, has acted to moot the action by supplying the material sought." *Sweatt v. U.S. Navy*, 683 F.2d 420, 423 (D.C. Cir. 1982) (per curiam) (cleaned up). Against that backdrop, Congress was "presumably" aware of "the interpretation federal courts had given the words earlier Congresses had used," and thus adopted the same interpretation that courts had already given that phrase. *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268 (1992); *see also Stokeling v. United States*, 586 U.S. 73, 80 (2019) (a statutory term "obviously transplanted from another legal source … brings the old soil with it" (citation omitted)). The Court may thus "fairly credit" the unanimous judicial understanding of "substantially prevails" in understanding CAFRA's meaning. *See Holmes*, 503 U.S. at 268; Scalia & Garner, *supra*, at 73.

CAFRA's structure confirms this interpretation of the fee-shifting provision. In subsection (a) of the statute, Congress required the return of seized property if a claimant received "entry of a judgment" in his favor and thereby prevailed. 28 U.S.C. § 2465(a)(1). And in subsection (b)(1)(B), CAFRA refers to "post-judgment" interest. But when Congress described eligibility for fees in subsection (b)(1)(A), it used broader language: a claimant need only "substantially prevai[l]." *Id.* § 2465(b).[2] Had Congress required a "judgment" to award fees, it would have used that term, as it did in subsection (a) and in (b)(1)(B), or it could have simply referred back

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[2] A different provision governs the availability of fees when a claimant prevails only in part. In that scenario, Section 2465(b)(2)(D) provides that fees will be reduced for partial success. The question presented in this case concerns only the antecedent, threshold question whether Petitioner is *eligible for* recovery of his fees.

to subsection (a). But it did not. That "difference in language … convey[s] a difference in meaning." *Enbridge Energy LP v. Nessel*, 146 S. Ct. 1074, 1084 (2026) (citation omitted); *see also* Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 224 (1967) ("[W]hen Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things"). CAFRA's structure thus confirms that fee eligibility does not turn on the claimant obtaining judicially sanctioned relief.

The Second Circuit's reading also cannot be squared with Section 2465(b)(2)(C). That provision governs what happens when "there are multiple claims to the same property." In that case, if the Government "promptly" returns the claimant's interest and "does not cause the claimant to incur additional, reasonable costs or fees," *id.*, the Government is not liable for fees. But if a judgment is required for fees, there would be no need for this provision because the claimant would not be entitled to fees in any event.

2. Mr. Ross satisfies this commonsense standard. After Mr. Ross was the victim of fraud, the Government seized the entirety of Mr. Ross's Interest on Trust Account (IOTA), including more than $1.2 million it acknowledged appeared to be "unrelated" to the fraud. C.A. App. 25–26. Nearly a year after the seizure, and after incurring over $100,000 in legal fees defending against the wrongful forfeiture, Mr. Ross informed the Government that he would move for summary judgment. D.Ct. Dkt. 61-2, at 62, 65. The Government then moved to dismiss its case without prejudice, in effect "conceding" that the innocent funds were "not forfeitable," and returned Mr. Ross's $1.2 million in full. Pet.App.77a; Gov't C.A. Br. 4. Mr. Ross thus accomplished his goal of obtaining possession of his property after mounting a defense. Accordingly, he substantially prevailed and was entitled to fees under CAFRA. *See* 28 U.S.C. § 2465(b)(1).

B. Under This Court's Precedents, a Forfeiture Claimant "Prevails" When the Government Returns the Contested Property.

As explained, the Second Circuit's approach cannot be squared with CAFRA's text and structure. Rather than give appropriate meaning to the term "substantially prevails," the court of appeals applied the "prevailing party" standard for plaintiffs. Pet.App.28a–34a. The court did so despite this Court's clear admonishment that "prevailing party" is a term of art that should *not* be imported into a fee-shifting statute "from which it is conspicuously absent," because doing so "more closely resembles inventing a statute rather than interpreting one." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251–52 (2010) (cleaned up). Had Congress desired to impose the requirements associated with that plaintiff-side "prevailing party" doctrine, it could have done so. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 n.3 (1983) (collecting examples). The Second Circuit's failure to adhere to this Court's instruction was error.

In any event, insofar as the "prevailing party" and related cases have bearing here, they underscore the Second Circuit's error. As the Court recently reaffirmed, "different bod[ies] of caselaw" govern whether plaintiffs and defendants qualify as prevailing parties "for the purposes of … fee-shifting statutes." *Lackey*, 604 U.S. at 204 n.*. That distinction reflects a basic feature of litigation: It is "[c]ommon sense" that "[p]laintiffs and defendants come to court with different objectives," and thus different definitions of what it means to prevail. *CRST Van*, 578 U.S. at 431. While a plaintiff "seeks a material alteration in the legal relationship between the parties," a defendant seeks only "to prevent" such a change and maintain the prelitigation status quo. *Id.* Measured against the standard that the Court has developed for defendants, CAFRA claimants prevail when the Government dismisses its action and returns the claimant's property.

CAFRA claimants are aligned with traditional defendants. A plaintiff prevails by obtaining "enduring judicial relief on the merits that materially alters the legal relationship between the parties." *Lackey*, 604 U.S. at 203–04 (discussing 42 U.S.C. § 1988(b)). That requirement follows naturally from the plaintiff's objective: A plaintiff comes to court to "ma[ke] a claim," and thus prevails only when it has "successfully maintained it." *Id.* at 200 (quoting *Prevailing Party*, *Black's Law Dictionary* 1352 (rev. 4th ed. 1968)). A defendant, on the other hand, comes to court to defend against a claim. In the forfeiture context, it is the claimant who defends against the Government's assertion of a right to the forfeited property. And much like a plaintiff, it is the *Government* who can control the litigation by simply dismissing when the going gets tough.

For more than four decades, this Court's decisions on plaintiff prevailing-party status have reflected that commonsense understanding of the difference between litigating in an offensive and defensive posture.

In *Texas State Teachers Association v. Garland Independent School District*, the Court explained that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." 489 U.S. 782, 792 (1989) (quotation marks omitted). And building on that principle, *Buckhannon* held that a plaintiff "prevail[s]" only by obtaining a "judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 605. Accordingly, in *Buckhannon*, the plaintiff had *not* prevailed in its lawsuit against the Government simply because the Government voluntarily eliminated the challenged statute and regulation; the plaintiff needed a "judicially sanctioned change in the legal relationship of the parties" to secure fees. *Id.* at 602, 605.

Most recently in *Lackey*, the Court clarified that not every "judicially sanctioned change" is enough. A plaintiff prevails only after securing "enduring … relief on the merits." 604 U.S. at 203–04 (quoting *Buckhannon*, 532 U.S. at 605). Only then has a plaintiff "successfully prosecute[d] the action." *Id.* at 200 (quoting *Prevailing Party*, *Black's Law Dictionary*, *supra*, at 1352).

But the story is quite different for defendants: The Court has not required them to obtain enduring, judicially sanctioned relief to be a prevailing party. In *CRST Van*, the Court confirmed that the rules for those prosecuting claims differ from those hauled into court to defend against claims. There, the Court considered whether a defendant qualified as a "prevailing party" under Title VII's fee-shifting provision even though the district court had dismissed the plaintiff's claims on non-merits grounds. *See* 578 U.S. at 431; 42 U.S.C. § 2000e-5(k). The Court acknowledged that *Buckhannon* and *Texas State Teachers Association* established the standard for determining when "a plaintiff" prevails, but noted that it "ha[d] not" previously "set forth in detail how courts should determine whether a defendant has prevailed." 578 U.S. at 422. The Court declined to extend the standard applied in *Buckhannon* or *Texas State Teachers Association* to defendants.

Instead, the Court looked to "common sense" and held that a defendant had prevailed if it "fulfilled its primary objective" by "rebuff[ing]" the plaintiff's challenge, regardless of "the precise reason for the court's decision." *Id.* at 423–31. "Neither the text of the fee-shifting statute nor the policy … underpin[ning] it" required the defendant to obtain a final judgment on the merits. *Id.* at 434; 42 U.S.C. § 2000e-5(k) ("[T]he court, in its discretion, may allow the prevailing party … a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."). That "congressional policy"—which permits courts to exercise their "discretion" under Title VII to award fees to "prevailing defendants" only when "the plaintiff's 'claim was frivolous, unreasonable, or groundless,'" *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)—did not "depen[d] on the distinction between merits based and non-merits-based frivolity." 578 U.S. at 432. Indeed, "Congress could not have intended to bar defendants from obtaining attorney's fees" when, as in *CRST Van*, "the litigation was resolved in their favor." *Id.* at 434.

The reasoning of *CRST Van* suggests that a defendant can "rebuf[f]" a plaintiff's challenge in many ways, including but not limited to a judicial decision. *Id.* at 431. Because a defendant's objective is to defeat the plaintiff's claim, success must turn on whether the defendant accomplishes that goal, not on the mechanism by which relief to the plaintiff was denied. *See id.* at 431. Accordingly, when "the litigation [is] resolved" without judicial relief for the plaintiff, the result is "in [the defendant's] favor" and sufficient to prevail. *See id.* at 434.

CRST Van's standard for prevailing defendants guides this case. If a Title VII defendant could prevail without judicial relief under the logic of *CRST Van*, then surely a forfeiture claimant can as well.[3] If anything, CAFRA's fee-shifting provision is more protective of claimants than Title VII's is protective of defendants. Title VII permits courts to award fees to a "prevailing party" on a discretionary basis (only when the plaintiff's claim is "frivolous, unreasonable, or groundless"). *Christiansburg*, 434 U.S. at 422; 42

[3] True, *CRST Van* involved judicially sanctioned relief (a dismissal on procedural grounds). *Id.* at 426–27. But the Court held only that such relief was *sufficient* to render the defendant a prevailing party. *See id.* at 432. Nothing in the Court's opinion suggests that judicially sanctioned relief is *necessary* for a defendant to prevail. *See generally id.* at 422–34. To the contrary, extending *Buckhannon* to require defendants, not just plaintiffs, to obtain judicially sanctioned relief would contravene *CRST Van*'s central clarification: that plaintiffs and defendants prevail in different ways and thus that *Buckhannon* did not "set forth" the standard appropriate for defendants. *Id.* at 422, 431.

U.S.C. § 2000e-5(k). But CAFRA *mandates* fees whenever a claimant "substantially prevails." 28 U.S.C. § 2465(b)(1). Nothing in CAFRA's text justifies imposing an additional requirement that *CRST Van* rejected either expressly (judicial relief on the merits) or impliedly (judicial relief at all) for Title VII.

This Court's decision in *Thompson v. Clark*, 596 U.S. 36 (2022), reinforces the principle that a defendant (like a forfeiture claimant) prevails when the Government-plaintiff fails to secure the relief it seeks, even without a judicial decision affirmatively vindicating the defendant's position. In *Thompson*, the Court again considered what it means for a defendant to obtain a favorable result, this time in the context of the "favorable termination" requirement for a malicious prosecution claim. *See id.* at 39. Shortly after the defendant was charged and detained in state criminal proceedings, the prosecutor dismissed the charges—and the trial judge dismissed the case—without explanation. *Id.* at 40. The defendant then sued the arresting police officers for malicious prosecution. *Id.* The Court held that the defendant satisfied the claim's "favorable termination" requirement because the prosecution "ended without conviction." *Id.* at 49. The defendant did not need to show that the "prosecution ended with some affirmative indication of innocence" from the prosecutor or the court—the criminal analogue of a judgment on the merits for the defendant. *Id.*

Under the principles recognized in these cases, a forfeiture claimant prevails—and no doubt "substantially prevails"—when the Government voluntarily dismisses the action and returns the property it sought to seize. In that circumstance, the

Government fails to obtain the judicial relief it sought, the claimant has achieved his "primary objective" of recovering his property, and the parties are restored to the status quo ante. *CRST Van*, 578 U.S. at 422, 431, 434. That "resolve[s]" the litigation in the claimant's "favor" and entitles him to fees under CAFRA. *Id.* at 434; *see also* 28 U.S.C. § 2465(b)(1).

The Second Circuit nevertheless collapsed *CRST Van*'s distinction between the standards governing prevailing plaintiffs and prevailing defendants. It treated *Buckhannon*'s requirement of judicially sanctioned relief for plaintiffs as a universal prerequisite. Pet.App.29a–34a. That approach conflicts with *CRST Van*'s express recognition that defendants require a different inquiry, one focused on the defendant's practical success in maintaining the pre-litigation status quo.

The Court should grant the petition for a writ of certiorari to reject the Second Circuit's conflation of these distinct standards. Because other circuit courts have committed the same error, this Court's intervention is critical to preserving the scope and purpose of CAFRA. *See, e.g.*, *United States v. $70,670.00 in U.S. Currency*, 929 F.3d 1293, 1303–04 (11th Cir. 2019); *United States v. $32,820.56*, 838 F.3d 930, 935–37 (8th Cir. 2016).

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Applying the logic of this Court's decisions, a forfeiture claimant "substantially prevails" when, following his defense, the Government voluntarily dismisses the forfeiture action and returns the claimant's property.

II. The Decision Below Invites Government Overreach.

The question presented in this case warrants the Court's immediate attention: Like decisions from other courts, the decision below misinterprets CAFRA's fee recovery provision, forcing property owners who defeat baseless forfeiture suits to bear litigation costs that Congress intended the Government to pay.

Congress enacted CAFRA "to make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures." H.R. Rep. No. 106-192, at 11 (1999). "[S]trong financial incentives … appear to influence how" the Government pursues forfeiture. *Culley v. Marshall,* 601 U.S. 377, 396 (2024) (Gorsuch, J., concurring). Overzealous pursuit of civil asset forfeiture had forced (and continues to force) innocent people "to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home." *Leonard v. Texas*, 580 U.S. 1178, 1180 (2017) (Thomas, J., statement respecting the denial of certiorari). Indeed, the Government often voluntarily dismisses forfeiture cases soon after a claimant simply retains counsel.[4]

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[4] *See, e.g.*, *Martin v. FBI,* No. 1:23-cv-00618 (D.D.C. filed Mar. 7, 2023) (notices of appearance by claimant's attorneys on March 7, 2023 and May 1, 2023; motion to dismiss filed June 8, 2023); *Kazazi v. CBP*, No. 1:18-mc-00051 (N.D. Ohio filed May 31, 2018) (order granting appearance pro hac vice by claimant's attorneys

(cont.)

Given the significant financial burden of litigating, CAFRA's fee-shifting provision created a critical incentive for wronged individuals to defend their innocent property. The threat of fees also helps deter the Government's overzealous practices and reduce wrongful forfeitures.

The Second Circuit's rule gives the Government a way around that structure and insulates the Government from having to pay fees when its forfeiture case is weakest. By design, CAFRA awards fees when the Government's case fails, such that the claimant "substantially prevail[ed]." 28 U.S.C. § 2465(b)(1). But under the rule below, if the Government dismisses even a meritless case, the claimant is ineligible for attorney fees. Perversely, the further the forfeiture case proceeds (on the strength of the Government's case), the *more* likely attorney fees become. That scheme inverts CAFRA's incentive structure. As a result, the rule below

on June 1, 2018; motion to dismiss filed on Nov. 16, 2018); *Serrano v. CBP*, No. 2:17-cv-00048 (W.D. Tex. filed Sept. 6, 2017) (order granting appearance pro hac vice by claimant's attorneys on Oct. 4, 2017; motion to dismiss filed on Dec. 13, 2017); *United States of America v. $107,702.66*, No. 7:14-cv-00295 (E.D.N.C. filed Dec. 23, 2014) (notice of appearance by claimant's attorneys filed Apr. 30, 2015; Government's motion to dismiss filed May 13, 2015); *United States v. $32,820.56*, No. 5:13-cv-04102 (N.D. Iowa filed Oct. 24, 2013) (notice of appearance by claimant's attorneys filed Oct. 13, 2014; Government's motion to dismiss filed Dec. 13, 2014); *United States v. $33,244.86*, No. 2:13-cv-13990 (E.D. Mich. filed Sept. 18, 2013) (notice of appearance by claimant's attorneys filed Nov. 4, 2013; Government's motion to dismiss filed Nov. 15, 2013); *United States v. $35,651.11*, No. 4:13-cv-13118 (E.D. Mich. filed July 19, 2013) (notice of appearance by claimant's attorneys filed Sept. 20, 2013; Government's motion to dismiss filed Nov. 15, 2013).

encourages the Government to pursue civil forfeiture even in marginal cases, as the Government can simply abandon its pursuit before formally losing—without consequence.

To illustrate, consider two forfeiture cases, both equally meritless. In one, an individual sues to reclaim his property and litigates to a final judgment and obtains the return of his property. In the second, a property owner sues, litigates until just before a final judgment, and the Government dismisses its case without prejudice and returns the property. Both property owners faced unfounded forfeiture actions, both incurred significant litigation costs, and both secured the return of their property. Under the Second Circuit's rule, only one is eligible to recover his fees, while the other claimant must bear costs Congress specifically assigned to the Government—costs that accrued only because the Government was empowered to seize property *before* having to evaluate the strength of its case.

Mr. Ross's case illustrates this dynamic in practice. The Government's forfeiture case against Mr. Ross's funds was weak from the outset, as the Government's notice of claim itself admitted that more than $1.2 million in Mr. Ross's IOTA were "unrelated" to the alleged fraud. C.A. App. 25–26. Nevertheless, the Government seized those funds. Mr. Ross immediately explained (with proof) that the funds were innocent. But it was not until Mr. Ross stated his intention to move for summary judgment—more than a year after the seizure and after incurring over $100,000 in attorney fees, D.Ct. Dkt. 61-2, at 62, 65—that the Government moved to dismiss the case without prejudice. Following its "conce[ssion]" that the innocent funds were "not forfeitable," the Government returned the $1.2 million in full. Pet.App.77a; Gov't C.A. Br. 4. Under CAFRA, the next step would have been to award Ross the fees he had incurred defending his property until he "substantially prevailed." But, more than three years later, he remains out of pocket for those fees, which have continued to accumulate in litigating their recovery.

Mr. Ross is one of many forfeiture claimants left worse off after successfully defending against the Government's attempt to seize their property. "[C]ivil forfeiture has in recent decades become widespread and highly profitable." *Leonard*, 580 U.S. at 1180 (Thomas, J., statement respecting the denial of certiorari); *see Culley,* 601 U.S. at 396 (Gorsuch, J., concurring). Though Congress designed CAFRA as a backstop to prevent bankrupting successful forfeiture claimants, the Government frequently moves for belated voluntary dismissals, thereby avoiding fee awards under CAFRA.[5] Without the Court's review, that perverse practice will only continue to proliferate.

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[5] *See, e.g.*, Order 6–7, *United States v. 2002 BMW*, No. 4:05-cv-01155, ECF No. 110 (S.D. Tex. Mar. 31, 2008); Order 5–7, *United States v. $13,275.21*, No. 5:06-CV-00171, ECF No. 84 (W.D. Tex. Jan. 31, 2007); Opposition Brief 12, *United States v. One 2008 Toyota Rav 4 Sports Utility Vehicle*, No. 2:09-cv-05672 (C.D. Cal. June 21, 2010), ECF No. 28; Memorandum 14, *United States v. Approximately $16,500.00*, No. 1:14-CV-00129, ECF No. 19 (M.D. Pa. June 30, 2015); *see also supra* n.4.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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