

No. ____

In the Supreme Court of the United States

DAMIAN PHILLIPS,

Petitioner,

\$200,000.00 U.S. CURRENCY,

In rem Defendant,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit**

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QUESTION PRESENTED

Whether a claimant in a civil forfeiture proceeding has established sufficient Article III standing to withstand summary judgment and proceed to trial where he has produced uncontroverted supporting evidence from a third-party.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

The petitioner, Damian Phillips, was the claimant in district court and the appellant in the Fourth Circuit. Mr. Phillips is an individual, so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

The respondent is the United States of America.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
PETITION FOR WRIT OF CERTIORARI.....	1
ORDERS AND OPINIONS OF THE COURTS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	4
A. Article III Standing.....	4
B. Factual Background.....	5
C. Procedural History.....	7
REASONS FOR GRANTING THE PETITION.....	9
A. The Decision Below Deepens An Entrenched Conflict Among the Circuits on the Proper Interpretation	

of Lujan When Reviewing Summary Judgment on the Issue of Article III Standing.....	9
B. The Question Presented Is Of Exceptional Importance And Requires This Court's Intervention.....	13
CONCLUSION.....	14
APPENDIX	
Opinion of the Fourth Circuit dated February 21, 2018.....	1a
Opinion and Order dated September 28, 2016 of the United States District Court for the Middle District of North Carolina.....	12a

TABLE OF AUTHORITIES

<i>Flast v. Cohen,</i> 392 U.S. 83 (1968).....	4
<i>Kadonsky v. United States,</i> 216 F. 3d 499 (5 th Cir. 2000).....	12-13
<i>Lujan v. Defenders of Wildlife,</i> 504 U.S. 555 (1992).....	4-5,9
<i>United States v. \$148,840.00,</i> 521 F. 3d 1268 (10 th Cir. 2008).....	10-11
<i>United States v. \$515,060.42,</i> 152 F. 3d 491 (1998).....	11,12
<i>Whitmore v. Arkansas,</i> 495 U.S. 149 (1990).....	4

CONSTITUTIONAL PROVISIONS

Article III, §2 United States Constitution.....	4
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STATUTES

18 U.S.C. §981(a)(1)(C).....	7
21 U.S.C. §881(a)(6).....	7

PETITION FOR WRIT OF CERTIORARI

Mr. Phillips petitions for a writ of certiorari to review the Fourth Circuit Court of Appeal's judgment in *United States v. \$200,000.00 U.S. Currency (Damian Phillips – Claimant)*, No. 16-2358. App. 1-11.

ORDERS AND OPINIONS OF THE COURT BELOW

The published opinion dated September 28, 2016 by the district court granting summary judgment for the United States on the issue of Article III standing is published as 210 F. Supp. 3d 788 (M.D. NC 2016) and is reproduced herein as App. 12-26.

The opinion of the Fourth Circuit dated February 21, 2018 affirming the district court judgment is reproduced herein as App. 1-11.

JURISDICTION

The district court had subject matter jurisdiction over this civil action commenced by the United States under 28 U.S.C. §1345, and over an action for forfeiture under 28 U.S.C. §1355(a). The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides, in pertinent part:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." Article III, §2 United States Constitution.

18 U.S.C. §981(a)(1)(C) provides:

(a) (1) The following property is subject to forfeiture to the United States:

* * *

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471,

472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 670, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956 (c)(7) of this title), or a conspiracy to commit such offense.

21 U.S.C. §881(a)(6) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

STATEMENT OF THE CASE

A. Article III Standing

Article III of the Constitution of the United States limits the power of federal courts to actual "cases" and "controversies". U.S. Const. Art. III, §2. The United States Supreme Court has determined that in order to establish Article III standing, "...a litigant first must clearly demonstrate that he has suffered an 'injury in fact'". *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). "Second, there must be a causal connection between the injury and the conduct complained of..." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Finally, it must be "likely" not merely "speculative" that the injury will be remedied by a favorable decision by the court. *Id.* at 561.

"When standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and *not whether the issue itself is justifiable*." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968)(emphasis added).

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court discussed what showing a litigant is required to make to establish his standing in a case during the various stages of litigation.

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to

support the claim....In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' *which for purposes of the summary judgment motion will be taken to be true.*" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)(emphasis added), citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990), Fed. Rule Civ. Proc. 56(e).

B. Factual Background

Following years of relentless hard work and painstaking perseverance, Mr. Phillips achieved his life-long ambition of becoming a football player in the National Football League (the "NFL") when he signed with the Buffalo Bills in June 2003. This accomplishment followed stints in the Arena Football League ("AFL") where he played first for the Montreal Alouettes and then the Indianapolis Firebirds. Not surprisingly, Mr. Phillips entered into lucrative financial arrangements with the NFL and AFL, which continued until a significant injury subsequently forced his retirement from the NFL. Ultimately, Mr. Phillips received a sizeable disability settlement from the NFL.

Unlike, many professional football players in the NFL, however, Mr. Phillips lived frugally – opting to reside in the free apartment facilities provided by the respective football franchises. Throughout this time, Mr. Phillips did not even possess his own automobile, choosing instead to

borrow vehicles from family members when the need arose. Instead of living lavishly, Mr. Phillips commendably saved his income (and subsequent disability settlement) in earnest. Mr. Phillips continued these spendthrift practices following his retirement from the NFL, saving what he could from various respective employers and minimizing household expenditures by living at home with his parents.

Always suspicious of banking institutions, as Mr. Phillips began to accumulate significant savings from income generated through the NFL, AFL, his disability settlement, and subsequent employers, he began to store his savings in the form of U.S. currency (the "Currency") in the security of the closet of his own bedroom. This habit accelerated as the nationwide meltdown of the country's financial institutions ultimately culminated in the greatest recession in a generation.

In early 2014, Mr. Phillips and his wife, Omega, were preparing to move from Zebulon, North Carolina to Leesburg, Virginia in order to pursue employment opportunities with the local public school district. Concerned for the security of the Currency during their relocation out-of-state, Mr. Phillips placed the Currency in a self-storage facility located Durham, North Carolina rented by his brother, Byron Phillips (the "Storage Locker"). Mr. Phillips' Currency was subsequently seized by the Durham County Sheriff's Office from the Storage Facility on April 4, 2014. During the seizure and the filing instant civil forfeiture action, no illegal substances were *ever* recovered from the Storage Locker.

C. Procedural History

Following the seizure, the United States of America (the “Plaintiff”) filed an *in rem* civil forfeiture proceeding pursuant to 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(C) for forfeiture of the \$200,000.00 seized from the Storage Locker. Mr. Phillips timely filed a Verified Claim seeking return of his Currency. The Plaintiff later filed a Motion for Summary Judgment, including a motion to strike Mr. Phillips’ claim arguing, *inter alia*, that he lacked sufficient standing under Article III of the Constitution of the United States to pursue his claim.¹ In response, Mr. Phillips submitted, *inter alia*, a sworn declaration by his brother, Byron Phillips who unequivocally stated “[t]hat in early year 2014, I allowed [Mr. Phillips] access to the Storage Locker to allow him to store his life savings, approximately \$200,000 in U.S. Currency...”. App. 19. Ultimately, the district court entered an order striking Mr. Phillips’ claim due to lack of Article III standing and granted summary judgment in favor of the Plaintiff, forfeiting the Currency to the United States. App. 12-26.

In affirming the judgment of the district court, the Fourth Circuit focused its attention almost exclusively on Mr. Phillips’ testimony and other circumstantial evidence. Indeed, the court states, “[Mr. Phillips] alleged facts purporting to

¹ Prior to the district court’s ruling on Plaintiff’s motion for summary judgment, Plaintiff did engage in some settlement negotiations with Mr. Phillips but these negotiations curiously occurred without the benefit of first hearing deposition or trial testimony from Mr. Phillips or Byron Phillips.

show that beginning in 2003, he accumulated \$200,000, which he then secured in the [Storage Locker]...[b]ut [he] presented no objective evidence corroborating those facts." App. 9. The court further concludes that Mr. Phillips' income during the time period in question was not significant enough to allow him to save the Currency in question – even though many years of tax returns were absent from the record. App. 9. Finally, the Fourth Circuit noted circumstantial evidence in the record including – "...[Mr. Phillips'] significant financial troubles during the [applicable] period, including two car repossessions, his wife's bankruptcy², failure to file tax returns in 2005 and 2010-2013, and delinquency in making rent payments³" App. 9.

Noteably, the Fourth Circuit appears to reject Mr. Phillips' showing of Article III standing because he personally did not forward additional corroborating evidence to support his claim. Rather, such corroborating evidence comes from his brother, stating in a sworn declaration, "[t]hat in early year 2014, I allowed [Mr. Phillips] access to the Storage Locker to allow him to store his life savings, approximately \$200,000 in U.S. Currency". App. 7.

² The record reveals that Mr. Phillips' wife, Ms. Omega Smith, filed bankruptcy *prior* to her marriage to Mr. Phillips.

³ Plaintiff argued before both the district court and the 4th Circuit that Mr. Phillips was delinquent in making rental payments; however, such a claim is not supported by the record in this case.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Deepens An Entrenched Conflict Among the Circuits on the Proper Interpretation of *Lujan* When Reviewing Summary Judgment on the Issue of Article III Standing.

Through its ruling in this case, the Fourth Circuit joins a multitude of other circuits that have differed sharply on the application of the *Lujan* case when considering whether a claimant has established sufficient Article III standing to proceed to trial on the merits of his claim. As previously discussed, the United States Supreme Court has determined that in response to a summary judgment motion on the issue of Article III standing, a claimant "...must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true". *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), *citing* Fed Rul Civ. Proc. 56(e).

More specifically, the Fourth and Fifth Circuits have taken a very narrow interpretation of *Lujan*, appearing to require additional evidence from the claimant himself regarding the specificity of his case to establish Article III standing at the summary judgment stage. Conversely, the Sixth and Tenth Circuits have taken a more expansive interpretation of *Lujan* by ruling that any evidence, appropriately in the record, tending to supplement the claimant's assertion of ownership is sufficient to establish Article III standing at the summary judgment stage of litigation.

The Tenth Circuit's opinion in *United States v. \$148,840.00* is instructive. In that case, a sheriff's deputy stopped David Austin's for speeding on a New Mexico highway. *United States v. 148,840*, 521 F. 3d 1268, 1270. After becoming suspicious regarding Austin's travel itinerary, the deputy asked Austin if he had any illegal contraband or large sums of money in the vehicle, to which Austin responded in the negative. *Id.* at 1271. Austin ultimately consented to a canine search of his vehicle. *Id.* Inside the trunk of the automobile, the canine alerted to the odor of a controlled substance coming from a cooler inside the trunk. *Id.* Upon closer inspection of the cooler, law enforcement discovered several plastic bags containing bundles wrapped in aluminum foil under the ice in the cooler. *Id.* at 1272. The aluminum foil bundles contained \$148,840 in "cold hard cash". *Id.* Austin refused to reveal the source of the cash, but told the deputy that the money belonged to him and said that he knew the amount of money that had been discovered. *Id.*

The United States subsequently filed a verified complaint *in rem* seeking forfeiture of the currency recovered from Austin's vehicle. *Id.* "At his discovery deposition, Austin repeatedly claimed that he was owner of the currency seized but invoked the Fifth Amendment privilege against self-incrimination". *Id.* He declined to state the source of the currency or to explain why it was packaged in plastic and foil. *Id.* He further declined to discuss why he was carrying a large amount of cash, his source of income and employment, or his travel itinerary during the relevant time period. *Id.*

In reversing the trial court's entry of summary judgment on the issue of Mr. Austin's Article III standing, the Tenth Circuit concluded:

"...because Mr. Austin's assertion of ownership is assumed to be true on this record, and because the currency was indisputably seized from a vehicle that Austin was driving, we hold that Austin has established constitutional standing at this stage of the litigation. He has both made a claim of ownership over the currency and provided some evidence tending to substantiate that claim, as he had obvious possession and control over the currency when it was taken". *Id.* at 1277.

The logic used by the Tenth Circuit, closely mirrored that used by the Sixth Circuit in *United States v. \$515,060.42*, 152 F. 3d 491 (1998). In that case, IRS agents conducted a search pursuant to search warrant of the residence of Ms. Virginia Hurst. *Id.* at 495. Ms. Hurst was suspected of operating an illegal gambling operation, and the search of her home yielded \$515,060.42 of United States currency. Following the conviction of Ms. Hurst and several others on charges involving illegal gambling, the government initiated a forfeiture action of the currency seized. *Id.*

In its complaint, the government subsequently alleged that the majority of the currency seized was found in the bedroom of one of the claimants. *Id.* at 499. It further asserted that Ms. Hurst operated illegal gambling operations for various organizations and that she transferred the

cash proceeds from such operations to her residence. *Id.* The claimants put forward little evidence to otherwise support their assertions of ownership of the currency. *Id.* at 499-500.

In affirming the ruling of the district court finding the claimants had sufficient Article III standing, the Sixth Circuit ultimately decided that the "...[claimants] need not have supplemented their claims with additional evidence of colorable property interests because the Government admitted the facts indicating the claimants' relationship to the seized currency in its complaint and in its briefing to the district court...*[w]e are attentive to the core jurisdictional issue, whether or not Article II's requirements are satisfied, and are less concerned with whether these claimants were the source of the evidence relating to standing.*" *Id.* at 499 (emphasis added).

In contrast to the aforementioned case, the Fifth Circuit, much like the Fourth Circuit in the instant matter has applied a literal interpretation of *Lujan* in considering whether a claimant has sufficiently established Article III standing to proceed to trial on the merits of the claim. In *Kadonsky v. United States*, 216 F. 3d 499 (5th Cir. 2000), law enforcement officers seized, *inter alia*, \$51,400 from a storage locker at the Dallas airport after obtaining evidence that the proceeds may have a connection to drug trafficking. *Id* at 502. Mr. Kadonsky subsequently challenged the seizure asserting that he had sufficient Article III standing based upon his assertion of ownership in the currency and the existence of an "affidavit of an FBI agent who informed the DEA that [Mr.] Kadonsky might have been involved in the placement of the currency in the storage locker". *Id.* at 508.

In affirming the district court's determination that Mr. Kadonsky lacked Article III standing to proceed on his claim, the Fifth Circuit wrote “[a] claimant need not prove the merit of his underlying claim. He must, however, be able to show at least a facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement and the prudential considerations defining and limiting the role of the court.” *Id.* Based upon the aforementioned recitation of the law, the Fifth Circuit determined that Mr. Kadonsky's assertion of ownership is insufficient to establish standing. The Fifth Circuit further noted that the record contained “...an affidavit of an FBI agent who informed the DEA that [Mr.]Kadonsky might have been involved in the placement of the currency in the storage locker” but the court summarily found that evidence insufficient to help support Mr. Kadonsky's Article III standing. *Id.*

B. The Question Presented Is Of Exceptional Importance And Requires This Court's Intervention.

Given the nationwide importance of the question presented, the conflict among the circuit courts is intolerable. Indeed, the present case deepens an entrenched conflict among the circuits regarding a citizen's right to access the federal courts in order to pursue his claim for the return of seized property. This is undoubtedly an issue requiring uniformity and consistency within the court system.

CONCLUSION

Based upon the foregoing, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX