No. 19-659

In The
Supreme Court of the United States

MILADIS SALGADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICUS CURIAE BRIEF OF PRACTICING ATTORNEYS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are experienced litigators who have served as prosecutors, *pro bono* public interest lawyers, and defense counsel—privately retained or court appointed, throughout their careers. This brief presents the practitioners' viewpoint on litigating and negotiating with the government, and lends context to the first question presented: When does a civil forfeiture claimant "substantially prevail"?

When the government dismisses a forfeiture case it spent years litigating, the property owner from whom cash was taken has "substantially prevailed" under 28 U.S.C. § 2465(b)(1), whether or not the dismissal is with prejudice. This is the only reasonable and pragmatic conclusion.

Amici curiae:

Kansas Justice Institute (KJI) is a non-profit, public-interest litigation firm committed to defending against government overreach and abuse. KJI believes the government's ability and propensity to seize and forfeit a person's property without a criminal conviction poses a serious risk to our constitutional rights.

The Beacon Center of Tennessee is committed to the protection of property rights in all forms and

[1] All parties were timely notified of and have consented to the filing of this brief. Counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to its preparation or submission.

believes such rights are essential to the preservation of a free society. The Beacon Center also endeavors to bring an end to the abusive practice of civil asset forfeiture, which empowers law enforcement to seize an individual's property based solely on probable cause to suspect the property owner of wrongdoing. Unless the rights of property owners in Tennessee are defended, other rights will be eroded over time.

The Government Justice Center (GJC) is a public interest law firm dedicated to protecting the rights of New Yorkers against improper action by state and local governments. Civil asset forfeiture is the unconstitutional practice of seizing an individuals' property based on the mere thought that the property was in some way linked to criminal activity. Property owners then must litigate to get their property back, at great cost. GJC believes that if a forfeiture case is dismissed without prejudice at the government's request, then the property owner has "substantially prevailed" and is entitled to attorneys' fees, costs, and interest under CAFRA.

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. It has been instrumental in studying Michigan's civil forfeiture laws and many of its recommendations have recently been enacted.

The Mississippi Justice Institute (MJI) is a nonprofit, public interest law firm and the legal arm of the Mississippi Center for Public Policy (MCPP), an independent, nonprofit, public policy organization dedicated to advancing the principles of limited government, free markets, strong families, individual liberty, and personal responsibility. MJI represents Mississippians whose state or federal constitutional rights have been threatened by government actions. MJI's activities include direct litigation on behalf of individuals, intervening in cases important to public policy, participating in regulatory and rule making proceedings, and filing amicus briefs to offer unique perspectives on significant legal matters in Mississippi and federal courts.

The Pelican Institute for Public Policy is a nonprofit and nonpartisan research and educational organization, and the leading voice for free markets in Louisiana. The Institute's mission is to conduct scholarly research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government. The Institute has an interest in defending laws that protect Louisiana citizens now and in the future, like due process and fee shifting protections for civil asset forfeiture.

The Texas Public Policy Foundation (TPPF) is a 501(c)(3) non-profit, nonpartisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise by educating policymakers and shaping the public policy debate with sound research and outreach. Right on Crime is the trademarked name of TPPF's national

criminal justice reform project. Right on Crime believes a well-functioning criminal justice system enforces order and respect for every person's right to property and ensures that liberty does not lead to license, and also that criminal justice should be accountable to the public.

Amicus Wisconsin Institute for Law & Liberty (WILL) is a public interest law firm dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. Founded in June of 2011 and based in Milwaukee, Wisconsin, WILL often litigates in defense of constitutional rights, including property rights. WILL urges the Court to accept review of this case.

Christopher M. Dunn is the founding member of the Law Office of Christopher M. Dunn. Mr. Dunn has experience handling forfeiture cases in multiple jurisdictions. Mr. Dunn practices in Wailuku, Hawai'i.

Christopher Joseph is the managing member of Joseph, Hollander & Craft, a law firm with offices in Kansas and Missouri. Mr. Joseph leads the firm's civil asset forfeiture practice group. In 2017, he served on the Kansas Judicial Council's Advisory Committee on Reformation of Civil Asset Forfeiture laws.

David B. Smith is one of the country's foremost experts in forfeiture law and is the author of the leading two-volume treatise on the subject, *Prosecution and Defense of Forfeiture Cases* (2019), published by Matthew Bender. Mr. Smith frequently counseled the

Senate and House Judiciary Committees on forfeiture and was heavily involved in drafting the Civil Asset Forfeiture Reform Act of 2000, which governs most federal civil forfeiture proceedings.

STATEMENT OF FACTS[2]

Drug Enforcement Administration agents raided Miladis Salgado's home and took her money—approximately $15,000. The DEA had no evidence connecting Ms. Salgado's cash to any criminal activity but refused to return it to her. Instead, the United States spent years litigating the forfeiture case. When it appeared likely Ms. Salgado would win on the merits at the summary judgment phase, the government moved to dismiss the case without prejudice, and the motion was granted.

Because of the dismissal, the trial court determined that Ms. Salgado had not "substantially prevailed" under 28 U.S.C. § 2465(b)(1), precluding an attorney's fee award. The appeals court affirmed.

Thus, even though the court ordered the government to return all the money it had seized from Ms. Salgado, she still ended up with significantly less money than before the government's raid. Of the approximately $15,000 taken from her, she could only keep $10,387.92 plus interest. The remainder went to her attorney.

[2] *Amici* adopt Petitioner's statement of facts but presents a summary for the Court's convenience.

SUMMARY OF ARGUMENT

Miladis Salgado asks this Court to resolve a question of profound practical importance: When the government voluntarily dismisses a civil asset forfeiture case it spent years litigating, did the property owner "substantially prevail" under 28 U.S.C. § 2465(b)(1)?

This Court's answer will have important consequences for the thousands of people impacted by the civil asset forfeiture process. If a voluntary dismissal of a forfeiture case means a property owner did not "substantially prevail" under 28 U.S.C. § 2465(b)(1), thus precluding an attorney's fee award, the practical result will be three-fold. First, property owners with small-dollar cases will find it virtually impossible to retain an attorney. Second, the government will have nothing to lose by endlessly and abusively litigating flawed forfeiture cases. Third, property owners will be forced to accept a government settlement offer regardless of its fairness.

This is not what Congress intended when it passed the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185 (2000).

Therefore, this brief focuses on the practical aspects of civil asset forfeiture litigation, not the theoretical; and provides a contextual explanation for why Ms. Salgado's case is an excellent vehicle to affirmatively answer the question presented.[3] After all, if *she* did

[3] Although Petitioner raises two questions, *amici* focus on the first.

not "substantially prevail" against the government, can anyone?

Amici urge this Court to grant the petition for certiorari to resolve this practically important and unsettled question.

ARGUMENT

Ms. Salgado's case is an excellent vehicle to answer the unsettled question of whether a forfeiture claimant has "substantially prevailed" under 28 U.S.C. § 2465(b)(1).

This brief is divided into four parts. The first provides a brief practical overview of forfeiture laws; the second explains how those forfeiture laws stack the deck against property owners; the third describes how negotiating with the government works in practice; and the fourth explains why Ms. Salgado's case warrants this Court's attention.

I. Civil Asset Forfeiture: A Brief Practical Background.

Civil forfeiture "proceedings often enable the government to seize the property . . . even when the owner is personally innocent." *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., respecting denial of certiorari). The forfeiture system "has led to egregious and well-chronicled abuses." *Id*. at 848. The "numerous horror stories of property owners caught in the web of

government's enormous forfeiture power has spawned distrust of the government's aggressive use of broad civil forfeiture statutes." Brief of *Amicus Curiae Institute for Justice in Support of Petitioner* at 12, *Bennis v. Michigan*, 516 U.S. 442 (1996) (No. 94-8729) 1995 WL 782840, at * 6 (cleaned up).

Former United States Representative Henry Hyde warned Congress "our civil asset-forfeiture laws are being used in terribly unjust ways." Alexandra D. Rogin, *Dollars for Collars: Civil Asset Forfeiture and the Breakdown of Constitutional Rights*, 7 Drexel L. Rev. 45, 52 (2014). Representative Deborah Pryce of Ohio "recognized that civil asset forfeiture laws, at their core, deny basic due process, and the American people have reason to be offended and concerned by the abuse[.]" *Id*. at 61 (cleaned up).

Rep. Hyde's warnings, coupled with the government's abusive forfeiture tactics, caused Congress to pass CAFRA, a "patchwork" of reforms. David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 Nev. L.J. 1, 15 (2012).

One of the most significant changes was CAFRA's attorney's fee provision. Prior to CAFRA, it was virtually impossible for property owners to retain counsel in small-dollar cases. Many civil seizures were not challenged.

However, "[e]ven post-CAFRA, forfeitures continue to attract criticism." *Id*. For good reason. "CAFRA was designed to rein in the worst abuses of the procedure but, for a variety of reasons, fell short of its

intended objectives." David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L. & Pol'y Rev. 541, 542 (2017).

Civil forfeiture "has in recent decades become widespread and highly profitable." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting denial of certiorari). In 1986, "the year after the Department of Justice's Assets Forfeiture Fund was established, it took in just $93.7 million in deposits." Dick M. Carpenter II, et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (2d ed. Nov. 2015). By 2014, it exploded to "$4.5 billion." *Id*.

The exponential growth in seizures and forfeitures is not surprising. Law enforcement agencies usually keep the forfeited property. The government's forfeiture "practice has become a veritable addiction for federal, state, and local officials across the country[.]" Roger Pilon & Trever Burrus, *Cato Handbook for Policymakers* 116 (8th ed. 2017). There are even "reports of police departments creating wish lists of assets they want and choosing raid targets accordingly." David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L. & Pol'y Rev. 541, 550 (2017). This Court has recognized the government has "a direct pecuniary interest in the outcome" of forfeiture proceedings. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993).

II. The Law Stacks the Deck Against Property Owners in Civil Asset Forfeiture Cases: The Practical View.

Most forfeitures begin administratively, with a notice of seizure and intent to forfeit. The property owner must timely respond, or the property is automatically forfeited. *VanHorn v. Florida*, 677 F. Supp. 2d 1288, 1294 (M.D. Fla. 2009).

If the property owner does file a timely administrative claim, the government then files an *in rem* complaint against the property. 18 U.S.C. § 983(a)(3)(A). The property owner must timely file *two* responsive pleadings: a verified claim and an answer. 18 U.S.C. § 983(a)(4)(A), (B); Federal Rule of Civil Procedure Supplemental Rules G(5)(a), (b) for Admiralty and Maritime Claims and Asset Forfeiture Actions. The verified claim requires the property owner to make statements under oath, subject to perjury charges. Fed. R. Civ. Pro. Supp. Rule G(5)(a)(i)(C). For some *pro se* claimants distrustful of the government's motives, they fear they will be retaliated against even if they have done nothing wrong, so they do not even begin the process.

If the property owner files its verified claim, the government often serves—immediately—special interrogatories. *See* Fed. R. Civ. Pro. Supp. Rule G(6)(a). The special interrogatories are supposed to be limited to determining the owner's standing. Fed. R. Civ. Pro. Supp. Rule G(6)(a) ("The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property[.]"). But that is not what usually happens in practice.

First, the government frequently serves the interrogatories even where it is obvious the claimant has standing. Second, the special interrogatories usually go beyond their proper scope. If the claimant, who is often *pro se*, fails to answer the improper special interrogatories to the government's satisfaction, the Assistant United States Attorney (AUSA) moves to strike the property owner's claim based on supposed discovery noncompliance. Of course, this causes the property owner to wade through, and timely respond to, the government's motions or risk forfeiting their property on technical grounds. These coercive discovery practices are labyrinths designed to trip up property owners. They are commonly employed. *E.g.*, *United States v. $154,853.00 in United States Currency*, 744 F.3d 559, 564 (8th Cir. 2014) (overruled on other grounds); *United States v. Real Prop. Located at 17 Coon Creek Road*, 787 F.3d 968, 974 (9th Cir. 2015); *United States v. Funds in the Amount of $239,400*, 795 F.3d 639, 645 n.3 (7th Cir. 2015); *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.*, 959 F. Supp. 2d 81, 93 (D.D.C. 2013).

Not only are these practices common, they happened in this case. *See* Dkts. 15, 17, 27, 75.

If the property owner survives the discovery gamesmanship, motions to dismiss, motions to strike, motions for summary judgment, discovery sanctions, and so on, at trial the government bears the relatively light burden of proving the property is "subject to forfeiture" by a preponderance of the evidence. 18 U.S.C. § 983(c)(1). Not everyone has an innocent owner defense, but for those who do, the burden then shifts to

them to prove their own innocence. 18 U.S.C. § 983(d)(1). Conceptually, proving innocence is far more difficult to establish than proving the property's guilt. That is because proving innocence involves proving a negative. *See Piedmont & Arlington Life-Ins. Co. v. Ewing*, 92 U.S. 377, 378 (1875); *Lupyan v. Corinthian Cs., Inc.*, 761 F.3d 314, 322 (3d Cir. 2014) ("The law has long recognized that such an evidentiary feat [of proving a negative] is next to impossible.").

A federal civil forfeiture trial—or any trial for that matter—is not for the faint of heart. *Pro se* claimants have virtually no chance of succeeding against the United States. How could they? Imagine trying a case to a jury in federal court, under the Rules of Civil Procedure and Rules of Evidence, against a seasoned federal prosecutor, on your first day of law school. For most *pro se* claimants, it would be far worse.

This is precisely why property owners need to retain counsel. But the unfortunate reality is that it simply does not usually make practical or financial sense for the property owner or the lawyer to establish an attorney-client relationship if attorney's fees are not available, given the relatively low financial values at stake.[4] For both property owners and attorneys,

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[4] One study shows the median value of *state* negotiated cases ranges between $451 and $2,048. Rishi Batra, *Resolving Civil Forfeiture Disputes*, 66 U. Kan. L. Rev. 399, 413 (2017). The average dollar value per drug forfeiture case in Connecticut was approximately $1,520, $1,535, $1,442, $1,586, $2,549, and $1,239 for the years 1993 through 1998, respectively. *Office of Legislative Research Report*, 98-R-1248 (1998).

paying an attorney a contingency fee to recover a relatively small sum is impracticable, without the ability to recover reasonable attorney's fees from the government. In the rare instance an attorney takes a small forfeiture case, the property owner is practically no better off than before. Take Matt Lee's situation for example.

In 2011, the government seized $2,400 from Mr. Lee. Mr. Lee hired an attorney who successfully recouped Mr. Lee's cash. "But the attorney took about half as his fee and costs, $1,269.44, leaving Lee with only $1,130.56." Robert O'Harrow Jr., et al., *They Fought the Law. Who Won?* THE WASH. POST (Sept. 8, 2014).

Even moderately larger forfeiture cases are not financially worth retaining a lawyer, in the absence of an enforceable attorney's fee provision.

In 2017, a sheriff's deputy seized $8,000 from Johnnie Grant, a musician. Mr. Grant hired a lawyer who "made a deal with prosecutors," letting them keep $500 of the $8,000. Mike Ellis, *Atlanta Rapper Fought the Law and Won*, THE GREENVILLE NEWS (Jan. 27, 2019). At first blush, the settlement appears quite favorable. Not so, upon further reflection. Mr. Grant estimated losing "$4,000 to $5,000" because of attorney's fees, court appearances, and lost work opportunities. *Id*.

Without an enforceable attorney's fee provision, even larger cases would yield no different result. In May 2010, a sheriff's deputy seized $32,934 from Vincent Costello. Robert O'Harrow Jr., et al., *They Fought*

the Law. Who Won? THE WASH. POST (Sept. 8, 2014). Mr. Costello hired an attorney. *Id*. "After making a few calls, the lawyer told him to accept a deal from the government for half of the money. Costello agreed. But his legal fees were $9,000—leaving him with only about $7,000." *Id*.

Forfeiture victim Richard Apfelbaum sums up the practical financial dilemma succinctly: "I'm not in a position to spend $10,000 in legal fees trying to get $9,000 back." Leonard W. Levy, *A License to Steal: The Forfeiture of Property* 131 (1996). Of course, the calculus would dramatically change with an enforceable attorney's fee provision. Mr. Apfelbaum would then be able to recoup his fees and his cash.

Police conducting cash seizures understand the practical problems with retaining lawyers in small-dollar cases too, without an enforceable attorney's fee provision. A police officer was recorded telling the person from whom he took cash, "[g]ood luck proving [your innocence]. You'll burn it up in attorney fees before we give it back to you." David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L. & Pol'y Rev. 541, 551 (2017).

From the attorney's perspective, the frustrating reality is that it usually does not make practical sense to represent a property owner in anything but a high-dollar dispute, if attorney's fee awards are easily circumvented by the government's voluntary dismissal. For established attorneys in private practice,

shepherding a forfeiture case from discovery through trial on a contingency fee basis, against the United States government, is not usually financially viable. As one attorney colorfully declared, "[s]ue to get your car back? Forget it. If they take your car, it's gone. Unless I . . . take a case for the sweet pleasure of revenge, I'm not going to handle anything less than $75,000 in assets, from which I'd get one-third." Leonard W. Levy, *A License to Steal: The Forfeiture of Property* 130 (1996). Another lawyer remarked "It's sad . . . but I can't work for nothing. Even if we won, it wouldn't be worth it." *Id*.

This practical dilemma is precisely why the attorney's fee provision is so important for property owners wanting to hire an attorney. The whole point of the attorney's fee provision is to make it financially feasible for a property owner to contest a wrongful forfeiture.

Without an enforceable attorney's fee provision, abusive practices will proliferate. There is no check on the government's ability and propensity to endlessly litigate unjustifiable forfeiture cases.

Take Barbara Reese for example. Her saga lasted almost 25 years. An attorney's fee provision would almost certainly have changed the calculus.

In 1995, the Kansas Highway Patrol seized $17,660 from Ms. Reese. Peter Hancock, *Civil Liberties Advocates, Law Enforcement Clash Over Asset Forfeiture Bill*, LAWRENCE JOURNAL-WORLD (Jan. 24, 2017). She was not criminally charged. *Id*. The Highway Patrol refused a court order to give back the money. Tim Carpenter,

Years Can't Tame Political Drama of KHP's Hefty Cash Seizure from Topeka Woman, THE TOPEKA CAPITAL-JOURNAL (May 26, 2018). Various court skirmishes ensued over the years. *Id*. In 2018, the Kansas Legislature tried correcting the injustice by specifically authorizing repayment to Ms. Reese. The Governor line-item vetoed the appropriation because Ms. Reese had criminal convictions wholly unrelated to the seizure of her money, and because the authorization "accuse[d] law enforcement officers of an improper act[.]" *Message from the Governor Regarding House Substitute for Senate Bill 109* (May 15, 2018). Finally, in 2019, Ms. Reese unceremoniously received $11,833.60, almost $6,000 less than what the Highway Patrol took from her.

If the United States is permitted to litigate for years on end only to voluntarily dismiss its case without prejudice, thus preventing an attorney's fee award, practitioners will only take large-dollar cases. An experienced attorney simply cannot afford to accept the typical forfeiture case without the prospect of obtaining reasonable attorney's fees from the government upon a successful outcome. This is especially true given the government's litigation tactics in Ms. Salgado's case, and the trial court's ruling that she did not "substantially prevail." An attorney evaluating whether to accept a forfeiture case must take into consideration that their client will walk away with less money, even if successful, because attorney's fees will not be awarded.

The consequences are not surprising: the attorney will not take on the forfeiture client and the property

owner is forced to slog away against the government alone. Or just give up, as most do. From 1997 to 2013, 88% of civil forfeiture cases ended in an administrative default. Dick M. Carpenter II, et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 5 (2d ed. Nov. 2015).

In sum, without an enforceable attorney's fee provision, a typical forfeiture case is not worth pursuing, from both the owner's and the attorney's perspective.

III. Negotiating with the Government: A Pragmatic Perspective.

> "I have seen a lot of people where the offer isn't necessarily fair, but given the challenges of actually going to court on a [forfeiture] case like that, the smart thing to do is to take the offer." Attorney Jake Erwin. Nathaniel Cary & Mike Ellis, *TAKEN: Risk a trial to get your money back, or settle for less?* THE GREENVILLE NEWS (Jan. 29, 2019).

Even *if* the value of the property makes it financially worth hiring an attorney, property owners still face an uphill battle when dealing with the government. Negotiating with the United States is far different than negotiating with private counsel, for a multitude of reasons.

While it is true that an AUSA has the authority to settle a forfeiture case, the discretion to do so is not fully theirs. "All [forfeiture] settlements must be negotiated in consultation with the seizing agency and the U.S.

Marshals Service." U.S. Dep't of Just., *Justice Manual* § 9-113.103 (2019). The seizing agency's input is considered "essential." U.S. Dep't of Just., *Asset Forfeiture Policy Manual*, Chap. 11, § I.B.2 (2019). Mandating input from the seizing agency is particularly problematic given the seizing agency's vested financial interest in extracting the largest settlement possible. *See generally* Dick M. Carpenter II, et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. Nov. 2015); Brian D. Kelly, Ph.D., *Fighting Crime or Raising Revenue? Testing Opposing Views of Forfeiture* (June 2019). So even if an AUSA were inclined to settle a forfeiture case for twenty cents on the dollar, for example, they must consult with an agency motivated by profit.

If the seizing agency disagrees with the potential settlement, it can bypass the AUSA altogether. U.S. Dep't of Just., *Asset Forfeiture Policy Manual*, Chap. 11, § I.B.5 (2019) ("If the seizing agency . . . disagrees with the U.S. Attorney's recommended settlement proposal, it may refer the matter to the Chief of the Money Laundering and Asset Recovery Section (MLARS) for resolution.").

A seizing agency financially incentivized to seek the largest settlement possible is not the only hurdle to a reasonable settlement. Institutional and reputational barriers exist in government practice that do not exist in private practice.

"Some [AUSAs] seem to believe they are engaged in a war with crime in which no quarter should be given to the enemy." David B. Smith, *Prosecution and*

Defense of Forfeiture Cases § 10.09[1] (2019). An AUSA "will hardly ever be criticized for declining a reasonable settlement offer, but an AUSA may be second-guessed if he or she accepts one." *Id*.

The government's ability to leverage its vast resources presents an additional settlement barrier.

The United States government's power, resources, and finances stand in stark contrast to property owners. The imbalance between the two is so severe and pervasive that even innocent property owners are compelled to accept unfavorable settlements. This disparity leaves scant room for effective and successful negotiations. When the government seizes a person's *livelihood*, the bargaining power shifts even more dramatically against the property owner.

The government holds all the litigation cards, especially now that "substantially prevails" does not include the United States dismissing a losing forfeiture case after years of litigation. The options are bleak: accept the government's offer, regardless of the inequities, or litigate. But now, given the lower courts' rulings, "winning" the litigation battle still ends up netting less money for the client. The victory is Pyrrhic.

Based upon the rulings below that "substantially prevails" means something only a lawyer could imagine, when a client asks the attorney, "what should I do," the answer is obvious: take the deal. It does not make practical sense to advise a client to embark on a full-blown litigation battle with the United States government over a few thousand dollars. The risk does not

justify the reward for the client. Accepting a settlement offer is the only reasonable option.

The American Bar Association addresses the practicality of these types of situations in its commentary to the Model Rules of Professional Conduct.

> "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate." 2.1 Advisor, Ann. Mod. Rules Prof. Cond. § 2.1 cmt. 2.

> "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront." 2.1 Advisor, Ann. Mod. Rules Prof. Cond. § 2.1 cmt. 1.

Moreover, because negotiating with the government in civil forfeiture cases is practically speaking no different than criminal plea bargaining, it stands to reason that "prosecutorial hard bargaining tactics are routine." Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 Nev. L.J. 401, 407 (2017) (Discussing criminal plea bargaining). Hard-bargaining includes "exploding offers" and "take-it-or-leave-it offers." *Id*.

Often, the government simply offers to split the proceeds "50/50." For property owners lacking the

financial wherewithal to continue their defense, a 50/50 settlement is very difficult to reject.

These hard-bargaining negotiation tactics and 50/50 settlement offers are not just theoretical:

> "Your client needs to resolve this or litigate it. But publicity about it doesn't help. It just ratchets up feelings in the agency. My offer is to return 50% of the money." Assistant United States Attorney to Forfeiture Counsel. *United States v. $107,702.66 in U.S. Currency*, No. 7:14-CV-00295-F, 2016 WL 413093 (E.D.N.C. Feb. 1, 2016). (Dkt. 23-3).

Given the power disparity between the United States and the property owner, especially now that a reasonable attorney's fee award is removed from the equation, the only reasonable and practical course of action is to accept a settlement offer regardless of its fairness.

IV. This Case is an Excellent Vehicle to Curb Forfeiture's Well-Chronicled Abuses.

Ms. Salgado's case is an excellent vehicle to answer the unsettled question of whether a forfeiture claimant has "substantially prevailed" under 28 U.S.C. § 2465(b)(1). The compelling fact pattern and counter-intuitive result underscore the need for a definitive ruling by this Court.

If Ms. Salgado did not "substantially prevail," nobody can.

The government had zero evidence connecting Ms. Salgado's money to any criminal activity[5] but vigorously litigated the case anyway. The United States propounded special interrogatories;[6] filed a motion to compel;[7] filed a motion to strike Ms. Salgado's claim;[8] and filed a motion to strike certain defenses.[9] Trial counsel spent more than 685 hours litigating this case on behalf of the claimants.[10] Eventually, when it appeared likely Ms. Salgado would win on the merits at the summary judgment phase, the government moved to dismiss the case without prejudice, and the motion was granted. The trial court ruled Ms. Salgado did not "substantially prevail," which deprived her of an attorney's fee award. She lost money defending a forfeiture case that never should have been brought. If this Court hopes to resolve the unsettled question presented, when does a property owner "substantially prevail," *this* is the fact pattern to do it.

Ms. Salgado's case is worthy of this Court's attention for another reason. It is a vehicle. That is to say, most forfeiture cases never even make it past the administrative level, let alone reach this Court. If property is not administratively forfeited by default, the property owner usually loses in court on technical or procedural grounds. In the rare situation a property

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[5] Pet. App. 56-62.

[6] Dkt. 15.

[7] Dkt. 17.

[8] Dkt. 27.

[9] Dkt. 75.

[10] Dkt. 141-1 at Exhibit D.

owner survives the government's motions, the property owner cannot afford to continue litigating. So, the property owner settles the case. Given these practical hurdles, if this Court ever hopes to answer the unsettled question presented, when does a property owner "substantially prevail," *this* is the case to do it.

This case is worthy of this Court's attention for policy reasons as well.

Litigating against the United States is complex, time consuming, and expensive. Most property owners cannot afford counsel and need an enforceable attorney's provision to secure an attorney's services. Until now, the provision helped to level the playing field and helped prevent the government from litigating flawed forfeiture cases like this one. But if "substantially prevail" means something totally divorced from its normal meaning, make no mistake, the United States will cite Ms. Salgado's case as *the* example for denying an attorney's fee award in future proceedings.

This Court has the rare opportunity to provide clarity to the circuits and state the obvious: when the government dismisses its claim to property it seized, the owner has "substantially prevailed" under 28 U.S.C. § 2465(b)(1).

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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