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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether claimants "substantially prevail" under the Civil Asset Forfeiture Reform Act who reclaim their assets in a case where the government suffers dismissal "without prejudice."

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case interests Cato because it concerns the security of Americans' property rights and access to judicial process to vindicate those rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Civil forfeiture is a process by which law enforcement can seize the assets and property of those who are suspected of crimes without judicial process or a successful criminal prosecution. Congress codified modern civil forfeiture in the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 1 et seq. (repealed), but the process has its origins in the common law. Over the last three decades, civil forfeiture has exploded, often as a complement to the "war" on illegal drugs.

This Court in 1993 recognized that civil asset forfeiture is a form of punishment and subject to the Excessive Fines Clause of the Eighth Amendment. *Austin v. United States*, 509 U.S. 602 (1993). Reacting to the abuses inherent in the system—the number of innocent and excessively fined citizens whose property has

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

been lost to civil forfeiture, and law enforcement's perverse incentives to rely on forfeiture as a source of revenue—Congress in 2000 passed the Civil Asset Forfeiture Reform Act ("CAFRA"), 106 P.L. 185, 114 Stat. 202. Chief among the injustices CAFRA meant to correct are the difficulties in finding legal representation to challenge civil forfeiture actions. 28 U.S.C. § 2465. Many parties choose not to challenge forfeitures due to the expense of legal representation. Moreover, the government often offers settlements, returning some or most of the original property, leaving attorneys willing to work on a contingency basis in short supply. Most often, as here, a further part of the assets ultimately returned to their owners are lost to attorney's fees. Altogether these difficulties are a formidable disincentive to innocent owners embarking on the daunting task of suing the government.

The chief corrective offered by CAFRA is the provision at issue here: requiring attorney's fees to be awarded to a private claimant who "substantially prevails" over the government in a civil forfeiture case. 28 U.S.C. § 2465(b)(1). The central interpretive question here is the legal effect of "substantially" upon the relatively well-established meaning of "prevail"—whether the adverb lowers or raises the bar that litigants must pass to be compensated. Specifically, many courts have found, as did the court below, that a plaintiff hasn't prevailed "substantially" when his assets are returned as a result of a case being dismissed without prejudice, even when the government is instructed to pursue the matter no further. *United States v. $70,670.00 in U.S. Currency*, 929 F.3d 1293 (11th Cir. 2019). Linguistic research and commonsense interpretive canons reveal that interpretation to be the opposite of the original public meaning of the statute. When

modifying a verb such as "prevail," "substantially" serves to aid plaintiffs by lessening the burden of the statutory provision.

CAFRA operates within an area of the law where ordinary citizens are confronted with state coercion in the course of their daily lives, often with little warning, and where many struggle to find legal representation. Americans subject to civil forfeiture should not be subject to a special or narrowly legal definition of the terms which define their rights under the law. If there were ever a case in which it would be appropriate to interpret statutory language according to its "ordinary usage" this would be it.

By interpreting CAFRA according to ordinary usage the court would render the language of the act "clear" to those whom it governs and fulfill an imperative critical to the ideal of "rule by law not men.". "[O]bscure and incoherent legislation can make legality unattainable by anyone, or at least unattainable without an unauthorized revision which itself impairs legality." Lon L. Fuller, The Morality of Law 63 (1963). This desideratum of clarity concerns not just a matter of legislative best practice but "one of the most essential ingredients of legality" itself. *Id.* When choosing interpretive methods, the words "of law" accompanying the "due process" clauses of the Fifth and Fourteenth Amendments should not be forgotten.

Given the abusive overuse of settlements and dismissals without prejudice in this area of the law, few cases ever reach the appellate level. This Court should seize this opportunity to correct a profound overreach by law enforcement by giving proper force and effect to CAFRA's duly enacted provisions.

ARGUMENT

WHEN FORFEITED ASSETS ARE RETURNED VIA A JUDICIAL DECISION, THE PARTY HAS "SUBSTANTIALLY PREVAILED" OVER THE GOVERNMENT, WHETHER THE DISMISSAL WAS "WITH PREJUDICE" OR WITHOUT

The text of CAFRA reads, in relevant part, "Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for— (A) reasonable attorney fee and other litigation costs reasonably incurred by the claimant." 28 U.S.C. § 2465(b).

The court of appeals erred twice in its interpretation of this provision, first by failing to give effect to the word "substantially," and again by interpreting "prevail" to raise a bar higher than in other statutory contexts. The cumulative effect has been to make it more difficult for claimants to "substantially prevail" here than "prevail" elsewhere. *Cf. Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686–92 (1983). These conclusions are contradicted by long-established canons of interpretation, the former by the non-surplusage canon, the latter by "*in pari materia*," the idea that statutes on the same subject should be interpreted the same way. Respecting Congress's legislative power, the Court should give effect to every word of the statute. And, as *amicus* will demonstrate, it is possible to ascertain a coherent and non-ambiguous meaning of "substantially."

As for the second canon, many times this Court has interpreted the "prevailing party" standard for awarding attorney's fees. In *CRST Van Expedited, Inc. v.*

EEOC, "prevailing" required a "material alteration of the legal relationship of the parties" with "judicial imprimatur" rather than a judgment on the merits. 136 S. Ct. 1642, 1646 (2016) (quoting *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792–93 (1989)). Likewise, in *Ruckelshaus*, then-Justice Rehnquist observed that "courts require that, to be a 'prevailing party,' one must succeed on the 'central issue,' *or* 'essentially [succeed] in obtaining the relief he seeks in his claim on the merits.'" 463 U.S. at 688 (quoting *Coen v. Harrison County School Bd.*, 638 F.2d 24, 26 (5th Cir. 1981) and *Bagby v. Beal*, 606 F.2d 411, 415 (3d Cir. 1981)) (emphasis added) In *N.C. DOT v. Crest St. Cmty. Council, Inc.*, the Court stipulated that a prevailing party must succeed within a lawsuit, not an administrative hearing. 479 U.S. 6 (1986) If Congress had invoked the "prevailing party" standard here, dismissal without prejudice would not be a bar.

The central question of interpretation remains—unaddressed by the circuit court—how to interpret CAFRA in a way that gives full weight to both "substantially" and "prevail." Namely, does "substantially" diminish or intensify the demands of "prevail." To answer that question, it is necessary to look for a mode of interpretation outside the mere recitation of dictionary definitions.

A. Introducing Corpus Linguistics

Corpus linguistics is, in its application to the law, a novel approach to textualism that seeks to discern ordinary usage from large bodies of organic speech drawn from news media, film and television, academia, and literature. Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU

L. Rev. 1915 (2010). These corpora produce large samples that reveal how a given term is actually used in normal speech. The largest and most well-respected corpus-linguistic database for contemporary usage is the Corpus of Contemporary American English. *Id.*

Corpus linguistics analysis does not do away with dictionaries, only with the tendency to use dictionaries as a "fortress." Dictionaries most often list multiple definitions of a given term—and even more senses for each definition—and many of these may be outdated, academic, or otherwise out of step with ordinary usage. Dictionaries may fail to shed light on a perceived ambiguity when two or more senses could seem to be reasonably read in to the statutory text. Some opinions have even focused on such ephemera as the order in which senses and definitions are listed by the lexicographer, often giving preference to the oldest and least ordinary uses *Id.* at 1931. A corpus linguistics approach relies on the authority of the dictionary to establish the outer boundary of permissible *formal* usage—we shouldn't be governed by slang—and then proceeds to the corpora to gather information on the context and occurrence of a term within ordinary speech. *Id.* at 1922.

Justice Scalia once wrote that the canons of interpretation are "so commonsensical that, were [they] not couched in Latin" with obscure names such as *ejusdem generis* and *noscitur a sociis*, "you would find it hard to believe anyone could criticize them." Antonin Scalia, *Common Law Courts in a Civil–Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, in* A Matter of Interpretation 3, 26 (Amy Gutman ed., 1997). Much the same can be said of corpus linguistics, its name derived from the

Latin "corpus/corporis" here meaning a body of text. The chief benefit of the corpora is to increase the level of trust that linguistic examples used to make a point are not cherry picked in a way that is unrepresentative of the language and that obscure or antiquated meanings are not being marshaled into service in favor of a preferred interpretation. Within this frame of reference interpretive arguments may be more easily credited because their linguistic context, gathered from a vast assortment of diverse sources, is indeed shared by all speakers of modern American English.

B. Corpus Linguistics Shows that "Substantially Prevails" Implies Winning "For the Most Part," a Weaker Form of "Prevail"

Corpus linguistics points to the conclusion that CAFRA requires attorney's fees be awarded to those who triumph, for the most part, in their efforts to retrieve property confiscated by the federal authorities. This means, first, that "substantially prevail" must be interpreted to set a lower bar for plaintiffs than those provisions in areas of the law where they must "prevail" altogether. Second, and more essentially, it should be read to include all those who achieve their primary objective, the return of their lost assets, including those in cases where the government suffered dismissal with or without prejudice.

Arriving at this conclusion requires examining uses of the words both separately and together. "Substantially" can be used in a variety of ways, but *amicus* will focus on two: an augmenting sense (Substantially_1) and a diminishing sense (Substantially_2). When used in context with a verb like "prevail," the relevant question is which sense fits better.

The most commonly proffered dictionary definitions of "substantially" demonstrates the pitfalls of a textualist approach that over-relies on dictionaries to the exclusion of other sources. The American Heritage Dictionary, along with Webster's, identifies "substantially" unhelpfully as merely an adverbial form of "substantial" for which it gives four meanings. Am. Heritage Dictionary of the English Language, https://ahdictionary.com/word/search.html?q=Substantially (last visited Dec. 18, 2019); Merriam Webster, https://www.merriam-webster.com/dictionary/substantially (last visited Dec. 18, 2019). Oxford's online Lexico dictionary defines the term in its own right with two senses: "To a great or significant extent" or "For the most part; essentially." Lexico, https://www.lexico.com/definition/substantially (last visited Dec. 18, 2019). The Oxford definition is useful for what it does not include, namely a misuse stemming from the sixth sense of "substantial" listed by American Heritage that makes "substantially" a synonym of "substantively."[2] Am. Heritage, *supra*. Clearly, if Congress had meant to award attorney's fees only when plaintiffs prevail substantively rather than procedurally it would have drafted the statute accordingly. But such an interpretation would be outside the acceptable grammatical use of the term.

Oxford's two senses of "substantially" map to, more or less, the interpretations offered by the parties here. The first definition, to perform an action "to a great or significant extent" (Substantially$_1$) will almost always convey the meaning that the actor in question has in

[2] "Achieving the goal of justice itself, not merely the procedure or form that is a means to justice: principles of substantial justice."

some sense done more than would be implied by the unmodified verb. Lexico, s*upra*. The second definition, "for the most part," (Substantially$_2$) implies a diminishment—that is, the sentence "he substantially climbed the mountain" implies less climbing than "he climbed the mountain." An action performed "for the most part" remains, for some lesser part, unperformed. *Id.* To ascertain which of these two acceptable meanings Congress employed we look to the corpora.

A random sampling of 100 uses of "substantially", culled from the Corpus of Contemporary American English (CCAE), reveals 9 instances of Substantially$_2$, 55 instances of Substantially$_1$, 33 instances of a non-adverbial use of substantially—"substantially less" etc.—and 3 ambiguous uses. Corpus of Contemp. Am. English, https://www.english-corpora.org/coca.

At this stage of the analysis there is yet another opportunity for textual interpretation to run off the rails. The purpose of the corpora is not necessarily to determine a single "ordinary usage" to be preferred over other dictionary definitions based on more frequent appearance. First, the corpus sample serves to discover which senses recorded by the lexicographer find their way into ordinary usage at all. Those obscure senses that do not should be set aside from the interpretation of generally applicable law. Second, the sample may allow the interpreter to gain critical insight on the all-important context in which different uses occur and apply those insights to the original statutory context. Mouritsen, *supra*, at 1915.

Before addressing context, we must defend our identification of the instances of Substantially$_2$ within the sample—although, as we will show, the two issues

are much the same. To begin, there are clearly instances on either extreme where to read one sense or another would be absurd. For example: "For the first time in its modern history, Japan in the 1990s will be substantially free of security threats from the north." To be free of one thing or another means to be free of it altogether; "substantially" diminishes the meaning conveyed—making the phrase akin to "mostly free" or "almost completely free." This is an instance of Substantially$_2$. Conversely: "Most patients experienced a complete cure, and the remainder improved substantially." Without "substantially" the scale of "improve" would be left unattested. This is an instance of Substantially$_1$. To read either meaning out of ordinary usage would be to diminish our understanding of how the term is ordinarily used.

To understand the context in which these uses occur we have only to evaluate our common-sense intuitive reactions to these samples and ask what causes us to read "substantially" in one sense instead of another. The sense of "substantially" in ordinary usage can be determined in virtually all cases from the nature of the verb it modifies. Where the verb is indeterminate as to scope or degrees, Substantially$_1$ provides what is missing. Where the verb, by itself, connotes completeness or a binary outcome, however, Substantially$_2$ offers a corrective.

The test for resolving seemingly ambiguous uses of "substantially" should be to remove it from the sentence and ask whether the question "how much, to what extent?" is left unanswered. For example: "From the study, the use of metaphors substantially improved learning of visual materials." Remove "substantially" and the scale of the stated improvement

would be unclear. Another example from the corpus reads, "Elton and Mary were making a life together, and lives for each other. Together they were coming substantially into existence." As with the old truism that one cannot be a little bit pregnant—or "mostly dead" as in the movie "The Princess Bride" (Art III Communications, 1987)—coming into existence is something that is done all the way or not at all. Here "substantially" does not add the missing element of degree but instead walks back the comprehensiveness of the unmodified verb.

This leads to a reconsideration of "prevail," the central question being whether the word implies certainty of extent or degree such that Substantially$_2$—the diminishing "substantially"—is implicated when the terms are used in conjunction.

The American Heritage Dictionary lists four meanings of "prevail":

1. To be greater in strength or influence; triumph: "The home team prevailed against the visitors."
2. To be most common or frequent; be predominant: "a region where snow and ice prevail."
3. To be in force, use, or effect; be current: an ancient tradition that still prevails.
4. To use persuasion or inducement successfully. Often used with on, upon, or with.

Am. Heritage Dictionary of the English Language, https://ahdictionary.com/word/search.html?q=prevail (last visited Dec. 18, 2019). Other dictionaries' entries are—let's just say, "substantially"—similar. *See*, *e.g.*, Lexico, https://www.lexico.com/definition/substantially (last visited Dec. 18, 2019).

Prevail$_1$ is both the most frequent sense of the term in ordinary usage and the only one that reasonably can be thought to describe the behavior of a party in civil litigation. A sample from the CCAE includes 73 instances of Prevail$_1$, 13 of Prevail$_2$, 3 of Prevail$_3$, 4 of Prevail$_4$, 6 ambiguous uses, and one acronym, "PREVAIL." As far as the interpretive question at issue is concerned, Prevail$_2$ and Prevail$_3$ may be dismissed as absurd.

Prevail$_1$ is precisely the kind of verb that triggers Substantially$_2$, the diminishing "substantial." One either triumphs or not, and this conclusion is borne out by examples from the corpus. The sample is suffused with reference to military and political contests in which victory or loss is not a matter of degree: "That provided the alert Confederates with ample opportunities when their attack began late in the day. For a second time it seemed they would prevail." "If the president of the United States decides to undertake military operations with the coalition mentioned by the secretary, there is no doubt we will prevail." "But Republican leaders, who have remained united enough to block Democrats on key Iraq votes, predicted they would prevail again."

Applying this logic to the statute at hand, for a claimant to "substantially prevail" in a forfeiture action means less than fully winning, and it certainly includes voluntarily dismissal without prejudice. More often than not, such dismissals mean that the government is aware that they will lose the forfeiture challenge. A claimant who achieves such a victory has "substantially prevailed" under a fair reading of the statute illuminated both by congressional intent (as discussed by petitioners) and corpus linguistics.

CONCLUSION

For the above reasons, and those stated in the petition, the Court should grant certiorari and reverse the Eleventh Circuit.

Respectfully submitted,

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