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

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REPLY TO PETITION FOR A WRIT OF CERTIORARI

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Five years ago, Petitioner's money was wrongfully seized. Three years ago, the district court ordered the United States to return it. But obtaining that court order cost Petitioner money. Under CAFRA's fee-shifting provision, Petitioner should have been made whole. She has not been because, unlike other federal courts, the lower courts in this case erred on both questions presented.

In her petition, Petitioner argued that the first question presented—when does a civil forfeiture claimant "substantially prevail" under CAFRA's fee-shifting provision—is an important federal question never addressed by the Court. Rather than dispute this, the United States argues that the Court should deny certiorari because, in the United States' view, this case is not a good vehicle for review, the lower courts do not require guidance, and Petitioner's approach could worsen forfeiture abuse.

Petitioner argued that the second question presented—whether it is an abuse of discretion for dismissal to be entered without prejudice in this situation, thereby supposedly foreclosing a fee award—involves a circuit split that leads to divergent outcomes based solely on geography. In response, the United States argues that there is no split and the argument was not preserved.

The United States' arguments are incorrect. Respectfully, the Court should grant certiorari for both questions presented.

REASONS FOR GRANTING THE PETITION

I. The United States Does Not Dispute that Petitioner's First Question Is an Important Federal Question the Court Has Never Addressed, and the United States' Arguments Against Granting Certiorari Are Incorrect.

The United States does not dispute that this is an important federal question never addressed by the Court. Nonetheless, the United States presents numerous arguments why the Court should deny certiorari. All are incorrect.

A. This Case Presents an Excellent Vehicle.

The United States contends that this case is not a good vehicle to examine the meaning of "substantially prevails," but the United States is wrong. As noted by a long list of amici, including our nation's foremost forfeiture scholar, David B. Smith, this case presents an excellent vehicle for review. *See* Amicus Br. Practicing Att'ys 21–23.

The United States disagrees for two reasons. First, the United States contends that one of the arguments supporting Petitioner's claim that she substantially prevailed was "neither pressed nor passed upon below." Opp'n 19. Second, the United States contends that even if the Court were to agree with Petitioner's view of "substantially prevails," the result would not change. *Id*. The United States is mistaken.

First, the United States conflates claims with arguments. The United States does not actually dispute that Petitioner pressed, and the lower courts ruled upon, Petitioner's claim that she substantially prevailed. *See* Opp'n 11 ("Because the government's claim to the funds remains unadjudicated, and could in fact be re-filed, the court determined that petitioner had not substantially prevailed and therefore was not entitled to attorney's fees." (internal quotations omitted)); Pet'r's Ct. App. Br. 3, 46–52; Pet'r's Ct. App. Reply Br. 18–21; D. Ct. Docket 141 at 4–6; 145 at 4–9.

Instead, the United States contends that Petitioner primarily supported this claim in the courts below with an argument that she "substantially prevailed" even if the term were treated as "prevailed." This is true, but it does not restrict Petitioner. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). Since Petitioner properly presented this claim, she can make any argument in support, including the argument that "substantially prevails" is different than "prevails."

Second, under the proper reading of "substantially prevails," Petitioner would indeed qualify. The district court ordered the United States to return her money, App. 36, and ordered that the court would assess costs if the United States refiled the case. App. 55. Therefore, the court placed its judicial imprimatur on

two material changes to the parties' legal relationship. *See CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1651–53 (2016). The first has already been held to be sufficient. *See In re Return of Seized $11,915 in U.S. Currency*, 2013 WL 12416063 (S.D. Cal. 2013) (holding that claimant substantially prevailed when claimant obtained return of seized money without a forfeiture ruling). And the district court considered the second to be so material as to render dismissal with prejudice unnecessary. App. 30.

The United States mistakenly focuses its argument on the stipulation with the ex-husband's judgment creditor, AnnCherry. Opp'n 17. But the stipulation is irrelevant here because it did not affect whether the United States would return Petitioner's money. AnnCherry never asserted any claims against Petitioner, D. Ct. Docket 58-1, which is why the stipulation stated that AnnCherry would never receive any of Petitioner's money. App. 42. Consequently, the United States was free to pursue a forfeiture action against Petitioner's money both before and after the stipulation but did not do so because the United States was impeded by the district court's orders. App. 36, 55.

B. The Lower Courts' Confusion is Real.

The United States contends that no confusion exists over the meaning of "substantially prevails" and makes two arguments in support. First, it claims that no cases cited by Petitioner actually support Petitioner's view of "substantially prevails." Second, it

points out that other statutes use the term "substantially prevails." Both arguments fail.

First, the opinions cited by Petitioner do, in fact, support Petitioner's position. Regarding *Kazazi*, the United States contends that the parties did not dispute "whether claimants had 'substantially prevailed.'" Opp'n 18. But the United States is mistaken, as shown by its own brief in that case and the court's opinion. *Compare* Br. in Opp'n to Pls.' Mot. for Att'ys' Fees and Costs, *Kazazi* Docket 20 at 5 ("Petitioners did not 'substantially prevail[],' and this Court should deny their motion for attorneys' fees under CAFRA."), *with Kazazi v. U.S. Customs & Border Prot.*, 376 F. Supp. 3d 781, 784 (N.D. Ohio 2019) (holding that "Petitioners substantially prevailed in this case," even without a ruling on the merits of government's forfeiture claim).

Regarding *$60,201.00*, the United States is correct that the central dispute was the calculation of the hourly rate and hours billed, but that does not change the fact that the court's position on the relevant clause was irreconcilable with that of the lower courts here. *See United States v. $60,201.00 U.S. Currency*, 291 F. Supp. 2d 1126 (C.D. Cal. 2003) (explaining that CAFRA "broadens the class that can receive fees in forfeiture actions to claimants who 'substantially prevail'").

Nor are those cases alone. In *$11,915*, a claimant successfully moved for the return of seized money and then subsequently sought an award of attorney's fees. *In re $11,915 in U.S. Currency*, 2013 WL 12416063, at

*1. The United States argued that the claimant did not substantially prevail because the claimant merely obtained the return of the seized money without a forfeiture ruling. *Id*. The district court expressly rejected the United States' argument and held that the claimant had substantially prevailed. *Id*.

Second, the United States argues that other statutes use the term "substantially prevails." Opp'n 16. However, this provides an additional reason to grant certiorari, not deny it. Not only does it show the broader impact this Court's guidance could have, but the application of "substantially prevails" for one of those statutes directly conflicts with the approach taken here.

That statute is the Freedom of Information Act. There, like in CAFRA, Congress included the term "substantially prevails" to make it easier to obtain fee awards. 5 U.S.C. § 552(a)(4)(E)(i). And there, like with CAFRA, courts conflated "substantially prevails" and "prevails," leading to increased abuse. *See Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 524–25 (D.C. Cir. 2011). Congress responded by expressly clarifying that this conflation was incorrect and that plaintiffs who do not "prevail" can "substantially prevail." *Id*. at 525. The Court should grant certiorari and apply the same logic to CAFRA's analogous provision.

C. The Statutory Protections Crafted By Congress Would Reduce Forfeiture Abuse if Followed.

Finally, the United States argues that adopting Petitioner's position could worsen forfeiture abuse. Opp'n 20. According to the United States, without the ability to obtain consequence-free dismissals years into litigation, the United States might return wrongfully seized money even less frequently than it currently does. *Id*.

The United States is mistaken for two reasons. First, it overlooks the solution to this problem that Congress has crafted. Second, even if the United States disagrees with Congress' policy choices, that should not prevent certiorari here.

First, the United States overlooks the fact that CAFRA provides an opportunity for the United States to review the seizure before becoming potentially liable for attorney's fees. The statute provides 90 days to do so.[1] 18 U.S.C. § 983(a)(3). It is only at the conclusion of that 90-day review period, if the United States decides to proceed with a forfeiture action rather than return the seized money, that the United States becomes liable to any claimant who substantially prevails. *Id*. at § 983(a)(1)(F). Unfortunately, the lower courts' failure

[1] Functionally, this review period is actually between 150 and 185 days, as the statute provides the United States with an initial 60 days to send the seizure notice and the claimant with 35 days to respond before the 90-day review technically begins. *Id*. at §§ 983 (a)(1)(A), (a)(2)(B).

to apply CAFRA's fee provision to dismissals at the summary judgment stage has the practical effect of extending the 90-day review period to approximately two years, during which most innocent owners give up.

The dangers of allowing the government to retain seized funds for this extended period are illustrated by the fate of Petitioner's ex-husband. He loudly protested his own innocence (even urging federal agents to arrest him in the hope of getting the case before a judge), but to no avail: While the DEA held his life's savings, his business crumbled, and a default judgment was entered against him in a civil suit when he could not pay for a defense. Pet. 9 n.1. Consequently, his seized funds were paid to a judgment creditor rather than returned to him—even though there was no basis for the initial seizure, let alone for the extended retention of the money.

These serious consequences for property owners are in stark contrast to the absence of government incentives to avoid delay under the lower courts' holding: So long as the government eventually seeks voluntary dismissal, it can walk away without repercussion while the property owner sits mired in legal fees and debt. In a system expressly intended to make innocent property owners "whole," this is intolerable, and the petition for certiorari should be granted so the Court can say as much.

Second, even if the United States disagrees with Congress' policy choices, the statute should still be followed. The separation-of-powers implications flowing

from the United States' argument are deeply troubling and provide further support for the Court to grant certiorari.

II. The Circuit Split on the Second Question Presented Creates Different Outcomes Based Solely on Geography.

The second question presented asks this Court to resolve a split that produces divergent outcomes based on location. The split is between the Ninth Circuit (along with district courts elsewhere) and the Fifth, Eighth, and Eleventh Circuits.

The United States' efforts to wave away this split fail for three reasons. First, the claim that the ruling below was fact-bound is incorrect. Second, the contention that there is no conflict is also incorrect. Third, the United States fails to address the divergent outcomes in district courts resulting from this confusion.

Finally, the United States argues that even if there is a split, this issue was not preserved. However, the lower courts ruled on its merits, thus making review proper.

A. This Unresolved Question Was a Basis for the District Court's Ruling.

The United States insists that the district court acted "well within its discretion" by dismissing without prejudice, which it labels a "fact-bound conclusion." Opp'n 12, 13. But the district court relied on the fact

that "the Eleventh Circuit has not addressed whether loss of an argument for attorney's fees pursuant to CAFRA constitutes legal prejudice that should preclude voluntary dismissal without prejudice." App. 31. That is the very question Petitioner asks this Court to resolve: whether Petitioner suffered legal prejudice because she lost the "substantial right [to seek attorney's fees] by the dismissal." *Pontenberg v. Bos. Sci. Corp.*, 252 F.3d 1253, 1255 (11th Cir. 2001).

B. The Ruling Below Directly Conflicts with the Ninth Circuit's Ruling in *Ito*.

The United States claims that the Ninth Circuit's ruling in *United States v. Ito*, 472 F. App'x 841 (9th Cir. 2012) does not squarely conflict with the ruling below. Opp'n 14–15. But *Ito*'s facts are directly analogous to the facts below, with the government seeking voluntary dismissal of a CAFRA case over the claimants' objections. *See United States v. One 2008 Toyota RAV 4 Sports Util. Vehicle*, 2010 WL 11531203, at *1, *3 (C.D. Cal. July 16, 2010), vacated and remanded sub nom. *Ito*, 472 F. App'x at 841–42. In direct contrast to the ruling below, the Ninth Circuit overruled a district court that did what the district court did here: dismiss a CAFRA case without prejudice, thus preventing the claimants from seeking attorney's fees. *Id.*

The United States then questions *Ito*'s reasoning, claiming that the Ninth Circuit failed to explain why the *Ito* claimants had "suffered plain legal prejudice in losing their ability to move for attorney's fees."

Opp'n 15 (quoting *Ito*, 472 F. App'x at 842). But this only highlights the conflict. The *Ito* court did not require a showing that the claimants would have ultimately prevailed on their motion for attorney's fees, but instead found that *losing the ability to move for fees* constituted prejudice and remanded for a dismissal with prejudice on that basis alone. In contrast, as the United States emphasizes, the Eleventh Circuit based its ruling on a supposed "lack of evidence that claimants 'ultimately would have prevailed' but for the dismissal." Opp'n 15 (quoting App. 16).

The United States also claims that the Eighth and Fifth Circuit cases cited by Petitioner do not address this issue. Opp'n 14. Not so. Both held that district courts do not abuse their discretion by depriving claimants of eligibility for attorney's fees under CAFRA by dismissing cases without prejudice. In *United States v. Thirty-Two Thousand Eight Hundred Twenty Dollars and Fifty-Six Cents ($32,820.56) in U.S. Currency*, the Eighth Circuit found that the district court did not abuse its discretion when it "found that [claimant] had not shown that she would be prejudiced [in being unable to pursue attorney's fees] by a dismissal without prejudice." 838 F.3d 930, 937 (8th Cir. 2016). This holding directly conflicts with *Ito*.

Similarly, in *United States v. Minh Huynh*, the Fifth Circuit found that the district court did not abuse its discretion in denying fees for "a claim that the Government voluntarily dismissed without prejudice" because the issue of whether the government provided deficient notice "was not actually or necessarily

decided" due to the government's voluntary dismissal. 334 F. App'x 636, 639 (5th Cir. 2009). In other words, the government's voluntary dismissal prevented claimants from obtaining the key finding they needed to prevail, and thus obtain attorney's fees. This too conflicts with *Ito*'s holding that depriving claimants of their ability to seek fees constitutes legal prejudice.

Finally, the United States suggests *Ito* is unimportant because it is unpublished. Opp'n 14. But *Ito* demonstrates that innocent owners living in our nation's largest circuit would likely receive, and in *Ito* did receive, a different outcome than their fellow Americans living in the Fifth, Eighth, and Eleventh Circuits.

C. District Court Confusion Over This Issue Produces Widely Divergent Outcomes.

The United States declines to address any of the cases raised by Petitioner showing district courts' confusion about the second question presented. Pet. 28–29. Instead, the United States suggests these cases are irrelevant because they either "predate the alleged conflict" or "are from outside the circuits that allegedly disagree." Opp'n 15. But these divergent rulings demonstrate the need for clarity and likely undercount the problem because so few CAFRA cases reach a decision on the merits. *See* Amicus Br. Practicing Att'ys 22–23.

D. This Question Is Preserved.

The United States also claims this issue was not properly preserved. Opp'n 15. But the Petition expressly addressed this, noting that both courts below ruled on its merits, thus placing it within the proper scope of this Court's review. Pet. 26 n.6; *see also United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . permit[s] review of an issue not pressed so long as it has been passed upon."). The United States does not respond to this argument.

Even if Petitioner's detailed explanation for why the case should be dismissed with prejudice was initially untimely, that was cured when the district court ruled on the merits. This is true for two reasons. First, Petitioner initially opposed dismissal without prejudice as "contrary to law and a manifest injustice," and then, in her motion for reconsideration, identified the specific prejudice she would suffer: ineligibility to seek CAFRA fees. App. 7–8. Second, the general rule—although not yet expressly adopted by the Eleventh Circuit—is that an untimely claim raised in a motion for reconsideration is preserved for appeal if the district court addressed its merits. *See Murchison Capital Partners, L.P. v. Nuance Commc'ns, Inc.*, 625 F. Appx. 617, 621 (5th Cir. 2015); *Gerhartz v. Richert*, 770 F.3d 682, 686 (7th Cir. 2015). Because the district court addressed the merits, App. 28–31, that ruling was properly subject to appellate review, and is thus now properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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