No. _____

In The

Supreme Court of the United States

RETAIL READY CAREER CENTER, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the United States have complete immunity from constitutional counterclaims asserted in an *in rem* civil forfeiture case initiated by the United States?

2. Does the seizure of funds from a bank account without notice and a hearing violate the Due Process Clause of the Fifth Amendment when Congress has provided for injunctions and restraining orders as an alternative?

PARTIES TO THE PROCEEDINGS

Petitioner Retail Ready Career Center, Inc. is a claimant in the district court and was the appellant in the court of appeals. Respondent United States of America is the plaintiff in the district court and was the appellee in the court of appeals. Moreover, $4,480,466.16 in funds seized from Bank of America account ending in 2653 is a defendant in the district court and was listed as a defendant in the court of appeals.

In addition to the above, the defendants in the district court are: (i) $146,370.00 In Funds Seized From Bank Of America Account Ending In 0252; (ii) $77,437.59 In Funds Seized From Charles Schwab Account Ending In 8588; (iii) $263.47 In Funds Seized From Wells Fargo Account Ending In 2092; (iv) $9,668.28 In Funds Seized From Bank Of Utah Account Ending In 2251; (v) $2,814.51 In Funds Seized From Bank Of Utah Account Ending In 8074; (vi) A 2014 Lamborghini Aventador (VIN ZHWUR1ZD0ELA02916); (vii) A 2016 Ferrari 488 (VIN ZFF80AMA0G0219421); (viii) A 2017 Bentley Continental Gt V8 (VIN SCBFH7ZA0HC063118); (ix) A 2017 Mercedes-Benz Amg S63 (VIN WDDUG7JB4HA325733); (x) A 2016 Mercedes-Benz G63 (VIN WDCYC7DF4GX258941); (xi) A 2016 Dodge Ram 2500 (VIN 3C6UR5DL1GG314858); (xii) A 2016 BMW Alpina (VIN WBA6DC6C54GGK18160); (xiii) Real Property Known As 14888 Lake Forest Drive, Dallas, Texas; (xiv) $11,005.00 In Funds Seized From Capital One Account Ending In 2713; (xv) Real

PARTIES TO THE PROCEEDINGS—Continued

Property Known As 195 North 200 West, Logan, Utah; (xvi) Real Property Known As 1408 West 2125 South, Logan, Utah. In addition to Petitioner Retail Ready Career Center, Inc., the other claimants in the district court are: (i) Jonathan Davis, (ii) Melissa Richey, (iii) Don West, (iv) Lake Forest Drive Properties, Inc., (v) Clear Conscience LLC, and (vi) Trades United, Inc.

CORPORATE DISCLOSURE STATEMENT

No parent corporation or publicly held company owns 10% or more of Petitioner Retail Ready Career Center, Inc.'s stock.

RELATED PROCEEDINGS

1. *United States v. $4,480,466.16 in Funds Seized From Bank of Am. Account Ending in 2653*, 3:17-CV-2989 (N.D. Tex.)—Order dismissing counterclaims entered on April 26, 2018; Rule 54(b) judgment entered on June 12, 2018; United States' claims for forfeiture are still pending.

2. *United States v. $4,480,466.16 in Funds Seized From Bank of Am. Account Ending in 2653, et al.*, No. 18-10801 (5th Cir.)—Judgment entered on August 22, 2019; judgment and opinion withdrawn and superseded on November 5, 2019.

RELATED PROCEEDINGS—Continued

3. *In re Retail Ready Career Center, Inc.*, No. 19-10253 (5th Cir.)—mandamus proceeding arising from forfeiture case unrelated to counterclaims at issue before this Court.

4. *Retail Ready Career Center, Inc. v. United States of America, et al.*, 3:19-cv-2204-X (N.D. Tex.)—Federal Tort Claims Act and *Bivens* claims based on the seizures at issue in this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Retail Ready Career Center, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

This case provides the Court an important opportunity to recognize a remedy for property owners damaged as a result of the government's choice to pursue civil forfeiture in a manner that denies due process.

In the Civil Asset Forfeiture Reform Act of 2000, Congress enacted a restraining order scheme for civil forfeiture proceedings found in 18 U.S.C. § 983(j). Under that scheme, the United States can obtain an injunction regarding property upon showing "a substantial probability that the United States will prevail on the issue of forfeiture" and that the need for injunctive relief "outweighs the hardship" that would be imposed on the property owner. 18 U.S.C. § 983(j)(1). Additionally, while the government can obtain a temporary restraining order without notice and a hearing, the temporary restraining order can last no more than fourteen days and the property owner is entitled to a hearing "at the earliest possible time." 18 U.S.C. § 983(j)(3).

Unfortunately, the sensible process found in 18 U.S.C. § 983(j) is a dead letter because the government

almost never seeks injunctive relief. Instead, the government continues to seize property pursuant to other statutes. For instance, all of Petitioner's funds were seized from Petitioner's bank accounts pursuant to 18 U.S.C. § 981(b). That statute permits the government to obtain an *ex parte* seizure warrant pursuant to the Federal Rules of Criminal Procedure. 18 U.S.C. § 981(b)(2).

By seizing property rather than seeking an injunction, the government denies due process to property owners. The *ex parte* seizure process provides no notice or hearing prior to the owner being deprived of property. The utilization of seizures also results in no meaningful post-deprivation due process. Petitioner has been deprived of its funds for more than two years and four months without trial, without indictment, without evidence, and without the government even stating a claim for forfeiture.[1] Moreover, the destruction of Petitioner's business—the inevitable result of seizing all of its funds—will not be remedied by the mere return of its funds years later. Petitioner's predicament is not uncommon, and the vast majority of property owners give up before ever being heard. *See* David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?* 25 Geo. Mason L. Rev. 173, 182-83 (2018) (collecting sources estimating that between 80

[1] The district court dismissed the government's claims twice for failure to state a claim but granted leave to amend. Petitioner's current motion to dismiss along with its motion for summary judgment (to which the government has not responded) has been pending for well over a year.

percent and 88 percent of federal forfeitures are uncontested); Christine A. Budasoff, *Modern Civil Forfeiture Is Unconstitutional*, 23 Tex. Rev. of Law & Politics 467, 482 (2019) ("five-sixths of the cash seizures in the [federal equitable sharing] program were afforded no hearing at all").

Faced with widespread and well-chronicled abuses, courts should look for ways to hold the government accountable. *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement on denial of certiorari) ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses."). However, the court of appeals went in the opposite direction in this case and, instead, immunized the government from responsibility for violating the Constitution when it seeks civil forfeiture. This ruling conflicts with the statutory language, the decisions of this Court, and the decisions of the other courts of appeals.

The Court should not allow the government to destroy businesses in violation of the Constitution with impunity and should grant a writ of certiorari in this case to reconcile the Due Process Clause with historic and modern civil forfeiture statutes and practices. *Id*. at 847 ("This petition asks an important question: whether modern civil-forfeiture statutes can be squared with the Due Process Clause and our Nation's history.").

OPINIONS BELOW

The initial opinion of the court of appeals dated August 22, 2019 was reported at 936 F.3d 233; however, that opinion was withdrawn from the bound volume. The initial opinion is included in the Appendix. App. 25–39. On denial of petition for rehearing on November 5, 2019, the court of appeals withdrew its prior opinion and substituted a new opinion, which is reported at 942 F.3d 655 and included in the Appendix. App. 1–24. The opinion of the district court was not reported but is included in the Appendix. App. 40–62.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its initial judgment vacating and remanding with instructions on August 22, 2019. App. 39. On November 5, 2019, the court of appeals denied Petitioner's petition for rehearing, withdrew its prior opinion and judgment, and substituted a new opinion and judgment affirming the district court's judgment. App. 1. Petitioner Retail Ready Career Center, Inc. respectfully petitions for a writ of certiorari under and the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Congress' directive that forfeiture proceedings "conform as near as may be to proceedings in admiralty" is found in 28 U.S.C. § 2461(b):

> Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

Additionally, Congress reconfirmed the connection to admiralty practice in the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") as codified in 18 U.S.C. § 983(a)(3)(A), which provides:

> Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

Congress waived immunity for counterclaims asserted in admiralty proceedings brought by the United States in 46 U.S.C. § 30903(a), which provides:

> In a case in which, if a vessel were privately owned or operated, or if cargo were privately owned or possessed, or if a private person or property were involved, a civil action in admiralty could be maintained, a civil action in admiralty in personam may be brought against the United States or a federally-owned corporation. In a civil action in admiralty brought by the United States or a federally-owned corporation, an admiralty claim in personam may be filed or a setoff claimed against the United States or corporation.

The Fifth Amendment of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Congress provided for restraining orders in forfeiture cases in the Civil Asset Forfeiture Reform Act of 2000 as codified in 18 U.S.C. § 983(j):

> (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture—
>
> (A) upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or
>
> (B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—
>
> (i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and
>
> (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 14 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

STATEMENT OF THE CASE

Petitioner Retail Ready Career Center, Inc. operated a school to train technicians in the heating, ventilation, and air conditioning industry ("HVAC"). Petitioner's innovative approach combined classroom and lab training in an intense six week program with school days running from 7:30 in the morning until 6:30 in the evening. The school had a graduation rate of 89 percent and a placement rate of 81.49 percent in its final audited reporting year.

The school's "boot camp" approach attracted thousands of veterans who wanted to fill one of the thousands of well-paying job openings in the HVAC industry but could not commit to the year or two-year training programs offered by traditional trade schools. The price and curriculum of Petitioner's program was approved by the Texas Workforce Commission, Texas Veterans Commission, and the United States Department of Veterans Affairs. Just prior to the events at issue in this case, the school had been reapproved by the regulators after a successful compliance audit.

In September of 2017, the government obtained a seizure warrant for the funds in Petitioner's bank accounts pursuant to 18 U.S.C. § 981(b)(2). The seizure warrants were obtained based on the secret, *ex parte* testimony of a recently hired government agent with less experience than the most junior person in Petitioner's compliance department. On September 20, 2017, without giving Petitioner notice or a hearing, the

government began seizing Petitioner's funds from its bank accounts.

The seizure of all of Petitioner's funds destroyed its business. Teachers, staff, vendors, and the hotel supplying student housing could no longer be paid, and the school was forced to close. Hundreds of out of state veterans were stranded when the government refused to release funds to pay for their return travel. The owner had to use a credit card to pay for airfare—and the interest continues to accrue.

On October 30, 2017, the government initiated proceedings in the district court by filing an Original Complaint for Forfeiture. The district court has jurisdiction pursuant to 28 U.S.C. § 1345 (United States as plaintiff) and 28 U.S.C. § 1355 (Fine, penalty, or forfeiture).

The government's claims for forfeiture are threadbare. The district court dismissed the government's complaints twice for failure to state a claim but granted leave to amend each time. *See United States v. $4,480,466.16 in Funds Seized From Bank of Am. Account Ending in 2653*, 3:17-CV-2989-D, 2018 WL 1964255 (N.D. Tex. Apr. 26, 2018); *United States v. $4,480,466.16 in Funds Seized from Bank of Am. Account Ending in 2653*, 3:17-CV-2989-D, 2018 WL 4096340 (N.D. Tex. Aug. 28, 2018). Petitioner filed a motion to dismiss the current complaint on October 9, 2018, which is still pending a year and three months later. After the close of discovery, Petitioner filed a motion for summary judgment on November 8, 2018.

Although the government has never filed a response in the year since the filing, none of the five district court judges assigned to the case have granted the motion or set the case for trial. Thus, Petitioner has been deprived of its funds for over two years and four months without trial, without indictment, without evidence, and without the government even stating a claim for forfeiture.

At issue in this proceeding is one of the counterclaims asserted in the district court by Petitioner against the United States. In its counterclaim, Petitioner alleged that the seizure of its funds from a bank account without notice and a hearing violated the Due Process Clause of the Fifth Amendment because Congress had provided restraining orders as an alternative. Petitioner sought damages from the United States caused by the deprivation of due process.

The government filed a motion to dismiss the counterclaims based on a decision from the First Circuit which held, without citation to authority, that counterclaims are not permitted in a forfeiture proceeding. *See United States v. One Lot of U.S. Currency ($68,000)*, 927 F.2d 30, 34 (1st Cir. 1991). The government did not assert immunity in the motion to dismiss, but the validity of Petitioner's constitutional counterclaim was raised. The district court, like many other district courts, followed the First Circuit precedent and dismissed Petitioner's counterclaims on the basis that counterclaims are not permitted in a forfeiture proceeding. *See* App. 59–61. At Petitioner's request, the district court entered a Rule 54(b) judgment

dismissing Petitioner's counterclaims without prejudice based on its prior order, and Petitioner appealed to the United States Court of Appeals for the Fifth Circuit.

On appeal, Petitioner argued that, based on the text of the applicable statutes and rules of procedure as well as historic *in rem* practice in admiralty, counterclaims are allowed in forfeiture cases. In its response, in addition to arguing that counterclaims are not permitted, the government asserted immunity for the first time and again raised its challenge to the merits of Petitioner's counterclaim based on the Due Process Clause. Petitioner addressed those additional issues in its reply brief. The court of appeals held oral argument on February 8, 2019.

The court of appeals entered its initial opinion and judgment on August 22, 2019. *See* App. 25. The court did not address the question of whether counterclaims were permitted in forfeiture cases and instead held that Petitioner's counterclaims were barred by sovereign immunity. *See* App. 31–39. The court vacated the district court's judgment and remanded with instructions to dismiss the counterclaims for lack of jurisdiction. *See* App. 39.

Petitioner timely filed a petition for rehearing on October 4, 2019. On November 5, 2019, the court of appeals denied the petition for rehearing, withdrew its prior opinion and judgment, and substituted a new opinion and judgment. *See* App. 1. This time the court of appeals did address whether counterclaims could be

filed, expressly disagreed with the First Circuit, and held that there is not a categorical bar to counterclaims in a forfeiture case. *See* App. 7–16. The court of appeals continued to hold that the United States has immunity from Petitioner's counterclaims and affirmed the district court's dismissal without prejudice on that basis. *See* App. 16–24.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' Holding That The United States Has Immunity When It Initiates An *In Rem* Forfeiture Proceeding Conflicts With Numerous Precedents From This Court And Other Courts Of Appeals.

The court of appeals held that sovereign immunity applied to Petitioner's constitutional counterclaims and, therefore, the district court's dismissal of such claims should be affirmed. *See* App. 16–24. The court of appeals' conclusion is worthy of this Court's review because it conflicts with numerous precedents of this Court, the other courts of appeals, and congressional statutes. Faced with widespread and well-chronicled abuses, courts should be looking for ways to hold the government accountable—not expand the government's immunity. *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement on denial of certiorari) ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses.").

1. The Court of Appeals' ruling conflicts with the holdings of six other circuits that monetary relief is available to remedy a violation of the Due Process Clause.

In 1993, the Court held that the Due Process Clause prohibited the government from seizing real property without notice and a hearing. *See U.S. v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Because the practice of seizing real property in violation of the Due Process Clause was widespread, lower courts had to determine what remedy to provide property owners after this Court's decision. The courts of appeals for the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits concluded that dismissal was not a proper remedy and, instead, the property owner should receive monetary relief in the form of lost profits or rents for the period before due process was provided. *See United States v. All Assets & Equip. of W. Side Bldg. Corp*., 188 F.3d 440, 445 (7th Cir. 1999); *United States v. Real Prop. Located at 1184 Drycreek Rd., Granville, Ohio 43023*, 174 F.3d 720, 728 (6th Cir. 1999); *United States v. 408 Peyton Rd., S.W., Atlanta, Fulton County, Ga.*, 162 F.3d 644, 652 (11th Cir. 1998); *United States v. Marsh*, 105 F.3d 927, 931 (4th Cir. 1997); *United States v. Real Prop. Located at 20832 Big Rock Drive, Malibu, Cal. 90265*, 51 F.3d 1402, 1406 (9th Cir. 1995); *United States v. 51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d 1306, 1316 (10th Cir. 1994).

As discussed below in connection with the second question presented in this case, Petitioner's claim that the Due Process Clause was violated by the seizure of

funds from a bank account is premised on the same reasoning and three factors utilized by the Court in *James Daniel Good Real Property*. Petitioner is seeking monetary relief, the same remedy recognized by six courts of appeals as being available when the government unconstitutionally seizes property in forfeiture cases. Indeed, monetary relief is the only way to make Petitioner whole now that its business has been destroyed by the government's unconstitutional conduct.

The Fifth Circuit's holding in this case that the government has immunity from claims for monetary relief conflicts with the holdings of the six other courts of appeals that monetary relief is available for violations of the Due Process Clause. Indeed, the Fifth Circuit's idea that immunity might protect the plaintiff in an *in rem* forfeiture case from remedies for unconstitutional seizures is so novel that none of the courts of appeals felt the need to address it. Moreover, if the Fifth Circuit's holding is correct, then no remedy exists for unconstitutional seizures.

The government should not be allowed to violate constitutional rights of the residents of the Fifth Circuit with impunity. The Court should grant a writ of certiorari to reconcile the conflict between the circuits and make clear that the government does not have immunity in forfeiture cases from counterclaims based on violations of the Constitution. *See* Sup. Ct. R. 10(a).

2. Under prior precedent, the United States has never previously enjoyed immunity to counterclaims when it initiates an *in rem* proceeding.

In the words of Chief Justice Marshall, "The whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision." *The Mary*, 13 U.S. 126, 144 (1815). Thus, this Court repeatedly held that, when the United States initiates an *in rem* proceeding in admiralty, the United States opens itself up to liability for all claims related thereto. *See*, *e.g.*, *United States v. The Thekla*, 266 U.S. 328, 339–40 (1924) ("We do not qualify the foregoing decisions in any way, but nevertheless are of opinion that the District Court had power to enter a decree for damages. When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."); *United States v. The Paquete Habana*, 189 U.S. 453, 465–66 (1903) ("the court was of opinion that the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in like cases."); *The Siren*, 74 U.S. 152, 154 (1868) ("But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem, they

open to consideration all claims and equities in regard to the property libelled."); *see also The W. Maid*, 257 U.S. 419, 434 (1922) ("The ground of that decision was that when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject matter.").

As discussed in the next section, Congress later codified the absence of immunity when the government initiates a suit *in rem*. Thus, this Court's holdings that no immunity exists in admiralty, even in the absence of a statutory waiver, fell out of use. However, the Court's decisions still stand for the proposition that the United States has never had immunity to counterclaims in admiralty proceedings that it initiates.

The court of appeals "distinguished" these decisions as only being applicable to "collisions" in admiralty. *See* App. 20–21. However, two of this Court's decisions involved *seizures* for purposes of *forfeiture*, not collisions. *See United States v. The Paquete Habana*, 189 U.S. 453, 464–65 (1903) ("The libels were filed by the United States on its own behalf, praying a forfeiture to the United States."); *The Siren*, 74 U.S. 152 (1868) ("The steamer Siren was captured in the harbor of Charleston in attempting to violate the blockade of that port, in February, 1865, by the steamer Gladiolus, belonging to the navy of the United States."). Additionally, the decisions were made on a principle of law much broader than collisions. *See United States v. The Paquete Habana*, 189 U.S. 453, 465–66 (1903) ("In *The Nuestra Señora de Regla*, 108 U. S. 92, 102, *sub nom. United States v. The Nuestra*

Señora de Regla, 27 L. Ed. 662, 666, 2 Sup. Ct. Rep. 287, the court was of opinion that the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in like cases. It seems to us that the facts here are not less strong.").

Moreover, Congress has mandated that forfeiture cases be conducted "as near as may be to proceedings in admiralty." *See* 28 U.S.C. § 2461(b) ("Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress . . . in cases of seizures on land the forfeiture may be enforced by a proceeding by ***libel*** which shall conform as near as may be to proceedings in admiralty.") (emphasis added).[2] Therefore, the court of appeals' reasoning that immunity exists in forfeiture because the absence of immunity is limited to "admiralty" conflicts with Congress' directive to treat forfeiture cases like admiralty cases.

This Court should grant a writ of certiorari because the court of appeals decided an important

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[2] The "libel" was the historic method for asserting admiralty claims. *See* LIBEL, Black's Law Dictionary (10th ed. 2014) ("The complaint or initial pleading in an admiralty or ecclesiastical case."); *The Atlas*, 93 U.S. 302, 316 (1876) ("All know that the libel in the Admiralty Court takes the place of the declaration in an action at law, and that the answer is the substitute for the plea of the defendant.").

question of federal law in conflict with relevant decisions of this Court. *See* Sup. Ct. R. 10(c).

3. The Court of Appeals' decision conflicts with Congress' statutory directives, and the Court should intervene to align forfeiture jurisprudence with its statutory and admiralty origins.

In a footnote, the court of appeals held that Congress' statutory waiver of immunity in 46 U.S.C. § 30903(a) does not apply in forfeiture cases and only applies to "admiralty claims." *See* App. 21 n.19. This ruling conflicts with the statutory directives of Congress.

In 1920, Congress enacted the Suits in Admiralty Act which codified the common-law absence of immunity for claims against the United States arising in admiralty. *See* Pub. L. No. 66-156 § 2, 41 Stat. 525-26 (1920). The original language of the act provided that:

> In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. *See* 41 Stat. at 526.

The current version of that waiver is found in 46 U.S.C. § 30903(a), which utilizes modern terminology and provides that: "In a civil action in admiralty brought by the United States or a federally-owned

corporation, an admiralty claim in personam may be filed or a setoff claimed against the United States or corporation."

As noted above, Congress has directed that forfeiture proceedings be conducted "as near as may be to proceedings in admiralty." *See* 28 U.S.C. § 2461(b). In CAFRA, Congress directed that forfeiture claims filed by the United States shall be made in accordance with the admiralty rules. *See* 18 U.S.C. § 983(a)(3)(A) ("Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims . . . ").

Congress' requirement that forfeiture claims be asserted in admiralty, its mandate that such proceedings conform "as near as may be" to admiralty practice, and Congress' explicit waiver of immunity for counterclaims in admiralty proceedings should have sufficed to show that the government does not have immunity in a forfeiture case. Yet the court of appeals did not even address 28 U.S.C. § 2461(b) in its opinion, ignored the interplay of admiralty and forfeiture statutes and jurisprudence, and summarily dispensed with the statutory argument in a footnote. *See* App. 21 n.19. The Court should grant a writ of certiorari because the court of appeals has decided an important question regarding the interplay of forfeiture and admiralty statutes that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(c).

4. Under prior precedent from this Court and other courts of appeals, the United States has never had immunity from counterclaims for setoff or recoupment.

The United States is the plaintiff in a forfeiture case. In such cases, the United States is typically holding property seized from someone else. In this case, the government is holding over $4.5 million of Petitioner's funds. In the event the United States prevails in whole or in part on its claims for forfeiture (which is unlikely in this case), the property owner should be entitled to a setoff and recoupment of funds in an amount equal to the damages it has suffered from a constitutional violation.

The courts of appeals for the Second, Eighth, Ninth, and Tenth Circuits agree that immunity does not bar counterclaims against the United States in setoff or recoupment. *See United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2017) ("The United States enjoys sovereign immunity from unconsented suits. However, when the United States files suit, consent to counterclaims seeking offset or recoupment will be inferred."), *affirmed by equally divided court*, 138 S. Ct. 1832 (2018); *Berrey v. Asarco Inc.*, 439 F.3d 636, 644 (10th Cir. 2006) ("Waiver under the doctrine of recoupment, however, does not require prior waiver by the sovereign or an independent congressional abrogation of immunity."); *Miller v. Tony & Susan Alamo Found.*, 134 F.3d 910, 916 (8th Cir. 1998) ("Thus, when the United States brings a claim in court, it 'waives immunity as to claims of the defendant which assert matters in

recoupment—arising out of the same transaction or occurrence which is the subject matter of the [G]overment's suit.' "); *United States v. Forma*, 42 F.3d 759, 764 (2d Cir. 1994) ("Despite sovereign immunity, 'a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim.' ").

Those courts of appeals' decisions are consistent with this Court's prior rulings that immunity does not preclude claims against the United States for setoff or recoupment. *See*, *e.g.*, *U. S. v. U. S. Fid. & Guar. Co.*, 309 U.S. 506, 511 (1940) ("This concession is upon the theory that a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim."); *Bull v. United States*, 295 U.S. 247, 261 (1935) ("A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction."); *The Siren*, 74 U.S. 152, 154, 19 L. Ed. 129 (1868) ("when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem, they open to consideration all claims and equities in regard to the property libelled.").

By holding in this case that constitutional counterclaims against the United States are properly dismissed on immunity grounds at the beginning of a forfeiture case, the court of appeals categorically precluded Petitioner from obtaining a setoff or recoupment in the

unlikely event the government prevails on one or more theories of forfeiture in the district court. This departure from well established precedent has the effect of reducing even further the rights of property owners in proceedings brought by the government in the Fifth Circuit (but not elsewhere).

The Court should grant a writ of certiorari to resolve the conflict between the circuits on this important question of federal law and to resolve a conflict with the decisions of this Court. *See* Sup. Ct. R. 10(a), Sup. Ct. R.(c).

B. This Case Presents An Opportunity To Address The Important Question Of Whether The Government's Civil Forfeiture Practices Are Consistent With The Due Process Clause.

The question of whether the government's seizure of Petitioner's funds without notice or a hearing constitutes a violation of the Due Process Clause was briefed in both the district court and court of appeals. However, neither court addressed the question in their opinions. Therefore, the typical grounds that the Court considers for granting a writ of certiorari have not been met. *See* Sup. Ct. R. 10(a)-(c).

Because the court of appeals did not address the due process question, Petitioner strongly considered not including the issue in the questions presented to the Court. However, the question of whether the government's seizure of funds without notice or hearing comports with the Due Process Clause is presented by this case, and that question is indisputably important

and of pressing public concern. *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement on denial of certiorari) ("This petition asks an important question: whether modern civil-forfeiture statutes can be squared with the Due Process Clause and our Nation's history."). Moreover, few property owners can afford the lengthy judicial process required to obtain the return of their property, and almost none can take a challenge to that process all the way to this Court. As a result, the Court has not addressed due process and civil forfeiture since 1993, seven years before CAFRA was adopted in 2000. *See United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Having come this far, Petitioner owes an obligation to the other victims of forfeiture abuse to at least raise the due process question with the Court.

Moreover, this case is an appropriate vehicle for addressing the intersection of the Due Process Clause and the applicable civil forfeiture statutes because only a minor extension of this Court's existing precedent is needed. In its most recent pronouncement on due process and civil forfeiture, the Court started with the foundational principle that "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). The Court noted that "[w]e tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" *Id*. The Court held that the three-part inquiry set forth in

Mathews v. Eldridge, 424 U.S. 319 (1976) is the appropriate test:

> The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose. *James Daniel Good Real Prop.*, 510 U.S. at 53.

Applying that three-factor inquiry here makes clear that the seizure of funds from a domestic bank account without notice and a hearing violates the Due Process Clause. *First*, business ownership and operation, like home ownership, are private interests of historical and continuing importance. *Id*. at 53-54 ("Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance."). *Second*, *ex parte* seizures today still pose an unacceptable risk of error as was the case twenty-seven years ago. *Id*. at 55 ("The practice of *ex parte* seizure, moreover, creates an unacceptable risk of error."). *Third*, the Court recognized that an *ex parte* seizure is not necessary to protect the government's interests when restraining orders are available. *Id*. at 58 ("If there is evidence, in a particular case, that an owner is likely to destroy his property when advised of the pending action, the Government may obtain an ex parte

restraining order, or other appropriate relief, upon a proper showing in district court."); *Id*. at 62 ("To establish exigent circumstances, the Government must show that less restrictive measures—i.e., a lis pendens, restraining order, or bond—would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property.").

In CAFRA, which was enacted after the Court's decision in *James Daniel Good Real Prop*., Congress made injunctions and restraining orders an option in all civil forfeiture proceedings. *See* 18 U.S.C. § 983(j). Instead of obtaining an *ex parte* seizure warrant pursuant to 18 U.S.C. § 981(b)(2), the appropriate course of action for the government in most cases would be to seek injunctive relief in a contested hearing pursuant to 18 U.S.C. § 983(j)(1).[3] In the unusual event that *ex parte* relief is needed, a temporary restraining order pursuant to 18 U.S.C. § 983(j)(3) should normally be adequate. Moreover, unlike an *ex parte* seizure, which provides no post-deprivation hearing for months or years, the temporary restraining order process provides a property owner with a hearing at the "earliest possible time." *See* 18 U.S.C. § 983(j)(3).

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[3] Seizures for purposes of civil forfeiture that are not conducted pursuant to a warrant—such as cash found at a traffic stop—also pose due process concerns, but those cases would require a different analysis than situations where the government has a choice between obtaining a seizure warrant and obtaining injunctive relief.

In this case, injunctive relief clearly would have been adequate to protect the government's interests. Instead of seizing funds from a domestic bank account, the government could have obtained a restraining order freezing the account until a hearing could be held. A prompt hearing would have allowed Petitioner to disprove the government's case prior to its business being destroyed. Instead, Petitioner received neither pre-deprivation nor post-deprivation due process, remains without its funds over two years later, and had to close its business.

Now that Congress has provided for injunctive relief as an alternative, the government's practice of seizing property without notice or a hearing pursuant to seizure warrants obtained *ex parte* under 18 U.S.C. § 981(b)(2) is normally unnecessary. Unnecessary seizures without notice and a hearing violate the Due Process Clause. The Court should grant a writ of certiorari to consider the application of the Due Process Clause to the government's forfeiture practices, hold *ex parte* seizures to be unconstitutional when injunctive relief is available, and thereby force the government to utilize the more balanced approach found in 18 U.S.C. § 983(j) as Congress intended.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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