No. 19-970

In the Supreme Court of the United States

RETAIL READY CAREER CENTER, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress has waived the United States' sovereign immunity from a constitutional tort claim asserted as a counterclaim seeking money damages in an *in rem* civil forfeiture action.

2. If Congress has waived sovereign immunity from such a claim, whether the United States may, consistent with the Due Process Clause, seize bank-account funds pursuant to a judicial seizure warrant in connection with an *in rem* civil forfeiture action where the account holder is afforded postseizure notice and an opportunity for a hearing.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-24) is reported at 942 F.3d 655. The opinion of the district court (Pet. App. 40-62) is not published in the Federal Supplement but is available at 2018 WL 1964255.

JURISDICTION

The judgment of the court of appeals was entered, and a petition for rehearing was denied, on November 5, 2019. The petition for a writ of certiorari was filed on January 30, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a for-profit school for heating, ventilation, and air conditioning technicians. Pet. App. 2. A large share of petitioner's revenue came from the federal government, in the form of education or training

benefits for the predominately veteran student body that petitioner attracted. See *id.* at 2-3; cf. 38 U.S.C. 3680.

In order to protect veterans and the federal fisc, Congress has limited the types of educational and training programs for which federal veterans benefits may be expended. See, *e.g.*, 38 U.S.C. 3680A. As relevant here, Congress has generally required that the Department of Veterans Affairs (VA) deny a veteran's application for enrollment in a course if "more than 85 percent of the students enrolled in the course" have "all or part of their tuition, fees, or other charges paid to or for them" by either the VA or the school. 38 U.S.C. 3680A(d)(1); see 38 C.F.R. 21.4201(a). That statutory condition on federal funding, known as the "85-15 requirement," reflects Congress's "'concern[]'" that federal funds would create "'a strong incentive'" for schools to "'develop[] courses specifically designed for those veterans with available Federal monies to purchase such courses.'" *Cleland* v. *National Coll. of Bus.*, 435 U.S. 213, 214, 216 (1978) (per curiam) (citation omitted). The statutory requirement ensures that a sufficient "'number of nonveterans * * * find the course worthwhile and valuable'" before federal funds may be expended, thereby "minimiz[ing] the risk that veterans' benefits w[ill] be wasted on educational programs of little value" and "'protecting veterans by allowing the free market'" to function as a screening mechanism. *Id.* at 216, 219 (citation omitted).

To receive federal payment of veterans' benefits, a school must periodically submit to the VA calculations certifying its compliance with the 85-15 requirement. 38 C.F.R. 21.4201(f)(2); see 38 C.F.R. 21.4201(e)(3). The VA then processes new enrollments of veterans in

a course "on the basis of the school's submission of [its] most recent computation showing that," among other things, "[t]he 85-15 percent ratio is satisfactory." 38 C.F.R. 21.4201(g)(1)(i).

2. a. In 2017, the VA investigated whether petitioner had falsely claimed to be in compliance with the 85-15 requirement. Pet. App. 3. As a result of that investigation, the government filed a civil action seeking forfeiture of, *inter alia*, $4.6 million from petitioner's bank accounts. *Ibid.*

Congress has provided that certain categories of property are "subject to [civil] forfeiture to the United States," including "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation" of certain federal statutes prohibiting, among other things, the theft of government funds (18 U.S.C. 641) and mail and wire fraud (18 U.S.C. 1341, 1343). See 18 U.S.C. 981(a)(1)(C); see also 18 U.S.C. 1956(c)(7)(A) and (D), 1961(1). Congress has further provided that, before the government files a civil complaint for forfeiture, the government may seize personal "property subject to forfeiture" "pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure." 18 U.S.C. 981(b)(1) and (2); cf. 18 U.S.C. 985 (separately governing civil forfeiture of real property). A magistrate judge may issue such a warrant based on a sworn affidavit showing probable cause to believe that the property to be seized is property subject to forfeiture. See Fed. R. Crim. P. 41(d)(1).

In this case, shortly before filing its civil forfeiture action, the government obtained and executed such pre-suit seizure warrants for the funds in petitioner's bank accounts. Pet. App. 3. The government also obtained

warrants for and seized a Lamborghini Aventador, Ferrari 488, Bentley Continental GT, BMW Alpina, two Mercedes Benzs, and other tangible property. *Id.* at 3 n.2; 3d Am. Compl. 3-5; see Pet. ii.

b. The government initiates a civil forfeiture proceeding by filing "a complaint for forfeiture in the manner set forth in the Supplemental Rules for [Admiralty or Maritime Claims and Asset Forfeiture Actions (Supplemental Rules)]." 18 U.S.C. 983(a)(3)(A); see Supp. R. A(1)(B), G(1). The government's verified complaint *in rem* must describe the property (the defendant *in rem*), identify the statute under which the forfeiture action is brought, and state "sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supp. R. G(2).

"A person who asserts an interest in the defendant property" in an *in rem* forfeiture action may "contest the forfeiture by filing a claim in the court where the action is pending." Supp. R. G(5)(a)(i). The claimant may also request "immediate release of [any] seized property" from the appropriate government official, 18 U.S.C. 983(f)(1) and (2), and, if the property is not released within 15 days, may petition the court to order the property's release, 18 U.S.C. 983(f)(3). See Supp. R. G(8)(d). If the property, among other things, constitutes funds that are "assets of a legitimate business," 18 U.S.C. 983(f)(8)(A), a claimant "is entitled to immediate release" if (1) the claimant has a possessory interest in the property and can provide assurance that the property will be available at the time of trial; (2) continued possession by the government pending disposition of the forfeiture proceeding would "cause substantial hardship to the claimant, such as preventing the func-

tioning of a business"; and (3) the claimant's likely hardship "outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding." 18 U.S.C. 983(f)(1).

In addition to seeking both immediate and permanent recovery of seized property itself, a claimant may pursue monetary recoveries from the United States under two limited waivers of sovereign immunity from forfeiture-related claims. First, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, allows certain tort claims to be brought against the United States, 28 U.S.C. 1346(b), 2674, "based on injury or loss of * * * property, while in the possession of [federal officers]," if the property was "seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense," 28 U.S.C. 2680(c)(1). Second, 28 U.S.C. 2465(b) provides that, subject to certain exceptions, the "the United States shall be liable" for three types of monetary awards in a civil forfeiture action in which "the claimant substantially prevails." *Ibid.* If the forfeiture action "involv[es] currency, other negotiable instruments, or the proceeds of an interlocutory sale," the United States is liable for actual or imputed interest that the currency, instruments, or proceeds would have earned during the period of the government's possession. 28 U.S.C. 2465(b)(1)(C). The other two types of recovery available to a prevailing claimant in a forfeiture action are post-judgment interest and reasonable attorney fees and costs. 28 U.S.C. 2465(b)(1)(A) and (B). Beyond those three types of recoveries, however, Section 2465 provides that "[t]he United States shall not be required to disgorge the

value of any intangible benefits nor make any other payments to the claimant not specifically authorized by [Section 2645(b)]." 28 U.S.C. 2465(b)(2)(A).

In the government's *in rem* forfeiture action here, petitioner filed claims to the funds seized from its accounts. C.A. R.E. 51-56. Petitioner also filed claims for the three types of recoveries authorized by Section 2465 (actual or imputed interest, post-judgment interest, and attorney fees and costs). *Id.* at 56-57. Petitioner, however, did not seek the immediate release of the seized property under 18 U.S.C. 983(f).[1] Petitioner instead filed what it described as two "constitutional counterclaims" based on petitioner's contentions that the United States had violated the Fourth Amendment "by committing an unreasonable seizure of [petitioner's] property" and had violated the Fifth Amendment's Due Process Clause by seizing the claimed funds without providing petitioner prior notice or a hearing. C.A. R.E. 57-58 (capitalization and emphasis omitted). The counterclaims sought money "damages to compensate" petitioner for the alleged "destruction of its business." *Id.* at 58.

c. The district court dismissed petitioner's counterclaims without prejudice. Pet. App. 40-41, 58-61. The

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[1] In criminal proceedings relating to the seizure warrants before a magistrate judge, petitioner's owner and others separately sought the release of seized property, including petitioner's bank funds, by filing a motion for the return of property under Fed. R. Crim. P. 41(g) and Section 983(f). See D. Ct. Doc. 58-1, Ex. A (Dec. 26, 2017) (reproducing motion as exhibit). The movants, however, later withdrew that motion. See D. Ct. Doc. 85, at 3 & n.6 (Apr. 5, 2018). In this case, petitioner's owner subsequently moved the district court under Section 983(f) to release certain seized property but did not seek the release of petitioner's bank funds. See *id.* at 3, 10. The district court denied that motion. 5/11/18 Order.

court determined that petitioner could not file counterclaims in this forfeiture action because a forfeiture action is an *in rem*, rather than *in personam*, proceeding in which the property in question is the defendant *in rem*; petitioner is simply a claimant (rather than a defendant) against which no claim had been asserted; and, as a result, no "claim" against petitioner exists that might serve as the basis for counterclaims. *Id.* at 59-61. The court subsequently granted petitioner's request to enter judgment under Federal Rule of Civil Procedure 54(b) on petitioner's counterclaims in order to permit petitioner to appeal immediately. Pet. App. 6; see 6/12/18 Order. The court has stayed the remainder of the forfeiture proceeding—currently through May 15, 2020—on the ground that "civil discovery [in that proceeding] will adversely affect the ability of the Government to conduct [its] related criminal investigation," 18 U.S.C. 981(g)(1). See 4/27/20 Order; 1/30/20 Order; 2/6/19 Order.

3. The court of appeals initially vacated and remanded with instructions to dismiss petitioner's counterclaims for want of jurisdiction. Pet. App. 25-39. The court agreed with the government that Congress has not waived the United States' sovereign immunity from petitioner's counterclaims. *Id.* at 32-39. In light of that determination, the court declined to resolve petitioner's challenge to the district court's conclusion that claimants cannot file counterclaims in *in rem* civil forfeiture proceedings. *Id.* at 26, 31.

Petitioner petitioned for rehearing. The court of appeals denied rehearing but issued a substitute opinion, Pet. App. 1-24, and entered a judgment affirming the district court, 11/5/19 C.A. Judgment. In its revised

opinion, the court addressed and disagreed with the district court's conclusion that claimants in forfeiture proceedings are generally precluded from filing appropriate counterclaims, Pet. App. 7-16, but adhered to its determination that petitioner's counterclaims in this case were barred by sovereign immunity, *id.* at 16-24.

The court of appeals determined that petitioner had failed to identify any unambiguous waiver of federal sovereign immunity that would authorize its Fourth and Fifth Amendment damages claims. Pet. App. 17-23. The court observed that "Congress did enact [in the FTCA] an unambiguous waiver with respect to forfeiture proceedings," *id.* at 21 (discussing 28 U.S.C. 2680(c)), but that the FTCA waiver is inapplicable here because it waives immunity only from tort claims based on state law, not from constitutional torts. *Id.* at 18-20. The court additionally observed that Congress in 28 U.S.C. 2465(b)(1) expressly waived immunity from certain interest awards and attorney fees and costs to "claimants who 'substantially prevail[]' in a forfeiture action," but that that Section 2465(b)(1) also fails to waive immunity from "damages claims" for "constitutional torts." Pet. App. 23 (citation omitted).

The court of appeals found that petitioner had failed to "direct [the court] to any unambiguous statutory waiver" applicable to its constitutional damages claims in this civil forfeiture context. Pet. App. 21. The court explained that the waiver (46 U.S.C. 30903(a)) in the Suits in Admiralty Act, 46 U.S.C. 30901 *et seq.*, is inapplicable because it "pertains only to certain admiralty claims involving the United States." Pet. App. 21 n.19. And the court observed that petitioner had provided "no authority" for extending to statutory "civil forfeiture proceeding[s]" a "distinct admiralty rule," reflected in

decisions predating the Suits in Admiralty Act, that previously allowed an admiralty court to adjudicate a cross-libel against the United States when the United States sued a vessel in admiralty. *Id.* at 20-21.

4. In September 2019, while petitioner's rehearing petition was pending, petitioner filed a civil action against the United States (asserting FTCA claims) and a VA employee in his personal capacity (asserting a Fourth Amendment *Bivens* claim). 3:19-cv-2204 Compl. at 26-34, *Retail Ready Career Ctr., Inc.* v. *United States* (N.D. Tex. Sept. 16, 2019); see 3:19-cv-2204 1st Am. Compl. at 33-49 (Dec. 9, 2019). That separate action remains pending.

ARGUMENT

Petitioner contends (Pet. 13-23) that the court of appeals erred in its determination that sovereign immunity bars its constitutional-tort counterclaims for money damages in this civil forfeiture action. Petitioner further contends (Pet. 23-27) that the Court should grant review to decide in the first instance the merits of petitioner's due-process-based tort claim, which neither the court of appeals nor the district court addressed in light of their threshold rulings. The court of appeals' sovereign-immunity decision is correct and does not conflict with any decision of this Court or another court of appeals, and no sound basis exists for this Court to consider the merits of petitioner's (barred) underlying tort claim in the first instance. The Court should therefore deny review.

1. a. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (citation omitted). A congressional waiver of that immunity—and the relevant scope of that waiver—

"must be 'unequivocally expressed' in statutory text" before such an action may proceed against the United States. *FAA* v. *Cooper*, 566 U.S. 284, 290-291 (2012) (citation omitted). And those principles requiring "specific congressional authority" to waive sovereign immunity from such actions apply regardless "whether [the action] be in the form of an original action, or a setoff, or a counterclaim." *Nassau Smelting & Ref. Works, Ltd.* v. *United States*, 266 U.S. 101, 106 (1924); see *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) ("[C]ross-claims against the United States" are "governed by the same rules as direct suits" and are "justiciable only in those courts where Congress has consented to their consideration."); see also *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

The court of appeals correctly determined that Congress has not unequivocally waived sovereign immunity from petitioner's damages claim alleging an unconstitutional seizure of petitioner's bank funds in connection with a civil forfeiture action. Congress has enacted two waivers of sovereign immunity relevant to civil forfeitures, neither of which is relevant here. First, the FTCA allows certain tort claims to be brought against the United States for "injury or loss of * * * property, while in the possession of [federal officers]," if the property was "seized for the purpose of [civil] forfeiture." 28 U.S.C. 2680(c)(1). As the court of appeals correctly recognized, the FTCA does not waive sovereign immunity from petitioner's constitutional tort claims, Pet. App. 18-20, because the FTCA waives immunity only from tort claims based on "state [tort] law" and thus does not

authorize "constitutional tort claim[s]," which "[b]y definition" are based on "federal law." *FDIC* v. *Meyer*, 510 U.S. 471, 477-478 (1994).

Second, 28 U.S.C. 2465(b) provides that, subject to certain exceptions, the "the United States shall be liable" for three types of monetary awards "in any civil proceeding to forfeit property * * * in which the claimant substantially prevails": (1) awards for actual or imputed interest on "currency, other negotiable instruments, or the proceeds of an interlocutory sale" if the forfeiture action involves such property; (2) awards of post-judgment interest; and (3) awards of reasonable attorney fees and costs. 28 U.S.C. 2465(b)(1). As the court of appeals recognized, petitioner's constitutional tort claims seeking money "damages to compensate [it] for the destruction of its business," C.A. R.E. 58, plainly do not fall within that waiver. Pet. App. 23.

Section 2465(b)'s limited waiver of immunity "in any civil proceeding to forfeit property" in which the plaintiff substantially prevails, 28 U.S.C. 2465(b)(1), is particularly salient here, because Congress in that provision expressly preserved federal sovereign immunity from other types of claims asserted in such civil forfeiture proceedings. That provision specifies that "[t]he United States shall not be required to * * * make any other payments to the claimant not specifically authorized by [Section 2645(b)]." 28 U.S.C. 2465(b)(2)(A). Petitioner does not attempt to square its efforts to obtain money damages on its counterclaims here with that express preservation of immunity, let alone identify an unambiguous statutory waiver of immunity from constitutional tort claims that might apply in this civil forfeiture context.

b. Petitioner appears to argue (Pet. 16-20) that 28 U.S.C. 2461(b) provides the relevant waiver of sovereign immunity in this civil forfeiture context when read against the separate waiver of immunity in the Suits in Admiralty Act, Pet. 19-20, or certain of this Court's older decisions governing admiralty libel actions before Congress enacted the Suits in Admiralty Act, Pet. 16-18. Those arguments lack merit.

Section 2461(b) provides that, "[u]nless 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 land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty." 28 U.S.C. 2461(b). That provision prescribes the mode of recovery that may be *used by* the United States in certain contexts to enforce forfeitures. It does not provide a waiver of immunity from counterclaims *against* the United States in civil forfeiture proceedings, much less do so unambiguously.

Particularly when Section 2461(b)'s provisions regarding the mode of "enforcement" of a forfeiture are read in context with Congress's unqualified instruction that "[t]he United States shall not be required to * * * make *any other payments to the claimant*" in civil forfeiture proceedings beyond the three (inapplicable) types of awards "specifically authorized by [Section 2645(b)]," 28 U.S.C. 2465(b)(2)(A) (emphasis added), no sound basis exists for concluding that Congress unambiguously waived sovereign immunity from constitutional-tort damages claims in civil forfeiture proceedings. The best reading of Section 2461(b) is that it provides the government with an enforcement option, not that it waives sovereign immunity to constitutional

counterclaims in proceedings like this. But even if it were merely a "plausible interpretation" of the statutory text, Section 2461(b) would still leave federal sovereign immunity intact. See *Cooper*, 566 U.S. at 290-291, 299 (explaining that a statute does not unambiguously waive sovereign immunity "if there is a plausible interpretation of the statute that would not authorize money damages against the Government" in the relevant context because "Congress must speak unequivocally" in "statutory text" to waive such immunity).[2]

Moreover, even assuming *arguendo* that Section 2461(b) might be read as allowing certain counterclaims against the United States in civil forfeiture proceedings when such claims would be allowed in admiralty, petitioner fails to demonstrate that its constitutional tort

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[2] Petitioner similarly cites (Pet. 20) without elaboration 18 U.S.C. 983(a)(3)(A), which provides that normally within 90 days after a claimant has filed an administrative claim to seized property, "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." *Ibid.* In 2006, after Section 983's enactment in 2000, the Supplemental Rules were renamed the "Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions" and amended to add Rule G to govern *in rem* civil forfeiture proceedings. See 547 U.S. 1235, 1258-1267 (2006) (order); Supp. R. G(1) & 2006 advisory comm. note; see also *United States* v. *All Assets Held at Bank Julius Baer & Co.*, 571 F. Supp. 2d 1, 15 (D.D.C. 2008). Nothing in those rules—which were prescribed by this Court pursuant to the Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, rather than being enacted by Congress—suggests the necessary statutory waiver of sovereign immunity, much less a waiver of immunity from constitutional-tort claims for damages. See 547 U.S. 1235 (order adopting Supplemental Rule G); 383 U.S. 1031, 1071-1085 (1966) (order adopting Supplemental Rules); see also 28 U.S.C. 2072(b) (providing that such rules shall not "enlarge or modify any substantive right").

claims could be asserted in admiralty. Petitioner relies (Pet. 19-20) on the Suits in Admiralty Act, which provides that "[i]n a civil action in admiralty brought by the United States or a federally-owned corporation, *an admiralty claim* in personam may be filed * * * against the United States or corporation." 46 U.S.C. 30903(a) (emphasis added). And as petitioner itself observes (Pet. 19), that provision simply allows admiralty claims to proceed against the United States "with the same force and effect as if [the government's admiralty action] had been filed by *a private party*." 46 U.S.C. App. 742 (2000) (emphasis added) (recodified in 2006 as 46 U.S.C. 30903(a)); see also 46 U.S.C. 30903 note (explaining that 2006 recodification "omitted [this text] as unnecessary"). But because "admiralty claims" asserted against a private libellant do not encompass claims based on the Constitution, Section 30903(a)'s waiver of immunity does not extend to petitioner's constitutional tort claims, as the court of appeals recognized. Pet. App. 21 n.19; cf. *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 461 (1952) (The Fifth Amendment's Due Process Clause "appl[ies] to and restrict[s] only the Federal Government and not private persons."). Petitioner disregards that textual limitation to "admiralty claims," Pet. App. 21 n.19, and makes no attempt to show, as it must, that the court of appeals' interpretation of Section 30903(a) is not a "plausible" one. See *Cooper*, 566 U.S. at 290-291, 299.

Petitioner alternatively attempts (Pet. 16-18) to broaden Section 2461(b) by arguing that this Court's older admiralty decisions show that, when the United States files an "*in rem* proceeding in admiralty," it "opens itself up to liability for all claims related thereto," Pet. 16. That is likewise incorrect. Petitioner

acknowledges (Pet. 17) that those decisions no longer govern admiralty actions because "Congress later codified the absence of immunity" in admiralty contexts (which is limited to admiralty claims available against a private libellant) by enacting the Suits in Admiralty Act. But even if the decisions continued to have some force, petitioner misinterprets them as stripping the United States of sovereign immunity from constitutional damage claims whenever Executive Branch officials bring *in rem* admiralty actions. This Court "ha[s] never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and ha[s] suggested that no such exception exists." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 38 (1992); see also *United States* v. *Shaw*, 309 U.S. 495, 500-501 (1940) (concluding that government's "voluntary submission" of its claim to a state court does not waive sovereign immunity on cross-claim and that "[n]o officer by his action can confer [such] jurisdiction").

The decisions that petitioner cites (Pet. 16-17) simply reflect that when the United States brought an *in rem* admiralty action against a vessel, an admiralty court had authority both to determine a claimant's interest in the property (*i.e.*, the vessel) and to adjudicate a claim against the United States to determine the extent of the parties' relative liability involving the transaction underlying the libel action in the same manner that it would resolve such admiralty claims against private parties. For instance, *United States* v. *The Thekla*, 266 U.S. 328 (1924), reflects that when a libel is brought against a vessel for a collision, "[t]he subject matter of [the] suit" is "the collision" itself, "not the vessel libelled," such that "when the United States libels the vessel of another for collision damages and a cross-libel

is filed, it is necessary to determine the cross-libel as well as the original libel" to determine the degree of each party's respective "responsibility for damages" arising from the collision. *Shaw*, 309 U.S. at 502-503 (discussing *The Thekla*). In *The Paquete Habana*, 189 U.S. 453 (1903), where the United States filed war-prize libel actions for fishing vessels and then entered into "agreements" with the individuals who seized the vessels and the claimants in order to determine damages for the vessels' improper capture, the Court determined that such damages in admiralty could be determined "according to the rules applicable to private persons in like cases." *Id.* at 464-466. And in *The Siren*, 74 U.S. (7 Wall.) 152 (1869), the Court recognized that where the United States brought a war-prize libel claim against a vessel seized during the Civil War, admiralty courts possessed authority to adjudicate a third-party *in rem* claim against the vessel for a collision that the vessel caused after its seizure, explaining that the government stood "precisely as private suitors" "with reference to the rights of defendants or claimants" to the vessel "to the extent of [the government's] demand made or property claimed." *Id.* at 154; see *id.* at 152-153 (statement of the case). Those precursors to the Suits in Admiralty Act recognize that certain *admiralty* claims that could be asserted against private parties may be brought against the United States but, like that Act, they do not suggest that distinct *constitutional* claims may be brought against the sovereign absent a waiver of its immunity.

c. Petitioner separately argues (Pet. 21-23) that "[i]n the event the United States prevails in whole or in part on its claims for forfeiture," petitioner would be entitled to "a setoff and recoupment of funds in an amount

equal to the damages it has [allegedly] suffered from a constitutional violation," Pet. 23. Petitioner, however, did not raise any setoff or recoupment arguments in the court of appeals, see Pet. C.A. Br. 12-22; Pet. C.A. Reply Br. 1-26, which therefore did not address them, see Pet. App. 1-24. That alone is sufficient reason to deny review. This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below,'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted), reflecting the principle that a petitioner cannot properly "assert new substantive arguments attacking * * * the judgment when those arguments were not pressed in the court whose opinion [this Court is] reviewing, or at least passed upon by it," *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001).

Moreover, petitioner's new argument depends on a contingency that has not occurred. Its argument would apply only *if* the government "prevails" on its forfeiture claims, Pet. 21, and the government's forfeiture claims remain pending. Petitioner successfully sought entry of a Rule 54(b) judgment to separate its claims from the ongoing forfeiture proceeding in order to pursue an immediate appeal. See p. 7, *supra*. Accordingly, this case is not an appropriate vehicle to consider petitioner's new and contingent argument, which rests on the possible occurrence of a predicate event that has yet to pass.

In any event, petitioner's new arguments lack merit. First, petitioner does not assert "recoupment" claims, *i.e.*, claims "in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded." *Bull* v. *United States*, 295 U.S. 247, 262 (1935). Petitioner's constitutional claims concern the seizure of property in an allegedly

unconstitutional manner and are therefore distinct from the transaction on which the government's forfeiture action is based, namely, petitioner's alleged fraud in certifying its compliance with the 85-15 rule. Petitioner's constitutional claims would thus at best be "set-off" claims, because they "arise[] out of a transaction different from that sued on." *Frederick* v. *United States*, 386 F.2d 481, 487 (5th Cir 1967); see *United Structures of Am., Inc.* v. *G.R.G. Eng'g, S.E.*, 9 F.3d 996, 998 (1st Cir. 1993) (explaining the "well established" distinction between "[r]ecoupment," which is a "a reduction or rebate * * * of the plaintiff's claim" based on a right of the defendant "*arising out of the same transaction*" as "the plaintiff's claim," and "set-off," which is a counterclaim "arising out of a transaction *extrinsic* of plaintiff's cause of action") (citations and internal quotation marks omitted). But this Court has made clear that a claim against the United States "in the form of * * * a set-off" requires a waiver of sovereign immunity, *Nassau Smelting & Ref. Works, Ltd.*, 266 U.S. at 106; see *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 290-291 (1851), which, as previously discussed, is lacking here.

d. Petitioner contends (Br. 14-15) that the court of appeals' decision conflicts with the decisions of six other courts of appeals. That is incorrect.

The decisions that petitioner cites merely conclude that where the government's initial seizure of real property is unlawful under *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), and the property is later forfeited to the government in judicial proceedings, the proper remedy is disgorgement of "any rents received or other proceeds realized from the property during the period of illegal seizure." *United States*

v. *408 Peyton Road, S.W.*, 162 F.3d 644, 652 (11th Cir. 1998) (en banc), cert. denied, 526 U.S. 1089 (1999); 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 Road*, 174 F.3d 720, 728 (6th Cir.), cert. denied, 528 U.S. 987 (1999); *United States* v. *Marsh*, 105 F.3d 927, 931 (4th Cir. 1997); *United States* v. *Real Prop. Located at 20832 Big Rock Drive*, 51 F.3d 1402, 1406 (9th Cir. 1995); *United States* v. *51 Pieces of Real Prop.*, 17 F.3d 1306, 1316 (10th Cir. 1994). Such a remedy is specifically "limited" to "'ordering the return of [property] which rightfully belongs to the [claimant],'" *Tull* v. *United States*, 481 U.S. 412, 424 (1987) (citation omitted)—in particular, the return of rents and proceeds collected on the claimant's behalf during the (postseizure, preforfeiture) period when the government's possession of the claimant's real property was unlawful. The decisions petitioner cites thus do not permit the "same remedy" (Pet. 15) that petitioner seeks: consequential damages purportedly resulting from the seizure of petitioner's bank accounts. And perhaps because they merely require the *return* of property belonging to the claimant in a forfeiture proceeding brought by the government, none of the decisions address, much less resolve, any question of sovereign immunity. The decisions therefore embody no holdings that might conflict with the application of sovereign-immunity principles in this case.

Indeed, the same courts of appeals have determined, like the court of appeals here, that sovereign immunity bars claims against the United States for compensatory damages arising out of the seizure of property. See, *e.g.*, *United States* v. *1461 W. 42nd St.*, 251 F.3d 1329, 1339 (11th Cir. 2001) ("[T]he assessment of damages

* * * would, absent waiver, trespass upon the government's sovereign immunity."); *United States* v. *$277,000 U.S. Currency*, 69 F.3d 1491, 1498 (9th Cir. 1995) (explaining that the "government is immune" from "consequential damages" resulting from its seizure of property); see also, *e.g.*, *United States* v. *Property, Parcel of*, 337 F.3d 225, 235 (2d Cir. 2003) (holding that sovereign immunity prohibits awards of "damages allegedly sustained by the loss of [claimant's] property"). Those courts distinguish between claims for damages like petitioner's, which require a waiver of immunity, and the "disgorgement of property held by the government during the illegal seizure period," which does not. *1461 W. 42nd St.*, 251 F.3d at 1338; see *$277,000 U.S. Currency*, 69 F.3d at 1498 (concluding that sovereign immunity does not bar the government's "disgorge[ment]" of benefits "received from an asset that it has been holding improperly"). Petitioner has thus identified no sound basis for further review of the sovereign-immunity issue decided below.

2. Petitioner additionally seeks this Court's review on the separate question whether, consistent with the Due Process Clause, the United States may seize bank-account funds pursuant to a judicial seizure warrant where the account holder is afforded postseizure, but not preseizure, notice and an opportunity for a hearing. See Pet. i, 23-27. The merits of that constitutional claim are not properly presented here, however, because the court of appeals and district court both rejected petitioner's claim on threshold grounds without reaching the merits. This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it ordinarily does "not decide in the first instance issues not decided below," *Adarand Constructors, Inc.*

v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (citation omitted). Petitioner identifies no sufficient reason for the Court to review petitioner's due-process contention, where no court in this case has yet analyzed that contention.

In any event, this Court's due-process decision in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), resolves petitioner's second question presented in the government's favor. In *Calero-Toledo*, the Court concluded that the Puerto Rican government's seizure of a claimant's yacht under Puerto Rico law "without notice or a prior adversary hearing," *id.* at 668, was consistent with procedural due process. *Id.* at 676-680. The Court explained that although due process often requires a predeprivation hearing, the government's "immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible" where there is a sufficient "'need for very prompt action'" to protect an important government interest. *Id.* at 678 (citation omitted). The Court concluded that the government's seizure of the claimant's personal property without a preseizure notice and hearing was constitutionally warranted because (1) the seizure allowed the Commonwealth "to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings" based on the property's illicit use and (2) "if [the] advance warning" that is inherent to "preseizure notice and hearing" were given, the property "could be removed to another jurisdiction, destroyed, or concealed." *Id.* at 679; see *James Daniel Good Real Property*, 510 U.S. at 57 (explaining that those "[t]wo essential considerations informed [the Court's due-process] ruling" in *Calero-Toledo*). The

same holds true here, where funds in bank accounts can be spirited away in an instant.

Petitioner does not address *Calero-Toledo* and exclusively relies (Pet. 24-26) on the Court's decision in *James Daniel Good Real Property* to support its contention that due process required notice and an opportunity for a hearing before the government seized its bank funds as forfeitable property. That reliance is misplaced. *James Daniel Good Real Property* did not deviate from *Calero-Toledo*'s holding as to personal property; it simply determined that "[n]either of the[] factors" that were "essential" to *Calero-Toledo* "is present when the target of forfeiture is *real property*," because real property, "by its very nature, can be neither moved nor concealed." 510 U.S. at 52-53, 57 (emphasis added). As a result, the Court held that, "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Id.* at 62.

That holding does not support petitioner here, because bank funds are not real property—they are a quintessential example of personal property that can be promptly moved and concealed if advance notice of a government seizure is given. Petitioner characterizes (Pet. 24) its position as seeking "only a minor extension" of *James Daniel Good Real Property*, but that characterization disregards the real-property-specific rationale of that decision and fails entirely to address the Court's on-point reasoning in *Calero-Toledo*. Indeed, petitioner fails to identify any decision from any court suggesting that *Calero-Toledo*'s holding does not apply to bank funds, let alone a division of authority on the issue warranting this Court's review.

To the extent petitioner simply disagrees with *Calero-Toledo*, petitioner does not ask the Court to overrule it, and petitioner's position is unsound. Petitioner contends (Pet. 26) that pre-notice seizure is unnecessary—and therefore violates the Due Process Clause—because the government can seek a restraining order or injunction. See 18 U.S.C. 983(j). But petitioner's proposed solution fails to grapple with the essential problem: notice of an application for a restraining order or injunction would allow account owners to move assets and frustrate forfeiture. As a result, such restraining orders are often ineffective at preventing property owners from moving assets. See Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 3.2, at 99 & n.11 (2d ed. 2013) (describing "instances where the bank's failure" to adequately notify its personnel about a restraining order "resulted in the movement of funds beyond the jurisdiction of the court before the restraining order was put in place").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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