No. 20-768

In The Supreme Court of the United States

GERARDO SERRANO,

Petitioner,

v.

U.S. CUSTOMS AND BORDER PROTECTION, *ET AL.*,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

If federal civil forfeiture laws had provided for a prompt post-seizure hearing, it is hard to believe that CBP would have seized Gerardo's truck at all—much less that a judge would have upheld the seizure based on five forgotten bullets. But federal civil forfeiture laws do not provide for any such hearing. The United States seizes and forfeits billions of dollars in property every year under those laws, generally without any involvement by a judge.

Rather than seriously disputing that the question presented warrants review, the BIO primarily argues that the case is moot. Importantly, however, the BIO (at 12) concedes the class claims could proceed *if* a class had been certified before CBP returned Gerardo's truck. Rightly so, as the class exception to mootness is the typical means to vindicate such claims. *See*, *e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The BIO thus does not raise any fundamental Article III problem with this case; the BIO argues the case was mooted by technicality. However, both courts below disagreed. The BIO's contrary arguments would change current law and are not a reason to leave the Fifth Circuit's merits ruling unreviewed.

After leading with mootness, the BIO argues that due process does not require a prompt post-seizure hearing. In the BIO's view, due process is satisfied so long as the timing of the ultimate forfeiture trial satisfies the *Barker*/*$8,850* speedy trial test. But the Second

Circuit rejected that argument in *Krimstock v. Kelly*, 306 F.3d 40, 68 (2d Cir. 2002), and held that due process "distinguishes between the need for prompt review of the propriety of continued government custody . . . and delays in rendering final judgment." The BIO's disagreement with *Krimstock* is not a reason to deny review.

When the BIO does finally address the split, its arguments fall flat. The BIO (at 25) says the Court granted *Alvarez v. Smith*, 558 U.S. 87 (2009), to address a "methodological conflict" concerning the relevance of *Barker/$8,850*, but that is the same test the BIO argues should control this case. And while the BIO argues there is no split because state and federal seizures are somehow distinct, the United States argued that *Barker/$8,850* should control the state seizure in *Smith* as well. U.S. *Amicus* Br., *Smith*, 2009 WL 1397196, at *18-20. In any event, if a case requiring a prompt post-seizure hearing in the federal customs context is required, then *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976), fits the bill.

Finally, it is worth noting the BIO's omissions: The BIO nowhere addresses *United States v. James Daniel Good*, 510 U.S. 43 (1993), which requires a *pre*-seizure hearing when the government forfeits real property, and the BIO ignores the Petition's historical discussion. The rampant due process violations associated with modern civil forfeiture warrant review.

I. The BIO's Creative Mootness Arguments Are Not A Reason To Deny Review.

1. The BIO argues the government successfully mooted the case when it returned Gerardo's truck shortly after filing. But the Fifth Circuit held the "picking off" exception to mootness prevented that result, and the same is also true under the "inherently transitory" exception. The BIO's contrary arguments depart from current law.

First, the BIO (at 13) argues the picking off exception is limited to plaintiffs who "could seek compensation for attorney's fees and costs they incurred on behalf of the class." But that is no distinction, as Gerardo would likewise be entitled to recover costs and even potentially fees. *See* 28 U.S.C. § 2412(a), (b).[1] More fundamentally, if Gerardo could represent the class had his truck been returned *after* the class was certified (which nobody disputes), it would "invite waste of judicial resources" and "frustrate the objectives of class actions," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980), to allow the government to strategically moot the case *before* certification.

The BIO (at 13 n.1) suggests the picking off exception may no longer be good law after *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013). But the BIO does not cite any case adopting that position,

[1] To the extent the BIO contends that an award of costs would be too small in amount to support jurisdiction, that argument is meritless. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).

and courts beyond the Fifth Circuit have held otherwise. *See* Pet. 36 n.26 (citing *Wilson v. Gordon*, 822 F.3d 934, 949-50 (6th Cir. 2016) and *Richardson v. Bledsoe*, 829 F.3d 273, 283 (3d Cir. 2016)).

Second, the BIO (at 14) argues this case cannot fall within the inherently transitory exception, as the time the government holds property without a prompt hearing "is not inherently too brief." But courts hold that the "key inquiry for assessing whether something is transitory is not merely how long a claim is likely to remain active" and, instead, "is the uncertainty about the length of time a claim will remain alive." *Unan v. Lyon*, 853 F.3d 279, 287 (6th Cir. 2017) (marks and citation omitted); *see also J.D. v. Azar*, 925 F.3d 1291, 1311 (D.C. Cir. 2019); *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010). That uncertainty is at its peak when the government "may quickly and unilaterally grant relief." *Unan*, 853 F.3d at 287. In this context, the inherently transitory and picking off exceptions are closely intertwined.

The BIO (at 14-15) again cites *Genesis Healthcare*, but again courts do not read that decision so broadly. *Genesis Healthcare* holds that a claim for damages is not inherently transitory, 569 U.S. at 77, but that ruling is inapplicable to claims for injunctive relief, which the government can unilaterally moot. *See*, *e.g.*, *J.D.*, 925 F.3d at 1311; *Wilson*, 822 F.3d at 946. In fact, this Court recently applied the doctrine to detentions that could potentially last years. *Nielsen v. Preap*, 139 S. Ct. 954, 963 (2019). The BIO's contrary arguments are not a reason to deny review.

2. Alternately, the BIO asserts (for the first time in these proceedings) that the case became moot because the district court granted the motion to dismiss before ruling on the pending motion to certify. BIO at 15-17. The BIO seeks to impose an order of operations, requiring courts in this posture to resolve class certification before a motion to dismiss for failure to state a claim. But courts apply no such rule.

The Fifth Circuit is hardly alone in taking the issues in this order. In *Unan*, 853 F.3d at 285, the Sixth Circuit held that the district court erred by dismissing putative class claims after the individual claims became moot—reasoning that the picking off and inherently transitory exceptions applied—and then went on to partly affirm the judgment on the alternative ground that the due process claims of the uncertified class failed on the merits. And in *Salazar v. King*, 822 F.3d 61 (2d Cir. 2016), the Second Circuit held that the inherently transitory exception saved an uncertified class from mootness even though the individual claims were moot and then overturned the lower court's decision dismissing on the merits.[2]

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[2] *See also McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-cv-00033, 2021 WL 366776, at *10 (M.D. Tenn. Feb. 3, 2021); *Bellin v. Zucker*, 457 F. Supp. 3d 414, 420 (S.D.N.Y. 2020); *Little v. Frederick*, No. 6:17-CV-00724, 2017 WL 8161160, at *3 (W.D. La. Dec. 11, 2017), *R&R adopted in relevant part*, 2018 WL 1188077 (W.D. La. Mar. 6, 2018); *Tanasi v. New All. Bank*, No. 12-CV-646S, 2013 WL 12308197, at *6 (W.D.N.Y. Aug. 27, 2013); *Mabary v. Hometown Bank, N.A.*, 276 F.R.D. 196, 209 (S.D. Tex. 2011).

This approach flows from the black-letter rule that standing must be established "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *see also Perry v. MSPB*, 137 S. Ct. 1975, 1984 (2017) ("[A] nonfrivolous allegation of jurisdiction generally suffices to establish jurisdiction upon initiation of a case."). Of course, when jurisdiction is invoked under a class-action exception to mootness, the court must certify a class before awarding final injunctive relief. *See Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297, 302-03 (3d Cir. 2016). But a district court may appropriately resolve a motion to dismiss before certification so long as jurisdiction appears on the face of the complaint. *See* Fed. R. Civ. P. 23(c)(1)(A) & 2003 committee note. To the extent there is a risk that jurisdiction may fall out if certification is denied, that is no different from *any* case where jurisdiction appears on the face of the pleadings but must be proved with facts. Notably, the BIO does not dispute that the complaint states a valid basis for class certification.[3]

Moreover, if a district court has jurisdiction to resolve a motion to dismiss, then its decision can be appealed. If certification is denied on Rule 23 grounds, the plaintiff must naturally limit its appeal to the basis for the denial and "may not continue to press the appeal on the merits." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). Here, however, the district

[3] The BIO does not address decisions—cited in the Petition—explaining that this due process claim is obviously appropriate for certification under Rule 23(b)(2). *See* Pet. 35-36 n.25.

court denied certification on the sole ground that it had already dismissed, Petitioner appealed *both* the dismissal and the denial of class certification, the Fifth Circuit affirmed on the sole ground that the claims failed on the merits, and Petitioner now seeks review of the only justification offered by any court for denying certification. *See* Pet. App. 11-12, 24. Petitioner therefore "retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." 445 U.S. at 404.[4]

But even if the BIO raised a colorable question on this point, the proper course would be to grant certiorari and add a second question presented. If there is a correct order of operations in this posture, then lower courts need to be told. The BIO suggests the Court cannot reach the issue, but the Court can always consider jurisdiction; if this issue is *not* jurisdictional, then *the government* waived it.[5] If the case is moot, it was also moot in the Fifth Circuit, and the government's mootness argument is not a reason to leave its merits victory unreviewed.

3. Finally, the BIO (at 22) attempts to subtly undermine Gerardo's fitness as a plaintiff by suggesting

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[4] If the government believed the motion to certify should have been denied on alternative grounds—for instance, under Rule 23—then it was free to argue as much before the Fifth Circuit. It did not.

[5] The magistrate judge found that the government waived any objection to this order of operations, *see* Pet. App. 97-98, and the government did not object to that finding.

that he "does not dispute that the seizure of his property was legally authorized."

Gerardo absolutely disputes that CBP could seize his truck over five low-caliber bullets. Gerardo said as much in the Complaint: "If Plaintiff had been provided a hearing . . . Plaintiff would have argued that CBP lacked a lawful basis to seize his vehicle." Complaint, No. 17-cv-00048, ¶ 91 (W.D. Tex. Sept. 6, 2017). And before the Fifth Circuit: "[I]t is certainly questionable whether *unknowingly* transporting a magazine with five low-caliber bullets (but no gun) even constitutes exporting 'munitions of war.' " Br. for Appellant, No. 18-50977 at 27 (5th Cir. Apr. 16, 2019) (citing *Rubin v. United States*, 289 F.2d 195, 199 (5th Cir. 1961)).[6] Had Gerardo been afforded a prompt hearing, it would have made all the difference in his case. For that reason, it is difficult to imagine a more suitable plaintiff to litigate these claims.

II. Courts Have Split Over Whether Due Process Requires A Prompt Post-Seizure Hearing.

1. This Petition poses the same question the Court granted certiorari to address in *Smith*, 558 U.S. 87. The BIO (at 25) attempts to muddy the waters by stating that *Smith* involved an "alleged methodological conflict between *Smith* and *Krimstock* and other courts

[6] The BIO cites a footnote in the Fifth Circuit's opinion, but that footnote simply describes the class claims—which naturally do not turn on the particular facts of Gerardo's case. *See* Pet. App. 13 n.10.

applying the *Barker* test." But that is just another way of phrasing the question presented: Is due process satisfied so long as the ultimate forfeiture trial is timely under the *Barker/$8,850* speedy trial test (as the Fifth Circuit held, Pet. App. 21-22), or is an additional prompt post-seizure hearing required (as the Second Circuit held in *Krimstock*, 306 F.3d at 68)? Indeed, this Court explained as much summarizing the question presented in *Smith*. *See* 558 U.S. at 89.

2. The BIO (at 24) also asserts that there is not actually a split because due process is "context-specific" and different rules should apply to state and federal seizures. However, the BIO offers no reason why the right to a prompt post-seizure hearing would differ at the state and federal level.

The BIO (at 24) asserts that none of the cases requiring a prompt post-seizure hearing "involv[e] the Tariff Act procedures at issue," but that overlooks the Second Circuit's decision in *Lee*, 538 F.2d at 33. *See Krimstock*, 306 F.3d at 53 (citing *Lee* for the proposition that "'[d]eprivation of means of transportation for [substantial] periods requires an opportunity to be heard'"). The BIO (at 27) eventually concedes that *Lee* required a "'hearing on probable cause'" in this same federal context, but then says *Lee* is distinct because it suggests the hearing could be held before an administrative judge. That, however, does not change *Lee*'s holding that a hearing is required.[7]

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[7] Whether CBP is complying with *Lee* is a separate question from whether *Lee* is good law.

The BIO's context-based argument is also inconsistent with the position the United States took in *Smith*. Although *Smith* involved a state-law seizure, the United States argued that the due process analysis was controlled by this Court's opinions in *Von Neumann* and *$8,850*—both involving the federal customs context. U.S. *Amicus* Br., *Smith*, 2009 WL 1397196, at *18-20. And that is also the position the BIO advances here. BIO at 18-21. The United States argues for an identical rule for state and federal seizures.

In fact, if the requirements of due process differed for state and federal seizures, there would have been no reason to grant *Smith*. That case involved a state seizure, but, at the time, the only cases on the other side of the split involved federal seizures. *See* Pet., *Smith*, 2008 WL 4294883, at *19 & n.2.[8]

Finally, the BIO does not actually dispute that federal law fails to provide a prompt post-seizure hearing. The BIO (at 26) cites *Krimstock* for the proposition that federal law allows for release of a vehicle upon posting a bond, but that remedy is discretionary with the agency and (in any event) is not the equivalent of a hearing. *See* 19 U.S.C. § 1614. Due process requires an opportunity to be heard, not an opportunity to pay to post a bond. And the BIO (at 26) also cites a passage from *Smith* that suggested—based on language in *Von Neumann*—that Rule 41(g) motions might allow for prompt hearings. The Petition, however, explained

[8] Today, those courts are joined by the Illinois Supreme Court. *People v. One 1998 GMC*, 960 N.E.2d 1071 (Ill. 2011).

that Rule 41(g) does not serve that function today. *See* Pet. 7, 25-26 & n.18. The BIO does not argue otherwise and, instead, concurs that Rule 41(g) is limited to "atypical cases." BIO at 22. The BIO identifies no mechanism for a property owner in a federal civil forfeiture case to obtain a prompt post-seizure hearing.[9]

Nor does the BIO dispute that claimants in federal civil forfeiture cases must ordinarily wait months or even years for a hearing. The BIO (at 21) cites statutory language urging CBP to move "promptly" or "without delay," but that language is not judicially enforceable. *James Daniel Good*, 510 U.S. at 63. And even if CBP took that language to heart, the relevant statutes necessarily contemplate delay for notice-and-claim procedures as well as post-seizure investigation. *See* 19 U.S.C. §§ 1604, 1607. While the Petition cites examples of prolonged delays, the BIO does not cite a single example where a property owner was afforded anything even approaching a prompt post-seizure hearing in a federal civil forfeiture case.[10]

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[9] The BIO (at 22) briefly mentions remission petitions but does not dispute that such petitions afford only discretionary relief and take significant time to resolve. *See* Pet. 23-24.

[10] The BIO (at 27-28) argues that state-court cases cited in the Petition are "even further afield" because some limit the right to a prompt post-seizure hearing to alleged innocent owners. But that just drives home the variety of rules that courts have adopted.

III. The Question Presented Warrants Review.

Modern civil forfeiture is an anomaly. It is a legal anomaly, as it is incompatible with the principle that due process requires a timely opportunity to be heard. *See* Pet. 32-33 (citing *James Daniel Good*, 510 U.S. at 55-56; *Comm'r v. Shapiro*, 424 U.S. 614, 619 (1976)). And it is a historical anomaly, as its routine administrative delays would be alien to the Founders. *See* Pet. 7-8, 33-34.[11]

Cases have percolated for decades asking whether to correct this historical and legal anomaly, but the issue has escaped review. As a result, these anomalous procedures are applied to billions of dollars of property every year—including vehicles that people rely on for essential activities in their lives. This is the time and the case to consider whether that anomaly can be sustained.

[11] It is also a profitable anomaly, as Treasury budgets return seized funds to CBP. *See* Pet. 11 & n.12.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2021