No. _____

In The
Supreme Court of the United States

MILADIS SALGADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JUSTIN PEARSON*
INSTITUTE FOR JUSTICE
2 S. Biscayne Boulevard
Suite 3180
Miami, FL 33131
(305) 721-1600
jpearson@ij.org
**Counsel of Record*

DAN ALBAN
INSTITUTE FOR JUSTICE
901 N. Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
dalban@ij.org

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. When does a civil forfeiture claimant "substantially prevail" under 28 U.S.C. § 2465(b)(1)?

2. In civil forfeiture lawsuits where a district court has ordered the United States to return the seized money and the lawsuit will never be refiled, is it an abuse of discretion for the dismissal to be without prejudice?

PARTIES TO THE PROCEEDINGS AND DIRECTLY RELATED PROCEEDINGS

Petitioner is Miladis Salgado. Respondent is the United States of America.

In the district court, the defendants were: (i) $70,670.00 in U.S. Currency; (ii) $101,629.59 in U.S. Currency Seized from Wells Fargo Bank Cashier's Check No. 6648201039; and (iii) $30,000.00 in U.S. Currency Seized from Chase Bank Cashier's Check No. 1178710368. In addition to Petitioner Miladis Salgado, the other claimants were Wilson Colorado and Kurvas Secret by W. Although not listed as a party, AnnCherry Fajas USA Inc. was also involved as a judgment-creditor possessing a state court judgment against Wilson Colorado and Kurvas Secret by W.

The directly related proceedings are:

1. *United States of America v. $70,670.00 in U.S. Currency, et al.*, No. 1:15-cv-23616-DPG (S.D. Fla.)—Dismissal without prejudice entered August 10, 2017; Order denying Claimants' Motion for Attorneys' Fees, Costs, and Interest entered January 3, 2018.

2. *United States of America v. $70,670.00 in U.S. Currency, et al.*, No. 18-10312 (11th Cir.)—Judgment entered July 8, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTRODUCTION

This civil forfeiture case presents two questions of national importance. The first is an unsettled question of federal law. The second is the subject of a circuit split.

Both arise from a particularly disturbing aspect of modern civil forfeiture—law enforcement's practice of wrongfully seizing money and then using the time and expense required to contest a forfeiture lawsuit as leverage to extract a settlement from the innocent owner. *See* Edgar Walters & Jolie McCullough, *Texas Police Made More than $50 Million in 2017 from Seizing People's Property. Not Everyone Was Guilty of a Crime*, TEXAS TRIB. (Dec. 7, 2018); Deanna Paul, *Police Seized $10,000 of a Couple's Cash. They Couldn't Get It Back—Until They Went Public*, WASH. POST (Aug. 31, 2018); *see also* Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 5, 2013) (police threatened to send a couple's children to Child Protective Services unless they surrendered their money to police on the spot). In these settlements, the government frequently receives roughly fifty percent of the money in exchange for returning the rest. *See*, *e.g.*, Nathaniel Cary & Mike Ellis, *TAKEN: Risk a Trial To Get Your Money Back, or Settle For Less?* THE GREENVILLE NEWS (Jan. 29, 2019) (providing specific examples).

More often than not, these innocent Americans are not arrested, let alone convicted of anything. But they cannot afford to litigate for two years or more while they wait for the return of their money. *See*, *e.g.*, Scott

Rodd, *Should Police Be Allowed to Keep Property Without a Criminal Conviction?* ASSOCIATED PRESS (Feb. 8, 2017) (detailing how it took two innocent people two years and thousands of dollars in attorneys' fees to obtain return of money). As a result, most owners bitterly take the deal. In fact, 88 percent of federal civil forfeitures never make it to a judge. *See* Dick M. Carpenter II, et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 12–13 (2d ed. Nov. 2015); *see also* David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?* 25 Geo. Mason L. Rev. 173–74, 182–83 (2018) (collecting sources estimating that between 80 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 ("five-sixths of the cash seizures in the [federal equitable sharing] program were afforded no hearing at all"). When innocent people are treated this way, many of them lose all trust in our legal system.

In the rare cases where the owners can survive without their money until the summary judgment stage, another disturbing pattern emerges. The United States will suddenly decide to return all the money and move to voluntarily dismiss the forfeiture lawsuit without prejudice, which district courts usually grant. *See* David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 10.08[2] (2018). The United States will then argue, often successfully, that this means the owner did not "substantially prevail" under 28 U.S.C. § 2465(b)(1) and therefore cannot obtain an award of

attorneys' fees, costs, and interest. *See* Smith at § 10.08[2]. This also means that even in the rare cases where the owners have the wherewithal to fight back, they are almost never made whole. This tactic has become so widespread that a leading civil forfeiture treatise refers to it as the "issue that has arisen most frequently in civil forfeiture cases." *Id.*

The primary reason this tactic exists is the lower courts' widespread confusion over the first question presented here—when does a civil forfeiture claimant "substantially prevail" under 28 U.S.C. § 2465(b)(1)? *See* Smith at § 10.08[2]. This question has never been addressed by this Court.

Congress, for its part, spoke clearly. In an attempt to combat abusive forfeiture tactics, Congress made it easier for civil forfeiture claimants to obtain awards of attorneys' fees, costs, and interest than litigants in other types of fee-eligible cases. *See* 28 U.S.C. § 2465(b)(1). The statute's text mandates that any civil forfeiture claimant who merely "substantially prevails" "shall" receive an award of attorneys' fees, costs, and interest. *Id.* Unfortunately, the unsettled question of how to apply this provision has led many courts to read the word "substantially" out of the statute. *See* Smith at § 10.08[2].

Worse still, courts overseeing civil forfeiture cases have ignored this Court's holding that a ruling on the merits is not always required to obtain an award of attorneys' fees, costs, and interest as a prevailing party. *See CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct.

1642, 1651–53 (2016). Consequently, it is now more difficult for civil forfeiture victims to obtain awards of attorneys' fees, costs, and interest than in other types of fee-eligible cases. That outcome is the opposite of the approach Congress stated in the statute's plain text.

Faced with law enforcement's effective use of this tactic to frustrate Congress's plainly stated intent, as well as the injustice inherent in preventing civil forfeiture's victims from being made whole, a circuit split has arisen. This split focuses on the second question presented here—in civil forfeiture lawsuits where a district court has ordered the United States to return the seized money and the lawsuit will never be refiled, is it an abuse of discretion for the dismissal to be without prejudice? *Compare United States v. Ito*, 472 F. App'x 841, 841–42 (9th Cir. 2012) (holding that it is an abuse of discretion)*, with United States v. $32,820.56 in U.S. Currency*, 838 F.3d 930, 937 (8th Cir. 2016) (holding that it is not); *United States v. Minh Huynh*, 334 F. App'x 636, 639 (5th Cir. 2009) (same). The decision below has only deepened the split. *See* Pet. App. 1–21.

Although both questions presented merit the Court's attention, the core of the problem is the first. If law enforcement were forced to follow Congress's mandate that victims of baseless forfeiture cases must be made whole, the result would be a substantial reduction in the abuse we see nationwide. Because this case presents the Court with a rare opportunity to address these nationally important issues affecting thousands of innocent Americans, *see* Michael Sallah, et al., *Stop*

and Seize, WASH. POST (Sept. 6, 2014), as well as a good vehicle to do so, the Court should grant certiorari.

OPINIONS BELOW

The opinion of the court of appeals is reported at 929 F.3d 1293. Pet. App. 1–21. The opinions of the district court were not reported but are included in the Appendix. Pet. App. 24–33, 53–55.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on July 8, 2019. Pet. App. 22–23. On September 17, 2019, Petitioner Miladis Salgado timely sought an extension of time through November 21, 2019, which Justice Thomas granted on September 25, 2019. Petitioner Miladis Salgado respectfully petitions for a writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The fee-shifting provision of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), codified at 28 U.S.C. § 2465(b)(1), states:

> Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant

substantially prevails, the United States shall be liable for—

(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;

(B) post-judgment interest, as set forth in section 1961 of this title; and

(C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale–

(i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

Federal Rule of Civil Procedure 41(a)(2) states:

> Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

STATEMENT

1. Petitioner Miladis Salgado's full-time, primary employment is at an airport duty-free store, where she undergoes periodic background checks confirming her lack of a criminal record. *See* Dkt. 109-16 at 7. To make ends meet, she also works a second job part time at a Subway sandwich shop. *See id.* at 7, 13.

Ms. Salgado is currently divorced. *See id.* at 15. Her ex-husband Wilson Colorado was a claimant in the lower courts but is not a petitioner here. Pet. App. 1–22. At the time of the seizure, Ms. Salgado and Mr. Colorado were not yet divorced, but were separated and living in different bedrooms in the same house, along with their son and daughter. *See* Dkt. 109-16 at 15–16, 19.

In May 2015, federal Drug Enforcement Agency agents raided their house based on a tip from a confidential informant that Mr. Colorado was a drug dealer. *See* Dkt. 33-2 at 6. The tip was false; Mr. Colorado is not a drug dealer. Dkt. 109-12 at 12:18–23. At the time, he owned a garment sales company. *Id.* at 19:8–16.

The DEA agents did not find any drugs belonging to Ms. Salgado or Mr. Colorado. Instead, they found a small quantity of drugs that clearly belonged to their son and was not substantial enough to pursue charges. Dkt. 108-1 at 93; Dkt. 109-12 at 167.

However, the DEA agents found something else that interested them—cash. Mr. Colorado had approximately $55,000 in cash, as well as cashier's checks totaling approximately $132,000, which he intended to use to purchase garments for resale. Dkt. 109-12 at 48:12–50:7, 168:14–169:19. Ms. Salgado had approximately $15,000 in cash, which mostly consisted of gifts from family members and which she was saving to spend on her children, including for her teenage daughter's then-upcoming fifteenth birthday "quinceañera" celebration. Dkt. 109-2 at 28; Dkt. 109-16 at 33:1–34:23.

The lead DEA agent for the case would later admit in his deposition that the United States had zero evidence connecting Ms. Salgado, Mr. Colorado, Mr. Colorado's business, or any of their money to any criminal activity. Pet. App. 56–62. But the DEA agents seized all the money anyway and refused to return it. This

included Ms. Salgado's money, thereby forcing her to cancel her daughter's quinceañera. *See* Dkt. 8-2.

2. Ms. Salgado insisted on vindicating her rights.[1] Her search for an attorney was complicated by the fact that she could not access her seized money, but she was able to find an attorney willing to represent her on a contingency fee basis. *See* Pet. App. 40–45. This meant that Ms. Salgado could only be made whole if she obtained an award of attorneys' fees and costs. *See id.* Otherwise, approximately one-third of the money recovered would be retained by her attorney. *See id*.

Two years after the seizure, the civil forfeiture lawsuit reached the summary judgment stage. Considering the lead DEA agent's admissions that the United States had no evidence connecting Ms. Salgado, Mr.

---

[1] Although not a petitioner here, Mr. Colorado also insisted on vindicating his rights in the lower courts. Indeed, at the time of the seizure, he asked the DEA agents to arrest him in the hope that he could appear before a judge in time to save his business. Dkt. 109-12 at 149:5–8. Later, his predicament was covered by the local news. Pet. App. 63–66. However, the DEA agents declined his request and simply kept his money, thereby destroying his business. His inability to access his seized money also prevented him from hiring his preferred attorney to represent him and his now-defunct business in a legal dispute with one of his garment suppliers in state court. Dkt. 112 at 3 n.3. Eventually, he was able to find a temporary attorney willing to accept the meager funds he could scrape together, but those funds soon ran out, and the temporary attorney withdrew from the case, leaving Mr. Colorado to defend the state court lawsuit pro se. *See id.* Based solely on discovery violations, the state trial court entered a default judgment against Mr. Colorado for $318,019.70, which exceeded the amount of his claim in the present civil forfeiture action. Pet. App. 5, 7.

Colorado, Mr. Colorado's business, or any of their money to any criminal activity, *see* Pet. App. 56–62, it appeared likely that Ms. Salgado was finally going to win.

When the parties filed their cross-motions for summary judgment, the United States included an alternative request asking that if the court denied the government's motion for summary judgment, then the court should allow the United States to voluntarily dismiss the entire case without prejudice. Dkt. 110. The rationale for doing so had nothing to do with Ms. Salgado or her money. *Id.*[2] Other than her likelihood of success on the merits, there was no reason why the United States could not continue with the civil forfeiture lawsuit solely against Ms. Salgado's money.[3] Nonetheless, the United States sought dismissal of the entire case without prejudice, including Ms. Salgado's claim. Dkt. 110.

---

[2] The government's asserted rationale for dismissing the entire case without prejudice was that the seized money should go to pay the default judgment against Mr. Colorado and his now-defunct business. Dkt. 110. Ms. Salgado was not a party to the state court lawsuit or the resulting default judgment, and the judgment-creditor expressly disclaimed any interest in her money. Dkt. 155.

[3] This includes the absence of any practical obstacle preventing the United States from continuing against Ms. Salgado's money. Indeed, Ms. Salgado's $15,000.00 far exceeded the typical amounts sought by the United States in civil forfeiture lawsuits. *See* Michael Sallah, et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014) (finding that half of cash seizures through federal "equitable sharing program" were for below $8,800); *see also* Rishi Batra, *Resolving Civil Forfeiture Disputes*, 66 U. Kan. L. Rev. 399, 413 (2017) (noting that median property value forfeited in ten states ranged from $451 to $2,048).

The district court allowed the United States to voluntarily dismiss the entire lawsuit without prejudice over Ms. Salgado's objection. *See* Pet. App. 55. However, the order also stated that if the United States were ever to refile the lawsuit, then the district court "will award costs" to Ms. Salgado and Mr. Colorado. *Id.* This provision was significant because approximately three years remained under the statute of limitations for the United States to refile the civil forfeiture action. *See* 19 U.S.C. § 1621; *see also U.S. v. Twenty-Seven Parcels of Real Property Located in Sikeston, Scott Cty., Mo.*, 236 F.3d 438, 440–41 (8th Cir. 2001) (discussing changes to statute of limitations under CAFRA).

The district court ordered the United States to disburse Ms. Salgado's $15,000.00 to her and her attorney. Pet. App. 36 at ¶ 3. As a result, $10,387.92 plus interest was immediately distributed to Ms. Salgado, while the remainder of her seized money was placed in her attorney's trust account, where it remains today. Pet. App. 42–45. If Ms. Salgado obtains an award of attorneys' fees, the remainder will be returned to her, and she will finally be made whole. *See id.* Otherwise, it will be paid to her attorney as fees. *See id.*

Ms. Salgado moved to amend the dismissal without prejudice and argued that it should be with prejudice, but the district court denied the motion. Pet. App. 26, 32. The district court stated that the "curative conditions" the court had imposed preventing the United States from refiling the case precluded the need to dismiss the case with prejudice. Pet. App. 30. The district court also ruled that Ms. Salgado's counsel had failed

to timely assert the argument that dismissal without prejudice could prevent them from being able to obtain an award of attorneys' fees, costs, and interest. Pet. App. 30–31. Nonetheless, the court considered the merits of the argument and found that dismissal without prejudice was appropriate even if the argument had been timely asserted. Pet. App. 31.

The district court denied Ms. Salgado's motion for an award of attorneys' fees, costs, and interest solely on the grounds that the dismissal was without prejudice and, therefore, Ms. Salgado had not substantially prevailed under 28 U.S.C. § 2465(b)(1). Pet. App. 32.

3. Ms. Salgado (and Mr. Colorado) timely appealed to the court of appeals, which affirmed the district court in full. Pet. App. 1–21.

Regarding the first question presented, the court of appeals held that the fact that the dismissal was entered without prejudice meant that Ms. Salgado did not substantially prevail under 28 U.S.C. § 2465(b)(1) and therefore could not be awarded attorneys' fees, costs, and interest. Pet. App. 17–20.

Regarding the second question presented, the court of appeals agreed with the district court that Ms. Salgado's counsel had failed to timely argue that dismissal without prejudice would harm them by preventing them from seeking an award of attorneys' fees, costs, and interest. Pet. App. 14–15. Nonetheless, the court of appeals considered the merits of the argument. Pet. App. 15–16. The court of appeals held that the district court acted within its discretion when it allowed

the United States to voluntarily dismiss the case without prejudice, even though this prevented Ms. Salgado from obtaining an award of attorneys' fees, costs, and interest. *Id.*

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari as to both questions presented.[4] The question of when a civil forfeiture claimant "substantially prevails" under 28 U.S.C. § 2465(b)(1) has never been addressed by the Court, leading to widespread confusion and increased civil forfeiture abuse. And the related question of whether it is an abuse of discretion for a district court to dismiss a civil forfeiture lawsuit without prejudice in the situation presented here is the subject of a circuit split.

I. The Court Has Never Addressed the Question of When a Civil Forfeiture Claimant "Substantially Prevails" Under 28 U.S.C. § 2465(b)(1), Leading to Widespread Confusion in the Lower Courts and Increased Civil Forfeiture Abuse.

The question of when a civil forfeiture claimant "substantially prevails" under 28 U.S.C. § 2465(b)(1) is

[4] Although Ms. Salgado's position is that the Court should grant certiorari as to both questions presented, each question presented can stand on its own. Therefore, if the Court were to deny certiorari as to either question presented, Ms. Salgado would nonetheless ask the Court to grant certiorari as to the other question presented.

one of first impression for this Court. However, it frequently arises in the lower courts, and especially in district courts (since even the cases that make it to a district court tend to settle before reaching a court of appeals), and the Court should not pass up this valuable opportunity to provide much-needed clarity. This is true for three reasons. First, there is widespread confusion in the lower courts. Second, this confusion has led many courts to adopt a fundamentally flawed approach. Third, this confusion directly exacerbates many of the same forfeiture abuses that have already been commented on by members of this Court.

A. There Is Widespread Confusion in the Lower Courts.

Absent guidance from this Court, confusion abounds in the lower courts over when a civil forfeiture claimant "substantially prevails" under 28 U.S.C. § 2465(b)(1). On one hand, some lower courts take a practical approach, *see*, *e.g.*, *Kazazi v. U.S. Customs and Border Protection*, 376 F. Supp. 3d 781, 784 (N.D. Ohio 2019) (holding that owners substantially prevailed and therefore were entitled to an award of fees, costs, and interest, even though resolution was not on the merits) or even expressly hold that CAFRA "broadens the class that can receive fees in forfeiture actions to claimants who 'substantially prevail.'" *United States v. $60,201.00 in U.S. Currency*, 291 F. Supp. 2d 1126, 1130 (C.D. Cal. 2003). On the other hand, some lower courts take the approach that a civil forfeiture

claimant never "substantially prevails" without a judicial ruling on the merits. Pet. App. 1–21.

This confusion is exacerbated by the tendency of cases that initially make it to the courts of appeals to disappear before the courts of appeals rule. *See, e.g.*, Order Dismissing Appeal, *Kazazi v. U.S. Customs and Border Protection*, Case No. 19-3270 (6th Cir. 2019) (*Kazazi* Dkt. 8-1) (allowing the United States to voluntarily dismiss appeal after the United States originally elected to appeal an adverse ruling on the present issue); Unopposed Mot. to Remand, *United States v. Bednar*, Case No. 15-2232 (4th Cir. 2016) (*Bednar* Dkt. 39) (the United States agreeing to pay the owners' attorneys' fees shortly before the Fourth Circuit was to hear oral argument on the present issue).

Now, against all odds, an innocent owner has managed to reach this stage without succumbing to the extreme pressure to enter into a settlement along the way. The Court should capitalize on this rare opportunity to provide much-needed guidance for the lower courts.

B. The Court of Appeals' Approach Cannot Be Correct.

This confusion is perfectly illustrated in the present case, making it a good vehicle for the Court to address the issue. As a result of the confusion over when a civil forfeiture claimant "substantially prevails," the court of appeals applied an approach that cannot be correct, regardless of whether the Court

applies a textualist approach or examines the legislative history. *Compare Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring) (explaining textualist position that "we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended"), *with id.* at 782–83 (Sotomayor, J., concurring) (explaining opposing view that, even when statute is unambiguous, "consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text").

The court of appeals' approach is also flawed for another reason, in that it makes it even more difficult for a civil forfeiture claimant to "substantially prevail" under 28 U.S.C. § 2465(b)(1) than for other types of fee-shifting claimants to "prevail" under this Court's precedent. *See CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1651–53 (2016). In other words, the result of the court of appeals' approach is precisely backwards.

i. The Court of Appeals' Approach is Irreconcilable with CAFRA's Text.

From a textualist standpoint, the court of appeals' approach, in which it read the word "substantially" out of the statute, is impermissible. Therefore, this section will begin by addressing the lower court's deletion of the word "substantially" from the statute before turning to the canons of construction this approach violates.

The court of appeals unambiguously stated that it was applying 28 U.S.C. § 2465(b)(1) as if the term "substantially" were not included. In the court's words, "we interpret 'substantially prevailed' fee-shifting statutes consistently with 'prevailing party' fee-shifting statutes." Pet. App. 18 (citing *Loggerhead Turtle v. Cty. Council of Volusia Cty.*, 307 F.3d 1318, 1322 n.4 (11th Cir. 2002)). In fairness to the court of appeals, it is not alone. *See United States v. 115-98 Park Lane South*, No. 10-CIV-3748, 2012 WL 3861221, at *8 (E.D.N.Y. Sept. 5, 2012) (noting that several circuits view the terms "prevailing party" and "substantially prevails" as the same when determining possible recovery under a fee-shifting statute).

By doing so, the court of appeals violated the canons of construction, with the surplusage canon likely at the top of the list. The surplusage canon holds that every word in a statute is to be given effect whenever possible. *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174–79 (West 2012). Therefore, the court of appeals' approach would only have been permissible if it were impossible to give effect to the word "substantially." But the word "substantially" is common and well-understood, making it quite possible to give it effect. *See*, *e.g.*, *Substantial*, Merriam-Webster's Dictionary (2019) (defining "substantial" as "being largely but not wholly that which is specified").

Moreover, the terms "substantial" and "substantially" are often used in the legal world, with the Doctrine of Substantial Performance providing a notable

example. *See Substantial Performance*, Cornell Law Sch. Legal Info. Inst., https://www.law.cornell.edu/wex/substantial_performance. There, it allows recovery for less-than-complete performance. *See id.* Likewise, in CAFRA's fee-shifting provision, its use is clearly designed to allow civil forfeiture victims who less-than-completely prevail to obtain awards of attorneys' fees, costs, and interest.

In the case at hand, Ms. Salgado substantially prevailed. She obtained the full return of her money, and she even obtained a court order inhibiting the United States from refiling the civil forfeiture lawsuit. The only way she could be deprived of an award of fees, costs, and interest was for the lower courts to read the word "substantially" out of the statute and require a full victory on the merits. But that is what the lower courts in this case did, thereby violating the surplusage canon (and possibly other canons, including the presumption against ineffectiveness, *see* Scalia and Garner at 63–65), while presenting a good vehicle for the Court to address this issue.

ii. The Court of Appeals' Approach is Irreconcilable with CAFRA's Legislative History.

The court of appeals' approach fares no better if one examines the legislative history. The House Report on CAFRA expressly stated that this provision was designed to, among other goals, "give owners innocent of any wrongdoing the means to recover their property

and *make themselves whole after wrongful government seizures*." Pet. App. 90 (emphasis added); *see also*, *e.g.*, *United States v. Coffman*, 625 F. App'x 285, 289 (6th Cir. 2015) ("[T]he stated purpose of CAFRA is to make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government *seizures*." (emphasis added)); *United States v. Certain Real Prop., Located at 317 Nick Fitchard Rd., N.W., Huntsville, AL*, 579 F.3d 1315, 1322 (11th Cir. 2009) (using same quote (emphasis added)).

The House Report also explained that this approach was being taken in response to the problem that "many civil seizures are not challenged" due to the costs incurred along "the arduous path one must journey" to challenge them, "often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle." Pet. App. 96–97; *see also 317 Nick Fitchard Rd.*, 570 F.3d at 1322–23 (discussing this specific aspect of House Report). In other words, Congress intended the provision to have the exact opposite effect as the approach taken by the lower courts in this case. The Court should accept this opportunity to finally settle this important federal question.

iii. The Court of Appeals' Approach Makes It More Difficult for a Claimant to "Substantially Prevail" Than to "Prevail."

Even setting aside the difference, *arguendo*, between substantially prevailing and prevailing, the approach taken by the court of appeals worsens another problem. Under the court of appeals' approach, it was more difficult for Ms. Salgado to "substantially prevail" than it would be for Ms. Salgado to "prevail" under this Court's precedent. *See CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1651–53 (2016). The lower courts have turned Congress's plainly stated goal of making it easier for civil forfeiture claimants to prevail on its head.

In *CRST Van Expedited*, the Court held that a ruling on the merits is not required for a party to be awarded attorneys' fees and costs as a prevailing party. *Id.* at 1646. Instead, the party is merely required to obtain a "material alteration of the legal relationship of the parties" that is "marked by 'judicial *imprimatur*.'" *Id.* (quoting *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792–93 (1989); and *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 605 (2001); respectively) (emphasis in original).

Ms. Salgado meets the criteria this Court stated in *CRST Van Expedited*. Indeed, the district court believed that it had materially changed the parties' legal relationship, which the district court thought made dismissal with prejudice unnecessary. Pet. App. 30.

Ms. Salgado's argument is also consistent with the Court's underlying logic. In *CRST Van Expedited*, the Court explained that common sense must be used in reading statutes. *See* 136 S. Ct. at 1651. There, "[c]ommon sense undermine[d] the notion that a defendant cannot 'prevail' unless the relevant disposition is on the merits." *Id.*

Here, common sense similarly undermines the approach taken by the courts below. Other than the fee-shifting question at issue here, Ms. Salgado wanted two types of practical relief: She wanted her money back, and she wanted the government to be prevented from seeking forfeiture against her money in the future. She successfully obtained both.

Even if many courts insist on conflating "substantially prevailing" and "prevailing," the former should not be more stringent on claimants than the latter. Yet, that is the result in civil forfeiture cases, as shown by the case at hand. The Court should resolve this tension.

C. This Confusion Leads to Well-Chronicled Abuses, Including Those Mentioned by Justices Thomas and Sotomayor.

As Justice Thomas has already pointed out, the civil forfeiture "system—where police can seize property with limited judicial oversight and retain it for its own use—has led to egregious and well-chronicled abuses." *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting the denial

of certiorari). And Justice Sotomayor recently compared aspects of the civil forfeiture process to the Star Chamber. *See* Mark Joseph Stern, *Neil Gorsuch and Sonia Sotomayor Just Came Out Swinging Against Policing for Profit*, SLATE (Nov. 28, 2018) https://slate.com/news-and-politics/2018/11/neil-gorsuch-sonia-sotomayor-tyson-timbs-civil-forfeiture.html. These problems are only getting worse, in large part due to many lower courts' failure to apply the disincentives for abuse Congress crafted in 28 U.S.C. § 2465(b)(1).

Government at all levels has become addicted to civil forfeiture money. One recent national study found that over 60 percent of the 1,400 municipal and county agencies surveyed admitted that they "relied on forfeiture profits as a necessary part of their budget." Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, Harvard L. Rev. (June 8, 2018). Another found that 87 percent of all U.S. Department of Justice forfeitures are now civil rather than criminal. *See* D. Carpenter, et al., at 12.

As civil forfeiture has grown, so too have its abuses. We have reached the point where news stories about forfeiture abuse that once horrified us now seem routine. *See*, *e.g.*, Christopher Ingraham, *How Police Took $53,000 from a Christian Band, an Orphanage, and a Church*, WASH. POST (Apr. 25, 2016); Bobby Allyn & Ryan Briggs, *Cash Grab: As Asset Forfeiture Quietly Expands Across Pa., Abuses Follow*, PA. POST (Apr. 24, 2019); Nate Gartrell, *Contra Costa Cops Seized $1.1 Million From People Not Charged With a Crime in Past*

Four Years, Records Show, THE MERCURY NEWS (June 14, 2019); German Lopez, "*It's Been Complete Hell": How Police Used a Traffic Stop to Take $91,800 from an Innocent Man*, VOX (Mar. 20, 2018); Nick Sibilla, *Cops Use Traffic Stops to Seize Millions From Drivers Never Charged with a Crime*, FORBES (Mar. 12, 2014). Even comedian John Oliver has taken notice. *See* Last Week Tonight with John Oliver, *Civil Forfeiture*, YOUTUBE (Oct. 5, 2014) https://www.youtube.com/watch?v=3kEpZWGgJks.

Although the Court addressed one aspect of civil forfeiture abuse last term in *Timbs*, when it held that the Eighth Amendment's Excessive Fines Clause is incorporated against the states, *see Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019), the profit incentive driving most civil forfeiture abuse was not before the Court in *Timbs*. Nor could the Court have remedied the related issue presented here, which is the judicially-created "get out of jail free" card that allows the United States to evade financial responsibility for the harm it causes as long as the government moves to voluntarily dismiss the lawsuit without prejudice prior to the district court's summary judgment ruling. *See* Smith at § 10.08[2].

When courts remove the disincentives created by Congress, the United States responds precisely as one would expect. The United States does everything possible to maximize forfeiture revenue, knowing that most courts will later allow it to avoid the disincentives found in the statute. *See id.*

Without oversight from this Court, this national problem will only continue to worsen. And the very nature of the problem will often prevent these cases from reaching the Court. That is why the Court should take full advantage of the rare opportunity to address the questions presented here. The Court should grant certiorari.

II. The Circuit Split Over Whether Dismissal Without Prejudice is Allowed in this Situation Has Resulted in Different Levels of Protection Against Forfeiture Abuse Based Solely on the Circuit Where the Innocent Owner Lives.

The Court should also grant certiorari as to the second question presented because the opinion below exacerbates a split between four federal circuits. The subject of the split concerns whether it is an abuse of discretion for a district court to dismiss a civil forfeiture case without prejudice when the seized money has been returned to the owner and the case will not be refiled. This split has also led to widely divergent decisions by district courts across the country. In the jurisdictions where district courts are permitted to dismiss such cases without prejudice, claimants are placed in an unwinnable catch-22.

A. The Ruling Below Directly Conflicts with the Ninth Circuit's Rule.

The case below conflicts directly with the Ninth Circuit's ruling in *United States v. Ito*, 472 F. App'x 841 (9th Cir. 2012), which presented facts remarkably similar to those presented here. In that case, just as in this case, the government requested dismissal of a CAFRA lawsuit without prejudice even though it acknowledged that it did not intend to refile the action. *See United States v. One 2008 Toyota RAV 4 Sports Utility Vehicle*, 2010 WL 11531203, at *1 (C.D. Cal. July 16, 2010), vacated and remanded sub nom. *Ito*, 472 F. App'x at 841. As in the present case, the district court in *Ito* allowed the government to dismiss the case without prejudice over the claimant's objections. 472 F. App'x at 841. The district court in *Ito* even went out of its way to "emphasize[] that there is no evidence that the Government is acting in bad faith by requesting the dismissal without prejudice." *Id.* at 3.

But unlike the Eleventh Circuit, the Ninth Circuit in *Ito* reversed the district court and found the dismissal without prejudice to be an abuse of discretion. 472 F. App'x at 842. Applying the same legal standard applied here by the Eleventh Circuit—whether the claimant would "suffer some plain legal prejudice as a result of the dismissal"[5]—the Ninth Circuit concluded that

[5] The Circuits differ slightly in whether they refer to this as "clear legal prejudice" or "plain legal prejudice" and apply somewhat different factors for evaluating whether this standard has been met. *See* 9 Fed. Prac. & Proc. Civ. § 2364 ("Wright & Miller") (3d ed., updated Aug. 2019) (listing and comparing the factors in each federal circuit). However, those differences are largely

"[t]he Itos suffered plain legal prejudice in losing their ability to move for attorney's fees." *Id.* The court explained that "dismissal without prejudice precludes prevailing party status" and thus "[w]ithout prevailing party status, the Itos were unable to bring their attorney's fees motion under [CAFRA]." *Id.* As a result, the Ninth Circuit vacated the dismissal without prejudice and remanded with instructions to dismiss the case with prejudice.

In the present case, the Eleventh Circuit diverged sharply from the Ninth Circuit's reasoning, finding that Ms. Salgado was not entitled to dismissal with prejudice because "a meritorious claimant's loss of a right to statutory attorney's fees . . . cannot constitute *clear* legal prejudice unless it is in turn clear that the claimants would indeed 'substantially prevail[],' 28 U.S.C. § 2465(b)(1), were the action litigated to judgment." Pet. App. 15.[6] Accordingly, the court of appeals

---

immaterial to the outcome in CAFRA fee-shifting cases: None of the circuits expressly consider the effect of dismissal on the availability of attorneys' fees, and the Eighth and Ninth Circuits apply identical factors, *id.*, but have reached directly contradictory conclusions. *Compare United States v. $32,820.56 in U.S. Currency*, 838 F.3d 930, 937 (8th Cir. 2016), *with United States v. Ito*, 472 F. App'x 841 (9th Cir. 2012).

[6] The Eleventh Circuit also ruled that the district court did not abuse its discretion by initially rejecting as untimely Ms. Salgado's argument that dismissal should be with prejudice. *Id.* However, this question is properly before this Court because both the court of appeals and the district court below addressed and ruled on the substantive merits of Ms. Salgado's argument as though it were timely made, in part because she raised it in a motion for reconsideration before the district court. *Id.* Because this issue was both raised and decided by the courts below, it is proper for this Court to review this ruling on the merits. *See*, *e.g.*,

found that, "it is not clearly apparent from the record . . . that [Ms. Salgado and Mr. Colorado] ultimately would have prevailed, so the district court did not abuse its discretion in dismissing the complaint without prejudice." *Id.*

B. The Ruling Below Deepens the Split Between the Ninth Circuit and the Fifth, Eighth, and (Now) Eleventh Circuits.

By adopting the reasoning described above, the Eleventh Circuit widens the split between the Fifth and Eighth Circuits versus the Ninth Circuit on whether dismissal without prejudice in these circumstances is an abuse of discretion. The ruling below cited the Eighth Circuit's ruling in *United States v. $32,820.56 in U.S. Currency*, 838 F.3d 930, 937 (8th Cir. 2016) and quoted from the district court's opinion in the same case to support its reasoning that: "Finding plain legal prejudice on th[is] basis would necessarily presume that the party resisting voluntary dismissal would have prevailed on the merits if the case continued to a conclusion." *United States v. $32,820.56 in U.S. Currency*, 106 F. Supp. 3d 990, 997 (N.D. Iowa 2015).

On Lee v. United States, 343 U.S. 747, 750 n.3 (1952) ("Though we think the Court of Appeals would have been within its discretion in refusing to consider the point, their having passed on it leads us to treat the merits also."). Indeed, this Court may even review issues that were never raised in the courts below and are presented for the first time in a petition. *See*, *e.g.*, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Similarly, in a *per curiam* opinion, the Fifth Circuit has also held that it is not an abuse of discretion to deny fees under CAFRA when the government voluntarily dismisses a civil forfeiture case without prejudice. *See United States v. Minh Huynh*, 334 F. App'x 636, 639 (5th Cir. 2009).

By joining with the Fifth and Eighth Circuits in holdings that directly conflict with the Ninth Circuit (and a district court in the Fourth Circuit),[7] the Eleventh Circuit has deepened the circuit split on this issue. This Court should resolve that split.

C. The Circuit Split on This Issue Has Created Chaos in the District Courts, with Widely Divergent Outcomes.

The circuit split noted above has also resulted in widely divergent outcomes in district courts across the country. District courts in the Fourth and Eleventh Circuits have held that dismissing a case without prejudice would likely deprive claimants of their rights to seek fees under CAFRA and have instead dismissed the cases with prejudice. *See United States v. $107,702.66 in U.S. Currency*, No. 7:14-CV-00295-F, 2016 WL 413093, at *3-4 (E.D.N.C. Feb. 2, 2016);

---

[7] *United States v. $107,702.66 in U.S. Currency*, No. 7:14-CV-00295-F, 2016 WL 413093, at *4 (E.D.N.C. Feb. 2, 2016) (ruling that dismissing a civil forfeiture case without prejudice would create a "substantial legal prejudice" to the claimant because "a voluntary dismissal without prejudice would likely preclude prevailing party status under CAFRA, depriving Claimants of their right to bring a claim under that statute.").

United States v. Certain Real Prop., 543 F. Supp. 2d 1291, 1292, 1294 (N.D. Ala. 2008) (dismissing case with prejudice after it was clear that "the government has no intention of pursuing this civil forfeiture action," and awarding attorneys' fees under CAFRA, noting that, "[i]f the court were to side with the government and dismiss this case without prejudice and deny the claimants request for attorneys' fees under CAFRA it would render the fee-shifting provisions of CAFRA essentially meaningless.")

In addition to the district court rulings overturned in *Ito*, and upheld in *Huynh* and *$32,820.56 in U.S. Currency*, district courts in the Second, Third, and Sixth Circuits have granted dismissals without prejudice in civil forfeiture cases without regard to the impact that may have on the claimant's ability to seek attorneys' fees under CAFRA. *See United States v. Approximately $16,500.00 in U.S. Currency*, 113 F. Supp. 3d 776, 779–80 (M.D. Pa. 2015); *United States v. Any & All Funds on Deposit at JPMorgan Chase*, No. 12-CIV-7530, 2013 WL 5511348, at *1 (S.D.N.Y. Oct. 2, 2013); *United States v. 115-98 Park Lane South*, No. 10-CIV-3748, 2012 WL 3861221, at *5 (E.D.N.Y. Sept. 5, 2012), aff'd sub nom. *United States v. Capital Stack Fund, LLC*, 543 F. App'x 17 (2d Cir. 2013); *United States v. 2007 BMW 335i Convertible*, 648 F. Supp. 2d 944, 952 (N.D. Ohio 2009).

To bring uniformity to the federal courts on this issue, the Court should grant certiorari.

D. The Side of the Circuit Split Joined by the Court Below Creates a Catch-22.

In practice, the position staked out by the Fifth, Eighth, and Eleventh Circuits holds that claimants cannot substantially prevail before a dismissal without prejudice (because the right to recover fees, costs, and interest has not yet vested) and that there is no clear legal prejudice once a dismissal without prejudice has been granted (because no right to recover fees, costs, and interest ever vests).

This presents a catch-22 for claimants. In order for an innocent owner to be awarded attorneys' fees under CAFRA, the government's case against the money or property cannot be dismissed without prejudice. But the innocent owner cannot prevent the case from being dismissed without prejudice because, in these circuits, their right to be awarded attorneys' fees has not yet vested.

The Court should resolve this quandary. By granting certiorari, not only can the Court resolve the deepening circuit split, but the Court can do so in a way as to rescue innocent civil forfeiture claimants in the Fifth, Eighth, and Eleventh Circuits from the unwinnable situation created by those circuits' holdings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JUSTIN PEARSON*
INSTITUTE FOR JUSTICE
2 S. Biscayne Boulevard
Suite 3180
Miami, FL 33131
(305) 721-1600
jpearson@ij.org
*Counsel of Record

DAN ALBAN
INSTITUTE FOR JUSTICE
901 N. Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
dalban@ij.org

Counsel for Petitioner