No. 16-1206

In The
Supreme Court of the United States

FINN BATATO, ET AL. (CLAIMANTS),

Petitioners,

and

ALL ASSETS LISTED IN ATTACHMENT A,
AND ALL INTEREST, BENEFITS, AND ASSETS
TRACEABLE THERETO (*IN REM* DEFENDANTS),

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE, THE CATO INSTITUTE, DKT LIBERTY PROJECT, DRUG POLICY ALLIANCE, AMERICANS FOR FORFEITURE REFORM, AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of IJ's mission is protection for the right to own and enjoy property, both because property rights are a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. IJ litigates cases to defend property rights and also files *amicus curiae* briefs in important property-rights cases. *See*, *e.g.*, *Nelson v. Colorado*, 581 U.S. ___ (2017); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Kaley v. United States*, 134 S. Ct. 1090 (2014); *Bennis v. Michigan*, 516 U.S. 442 (1996).

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts

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[1] All parties were given ten days' notice and have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

conferences, and produces the annual *Cato Supreme Court Review*.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment from all levels of government, and to defend the rights to privacy and personal autonomy. The Liberty Project is committed to protecting privacy, guarding against government overreaching, and protecting every American's right (and responsibility) to function as an autonomous and independent individual. The organization espouses vigilance over regulation of all kinds, but especially those that restrict individual civil liberties.

Drug Policy Alliance ("DPA") is a 501(c)(3) nonprofit organization devoted to advancing pragmatic drug laws and policies grounded in science, compassion, health, and human rights. DPA has long been committed to reforming civil forfeiture, which has been dramatically expanded as a result of the war on drugs, and has led to governmental overreach and the erosion of basic constitutional rights. To that end, DPA has played an active role in the legislative process to reform civil forfeiture at the state and federal level.

Americans for Forfeiture Reform ("AFR") is a nonprofit, nonpartisan, civic group concerned with the government's fearsome power to forfeit private property – a power that is "devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). For this reason, AFR champions the proper, limited interpretation of forfeiture laws.

AFR advances this mission in many ways, including by filing *amicus* briefs. *See*, *e.g.*, Brief of Amicus Curiae Americans for Forfeiture Reform in Support of Petitioner, *Luis v. United States*, No. 14-419 (U.S. Aug. 25, 2015).

California Attorneys for Criminal Justice ("CACJ") is a nonprofit corporation founded in 1972. It has members across the state of California, primarily criminal defense lawyers. A principal purpose of CACJ, as set forth in its bylaws, is to defend the rights of individuals guaranteed by the United States Constitution. As an organization of attorneys who regularly defend individuals whose property is subject to civil and criminal forfeiture actions, CACJ is particularly concerned that courts ensure adherence to limitations on the government's ability to forfeit property. CACJ has appeared as *amicus curiae* in this Court on several occasions in cases addressing governmental forfeiture, most recently in *Luis v. United States*, 136 S. Ct. 1083 (2016) and *Kaley v. United States*, 134 S. Ct. 1090 (2014).

Amici are deeply troubled by the Fourth Circuit's expansion of federal forfeiture beyond its historical justifications and practice, particularly in light of the direct financial interest that inures to the government. This case offers a good vehicle for this Court to begin limiting civil forfeiture to its historical justifications.

SUMMARY OF ARGUMENT

As this Court has consistently recognized, constitutional protections must be at their apex when the government stands to financially benefit from its actions. The Fourth Circuit's decision turns this principle on its head – disregarding essential constitutional safeguards like jurisdiction and due process because the government has sought to take property using civil rather than criminal forfeiture. This Court should grant certiorari to clarify that the Constitution does not have a "civil forfeiture" exception.

This case involves civil forfeiture of alleged proceeds from secondary copyright infringement (or the encouraging of others to infringe copyright) – a novel and untested theory of liability not expressly contemplated by the criminal copyright infringement statute. Because the Justice Department is allowed to keep and use the forfeited assets, courts must be especially vigilant to ensure that the forfeiture complied with constitutional requirements. Despite the government's significant financial incentive in reaping the proceeds of civil forfeiture, the Fourth Circuit dangerously expanded *in rem* jurisdiction to property not within the control of the district court while denying overseas property owners a meaningful opportunity to contest forfeiture of their property.

This case illustrates the degree to which civil forfeiture has come unmoored from its historical origins and how the doctrine's devolution now threatens fundamental rights. The petition presents

an important opportunity for this Court to begin limiting civil forfeiture to its historical origins, and thereby restore the constitutional protections that its modern application has placed in jeopardy.

At the time of the Founding, civil forfeiture was justified by the necessity of obtaining "*in rem*" jurisdiction over property located in the United States – typically ships involved in smuggling – because the person responsible for the crime was overseas and therefore beyond the jurisdiction of United States courts. Today, civil forfeiture is often used to take property even when its owner is within the court's jurisdiction and could be subjected to criminal prosecution. The Fourth Circuit's ruling, however, expands a court's power to civilly forfeit property even further, to cases where the property is not even located within the court's jurisdiction. If the government can proceed "*in rem*" in a case where it does not even have control over the *res*, then the "*in rem*" doctrine has lost all meaning.

This aggrandizement of the federal government's forfeiture powers necessarily expands the scope of financial incentives available to law enforcement, as vividly demonstrated by this case. Here, the Fourth Circuit affirmed the forfeiture of up to $175 million worth of assets from seven, non-U.S. citizens living outside the United States through an action brought *in rem* against those assets – even though none of these assets are under the control of U.S. courts.

Compounding this redefining expansion of *in rem* jurisdiction, the Fourth Circuit extended the so-called "fugitive disentitlement" doctrine, ruling that because these foreign property owners insist on their right to contest extradition and decline to come to the United States (leaving their families, work, and their entire lives, for months, perhaps years) without a court order, they may be deemed "fugitives" and consequently "disentitled" from even asserting a claim to their own property. If left to stand, the Fourth Circuit's decision ratifies the ability of the United States to arbitrarily deem foreign residents "fugitives" and take their property without providing any meaningful opportunity to defend against the forfeiture of their property on either procedural or substantive grounds. Entering default forfeiture orders against international claimants – who are not fleeing justice but lawfully are staying in their home countries – both contravenes historical practice and violates due process.

Despite the Fourth Circuit's radical departure from historical practice, the United States has heavily relied on the decision below in seven pending cases across the country. This Court should accept review to safeguard constitutional rights that civil forfeiture has placed in jeopardy.

ARGUMENT

This brief proceeds in three parts. First, it details the substantial financial incentive law enforcement

has in pursuing civil forfeiture. When law enforcement can directly profit from seizing property for forfeiture, constitutional safeguards must be at their zenith to protect property owners. Second, this brief explains how the lower court's decision expands *in rem* jurisdiction beyond civil forfeiture's historical origins. Third, it examines how the Fourth Circuit's interpretation of the "fugitive disentitlement" doctrine cannot be squared with early forfeiture cases or due process.

I. The Ability of Law Enforcement to Retain Civil-Forfeiture Proceeds Has Fueled an Explosion of Forfeiture Activity That Courts Must Carefully Scrutinize.

This section briefly describes the mechanics of civil forfeiture, details the government's substantial financial incentive to use forfeiture, and then explains why courts must be especially vigilant when public officials stand to financially benefit from the outcome of enforcement proceedings they have broad discretion to initiate.

Civil forfeiture allows law enforcement to seize property on the mere suspicion that it is connected to a crime, even if its owner is not the suspected perpetrator.[2] At the federal level, most civil forfeitures are accomplished administratively by the seizing agency without any judicial involvement.[3] If a property

[2] *See* 18 U.S.C. § 981(b).

[3] 88 percent of all civil forfeitures by the Justice Department from 1997 to 2013 were administrative forfeitures. Dick M.

owner timely files a claim to the seized property, prosecutors can then bring a civil action against the property itself, under the legal fiction that the property is guilty of a crime, to take title or permanently keep the property.[4] Because it is a civil proceeding, property owners do not enjoy the protections guaranteed to criminal defendants, like the right to an attorney, the right to a jury trial, or the requirement that the government prove guilt beyond a reasonable doubt. To the contrary, by requiring property owners to affirmatively prove they are innocent of the alleged crime,[5] civil forfeiture unconstitutionally turns the presumption of innocence on its head.[6]

Magnifying these procedural infirmities, today's civil-forfeiture laws give police and prosecutors a direct financial incentive to seize and forfeit property

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Carpenter II, Ph.D., Lisa Knepper, Angela C. Erickson & Jennifer McDonald, Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 12–13 (2d ed. Nov. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf. And 81 percent of all Drug Enforcement Administration cash seizures were forfeited administratively. U.S. Department of Justice, Office of the Inspector General, *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities* 12–13 (Mar. 2017), https://oig.justice.gov/reports/2017/e1702.pdf.

[4] Carpenter et al., *supra*, at 8.

[5] *See* 18 U.S.C. § 983(d).

[6] "[The government] may not presume a person, adjudged guilty of no crime, nonetheless guilty ***enough*** for monetary exactions." *Nelson v. Colorado*, 581 U.S. ___ (2017) (emphasis in original) (holding Colorado's scheme requiring criminal defendants to prove innocence by clear and convincing evidence to obtain refund of criminal fees imposed pursuant to an invalid conviction violated due process).

by allowing law-enforcement officials to retain forfeiture proceeds. Throughout most of American history, proceeds from civil forfeitures went to the general Treasury to benefit the public at large.[7] Today, however, under federal (and most state) laws, forfeiture proceeds go directly to fund law-enforcement activities.

In 1984, Congress amended parts of the Comprehensive Drug Abuse and Prevention Act of 1970 to allow federal law-enforcement agencies to keep a portion of the forfeiture proceeds in a newly created Justice Department's Assets Forfeiture Fund.[8] After the 1984 amendments, federal agencies were able to keep and spend 100 percent of forfeiture proceeds – subject only to very loose restrictions – giving them a direct financial stake in generating forfeiture funds.[9] Many states followed the federal government's example by amending their civil-forfeiture laws to give law-enforcement agencies a direct share of forfeited proceeds. Law-enforcement agencies in 43 states receive some or all of the civil-forfeiture proceeds they seize.[10]

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[7] Carpenter et al., *supra*, at 2.

[8] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[9] Although Congress enacted the Civil Asset Forfeiture Reform Act in 2000, none of those reforms changed how forfeiture proceeds are distributed or otherwise mitigated the direct pecuniary interest law-enforcement agencies have in civil forfeitures. *See* Pub. L. No. 106-185, 114 Stat. 202 (2000).

[10] Carpenter et al., *supra*, at 14 (depicting in Figure 6 the percentage of forfeiture proceeds distributed to law enforcement in each state); *id.* at 151 (depicting at Table A.3 grades given to

Unsurprisingly, redirecting forfeiture revenue back to law enforcement (rather than to a neutral fund) has led to an explosion of forfeiture activity. At the federal level, the Departments of Justice and Treasury have increased their forfeiture activity by more than 1,000 percent between fiscal years 2001 and 2014, with deposits of forfeiture revenue totaling nearly ***$29 billion***.[11] Net assets in these funds increased 485 percent from $763 million in FY 2001 to almost $4.5 billion in FY 2014.[12] By contrast, in 1986, the Justice Department's Assets Forfeiture Fund took in just $94 million in deposits.[13]

It is no coincidence that this multibillion-dollar explosion of revenue occurred after the Justice Department began urging its lawyers to pursue forfeiture for budgetary reasons.[14] The Government Accountability Office explicitly recognized that one of the primary goals of the Justice Department's forfeiture program is "to produce revenues in support of future law enforcement investigations and related forfeiture

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states based on the financial incentives for forfeiture given to law enforcement).

[11] *Id*. at 148 (noting Justice Department total deposits were more than $21 billion and Treasury Department totals were more than $6 billion).

[12] *Id.* Measuring the funds' net assets provides a more stable picture of the volume of federal forfeiture accounts from year to year because it accounts for proceeds carried over from previous years as well as for obligations paid out from the funds. *Id*.

[13] *Id.* at 10.

[14] Exec. Office for U.S. Attorneys, U.S. Dep't of Justice, 38 United States Attorneys' Bulletin 180 (1990).

activities."[15] To that end, the Office of the Inspector General recently reported that the Justice Department agencies made nearly 100,000 cash seizures over the past decade totaling $4.15 billion.[16]

The financial incentive fueling civil forfeiture can also be seen in the scale of highway, airport, and bank-account seizures. According to a Washington Post exposé, from September 2001 to 2014, law enforcement conducted just shy of 62,000 cash seizures on our nation's highways totaling $2.5 billion – all without any warrants or indictments.[17] Indeed, one study on highway drug interdictions showed that law-enforcement agencies were enforcing the side of the highway where money was traveling ***ten times*** more than the side of the highway where drugs were traveling, effectively allowing drugs into communities.[18] Thus, the lure of additional funding from forfeiture distorts law-enforcement priorities and incentives to pursuing revenue over public-safety objectives. Indeed, since

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[15] U.S. Gov't Accountability Office, GAO-12-736, *Justice Assets Forfeiture Fund: Transparency of Balances and Controls over Equitable Sharing Should Be Improved* 6 (2012), http://www.gao.gov/assets/600/592349.pdf.

[16] Office of the Inspector General, *supra*, at 12–13.

[17] Michael Sallah et al., *Stop and Seize*, Wash. Post (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.ecc946b6f723.

[18] Phil Williams, *Are Middle Tennessee Police Profiting Off Drug Trade?*, NewsChannel 5 (updated Apr. 11, 2016, 5:37pm), http://www.newschannel5.com/news/newschannel-5-investigates/policing-for-profit/are-middle-tennessee-police-profiting-off-drug-trade.

2008, 298 police departments and 210 task forces have seized the equivalent of 20 percent or more of their annual budget.[19]

Similarly, federal agencies heavily use civil forfeiture to seize cash at our nation's airports. Before boarding a flight, Charles Clarke, a Florida college student, had his life savings seized on the allegation that the money he was carrying must have been drug proceeds.[20] There were no drugs or contraband found and no evidence that the money was connected to any crime. Nevertheless, it took nearly three years before the government agreed to return his money, and only after Clarke acquired *pro bono* counsel from *amicus* Institute for Justice. Unfortunately, Clarke is not alone. The Drug Enforcement Administration has seized more than $209 million in cash from at least 5,200 domestic travelers in the nation's 15 busiest airports, on the grounds that the money was drug proceeds – even though no drugs were found.[21]

Federal agencies have also used civil forfeiture to seize bank accounts from individuals and many small-business owners. Under an aggressive interpretation of banking laws, the government has forfeited entire bank accounts of anyone who has "structured," or broken up, their bank deposits in amounts below

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[19] Sallah et al., *supra*.

[20] Carpenter et al., *supra*, at 8.

[21] Brad Heath, *DEA regularly mines Americans' travel records to seize millions in cash*, USA Today (Aug. 11, 2016), https://www.usatoday.com/story/news/2016/08/10/dea-travel-record-airport-seizures/88474282/.

$10,000, even if they did not intend to avoid currency reporting requirements.[22] From 2005 to 2012, the Internal Revenue Service seized almost a quarter of a billion dollars in more than 2,500 "structuring" cases, a five-fold increase over eight years.[23] In a third of those cases, there was no allegation of criminal wrong-doing other than a series of less-than $10,000 deposits.

Other analyses find that so-called structured funds were not seized from criminals. The Treasury Inspector General for Tax Administration took a closer look at 278 cases from FY 2012 through 2014 and found that 91 percent of IRS forfeitures involved money that the owners obtained legally.[24] The same report also estimated that a fifth of the owners had reasonable explanations without the agency ever investigating. By allowing law-enforcement agencies, like the IRS, to retain proceeds, civil forfeiture incentivizes this kind of "seize first" mentality.

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[22] *See* Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. Times (Oct. 25, 2014), https://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html?_r=0.

[23] Dick M. Carpenter II, Ph.D. & Larry Salzman, Institute for Justice, *Seize First, Question Later: The IRS and Civil Forfeiture* 10 (Feb. 2015), http://ij.org/images/pdf_folder/private_property/seize-first-question-later.pdf.

[24] Inspector Gen. for Tax Admin., U.S. Dep't of the Treasury, *Criminal Investigation Enforced Structuring Laws Primarily Against Legal Source Funds and Compromised the Rights of Some Individuals and Businesses*, 8–9 (Mar. 30, 2017), https://www.treasury.gov/tigta/auditreports/2017reports/201730025fr.pdf.

In light of the substantial financial interest the government has in the outcome of forfeiture proceedings, courts must be exceedingly careful to protect the rights of people whose property the government seeks to take. In *United States v. James Daniel Good Real Property*, the Court stated that the neutrality protected by due process "is of particular importance here [in the context of civil forfeiture], where the government has a direct pecuniary interest in the outcome of the proceeding."[25]

Giving closer scrutiny to the actions of public officials and agencies when they have a direct financial stake in the outcome of proceedings is nothing new.[26] A long line of cases supports the proposition that when government officials have an incentive to act for self-interested reasons, courts must stand guard against unwarranted deprivations of property. In *Tumey v. Ohio*, this Court overturned a fine where the mayor also sat as a judge and personally received a share of the proceeds.[27]

It is not just the prospect of direct personal gain that merits vigilance; institutional gain is also cause for scrutiny. In *Ward v. Village of Monroeville*, this Court held that, where a substantial portion of the town's revenues came from fines, having the mayor sit

[25] 510 U.S. 43, 55–56 (1993).

[26] *See Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

[27] 273 U.S. 510 (1927).

as a judge violated due process.[28] In *Marshall v. Jerrico, Inc.*, this Court cautioned about the "possibility that [the official's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."[29]

This case presents this Court with the opportunity to clarify that civil forfeiture proceedings are especially vulnerable to prosecutorial overreach and why historical safeguards like *in rem* jurisdiction and due process must be strictly enforced.

II. This Court Should Grant Certiorari to Begin Limiting Civil Forfeiture to Its Historical Justifications of Obtaining *In Rem* Jurisdiction.

Civil forfeiture evolved as a substitute for *in personam* criminal proceedings brought against the person responsible for the crime. At the Founding, civil forfeiture was justified only by the practical necessities of enforcing customs and piracy laws.[30] As an *in rem* proceeding (an action against the property itself), civil forfeiture allowed courts to exercise jurisdiction when

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[28] 409 U.S. 57 (1972).

[29] 446 U.S. 238, 250 (1980); *id*. at 249–50 ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.").

[30] *See* Act of July 31, 1789, 1 Stat. 29, 39 (providing that all "goods, wares and merchandise, so landed or discharged, shall become forfeited").

the property was located within the United States even though it was virtually impossible to seek justice against property owners guilty of customs or piracy violations because they were overseas or otherwise outside the court's jurisdiction.[31]

Although the Court permitted the government to expand its forfeiture power during the Civil War,[32] civil forfeiture remained a relative backwater in American law throughout most of the 20th century, with one exception. During Prohibition, the federal government expanded the scope of its forfeiture authority beyond contraband to cover automobiles or other vehicles transporting illegal liquor.[33] The forfeiture provision of the National Prohibition Act, however, was considered "incidental" to the primary purpose of "destroy[ing] the forbidden liquor in transportation."[34]

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[31] *See*, *e.g.*, *The Bris Malek Adhel*, 43 U.S. 210, 233 (1844) (justifying forfeiture of innocent owner's vessel under piracy and admiralty laws because of "the ***necessity*** of the case, as the ***only*** adequate means of suppressing the offence or wrong") (emphasis added); *The Schooner Little Charles*, 1 Brock. 347 (1819) (Marshall, C.J.) (embargo laws).

[32] *See, e.g.*, *United States v. Huckabee*, 83 U.S. 414 (1872); *The Confiscation Cases*, 74 U.S. 454, 454 (1868) (stating Congress authorized the forfeiture of property used by the Confederacy and that the property "is declared by that act 'to be lawful subject of prize and capture' ").

[33] Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 San Diego L. Rev. 79, 101 (1996).

[34] *Carroll v. United States*, 267 U.S. 132, 155 (1925).

Even then, the Supreme Court observed that these "forfeiture acts are exceedingly drastic."[35] Consequently, the Court cautioned that "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law."[36] Historically, civil forfeitures retained the look of criminal proceedings. Historical precedent indicates that because civil forfeiture was designed to punish criminals, the proceedings were "highly penal" and required proof beyond a reasonable doubt.[37]

As "drastic" as forfeiture laws may have appeared during Prohibition, they were quite limited in comparison to the forfeiture laws of today, which authorize civil forfeiture even when an identifiable property owner was within the reach of the courts. This is not an incremental alteration and it leaves modern prosecutorial practices "all but detached themselves from the ancient notion of civil forfeiture."[38]

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[35] *United States v. One 1936 Model Ford V-8 De Luxe Coach, Commercial Credit Co.*, 307 U.S. 219, 236 (1939); *see also Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33–35 (1875) ("When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred.").

[36] *Id*. at 226.

[37] *Leonard v. Texas*, 580 U.S. ___ (2017) (Thomas, J., concurring in denial of certiorari).

[38] *James Daniel Good Real Property*, 510 U.S. at 85 (Thomas, J., concurring in part and dissenting in part); *see also* Stefan R. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 Mich. L. Rev. 1910, 1918–1920 (1998) (arguing that Founding-era precedents do not justify civil forfeiture for purely

The panel's decision below (and the statutory provision on which it relies) shreds what remains of the roots of the doctrine of *in rem* forfeiture. The historical practice allowed civil forfeiture when the offender was unavailable to be charged. Modern civil forfeitures proceed against property even if the offender is also within the court's power. Here, however, the panel's interpretation of 28 U.S.C. § 1355 allows a federal court to forfeit property without even having actual or constructive control of the property.

But *in rem* jurisdiction is "founded on physical power."[39] The basis of jurisdiction is the presence of the *res* inside the forum's territorial jurisdiction, so "tangible property poses no problem for the application of this rule."[40] When pursuing forfeiture of property within another nation's territory, the traditional solution is to bring the *res* to a court of the forfeiting nation.[41] By contrast, it is "repugnant to every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds."[42]

Under the panel's decision below, however, courts may exercise *in rem* jurisdiction over property ***in***

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domestic offenses where the owner is within the personal jurisdiction of both state and federal courts).

[39] *Hanson v. Denckla*, 357 U.S. 235, 246 (1958).

[40] *Id.*

[41] *E.g.*, *The Richmond*, 13 U.S. 102 (1815) (jurisdiction was proper when the Navy seized an American vessel in Spanish waters and brought it to the United States).

[42] *Rose v. Himely*, 8 U.S. 241, 277 (1808).

other countries and under the control of foreign governments. This expansion matters because an *in rem* action purports to bind the world. A successful plaintiff becomes the only person who may assert a claim to the property. Yet, if the *res* is in the control of a different sovereign, federal courts cannot, as a practical matter, extinguish the property rights of whomever the foreign court considers to be the lawful owner.

Here, the United States seeks precisely to lay claim to property in a foreign country belonging to residents of that country under the theory that a federal court has *in rem* jurisdiction – jurisdiction based on physical power. The panel's interpretation of Section 1355 permits courts to exert *in rem* jurisdiction even when they do not have power over the *res*. It follows that any decision concerning the *res*'s fate would be nothing but mere advice to the entity that ***does*** control the *res*.[43] As illustrated by this case, the Fourth Circuit affirmed the forfeiture of up to $175 million worth of assets[44] from seven foreign residents through an action the United States brought *in rem* against those assets – even though all of the assets are located abroad and are under the control of foreign courts. To make matters worse, some of those foreign

[43] Pet. for Writ of Cert. 14.

[44] *See United States v. All Assets Listed in Attachment A*, 89 F. Supp. 3d 813 (E.D. Va. 2015), *aff'd sub nom. United States v. Batato*, 833 F.3d 413 (4th Cir. 2016); Pet. for Writ of Cert. 3 n.2.

courts are issuing decisions contrary to the U.S. order of forfeiture.[45]

The Fourth Circuit's decision permits an unprecedented expansion of civil forfeiture not contemplated by founding-era precedents. *In rem* jurisdiction must be cabined to cases where the court has actual control over the property; that is, the *res* must be physically within the jurisdiction of the court.

III. The Court Should Grant Certiorari to Bar the Extension of "Fugitive Disentitlement" Which Contravenes Both Historical Practice and Due Process.

Compounding its error in expanding *in rem* jurisdiction, the Fourth Circuit extended the so-called fugitive-disentitlement doctrine to foreign claimants who – far from fleeing U.S. jurisdiction – are exercising their legal right to contest extradition.[46] This interpretation also flies in the face of historical practice and the right to due process.

Section 2466 denies a hearing to any claimant who, in order to avoid criminal prosecution, "declines to enter or reenter the United States."[47] Under the

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[45] Pet. for Writ of Cert. 18–19.

[46] *Contra Niemi v. Lasshofer*, 728 F.3d 1252, 1256 (10th Cir. 2013) (Gorsuch, J.) (detailing pedigree of doctrine and refusing to extend to "disentitle not a criminal in hiding, but a civil litigant who has chosen to sit defiantly" "in their home countries . . . going about their business as usual").

[47] 28 U.S.C. § 2466(a)(1)(B).

Fourth Circuit's reading, this provision applies to any foreign property owner who refuses to drop everything (family, work, and other obligations) in their life abroad and voluntarily come to the United States to face a criminal indictment. But this does not square with historical practice.

Historically, foreign claimants were allowed to contest forfeiture even when they were not present in the United States. For example, in *United States v. La Vengeance*, this Court considered the civil forfeiture of a ship owned by a French citizen.[48] Allegedly, the ship had been outfitted with weapons in violation of a federal criminal statute. Although the French ship owner faced possible criminal sanctions, his refusal to come to the United States did not preclude him from being able to file a claim to the ship through a representative. The district court granted the forfeiture after hearing argument, including the presentation of facts.[49] Significantly, the court did not forfeit the property by default simply because the ship owner failed to appear and could have faced criminal prosecution. Indeed, the lack of the owner's presence in the United States was never an issue.

Likewise, in *The Bello Corrunes*, this Court permitted an unknown Spanish citizen to challenge

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[48] 3 U.S. 297, 298 (1796).

[49] Subsequently, the court of appeals reversed, holding that, based on its reading of the facts, some of the illegal equipment was the property of merchants on board and other equipment had never reached the United States. *Id.*

the forfeiture of his cargo ship.[50] The ship was en route to a destination in the Gulf of Mexico when it was captured by an Argentine vessel. After two months of sailing, the ship's original Spanish crew mutinied against the captors and sailed toward the United States before becoming stranded off the coast of Rhode Island. The Collector of Newport seized the ship, alleging that it had sailed in violation of American trade laws, and filed a civil forfeiture action against the ship.

Three sets of claimants challenged the forfeiture of the ship: the original crew, the Argentine captors, and the unknown original owner as represented by the Spanish government. On appeal, it was argued that the Spanish government could not represent an absentee owner. The court, however, "fe[lt] no difficulty in deciding" that the original owner could be represented by the Spanish Vice Consul.[51] The absence of the original owner (even his very anonymity) did not preclude his claim to the seized property. And, on the merits, this Court ultimately decided in his favor.[52]

Although these cases were decided long before the fugitive disentitlement doctrine was created by the judiciary or codified by Congress, they show that courts did not preclude foreign property owners from making claims to their property, simply because they might have been criminally liable and did not come to the United States. Undoubtedly, this is because doing so

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50 *See* 19 U.S. 152, 168–69 (1821).

51 *Id.* at 168.

52 *Id.* at 175–76.

would violate the fundamental guarantee of due process: the right to be heard.

It is axiomatic that criminal defendants cannot be summarily convicted because they failed to appear for trial.[53] Similarly, property cannot be summarily forfeited through default judgment because the owner failed to submit to the jurisdiction of the court.

The "root requirement" of the Due Process Clause is that "an individual be given an opportunity for a hearing before he is deprived of any significant property interest."[54] For example, in *Quantity of Books v. Kansas*, this Court held that the government could not seize allegedly obscene books where the property owner "was not afforded a hearing on the question of the obscenity" and, therefore, "the procedure was . . . constitutionally deficient."[55]

The right to be heard in an action brought against oneself or property is fundamental, and it is irrelevant whether the claimants are foreign citizens – or even whether they are in open rebellion against the United States.[56] A mere statute cannot deny the right to be heard. That right is a part of "natural justice" and the

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[53] *See Diaz v. United States*, 223 U.S. 442, 455 (1912); *see also Crosby v. United States*, 506 U.S. 255, 262 (1993).

[54] *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *see also Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("at the very minimum" due process requires "***some*** kind of hearing") (emphasis added); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

[55] 378 U.S. 205, 210 (1964).

[56] *McVeigh v. United States*, 78 U.S. 259 (1871).

Constitution itself.[57] A court has no power "to deny all right to defend an action, and to render decrees without any hearing whatever."[58] This would "convert the court exercising such an authority into an instrument of wrong and oppression."[59]

The same is true of Congress. "If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution?"[60] Section 2466 does exactly that. It disentitles claimants who do nothing worse than exercise their rights.[61]

The Fourth Circuit dismissed these due-process concerns when it opined that "the guarantees of due process do not mean that 'the defendant in every civil case [must] actually have a hearing on the merits.' "[62] The court's mistake was not that there must always be a full-blown hearing on the merits, but that these

[57] *Hovey v. Elliott*, 167 U.S. 409, 414 (1897).

[58] *Id.*

[59] *Id.*

[60] *Id.* at 417.

[61] In that sense, the situation is analogous to the unconstitutional-conditions doctrine. *Simmons v. United States*, 390 U.S. 377, 394 (1968) (finding it "intolerable that one constitutional right should have to be surrendered in order to assert another"); *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 540 (1967) (concluding apartment lessee could not be convicted for refusing to give up constitutional right to have housing inspectors obtain warrant to search premises).

[62] *Batato*, 833 F.3d at 427 (citing *Boddie*, 401 U.S. at 378).

claimants were denied ***any opportunity*** to assert their claim to the property.

Faced with the complaint for civil forfeiture, the petitioners moved to dismiss under Supplemental Rule G(8)(b), asserting that the complaint's novel theory failed to sufficiently state a claim. The United States then moved to strike the petitioners' claim to the property on the grounds that they lacked standing as "fugitives." Because Supplemental Rule G(8)(c)(ii) requires that any motion to strike "must be decided before any motion by the claimant to dismiss the action," the district court never heard the motion to dismiss, effectively enabling the United States to obtain forfeiture of the petitioners' property based on untested allegations alone.

This practice could be applied in any of the hundreds of cases where the government requests extradition, making the circuit court's decision a mistake of great and pressing importance. The Fourth Circuit's decision means that the government can file a civil forfeiture action every time it seeks extradition and win a default judgment regardless of whether the allegations were true. The government could even make unfounded criminal allegations and extradition requests with the specific intent to confiscate property, secure in the knowledge that there will be no judicial oversight of the merits of the case.

It is easy to visualize this tactic in practice. The United States requests that a foreign sovereign extradite someone. The defendant argues that he has never

committed an extraditable offense. Simultaneously, the United States seeks civil forfeiture of the defendant's assets. No one will be able to contest both simultaneously. The defendant files a claim to his property, but it is stricken under Section 2466 and the government's allegations are taken as true. At no point does the government need to prove even a *prima facie* case.

The only thing stopping the government from forfeiting the assets of anyone who contests extradition to the United States, regardless of whether they could defend the forfeitures, is its own discretion. Granting the petition would allow the Court to restore the proper role of the judiciary in scrutinizing government action and restore the right to be heard in a meaningful manner.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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