No. 15-1360

United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

FINN BATATO; BRAM VAN DER KOLK; JULIUS BENCKO; MATHIAS ORTMANN; SVEN ECHTERNACH; KIM DOTCOM; MEGAUPLOAD LIMITED; MEGAPAY LIMITED; VESTOR LIMITED; MEGAMEDIA LIMITED; MEGASTUFF LIMITED; MONA DOTCOM,
CLAIMANTS-APPELLANTS

AND

ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO, IN REM DEFENDANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NO. 14- CV-00969 HON. LIAM O'GRADY, PRESIDING

BRIEF *AMICI CURIAE* FOR THE CATO INSTITUTE, INSTITUTE FOR JUSTICE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF CLAIMANTS-APPELLANTS

Darpana Sheth
Institute for Justice
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9425

Thomas K. Maher
N.C. Office of Indigent Def. Services
123 W. Main St., Suite 400
Durham, N.C. 27705
(919) 354-7200

Ilya Shapiro
Counsel of Record
Cato Institute
1000 Massachusetts Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

CORPORATE & FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Fourth Circuit Local Rule 26.1, *amici* make the following declarations:

The Cato Institute is a nonprofit public policy research foundations dedicated in part to the defense of constitutional liberties secured by law. Cato has no parent corporation and does not issue shares of stock.

The Institute for Justice is a nonprofit civil liberties law firm. IJ is not a publicly held corporation and does not have any parent corporation. No publicly held corporation owns 10 percent or more of its stock.

The National Association of Criminal Defense Lawyers is a non-profit corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of NACDL's stock.

No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of *amici*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to protecting the right to property, both because individuals' control over their property is a tenet of personal liberty and because property rights are inextricably linked to all other rights. The government's ability to interfere with private property without adequate safeguards gravely threatens individual liberty. For this reason, IJ both litigates original cases to defend property rights and files *amicus* briefs in relevant cases, including *Henderson v. United States*, – S. Ct. – (2015); *Kaley v. United States*, 134 S. Ct. 1090 (2014), *Florida v. Harris*, 133 S. Ct. 1050 (2013); *Alvarez v. Smith*, 558 U.S. 87 (2009); *Bennis v. Michigan*, 516

[1] Pursuant to Fed. R. App. P. 29, both parties, through their respective counsel, have consented to the filing of this brief. Counsel for the parties did not author this brief in whole or in part. No person or entity other than *amici* and their members made a monetary contribution to the preparation or submission of this brief.

U.S. 442 (1996); and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct, including those subject to attempts by the government to forfeit property. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, the criminal justice system and the justice system as a whole.

The present case concerns *amici* because the federal government's aggressive use of forfeiture poses a grave threat to property rights and can cause irreparable injury when property is forfeited without any hearing. The strong pecuniary interest that law enforcement has in maximizing forfeiture proceeds has both distorted police and prosecutorial practices and, in many cases, led to the restraint or seizure of untainted assets.

SUMMARY OF THE ARGUMENT

In this, the 800th anniversary of Magna Carta, it's worthwhile to remember the document's most important contribution to Anglo-American law: due process according to "the law of the land." Rodney L. Mott, *Due Process of Law* (1926). Occasionally the government needs to be reminded of that fact. *Amici* will oblige.

The U.S. government is the most powerful organization in the history of humankind. Anyone who becomes the target of the government's power—whether from a criminal accusation, a regulatory infraction, or, as here, a civil-forfeiture proceeding—is immediately at an extreme disadvantage. Due process protections ensure that the government is wielding its astonishing power legitimately rather than just exercising pure, irresistible force.

The statute at issue, 28 U.S.C. § 2466, seeks to statutorily deprive the claimants of due-process rights that are, to say the least, much more firmly rooted in our law than the Civil Asset Forfeiture Reform Act of 2000. Extending the equitable doctrine of fugitive disentitlement to civil-forfeiture proceedings is contrary to the Supreme Court's jurisprudence in this area. That Court has held that the due-process right to be heard can't even be stripped from someone who was in rebellion against the United States. *McVeigh v. United States*, 78 U.S. 259 (1871). Surely that reasoning extends to those who are lawfully resisting extradition *and* fully appearing before the district court in the separate forfeiture action.

Stripping the claimants of their due process rights isn't just unconstitutional, it's dangerous. There's a growing literature on the abuse of civil forfeiture—and those abuses are directly tied to the protections given to the claimants here, as well as the ability of government officials to directly benefit from forfeitures. This court should not ratify a doctrine that would make abuses even easier.

Moreover, the reasons for invoking the fugitive disentitlement doctrine in criminal appeals are inapplicable to civil forfeiture actions. First, unlike an order against an absent criminal defendant, a valid forfeiture order where the court has rightful jurisdiction will be fully enforceable. Second, the claimants here haven't scorned the district court's authority as a fleeing criminal defendant would. Third, by appearing before the court via counsel, the claimants haven't disrupted the court's processes or offended its dignity. Finally, unlike with criminal appellants—who may need to be deterred from flight by the threat of disentitlement—the claimants are merely continuing to lawfully reside in their home countries.

George Washington apocryphally said "Government is not reason, it is not eloquence—it is force." Despite the mistaken provenance, the sentiment remains true. The protections of due process are not just crucial because they are fundamentally fair; they provide legitimacy to the exercise governmental force, when such force proves necessary.

In this case, the U.S. government has tried to reach its overwhelming force across the sea into other sovereign states in order to seize assets that it alleges are connected to a crime. Not content to hold the best hand in this card game—a U.S. Attorney's office with extensive resources and privileges—the government has decided that the other side should be forced to relinquish its chips before the game even begins. This Court should not countenance such a gross violation of due process. It should hold Section 2466 unconstitutional on its face or, at a minimum, invalidate the district court's application of the provision.

ARGUMENT

I. Section 2466 Unconstitutionally And Dangerously Strips Due Process Rights From Claimants Whom The Government Has Haled Into Court

At minimum, due process requires a right to be heard, yet Section 2466 removes even that small kernel of due process protection. Furthermore, in a government-initiated action, due process accords the right to defend against the government's claims. Finally, these deprivations of due process will roll back protections at a time when we are becoming aware of the well-documented tendency of government agents to abuse civil asset forfeiture.

A. The Right to Be Heard Is a "Root Requirement" of Due Process that Cannot Be Denied by Statute

Section 2466 deprives the claimants of the right to be heard before forfeiting their assets. Yet the Supreme Court has held that 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." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis original). *See also*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (hearing required before shutting off utilities); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("at the very minimum" due process "requires *some* kind of hearing") (emphasis original); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard"); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) ("controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

For more trivial deprivations than the several million dollars at issue here, the Supreme Court has held that a hearing is required. In *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972), the Court held that "the temporary, nonfinal deprivation of property" of a stove violated the Due Process Clause. *See also*, *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 338 (1969) (holding that the due process clause is violated "when a notice and an opportunity to be heard are not given before the *in rem* seizure of the wages"). In *Fuentes*, the Court struck down state statutes that allowed private parties to seize goods where owners were deficient in paying

installments. *Fuentes*, 407 U.S. at 69. Much like the government's *ex parte* assertions that underlie the seizure in the instant case, those goods, usually appliances and furniture, could be seized "simply upon the *ex parte* application of any other person who claims a right to them and posts a security bond[.]" *Id.* The Court held that "the statutes work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessors." *Id.* at 96.

If denying the right to be heard in a temporary, non-final deprivation of an appliance violated due process, then the permanent deprivation of several million dollars without a hearing is similarly suspect.

B. Due Process Requires the Right to Defend against Government-Initiated Forfeiture Proceedings

The claimants here aren't seeking this Court's indulgence by affirmatively bringing actions against the government or other persons. They aren't seeking to sap this Court's resources by haling people into its jurisdiction while residing elsewhere. Although this is an *in rem* proceeding, the claimants are "[l]ike the owner of property in any forfeiture proceeding, though labeled a claimant and allocated the burden of proof, [they are] clearly in a defensive position." *United States v. $40,877.59 in U.S. Currency*, 32 F.3d 1151, 1154 (7th Cir. 1994). "The government has initiated the proceedings to deprive claimant of his property; he is

not in court as the initiator of the action, but rather is defending that action against his property." *Id.*

In a property forfeiture proceeding initiated by the government, the irreducible minimum of due process is a right to be heard and to present every available defense. The right to be heard in an action brought against you is fundamental, *see* Section I.A, *supra*, and it is irrelevant whether the claimants are foreign citizens, or even whether they're in open rebellion against the United States. *McVeigh v. United States*, 78 U.S. 259 (1871). Being a part of "natural justice," and the Constitution itself, *Hovey v. Elliott*, 167 U.S. 409, 414 (1897), the right to be defend cannot be denied by a mere statute.

In *McVeigh*, the Court held that the right to defend against a forfeiture action could not even be abridged for someone who was allegedly collaborating with the Confederacy. 78 U.S. at 266. Pursuant to a July 1862 Act of Congress authorizing rebel property to be seized, the property of one McVeigh was set for forfeiture. McVeigh appeared "by counsel" to protest the seizure, and the U.S. Attorney argued that the claim should be stricken because the respondent was "a resident of the city of Richmond, within the Confederate lines, and a rebel." *Id.* at 266.

The district court agreed, but the Supreme Court unanimously overruled that court's "serious error." *Id.* at 267. "The order in effect denied the respondent a

hearing," wrote the Court, and the right to defend is a necessary corollary to the action brought against McVeigh:

> If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.

Id.

In support of the "first principle of the social compact and of the right administration of justice," the Court cited *Calder v. Bull*, in which Justice Chase famously invoked the higher principles behind the Constitution: "An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Calder v. Bull*, 3 U.S. 386, 388 (1798). The same can be said of Section 2466.

In *Hovey*, the Court further emphasized that the right to defend against an action is fundamental to due process:

> To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

167 U.S. at 414. The Court there called the right to defend "a principle of natural justice, recognized as such by the common intelligence and conscience of all nations." *Id.* (quoting *Windsor v. McVeigh*, 93 U.S 274, 277-78 (1876)). If a

sentence is given against someone without "hearing him, or giving him an opportunity to be heard, [it] is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Id.*

Yet the Court did not just confine the judiciary's inherent powers with this language. Later in the *Hovey* opinion, it emphasized that even a legislative act—such as Section 2466—that denied the fundamental right to defend cannot withstand constitutional scrutiny:

> Can it be doubted that due process of law signifies a right to be heard in one's defence? 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?

Id. at 417.

Due process requires that a person "must be permitted to defend himself in any court where his antagonist can appear and prosecute." *Nat'l Union of Marine Cooks v. Arnold & Stewards*, 348 U.S. 37, 47 (1954) (Black, J., dissenting). In his dissent in *National Union*, in which a state supreme court dismissed an appeal because the petitioner "disobeyed a court order to turn over certain bonds which were not even the subject matter of th[e] lawsuit," *id.* at 45, Justice Hugo Black echoed the concerns about illegitimate legislative action in *Hovey*: "I do not think the Washington legislature could provide this kind of punishment for disobedience

of a court order or for any other crime." *Id.* "Th[e] right of defense belongs to all—good or bad, one who has violated laws the same as one who has not." *Id.* at 47.

To put a finer point on this discussion, it is axiomatic that a criminal defendant can't be summarily convicted because he refused to show up for trial—and certainly a statute allowing such a conviction would be unconstitutional. A defendant may be tried in absentia and thus give up the right to personally confront witnesses, but he is nevertheless entitled to a trial in which his lawyer can fully participate. *Diaz v. United States*, 223 U.S. 442, 455 (1912). Well, in *Hovey*, the Court found "no distinction" between the due-process right to be heard in civil versus criminal cases: "If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject?" *Hovey*, 167 U.S. at 419.

In sum, the Due Process Clause of the Fifth Amendment requires that adequate notice and a meaningful hearing on the merits must precede a deprivation of life, liberty, or property. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). That hearing can't merely be hollow procedural exercise. *Id.* If a claimant is disentitled in a civil forfeiture suit, the government effectively strips away the

rights to be heard and to defend and transfers the property *to the government* based on *the government's* mere allegations of its connection to a crime.

C. Courts Must Pay Special Attention to Situations Where, as Here, the Government Is the Beneficiary of the Denial of Due-Process Rights

Section 2466 doesn't just unconstitutionally strip claimants of due process rights, it creates a dangerous situation whereby the government can benefit by riding roughshod over the rights of property owners.

Because the government serves as both the accuser and the beneficiary of property forfeiture, courts must take special care to ensure that the government doesn't illegitimately gain from squashing the claimants' due process rights. As the Court said in *James Daniel Good*: "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking," and "[t]hat protection is of particular importance here, where the government has a direct pecuniary interest in the outcome." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55-56 (1993). It's concerning enough when the government takes away due process rights in a criminal proceeding, or eliminates the right to be heard in a civil claim between two private parties. See *Fuentes*, 407 U.S. at 83 (finding that, in a civil action between private parties, when "private gain is at stake, the danger is all too great that [one party's] confidence in his cause will be misplaced.") But in neither of those situations is the government the direct

beneficiary of the deprivation of due process—and in the case of a criminal proceeding, punishing defendants actually costs the government money.

The Supreme Court has recognized that when there are potential conflicts of interest, or the possibility of unjust gains, then special attention must be paid to due process protections. In *Tumey*, the Court held that it deprives a defendant of due process "to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). In *Ward v. Vill. of Monroeville*, the Court ruled that allowing mayors to sit in judgment of ordinance violations denied due process because a "'possible temptation' may exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." 409 U.S. 57, 60 (1972). And in *Marshall v. Jerrico, Inc.*, the Court cautioned about the "possibility that [an official's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts." 446 U.S. 238, 250 (1980).

With the stunningly broad jurisdictional claims made in this case, the government's elimination of due process rights via the fugitive disentitlement doctrine is particularly alarming. Under the arguments proffered by the government, anyone who has ever been online and happened to have payments

routed through American servers could be subject to U.S. jurisdiction. Couple this de facto universal jurisdiction with the ability to invoke fugitive disentitlement in civil forfeiture proceedings, and this Court could ratify a dangerous mix of perverse incentives and unchecked government profiteering.

These concerns are hardly speculative. Over the course of the past two decades, it has become clear that civil forfeiture abuse is directly tied to whether law enforcement agencies and officials can profit from the seizures. This court should not make it easier for further misuse to occur.

The Texas Senate Committee on Criminal Justice has said that civil forfeiture has "become a profit-making, personal account for some law enforcement officials." Diane Jennings, *Lawmakers Eye Reforms for Texas Asset Forfeitures*, Dallas Morning News, Feb. 28, 2011, http://bit.ly/1Nc0kSS. As Police Chief Ken Burton of the Columbia Police Department described when asked about forfeiture funds, "there is some limitations on it, um, actually not really on the forfeiture stuff, we just base it on stuff that would be nice to have, that we can't get in the budget for instance. . . . Its kind of like pennies from heaven, it gets you a toy or something you need, is the way we typically look at it, to be perfectly honest." "Pennies From Heaven" Chief Burton Talks Asset Forfeitures (Raw Footage) (Nov. 19, 2012), https://www.youtube.com/watch?v=ipHUN-xLLms.

Civil forfeiture funds have been used to buy tequila, rum, kegs, and a margarita machine. *Montgomery DA Says Funds Used for Liquor at Cook-Off*, Houston Chronicle, Mar. 18, 2008, http://bit.ly/1zjObc3. If the police want a new toy—such as a $90,000 Dodge Viper—that too can be acquired via civil forfeiture. John Burnett, *Sheriff under Scrutiny over Drug Money Spending*, NPR, June 18, 2008, http://n.pr/1KdqiYo. *See also* Last Week Tonight with John Oliver: Civil Forfeiture (Oct. 5, 2014), https://www.youtube.com/watch?v=3kEpZWGgJks.

Now, *amici* are not accusing the government of trying to directly profit from the forfeiture in *this* case, but future malfeasance from government officials unconstrained by due process rights is certainly possible given the current state of affairs, if not likely.

In a 2010 report, *amicus* Institute for Justice studied patterns of civil forfeiture abuse. Marian R. Williams, Jefferson E. Holcomb, et. al, *Policing for Profit*, The Institute for Justice (Mar. 2010). The report found that putting higher burdens on owners to prove the property's innocence contribute to higher rates of forfeiture. *Id.* at 20-23, 35-40. Concerns about profiteering are "exacerbated by legal procedures that make civil forfeiture relatively easy for the government and hard for property owners to fight." *Id.* at 6. Such concerns of prosecutorial overreach and profiteering are, of course, among the many reasons for protecting fundamental due process rights.

II. There Are No Valid Countervailing Considerations That Justify Stripping Claimants Of Due Process Rights In A Forfeiture Proceeding

The Supreme Court has only ratified the use of fugitive disentitlement in criminal appeals for certain limited purposes. Because those purposes can't be extended to fugitive disentitlement in civil forfeiture proceedings, Section 2466 serves no purpose except to strip claimants of due process rights.

There is no constitutional right to appeal a criminal conviction. *Abney v. United States*, 431 U.S. 651, 656 (1977); *McKane v. Durston*, 153 U.S. 684 (1894). And it makes sense to limit appeals in criminal matters for defendants who (a) don't have a right to appeal; and (b) have escaped from custody. Yet, in civil forfeiture matters, not only does the claimant have a right to be heard and to defend, see Section I, *supra*, but the claimants and their property here are in no way "on the run."

Fugitive disentitlement is an equitable doctrine of appellate procedure to be applied to fugitive criminals. "[A]n appelate court may dismiss the appeal of a [criminal] defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993). The doctrine was originally motivated by a concern that a court could not enforce its judgment against a fugitive defendant. *Smith v. United States*, 94 U.S. 97, 97 (1876) ("It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond

to any judgment we may render."); *accord Bonaham v. Nebraska*, 125 U.S. 692 (1887); *Allen v. Georgia*, 166 U.S. 138 (1897); *Eisler v. United States*, 338 U.S. 189 (1949).

In *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (per curiam), the Court added another rationale for the fugitive disentitlement doctrine: a fugitive's escape "disentitles [him] to call upon the resources of the Court for determination of his claims." *Id.* at 366. And in *Ortega-Rodriguez*, the Court said that fugitive disentitlement "serves an important deterrent function and advances an interest in efficient, dignified appellate practice." 507 U.S. at 242 (citing *Estelle v. Dorrough*, 420 U.S. 534, 537 (1975)).

These rationales cannot be analogized to allow fugitive disentitlement in civil forfeiture proceedings.

A. The Interest in the Enforceability of the Court's Judgment

If a criminal defendant is not under the control of the justice system then any sentence handed down by a court cannot be enforced. As an equitable doctrine, it makes sense that a court would not allow a defendant to benefit from a successful appeal but evade an adverse ruling. *Smith v. United States, supra*. An absent claimant in a forfeiture proceeding, however, "does not threaten the integrity of the forfeiture proceeding." *United States v. $40,877.59 in U.S. Currency*, 32 F.3d 1151, 1156 (7th Cir. 1994).

Assuming that the court has jurisdiction over the property at issue here, a valid forfeiture order would be fully enforceable. Of course, as the claimants explain, the district court may not have jurisdiction over their property, and if that is true, the case should be dismissed. Some common-law countries (such as New Zealand) will not register a forfeiture order obtained via fugitive disentitlement on the grounds that it violates "natural justice." *See Kim Dotcom et al. v. Deputy Solicitor General et al.*, CIV-2015-404-856, [2015] NZHC 1197, 3 June 2015, Ellis J ("The application of the fugitive disentitlement doctrine to a person who is exercising a bilaterally recognised right to defend an eligibility hearing, with the result that he is deprived of the financial means to mount that defence, is to put that person on the horns of a most uncomfortable and [the plaintiffs would say] unconstitutional dilemma."). Nevertheless, in the event that a valid forfeiture order is obtained, the fugitive's property will suffer the effects of an adverse judgment. *See United States v. Pole No. 3172*, 852 F.2d 636, 643 (1st Cir. 1988) (explaining that the concerns that a judgment will not be enforceable "does not arise" in forfeiture actions).

Accordingly, the primary rationale for applying fugitive disentitlement—enforcing judgments—is simply inapplicable in the civil forfeiture context.

B. The Interest in Disentitling a Fugitive from Relief

Some courts have endorsed fugitive disentitlement as a sanction for a

fugitive who "has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." *Ali v. Sims*, 788 F.2d 954, 959 (3d Cir. 1986). But, as the Seventh Circuit has said, disentitlement is only properly applied in instances where the fugitive "initiates the proceedings[,]" and expanding the doctrine to cases where a claimant is defending his property would violate due process. *$40,877.59 in U.S. Currency*, 32 F.3d at 1154. When a civil forfeiture action is initiated by the government, as here, the claimant is not "call[ing] upon the court," he's merely defending himself and his property. No judicial authority has been scorned, and no relief summoned, by the claimant.

Criminal appellants, on the other hand, *are* seeking judicial relief. A fugitive criminal appellant seeks to use the courts for his benefit "while simultaneously evading any authority the court may wield." Martha B. Stolley, *Sword or Shield: Due Process & the Fugitive Disentitlement Doctrine*, 87 J. Crim. L. & Criminology 751, 777 (1997). Yet claimants in civil forfeiture cases "cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another." *Pole No. 3172*, 852 F.2d at 643 (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 210 (1958)). And, to reiterate, federal civil forfeiture claimants are haled into court by the most powerful organization in human history, one that now seeks to strip all due process protections from them.

C. The Interest in Not Disrupting the Court's Judicial Processes or Impugning the Court's Dignity

The absence of a criminal fugitive appellant can disrupt the orderly flow of justice. Delays in judicial proceedings are frustrating enough, and courts have inherent power to address delays caused by a criminal fugitive flaunting the judicial system.

In a civil forfeiture case, by contrast, a claimant's failure to appear does not disrupt the court's proceedings. As the D.C. Circuit has said:

> When an individual appeals his criminal conviction while he remains a fugitive, there is a connection between his fugitive status and the appellate proceedings, which is all that *Ortega-Rodriguez* requires. Thus, if Jose Ortega-Rodriguez had still been a fugitive at the time he pursued his criminal appeal, his absence would have flouted the authority of the Eleventh Circuit to carry out its mandate, making dismissal appropriate. But when the party's fugitive status bears no relation to the ongoing proceedings, the court has no authority to order dismissal.

Daccarett-Ghia v. Commissioner, 70 F.3d 621, 627 (D.C. Cir. 1995).

An absent claimant can obviously appear by counsel in a forfeiture proceeding; the claimants are doing just that here. Through counsel, the instant challenge to this fugitive disentitlement is being satisfactorily adjudicated—and the challenge to the forfeiture itself would have been similarly handled had the claimants not been stripped of due process. Moreover, there are things more important than a court's ability to swiftly move through its docket, among them the Fifth Amendment right to due process and adhering to ancient principles of

fairness. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (The Constitution protects "higher values than speed and efficiency"; "[t]he Due Process Clause . . . protect[s] the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize . . . government officials."); *Magna Carta*, cl. 39, (June 15, 1215) ("No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land.")

Nor does the claimants' absence from the criminal proceeding offend the district court's dignity. This is a separate case challenging a civil forfeiture, a proceeding in which the claimants have tried to participate fully and honestly—at least as much as the government will let them. Unlike the case of a fugitive criminal defendant who essentially thumbs his nose at the authority of both the trial and appellate courts, the dignity of this Court (and the district court) has been respected at every point in the process.

Finally, preserving this Court's dignity doesn't require stripping the claimants of the most fundamental due process protections. In fact, it undercuts the Court's dignity—and, indeed, the dignity of the U.S. government—to proceed against the claimants in such a heavy-handed and unconstitutional fashion. "[G]enuine respect, which alone can lend true dignity to our judicial establishment,

will be engendered, not be the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries." *Int'l Union v. Bagel*, 512 U.S. 821, 834 (1994) (quoting *Bloom v. Illinois*, 391 U.S. 194, 208 (1968)). Dignity is earned by using the government's awesome and irresistible power in the spirit of fairness and justice. "It is a greater stain on our jurisprudence for the court . . . to discard those procedures that safeguard right and fair decisions." *$40,877.59*, 32 F.3d at 1157.

D. The Interest in Deterring Escape From Justice

A final rationale for common-law fugitive disentitlement—deterring escape—is equally inapplicable here. A threat to dismiss a criminal appeal if the criminal escapes can be a powerful incentive not to flee. Criminal defendants who think that they will be vindicated once they have their "day in court" would find the possibility of fugitive disentitlement particularly concerning. These concerns aren't present in the case of fugitive disentitlement in civil forfeiture proceedings. "Granting a hearing on the validity of seizure to forfeiture claimants who are fugitives in a criminal proceeding does not encourage potential defendants to flee." Stolley, *Sword or Shield*, at 780-81.

Moreover, when, as here, the alleged "fugitives" never "escaped" from anywhere—they merely continued to lawfully reside in their countries of residence—there is no conduct to deter. To reiterate, it is not the absent claimants'

affirmative conduct that has brought this action, but rather the government's move to use the courts offensively and without consideration of fundamental fairness.

Finally, even if the courts needed to deter flight, there are less draconian methods. "[T]he need to deter flight from criminal prosecution," said the Supreme Court in *Degen v. United States*, "[is] substantial, but disentitlement is too blunt an instrument for advancing them." 517 U.S. 820, 828 (1996).

CONCLUSION

Section 2466 purports to do something that is beyond Congress's authority: categorically strip due-process rights from "fugitive" claimants in civil forfeiture proceedings. This Court should strongly consider whether the provision is facially unconstitutional. At a minimum, this Court should invalidate the district court's application of Section 2466.

Respectfully submitted,

Darpana Sheth
Institute for Justice
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9425
dsheth@ij.org

Thomas K. Maher
N.C. Office of Indigent Def. Services
123 W. Main St., Suite 400
Durham, N.C. 27705
(919) 354-7200
thomas.k.maher@nccourts.org

Ilya Shapiro
Counsel of Record
Cato Institute
1000 Massachusetts Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

CERTIFICATE OF COMPLIANCE

1. This memorandum complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,403 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This memorandum complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 point font.

/s/ Ilya Shapiro
July 8, 2015

CERTIFICATE OF SERVICE

I hereby certify that, I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing (NEF) to the appropriate counsel.

/s/ Ilya Shapiro
July 8, 2015