No. 19-659

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

BRIEF OF *AMICI CURIAE* LAW AND ECONOMICS SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are economists, law and economics scholars, and non-partisan, non-profit organizations who teach, conduct research, and publish on economics and law. *Amici Curiae* are interested in the application of sound economic theory in this Court's jurisprudence.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for *amici* state that after timely notification, all parties consented to the filing of this brief.

The Buckeye Institute ("Buckeye Institute") was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals. The Buckeye Institute's Economic Research Center provides reliable economic research, data analysis, and econometric modeling at the state level. The Economic Research Center files and joins amicus briefs that relate to the intersection of law and economics.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case entails competing interpretations of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), codified at 28 U.S.C. § 2465(b)(1). As Miladis Salgado's petition for a writ of certiorari describes, the division in the lower courts over the meaning of "substantially prevails" has caused widespread confusion. The Eleventh Circuit's approach is in conflict with the text and legislative history of the statute.

Amici submit this brief because the Eleventh Circuit's approach is flawed for an additional reason: it negates the incentives crafted by CAFRA's fee-shifting provision. As explained below, economic theory suggests that fee-shifting in this context would meaningfully deter the filing of inefficient and unmeritorious civil asset forfeiture actions, such as the one in this case. The Eleventh Circuit's holding, however, eliminates this important constraint on civil asset forfeiture actions.

Amici respectfully request that the petition for a writ of certiorari be granted so the incentive structure adopted by Congress may be reestablished in the interests of efficiency and justice.

ARGUMENT

I. FEE-SHIFTING DETERS INEFFICIENT FORFEITURE ACTIONS THAT MAY LACK A STRONG EVIDENTIARY BASIS AT THE TIME OF FILING.

"Fee shifting"—sometimes referred to as the "English rule"—has several desirable effects. In the absence of fee shifting, *all* parties tend "toward overuse of the legal system," as they do not "take into account that [their] suit will cause the [counter-party] and possibly the court to incur legal expenses as well." Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 578 (1997). Where available, fee-shifting provides a counterweight to litigious impulses. Scholars agree that the English Rule "promote[s] settlement, enhance[s] civil litigation, favor[s] more meritorious claims, [and] decrease[s] the number of nuisance lawsuits." Nuno Garoupa & Luciana Echazu, *Why Not Adopt a Loser-Pays-All Rule in Criminal Litigation?*, 32 INT'L REV. L. & ECON. 233, 233 (2012).

Critically, the English Rule does not depress litigation indiscriminately. Rather, it has a stronger deterrent effect on weaker claims. *See* Emanuela Carbonara et al., *Rent-Seeking and Litigation: The Hidden Virtues of Limited Fee Shifting*, 11 REV. L. & ECON. 113 (2015) (finding that fee-shifting reduces litigation, but not where the parties' positions have comparable merit, or where the government has the clear upper hand). Thus, as a result of fee-shifting, "[l]itigation is more concentrated on cases with more equal merits." *Id.* at 134. And in the criminal context, the English rule actually delivers "*more* deterrence" and "at a lower cost." Garoupa & Echazu, *supra*, at 237 (emphasis added).

Fee-shifting is particularly useful in marginally deterring Negative Expected-Value (NEV) suits. NEV

suits are "suits in which the plaintiff would obtain a negative expected return from pursuing the suit all the way to judgment—that is, one in which the plaintiff's expected total litigation costs would exceed the expected judgment." Lucian A. Bebchuk & Alon Klement, *Negative-Expected-Value Suits* 1, *in* PROCEDURAL LAW AND ECONOMICS (Chris Sanchirico ed., 2011), https://ssrn.com/abstract=1534703. There are several reasons why, absent fee-shifting, litigants might choose to pursue NEV suits—even unmeritorious ones—despite their negative expected values. *See id.* at 2–7 (discussing factors such as asymmetrical information, the defendant's up-front cost to defend, the potential to gain new information through the litigation, and whether the plaintiff is a repeat player). These suits create inefficiency and waste in the system, and may be undesirable on public policy grounds as well. *See id.* at 8 ("[W]ith respect to NEV suits that are frivolous, an NEV plaintiff's ability to extract a settlement offer might well have undesirable consequences.").

Fortunately, fee shifting has proven effective in reducing costs associated with unmeritorious NEV suits. *See* Amy Farmer & Paul Pecorino, *A Reputation for Being a Nuisance: Frivolous Lawsuits and Fee Shifting in a Repeated Play Game*, 18 INT'L REV. L. & ECON. 147 (finding that " fee shifting is effective in reducing costs associated with nuisance suits"). Under the English Rule, litigants will ordinarily avoid filing NEV suits, meaning that many inefficient or frivolous suits are never filed. *See* Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982); Shavell, *Fundamental Divergence*, *supra*, at 575.

In the forfeiture context, NEV suits might include meritorious actions involving small sums, as well as unmeritorious actions—like the one defended by Petitioner—in which the government lacks sufficient

evidence to carry its burden of proving a nexus between the seized property and criminality. Fee shifting serves to deter such inefficient actions, just as it does in private litigation, because government actors (here, prosecutors) are rational decision makers that respond to changed incentives. *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1593 (2017) (finding that government officials respond to financial incentives, despite the fact "that public dollars, not personal ones, will be used to satisfy any financial obligation"); Brent Mast et al., *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 303 (2000) (stating that "[l]ike market entrepreneurs," law enforcement officials "will respond to relative prices"); *see also* Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91. J. PUB. ECON. 2113, 2117 (2007) ("[P]olice respond to monetary incentives in ways predicted by theory….").

Thus, as in the sphere of private litigation, economic theory predicts that a fee shifting provision will increase the overall efficiency of forfeiture proceedings within its ambit by selectively weeding out undesirable NEV suits before they are brought.

II. THE SALUTARY EFFECTS OF FEE SHIFTING ARE LOST IF THE GOVERNMENT KNOWS IT CAN AVOID PAYING FEES BY STRATEGICALLY DISMISSING UNMERITORIOUS SUITS WITHOUT PREJUDICE.

CAFRA provides for fee-shifting in forfeiture actions: "[I]n 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," *inter alia*, "reasonable attorney fees and other litigation costs reasonably incurred by the claimant." 28 U.S.C. § 2465(b)(1).

Prior to passing CAFRA, Congress was concerned that even innocent property owners "may exhaust his or her financial assets in attorney's fees to fight for the return of property." 145 Cong. Rec. H4858-02, H4862 (June 24, 1999) (statement of Rep. Sheila Jackson Lee).[2] In response to this problem, Congress included in the statute a fee-shifting provision, which it believed would make successful claimants whole and curb abuse. *See id.* at H4852 (statement of Senator Deborah Pryce that the fee-shifting provision would "put into check the possibility of government to unintentionally trample over the rights of innocent citizens.").

However, as the facts of this case demonstrate, CAFRA has not effectively deterred NEV suits in the civil asset forfeiture context because it has been rendered toothless. Many lower courts have held that a dismissal without prejudice, even at an advanced stage of litigation, does not trigger CAFRA's "substantially prevailed" test for shifting the property owners' attorney's fees to the Government—even when the seized property is returned to the claimant.[3] The net

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[2] As Senator Deborah Pryce summarized, "under [pre-CAFRA] law, if the owner succeeds in reclaiming his property, the government owes him nothing for his trouble; no apology, no interest, no compensation, nothing whatsoever." 145 Cong. Rec. H4858-02, H4852. Senator Orrin G. Hatch also voiced concern that "[t]he costs of contesting a civil forfeiture of property can be substantial," and argued that "it is unfair for the property owner to have to incur attorney fees and costs when the government does not prevail in civil forfeiture actions." 145 Cong. Rec. S14612-05, S14629.

[3] *See, e.g.*, *United States v. $32,820.56 in U.S. Currency*, 106 F. Supp. 3d 990, 997 (N.D. Iowa 2015); *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 S.*, No. 10-CIV-3748, 2012

effect is that "the government is free to press its case until it appears unwinnable, and then voluntarily dismiss it to avoid paying attorney's fees." Michael J. Keblesh, *Using Insurance to Regulate Civil Forfeiture*, 50 CREIGHTON L. REV. 455, 463 n.46 (2017).

When the Government knows *ex ante* that it can ultimately escape attorney's fees, even on the eve of defeat, the intended benefits of fee shifting are lost. The potential for attorney's fees does not enter into the Government's pre-suit cost-benefit analysis, and it may then (correctly) perceive incentives to bring inefficient or unmeritorious NEV suits. *See* Bebchuk & Klement, *supra*, at 2–7. As long as the civil asset forfeiture game offers real prizes and is essentially free to play, prosecutors have every reason to play it as often as they can.

III. DETERRENCE OF NEGATIVE-EXPECTED-VALUE SUITS MAY BE DESIRABLE TO PROMOTE EFFICIENCY AND JUSTICE IN THE CIVIL ASSET FORFEITURE SYSTEM.

Unmeritorious NEV suits are, by their nature, likely to fail. But this does not mean that the owners of the seized property come out unscathed.

To the contrary, such suits are likely to affect property rights that many owners are unable to vindicate in court. This is because "[i]ndigent property owners . . . often lack the resources necessary to combat an unjust seizure of property."[4] Andrew Crawford,

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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).

[4] This is especially true for seizures of relatively small amounts. "Overcoming [litigation-related] hurdles is frequently difficult for claimants, especially because the amount seized is often small enough that it may not be worth pursuing a claim." Rishi Batra,

Note, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and Its Impact on Indigent Property Owners*, 35 B.C. J.L. & SOC. JUST. 257, 272 (2015). In fact, if the government does *not* bear the cost of litigation, economic models "suggest[] that prosecutors would prefer to prosecute poorer offenders as a rule." Nuno Garoupa & Francesco Parisi, *Should the Prosecutor Pay for Failure of Conviction?*, Minnesota Legal Studies Research Paper No. 12-42, at 13 (2012); *see also* Michael D. Makowsky et al., *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. LEGAL STUD. 189, 196 (2019) ("All else equal, police are less likely to focus their attention on groups with countervailing power.").

Because of this resource imbalance, many innocent property owners will have to settle their claims for less than the total amount seized. *See* Bruce L. Benson, *Escalating the War On Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 296, 315-16 & n.59 (2009) (discussing forfeiture practices in Volusia County, Florida, where innocent property owners nonetheless settled "for 50% to 90% of their money"). The result is that innocent victims of civil asset forfeiture fail to file suit in the vast majority of cases. Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 12–13 (2d ed. Nov. 2015); OIG, *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities* 28 (Mar. 2017) https://oig.justice.gov/reports/2017/e1702.pdf (studying 100 seizures, totaling $6.5 million, and finding that only 14 property owners filed a petition or claim).

This state of affairs suggests that property rights are currently under-protected and that additional marginal

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Resolving Civil Forfeiture Disputes, 66 U. KAN. L. REV. 399, 413 (2017).

deterrence of NEV forfeiture actions is warranted as a matter of both economics and justice.

CONCLUSION

Because lower courts have charted a course around CAFRA's fee-shifting provision, inefficient and unmeritorious forfeiture actions are not adequately deterred. Closure of this loophole would better protect the rights of innocent property owners and promote the just and efficient exercise of prosecutorial discretion.

Respectfully submitted.

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