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

REPLY BRIEF FOR CLAIMANTS-APPELLANTS

MICHAEL S. ELKIN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

ROBB C. ADKINS
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111
(415) 591-1000

STEFFEN N. JOHNSON
CHRISTOPHER E. MILLS
Winston & Strawn LLP
1700 K Street NW
Washington, DC 20006
(202) 282-5000

Counsel for Claimant-Appellant Megaupload Limited

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

CRAIG C. REILLY
111 Oronoco Street
Alexandria, VA 22314
(703) 549-5354

Counsel for Claimants-Appellants

DAVID B. SMITH
Smith & Zimmerman, PLLC
108 North Alfred Street
Alexandria, VA 22314
(703) 548-8911

Counsel for Claimants-Appellants Julius Bencko and Sven Echternach

IRA P. ROTHKEN
JARED R. SMITH
Rothken Law Firm
3 Hamilton Landing, Suite 280
Novato, CA 94949
(415) 924-4250

WILLIAM A. BURCK
DEREK L. SHAFFER
STEPHEN M. HAUSS
Quinn Emanuel Urquhart & Sullivan
777 6th Street NW, Suite 1100
Washington, DC 20001
(202) 538-8000

Counsel for Claimants-Appellants Kim Dotcom and Megaupload Limited

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INTRODUCTION

The government asks this Court to affirm a forfeiture order that is purely advisory, was justified only by Claimants' exercise of their right to oppose extradition, and was obtained without any opportunity to contest the government's case on the merits. Our justice system requires more. Claimants have not been convicted of any crime, have not fled the jurisdiction, and have not been extradited. They stand ready to defend their property—located entirely in countries that have refused to enforce the U.S. forfeiture orders. But without considering the merits, the district court declared that property forfeited. That order contravenes fundamental jurisdictional requirements, statutory commands, and due process.

In rem jurisdiction. The government does not seriously dispute that the district court lacked control of the defendant property. Indeed, the government concedes that the foreign courts have refused "to enforce the forfeiture order," that "[the] property may suffer no adverse effect" from that order, and that "[t]he court's role is not to declare rights in hypothetical cases." Br. 20 n.13, 52. Nevertheless, the government refuses to acknowledge what follows from these concessions—the U.S. courts lack jurisdiction over the defendant property. In fact, the government's jurisdictional argument never even *mentions* Article III. Instead, the government doubles down on its position that a court without control over foreign

property may issue an advisory opinion that cannot be enforced as to that property. That view is untenable.

Disentitlement. On fugitive disentitlement, the government neglects the text of §2466, which *separately* requires notice and a refusal to come to the United States. If §2466 required only "specific intent," the statute's language requiring that the claimant acted "in order to avoid criminal prosecution" would serve no purpose. Thus, §2466 requires a showing that the claimant had the sole or principal intent "to avoid criminal prosecution," and the government never disputes that it cannot meet that standard.

Due Process. On due process, the government concedes that Claimants were denied "a meaningful opportunity to be heard on the merits." Br. 41. That denial cannot be justified as a "reasonable procedural requirement[]" or a "presumption." *Id*. at 40. *Degen* and numerous Supreme Court due process decisions squarely reject such rationales for disentitlement. And because there is no connection between Claimants' failure to appear in separate criminal proceedings and the district court's ability to adjudicate the merits of *this* case, disentitling Claimants from defending their property violates due process.

ARGUMENT

I. The applicability of §2466 is reviewed *de novo*, and reasonable inferences must be drawn in Claimants' favor.

The government's suggestion that the applicability of §2466 is reviewed for "clear error" (Br. 10-11) is belied by its leading case, which explains that whether "the statute is applicable"—including the question whether a claimant is a "fugitive"—is reviewed "*de novo*." *Collazos*, 368 F.3d at 195. The district court's conclusion that Claimants acted "to avoid criminal prosecution" is a *legal* conclusion based on the erroneous view that contesting extradition makes one a fugitive.

Next, the government says we compared its motion to strike only to a summary judgment motion, and points out differences between the two motions. Br. 11-12. But, quoting the decision below, we actually said the government's motion was "akin to a motion 'to dismiss the claim' *or* for summary judgment." Opening Br. 30 (emphasis added). And "[e]ssentially every court to have considered a disentitlement case—both under the common law and post-CAFRA—has treated the motion as something like a motion to dismiss, has looked to matters outside the pleadings, and has, where appropriate, allowed for the possibility of conversion to summary judgment." *$6,976,934.65*, 478 F. Supp. 2d at 38.

However one labels the government's motion, "all reasonable inferences" must be drawn "in favor of the nonmoving party"—Claimants. *Country Vintner of N. Carolina, LLC v. E & J Gallo Winery, Inc.*, 461 F. App'x 302, 304 (4th Cir.

2012); *Robinson v. Clipse*, 602 F.3d 605, 607 (4th Cir. 2010). That is how the Sixth and D.C. Circuits treat §2466 cases (*$6,976,934.65*, 554 F.3d at 132; *Salti*, 579 F.3d at 664), and the government offers no reason to do otherwise.

II. The district court's exercise of *in rem* jurisdiction cannot be reconciled with precedent or Article III.

As this Court has recognized, "[o]nly if [a] court has exclusive custody and control over the property does it have jurisdiction … to adjudicate rights in it that are binding against the world," in compliance with Article III's "case or controversy" requirement. *Titanic I,* 171 F.3d at 964, 955. Remarkably, however, the government's jurisdictional argument never mentions Article III. Rather, it doubles down on the position "that there is no requirement of actual or constructive possession for the court to exercise *in rem* jurisdiction over assets located in foreign countries." Br. 13. That is not the law. Section 1355(b) is a venue provision, and certainly does not provide jurisdiction over foreign property beyond the court's control. Nor could it. Article III bars U.S. courts from issuing advisory opinions concerning the ownership of foreign property.

A. Section 1355(b)(2), a venue provision, does not provide *in rem* jurisdiction, let alone over property beyond the U.S. courts' control.

Unable to answer binding precedent, the government pretends that the "plain language" of §1355(b)(2) provides *in rem* jurisdiction. Br. 13-14 & n.8. Not so. "Section 1355(b) addresses venue in forfeiture actions"—nothing more. *Meza*, 63

F.3d at 151. Section 1355(b)(2) provides that "an action or proceeding for forfeiture [of foreign property] may be brought," among other places, in "the district in which any of the acts or omissions giving rise to forfeiture occurred." This subsection says not a word about *in rem* jurisdiction over foreign property; the government does not dispute that no other subsection does either; and "[e]ven if a district is the proper venue for a civil forfeiture action, the court cannot proceed unless it has jurisdiction over the defendant property." *United States v. 51 Pieces of Real Prop.*, 17 F.3d 1306, 1310 (10th Cir. 1994).

Lacking statutory text that says anything like what the government asserts—that "*in rem* jurisdiction is proper … regardless of whether the district court had actual or constructive control over the property" (Br. 14)—the government turns to one Senator's (selectively edited) discussion of the bill containing §1355. But this Court "refuse[s] to displace a clear statutory provision … with an explanation proffered by a single member of Congress." *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 306 (4th Cir. 2000). Like the Second Circuit, this Court should "reject" the government's reliance on §1355's legislative history "to fundamentally alter well-settled law regarding *in rem* jurisdiction." *Meza*, 63 F.3d at 152.

In any event, this legislative history supports reversal. It says the "problem" supposedly "resolve[d]" by §1355(b)(2) is that of "repeated[] litigat[ion] whenever a foreign government is willing to give effect to a forfeiture order issued by a Unit-

ed States court and turn over seized property to the United States if only the United States is able to obtain such an order." 137 Cong. Rec. S16640-01, S16643 (Nov. 13, 1991). This understanding conflicts with the government's view that "jurisdiction … is not dependent on the willingness of a foreign government to enforce the order." Br. 16. Indeed, it confirms that the government must "demonstrat[e] that the [foreign] government will turn over at least a portion of the [property] to the United States.'" *Meza*, 63 F.3d at 154.

Hedging its bet, the government half-heartedly suggests that there was "sufficient evidence of constructive custody" to give the district court "reason to believe that its forfeiture order was likely to be honored based upon facts when it issued its order." Br. 17 n.10. But this assertion, having been raised only in a footnote, is waived. *E.g.*, *Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015). Further, the district court itself recognized that the foreign courts "may or may not" enforce its order. JA-1982. As the government later acknowledges, "clearly," "even with a valid forfeiture order, the fugitive's property may suffer no adverse effect." Br. 20 n.13.[1]

[1] The government repeatedly complained about these releases, underscoring that the district court did *not* have "reason to believe that its forfeiture order was likely to be honored." Br. 17 n.10; *e.g.*, Dkt. 119 at 4 ("Prior to the United States' motions to strike," New Zealand courts released "40% of the restrained assets.").

Even if the district court then had "reason to believe that its forfeiture order was likely to be honored" (Br. 17 n.10), that is irrelevant now. "[A]n actual controversy must be extant at all stages of review" (*Preiser*, 422 U.S. at 401), and *in rem* jurisdiction is lost where later events reveal that any judgment would be "useless" (*Republic Nat'l Bank*, 506 U.S. at 85).

B. Even if §1355(b)(2) purported to provide *in rem* jurisdiction, Article III would foreclose that result here.

That brings us to our second point: Even if §1355 somehow created *in rem* jurisdiction over property beyond the court's control, that would violate Article III. The rule that *in rem* jurisdiction requires control of the defendant property derives from the Constitution. "[T]he limits of *in rem* jurisdiction … are defined by the effective limits of sovereignty," and "Article III … do[es] not amount to an attempt by the United States to extend its sovereignty over" foreign property. *Titanic I*, 171 F.3d at 965, 961.[2] Without "exclusive custody and control over the [defendant] property," courts cannot "adjudicate rights … binding against the world." *Id.* at 964. And because "a case or controversy" requires issuing "a definitive adjudication"—one not "subject to revision" by another governmental body—no case or controversy exists here. *Wallace*, 288 U.S. at 261-62.

[2] None of the government's out-of-circuit decisions (Br. 15) considered whether the government's view of *in rem* jurisdiction is consistent with Article III. *E.g.*, *Banco Espanol*, 295 F.3d at 27 ("the claimant has raised no constitutional objections"). And, of course, those decisions, unlike the *Titanic* cases, are not binding.

The government dismisses this Court's precedent in a footnote, observing that *Titanic* was "an admiralty action." Br. 13 n.8. But the constitutional rule of *Titanic* applies to all *in rem* actions: Without power to "bind others who may have possession" (*Titanic I*, 171 F.3d at 964), "no case or controversy exists" and any court order is an unconstitutional advisory opinion (*Titanic II*, 435 F.3d at 530).

The government later acknowledges that "[t]he court's role is not to declare rights in hypothetical cases." Br. 52. In its *in rem* argument, however, the government says "[i]t strains logic to assert that a court could have *in rem* jurisdiction over a shipwreck 400 miles offshore" but not "over property placed in custody in New Zealand." Br. 13 n.8. Again, that ignores this Court's holdings. In the *Titanic* cases, there was constructive possession over a wreck located in international waters because the court had "a portion of [the wreck] within its jurisdiction." *Titanic I*, 171 F.3d at 967. But the courts "did not have constructive *in rem* jurisdiction over" artifacts "taken to France," "because constructive *in rem* jurisdiction applied only to the *Titanic* wreck lying in international waters." *Titanic II*, 435 F.3d at 530. This Court refused "to define a constructive *in rem* jurisdiction over personal property located within the sovereign limits of other nations." *Id.* And since the property here is "located within the sovereign limits of other nations," there is no jurisdiction.

Finally, the government attacks a straw man. According to the government, it is not "true, as Claimants suggest, that the foreign court has no control over the assets." Br. 17. But we have suggested no such thing. It is not the *foreign* courts that lack such control—it is *the U.S. courts*. Thus, the district court could issue only an advisory opinion—and lacked jurisdiction.

C. The government has not shown minimum contacts between the defendant property and Virginia.

The government's response to our minimum contacts argument is equally unconvincing. The government says "the test for *in rem* jurisdiction over forfeiture cases is not 'minimum contacts.'" Br. 17. But this Court "appl[ies] the minimum contacts test to the district court's exercise of in rem jurisdiction." *Harrods*, 302 F.3d at 224. And the government largely ignores this Court's decisions establishing that no minimum contacts existed here. Opening Br. 26-30.

The government dismisses *Carefirst* in a footnote, asserting that "the servers [there] were located in another state." Br. 18 n.12. But that was irrelevant to this Court's ruling. Following prior precedent, *Carefirst* dismissed "as 'de minimis' the level of contact created by the connection between an out-of-state defendant and a web server located within a forum"—even though the website received payments from users in the State. 334 F.3d at 402. That is the situation here.

The government says this case involves "specific payments … made to PNC Bank in Richmond, Virginia to further the conspiracy" (Br. 19), but fails to men-

tion that the payments were "to [an] account for Carpathia Hosting," the in-forum hosting company that operated the servers. SJA-230; JA-1963 n.9. And as the government admits, "a party's business relationship with an in-forum hosting company" is insufficient to "confer jurisdiction" under *Carefirst*. Br. 18 n.12.[3]

In sum, because the district court lacked control over the defendant property, and because that property lacked minimum contacts with Virginia, this case should be dismissed.

III. The government ignores the text of the fugitive disentitlement statute that requires more than "specific intent," and cannot carry its burden of proving intent.

The government's interpretation of the fugitive disentitlement statute likewise lacks merit. Citing the district court's holding that Claimants remained overseas "in order to avoid criminal prosecution," the government says the court "applied the very standard that [we] urge." Br. 26-27. Not so. True, the district court quoted §2466. The issue, however, is what the government must prove to show that Claimants acted "to avoid prosecution." On that legal question, §2466's text conclusively requires more than a showing of "specific intent." And the government does not dispute that, under a "sole" or "principal" intent standard, it cannot satisfy §2466.

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[3] *Account No. 80020796*, 2015 WL 1285791,*5, which the government cites in arguing that "[u]se of the banking system would certainly establish sufficient connection" (Br. 19), was based on §1355, not minimum contacts.

A. Reading §2466 to require only a showing of "specific intent" would nullify the phrase "to avoid criminal prosecution."

As explained in our opening brief (at 32-33), reading §2466 to require only a showing of "specific intent" would nullify the phrase "in order to avoid prosecution." The government acknowledges that "interpretation of a statute[] begins with its text" (Br. 48), but never answers this clear textual argument.

"'[S]pecific intent' means the intent to accomplish the precise act with which one is later charged." *Technodyne*, 753 F.3d at 383 (quotations, brackets omitted). Here, therefore, proving "specific intent" would require only a showing that Claimants (1) had notice of the U.S. proceeding yet (2) failed to travel here to participate—elements that §2466 *separately* requires. Opening Br. 32-33. Under the government's "specific intent" reading, therefore, the statute's requirement that the claimants acted "in order to avoid criminal prosecution" does no work, in violation of the rule that "that a statute should be construed so that effect is given to all its provisions." *Corley*, 556 U.S. at 314.

The government has no answer. It largely ignores §2466's text, and simply cites Second and Ninth Circuit decisions that likewise fail to grapple with the text. Br. 27-28. The government repeatedly attacks a "sole intent" standard, but (tellingly) never suggests that it could satisfy that standard (or even a "principal intent" standard), which the D.C. and Sixth Circuits have held is compelled by §2466's "plain language." *$6,976,934.65*, 554 F.3d at 132; *accord Salti*, 579 F.3d at 664.

The government's effort to distinguish those decisions falls flat. According to the government, *$6,976,934.65* turned on the case's posture "on summary judgment." Br. 29. Not according to the D.C. Circuit, which held that "[t]he plain language of § 2466 mandates [a] showing" "that avoiding prosecution is *the* reason [the claimant] has failed to enter the United States." 554 F.3d at 132 (quotations omitted). In short, "mere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy the statute." *Id.*

The government says *Salti*, which adopted the same analysis (579 F.3d at 664), "recognized that the district court might be able to 'apply the fugitive disentitlement statute … on remand,' notwithstanding evidence that the claimant's poor health might be another reason." Br. 30. But what is instructive about *Salti* is that the *potential* existence of "another reason" that had been called into "doubt" was enough to reverse the "application of the fugitive disentitlement statute to dismiss [the claimant's] claim." 579 F.3d at 666. The government ignores this difficulty.

The government next argues that "when the legislature has meant to impose a sole intent limitation, it has done so expressly." Br. 30-31. Yet it is equally true that when Congress has meant to impose a specific intent limitation, it has done so expressly. *E.g.*, 10 U.S.C. §880(a); *id.* §950t(28)(b); 15 U.S.C. §6605(b)(1)(B)(i); 18 U.S.C. §1091(a). Moreover, courts commonly read statutes (including CAFRA itself) that do not specify the necessary mental state to require that committing the

requisite act was the party's principal or sole purpose or intent. *E.g., Foster v. United States*, 522 F.3d 1071, 1077-79 (9th Cir. 2008) (interpreting "for the purpose of forfeiture" to mean "solely for the purpose of forfeiture"); *Mortensen v. United States*, 322 U.S. 369, 373-74 (1944) (interpreting "intent and purpose" to mean "dominant motive"). Because §2466's other requirements demonstrate that it requires more than specific intent, the same result is warranted here.

B. The government fails to rehabilitate the district court's erroneous intent determination.

The government acknowledges "that there were factors that weighed against a finding" that Claimants acted "to avoid criminal prosecution." Br. 32. But it then cites facts with little relation to Claimants' intent in remaining abroad—and ignores the evidence that Claimants had many legitimate reasons to remain abroad. Worse, the government relies on "facts" lacking record support. Br. 34, 37. All of this confirms that Claimants did not act "to avoid criminal prosecution."

First, the government says "the weight of authority" shows that Claimants' opposition to extradition "is most surely relevant to their intent." Br. 32. But the government's cases simply confirm that "mere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy the statute." *$6,976,934.65*, 554 F.3d at 132. Unlike here, *$1,231,349.68* involved a claimant who, "aware of the allegations against him, fled the [United States]." 227 F. Supp. 2d at 133. And in *Kobi Alexander*, the court held that the claimant "cor-

rect[ly]" stated that "applying" fugitive disentitlement would "penalize" him "for asserting his rights under" foreign law. 617 F. Supp. 2d at 128.

Here, disentitlement violates several extradition treaties. Opening Br. 33-39. The government refuses to grapple with this point, dismissing it in a cursory footnote. Br. 46 n.28. But Claimants are not "made … fugitive[s] by opposing the government's request for extradition," for they have "a legal right to do" so. *Account No. 40187-22751518*, 2015 WL 1546350, *3.

Second, the government discusses each Claimant. For Dotcom, the government, following the district court, cites his public offer "of $5 million to anyone with" information "that could result in his victory." Br. 34. But this does not prove Dotcom's intent in remaining abroad. It simply suggests that, if extradited, Dotcom, like most litigants, desires to win his case.

The government also says Dotcom "found[ed] and donat[ed] at least NZD $3.5 million to a New Zealand political party, (J.A.151,1970) at least in part to avoid extradition." Br. 34, 37. But there is *no* record support for this assertion. Indeed, as even the district court recognized, Dotcom's "work in New Zealand,"

"includ[ing] Internet entrepreneurship and founding a political party," demonstrates that he had legitimate reasons to stay home. JA-1971.[4]

Other than to restate the legally insufficient fact that they oppose extradition, the government has no answer to our showing that Claimants Batato, Ortmann, and van der Kolk intend to remain in New Zealand to work and support their families. The government says their affidavits are "self-serving" (Br. 34), but cannot dispute the facts. Nor does the government dispute that "the government's actions in New Zealand would 'allow[] NZ authorities to sell any seized assets associated with Megaupload'—unless Claimants are there to contest that result." Opening Br. 35.

As to Echternach, the government ignores that the district court improperly focused on whether he "is in custody or confinement in Germany" (JA-1975), rather than whether he intended to avoid prosecution. According to the government, one of Echternach's reasons for failing to appear—that he "must remain in Germany to address … the criminal proceedings" there (JA-565)—is "dubious" because those proceedings would be "unlikely" to "persist" if he left Germany. Br. 36. But as Echternach's counsel explained in uncontroverted testimony, those proceedings

[4] Similarly unsupported is the government's claim that Dotcom has spoken "on the Fugitive-Claimants' behalf." Br. 35. There is no evidence that the other Claimants authorized or adopted the one cited message, sent from Dotcom's Twitter account. JA-181.

"differ[ed] from" the U.S. charges and, if absent, he could "face a non-revocable judgement/sentence." JA-1433-34.

Finally, the government emphasizes that Bencko desired "not [to] travel outside Slovakia." Br. 36-37. But as the district court explained, neither did he want to travel *within* Slovakia. JA-1977. In any event, Bencko merely returned to his birthplace and country of residence, citizenship, and work. JA-1976-77; JA-566.

Given that the government must show that §2466 applies, that all reasonable inferences must be drawn in Claimants' favor, and that notice and a refusal to come to the U.S. cannot satisfy the statute, Claimants' uncontroverted statements easily demonstrate their intent in remaining abroad.[5] And given the weakness of the government's case and the fact that "[t]he dignity of a court" is "eroded … by too free a recourse to rules foreclosing consideration of claims on the merits," the district court at a minimum should have exercised its discretion not to apply the "most severe" "sanction of disentitlement." *Degen*, 517 U.S. at 828. Indeed, ap-

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[5] The government's cases differ markedly from this one. The foreign claimant in *$671,160.00* had "extensive travel to California prior to the issuance of the pending criminal charge." 730 F.3d at 1057. The claimant in *$1,231,349.68* "fled the United States" after learning of the criminal investigation. 227 F. Supp. 2d at 131-32. And the claimant in *$138,381* appeared and "pled guilty" in his criminal case before he "fled" the jurisdiction (Br. 37). 240 F. Supp. 2d at 226. Our cases (Br. 38-39 & n.3), which the government ignores, are far more relevant.

plying §2466 here violates due process—and certainly raises sufficient constitutional doubts to warrant a narrowing construction of the statute. Opening Br. 40.

IV. Application of fugitive disentitlement here is unconstitutional.

As the government's own cases explain (Br. 40), from "[e]arly in [the Supreme Court's] jurisprudence," that Court has held "that 'wherever one is assailed in his person or his property, there he may defend.'" *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (alteration, citation omitted). "To put it as plainly as possible, the [government] may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); *see* Amicus Br. 5-10.

As the government recognizes, however, the disentitlement order does just that: It means Claimants "can never challenge the government's case," deprives them of "a meaningful opportunity to be heard on the merits," "bars [them] from invoking [the] judicial process," sets aside "all of [their] defenses," and makes the case "essentially an uncontested action." Br. 39 n.22, 25, 41. The government's attempts to defend this result are unconvincing.

A. Disentitlement was not based on any legitimate presumption, and thus violates Claimants' due process rights.

The government's leading argument is that disentitling Claimants for failing to appear in a separate criminal case operates as a mere "adverse presumption that a claimant can defeat by entering an appearance," and is thus a "reasonable proce-

dural requirement." Br. 40-41. This argument, however, cannot be squared with *Degen* or the Supreme Court's other decisions limiting use of the "most severe" "sanction of absolute disentitlement." *Degen*, 517 U.S. at 827-28; Opening Br. 42-49. Moreover, the government's own cases limit permissible procedural requirements to statutes of limitations, filing fees, and similar devices.

1. *Degen*'s holding that disentitlement was "unjustified," "harsh," and "arbitrary" confirms that the district court's forfeiture order violates due process.

The government's position would nullify *Degen*. To be sure, the Court there recognized the courts' inherent power "to protect their proceedings and judgments in … discharging their traditional responsibilities." 517 U.S. at 823. Yet the Court rejected the notion that disentitlement was a "reasonable response" that would "promote[] the efficient, dignified operation of the courts." *Id*. at 823-24. Explaining that "[a] court's inherent power is limited by … necessity," the Court found "no necessity to justify th[is] rule of disentitlement." *Id.* at 829. The Court repeatedly stressed this point, calling the "harsh" and "most severe" "sanction of absolute disentitlement" in this context "unjustified," "too blunt an instrument for advancing" the courts' interests, and "an arbitrary response to the conduct it is supposed to redress." *Id.* at 825, 827-28.

Under *Degen*, disentitling Claimants for failing to appear in a separate criminal case—the exact situation there—cannot be justified as a "reasonable procedur-

al requirement[]" that "rationally advances the court's interest in orderly procedure." Br. 40-41. Indeed, the government's assertion (without quotation) that *Degen* "suggested that procedural requirements such as Section 2466 could be permissible" (Br. 42, 22) renders that decision unrecognizable.

Although the Court in *Degen* declined to decide "whether enforcement of a disentitlement rule under proper authority would violate due process," it strongly suggested that due process would require the same result. 517 U.S. at 828. As the Court explained in the next sentence: "It remains the case, however, that the sanction of disentitlement is most severe," and "the respect accorded [a court's] judgments … is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." *Id.* The Court further noted that, because "[t]he right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there," the Court repeatedly "ha[s] held it unconstitutional to use disentitlement similar to this." *Id.* The government offers no reason to depart from the Supreme Court's reading of its own precedents, which confirm that §2466 was applied unconstitutionally here.

2. Section 2466 does not impose a "procedural requirement."

The government's own cases underscore that this Court should reverse. Citing *Logan*, the government says courts "'may erect reasonable procedural requirements.'" Br. 40. But *Logan* found an unconstitutional denial of due process, and

explicitly listed the types of "procedural requirements" it had in mind: "statutes of limitations" and "filing fees." 455 U.S. at 437. Both are a far cry from disentitling foreign residents from defending their foreign property for failing to appear in a separate U.S. action.

National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37 (1954) (Br. 41), upheld the dismissal of an appeal from a money judgment for failure to provide a bond pending appeal to "safeguard[] the collectability of that judgment." 348 U.S. at 41. The dismissal "cut off only" a constitutionally optional appeal "after a full trial by judge and jury," and the Court analogized this dismissal to dismissing a criminal appeal "where a prisoner has escaped from custody while his appeal is pending"—the traditional use of the fugitive disentitlement doctrine. *Id.* at 42-43. Nothing in *Arnold* sanctions the denial of "a full trial" on the merits in a separate action.

The government's reliance on *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876) (Br. 40) fares even worse. *Windsor* and *McVeigh v. United States* (78 U.S. at 266-67) involved the same claimant and identical allegations (but different property), and both held that the courts could *not* disentitle a Confederate rebel in Richmond who had "appeared by counsel, and filed a claim to the property." *Windsor*, 93 U.S. at 276. To allow striking such a claim would violate a principle "at the foundation of all well-ordered systems of jurisprudence": "Wherever one is assailed in

his person or his property, there he may defend, for the liability and the right are inseparable." *Id.* at 277.

The government dismisses the earlier *McVeigh* case on the purported basis that "Claimants [here] could have appeared … and invoked their right to a full opportunity to challenge the forfeiture." Br. 44. But that was equally true in the *McVeigh* cases, where the district court issued process "warn[ing] all persons" who were "interested in the land, or claiming an interest," to "intervene" and "appear and make their allegations." *Windsor*, 93 U.S. at 276 (quotations omitted). When the claimant instead "appeared by counsel, and filed a claim," the court struck it because it he apparently remained "a resident … of Richmond, within the Confederate lines, and a rebel." *Id.* But McVeigh's ability to appear did not deter the Supreme Court from holding that disentitlement violated due process—a holding it has repeatedly reaffirmed. Opening Br. 44-49. The same is true of *Hovey*, where the litigant deliberately disobeyed the court's order, but the Court held it unconstitutional to strike his answer. 167 U.S. 411-12.

3. Section 2466 cannot be justified as a presumption.

The *McVeigh* cases also confirm that disentitlement here cannot be justified as a mere "presumption." If striking the owner's claim in *McVeigh* for remaining in Confederate territory and in active rebellion could not be justified based on a

presumption that he was in fact a rebel, neither can disentitlement here be justified by relabeling it a "presumption."

Hammond Packing is not analogous. The Court there upheld striking a defendant's answer based on a "presumption that the refusal to produce" material evidence "was but an admission of the want of merit in the asserted defense." 212 U.S. at 339-42, 351. As the Court emphasized, laws as far back as the 1789 Judiciary Act approved of such presumptions, and no argument "ha[d] ever been raised questioning the power given to render a judgment by default under the circumstances provided for." *Id.* at 352. That longstanding tradition stands in stark contrast to §2466, a novel law that attempts to codify a practice invalidated by the Supreme Court. Opening Br. 42-49; *cf. Hovey*, 167 U.S. at 420 (refusing to sanction disentitlement for contempt, which lacked precedent in "all the reported decisions of the chancery courts in England" and nearly all "American adjudications").

Due process bars courts from striking the answer of defendants whose "behavior … will not support the *Hammond Packing* presumption" (*Compagnie des Bauxites*, 456 U.S. at 706), and §2466 is nothing like the presumption approved in *Hammond Packing*. Claimants have not refused to provide information, evidence, or pleadings. According to the government, because they could potentially "attack the Government's civil case from" abroad, that "justifies a presumption regarding 'the want of merit in their asserted defenses.'" Br. 42. But the former has nothing

to do with the latter. Unlike "refus[ing] to supply information" (*id.*), nothing about Claimants' conduct suggests that their defenses here lack merit. And the government's own authority recognizes that courts are rightly "reluctant to endorse imposition of sanctions that dispose of a case without reference to the merits, independent of the level of willful disobedience"—especially where "the issue subject to default or dismissal has no connection with [any] information the party has neglected to supply." 4A Moore's Federal Practice ¶ 37.03[2], at 37-70 (1995).

4. There is no "substantial nexus" between Claimants' absence from the criminal case and the course of this forfeiture case.

Disentitlement requires "a substantial nexus between a litigant's fugitive status and *the issue before the court*." *Jaffe*, 294 F.3d at 597 (emphasis added). Here, however, there is no "substantial nexus" between Claimants' foreign status and these proceedings. The government says a "'substantial nexus' exists here because the Claimants remain fugitives in the parallel criminal case," which Claimants "concede[]" is related to this forfeiture case. Br. 43. Not so. "[F]ugitive status alone does not suffice to invoke the doctrine." *Jaffe*, 294 F.3d at 596. A "substantial nexus" exists only if there is a "risk of unenforceability" of the judgment due to

the litigant's absence or a similarly close "connection to the course of [the court's] proceedings." *Ortega-Rodriguez*, 507 U.S. at 244-46. Neither exists here.[6]

Obviously the two actions here are "related" in some sense, but "mere commonality of subject matter is insufficient." *Daccarett-Ghia*, 70 F.3d at 629. As *Degen* held, failing to appear in "a related criminal prosecution" *cannot* "justify the rule of disentitlement in [the civil forfeiture] case," for such a rule is "an arbitrary response to the conduct it is supposed to redress." 517 U.S. at 823, 828-29; *see $40,877.59*, 32 F.3d at 1156 ("the claimant's fugitive status does not threaten the integrity of the forfeiture proceeding."). Thus, the government's "substantial nexus" argument is untenable.

5. Speculative discovery issues cannot justify disentitlement.

In a footnote, the government speculates that, "should this case proceed to discovery," it might not have the "opportunity" to "depose Claimants." Br. 43 n.23. But as *Degen* explains, if the claimant's "unwillingness to appear in person results in non-compliance with a legitimate order of the court respecting pleading, discovery, the presentation of evidence, or other matters, he will be exposed to the same sanctions as any other uncooperative party." 517 U.S. at 827. The Court continued: "[I]t would be premature to consider now the precise measures the court

[6] The government never disputes our contention that, "[a]ssuming *arguendo* the property is in the court's control, any judgment should be fully enforceable regardless of Claimants' fugitive status." Opening Br. 55 (quotations omitted).

should adopt as the case proceeds," but "[t]he existence of these alternative means of protecting the Government's interests … shows the lack of necessity for the harsh sanction of absolute disentitlement." *Id.*[7] So too here. The government ignores other possible scenarios—including that Claimants may prevail on defenses that "require little discovery" (*id.*), or could even be in the U.S. by then. Regardless, speculation about future events cannot justify applying disentitlement now.

6. Section 2466 provides no adequate due process safeguards.

The government says "two other procedural safeguards" in §2466 "support due process." Br. 45. Yet the government does not (and cannot) suggest that the statute provides *adequate* process. One "safeguard" is that the district court had "to make a factual finding" of Claimants' fugitive status. *Id.* Setting aside that this determination was made without discovery sought by Claimants (JA-536-40), this "safeguard" begs the question whether Claimants may be disentitled from defending the merits based on their absence from a separate case. It provides no means for Claimants to defend their property.

The government's second "safeguard"—that the district court had "discretion to choose not to" disentitle Claimants (Br. 45)—is equally irrelevant. That the

[7] The government speculates that a motion "to depose [Claimants] would be denied" (Br. 43 n.23), but the cited decisions did not prohibit taking foreign claimants' depositions. Rather, they denied foreign claimants' motions to testify remotely (*Kivanc*, 714 F.3d at 791; *Vringo,* 2015 WL 4743573, *6)—underscoring that discovery issues can be addressed as they arise.

court could have chosen not to act unconstitutionally does not make its order constitutional. And again, this "discretion" is unrelated to the denial of Claimants' right to defend this forfeiture action on the merits.

7. Claimants have not waived their due process challenge.

Citing three out-of-circuit decisions abrogated by *Degen*, the government next says Claimants' "extensive briefing and argument" below shows that they "waived their right to challenge the forfeiture of assets by their refusal to enter this country to face the criminal charges." Br. 45-47. Again, however, this argument begs the question whether the government can constitutionally prohibit Claimants' from contesting the government's forfeiture case for failing to appear in a separate criminal case. The answer is no: "[A] court in a civil forfeiture suit [cannot] enter judgment against a claimant because he is a fugitive from, or otherwise is resisting, a related criminal prosecution." *Degen*, 517 U.S. at 823.

By the government's lights, "[s]triking a fugitive's claim after following the procedure prescribed by the legislature … does not offend … due process." Br. 41. But this "view misconceives the origin of the right to procedural due process," which "is conferred, not by legislative grace, but by constitutional guarantee." *Vitek v. Jones*, 445 U.S. 480, 491 n.6 (1980). The government says "a hearing was certainly available to [Claimants] on the terms established by Congress." Br. 48. But since the right to defend on the merits is a *constitutional* right, it cannot be

"diminished by the fact that [Congress] may have specified its own procedures that it may deem adequate." *Logan*, 455 U.S. at 432 (quotation omitted).

Indeed, the government's "waiver" argument would allow it to eliminate all due process rights by substituting procedures it "deem[s] adequate for determining the preconditions to adverse official action." *Id.* But "courts indulge every reasonable presumption against waiver" of "constitutional rights." *Fuentes*, 407 U.S. at 94 & n.31 (quotations omitted). And here, Claimants have sought to vindicate their constitutional rights, not waive them.

The government's "rule would sweep far too broadly." *Ortega-Rodriguez*, 507 U.S. at 246. For instance, it would allow Congress to pass a law requiring that a "defendant-fugitive … be found guilty by default because of his fugitive status." *$40,877.59*, 32 F.3d at 1154. Yet that result would clearly be unconstitutional—and the Court in *Hovey* found "[n]o distinction" between such a rule and "taking property of one and giving it to another without [civil] hearing." 167 U.S. at 419.

In sum, the district court's application of §2466 violated due process and should be reversed.

B. The German MLAT protects Claimant Echternach from disentitlement.

The government initially says the MLAT is irrelevant because "Echternach was never summonsed to appear pursuant to … the treaty." Br. 49. But if Echternach was not summonsed, then the order below—which rests entirely on Echter-

nach's "failing to appear" (JA-1979 n.21)—was wrong from the outset. Perhaps this is why the government did not make this argument below.

In any event, the government in fact made "requests … under the [MLAT] … ask[ing] for the arrest and extradition of Mr Echternach to the United States in order to prosecute him." JA-1432-33. That is the very definition of a "summons": a "process commencing the plaintiff's action and requiring the defendant to appear and answer." Black's Law Dictionary 1665 (10th ed. 2014). Because Echternach "fail[ed] to appear" (JA-1979 n.21), the court disentitled him. That disentitlement violated the MLAT's plain text, which prohibits the United States from subjecting a non-resident who does "not answer a summons" "to any penalty or … any coercive measures" for failing to appear. JA-823. The government cannot evade its treaty obligations by re-labeling its summons.

Aware of this difficulty, the government says "application of fugitive disentitlement is not 'a punishment or coercive measure.'" Br. 49. As the Supreme Court has held, however, "[u]se of the dismissal sanction" following disentitlement and "statutory *in rem* forfeiture" both constitute "punishment." *Ortega-Rodriguez*, 507 U.S. at 247-48 & n.17; *Austin*, 509 U.S. at 614. The government insists that disentitlement here is but a "presumption," but as we have shown, Claimants' failure to appear in the criminal case has no bearing on the merits of "the[ir] asserted defense[s]." Br. 49.

Even the government's authority recognizes that disentitlement is a "coercive measure." The government compares disentitlement to "a district court's exercise of its civil contempt sanctions." Br. 51. But as the cited authority explains, "civil contempt sanctions … are considered to be coercive"—even though they are "avoidable through obedience." *Int'l Union v. Bagwell*, 512 U.S. 821, 827 (1994).

V. The district court erroneously struck Mona Dotcom's claims.

Citing cases decided after the pleading stage, the government says Mona's standing is determined not by a "colorable interest test," but by a "dominion and control" test. Br. 51-53. Not so. Every circuit has held that "all a claimant needs to show at the pleading stage is a 'facially colorable interest in the proceedings.'" 1 Smith, *Prosecution and Defense of Forfeiture Cases* ¶9.04[2][b], at 9-70.35-36 & n.72 (2015) (collecting cases). Contrary to the government's view that "a 'colorable interest test' was not part of [this Court's] *Munson*'s holding" (Br. 51), *Munson* held that the claimants "ha[d] Article III standing" because they "claim[ed] a facially colorable interest in the seized property." 477 F. App'x at 63.

The government next argues that Mona's challenge is not ripe because the New Zealand courts have "refused to allow even an innocent spouse[] … to retain [property] subject to forfeiture" (Br. 54), but that puts the cart before the horse. The government has not proved forfeitability, and Mona has alleged a colorable interest in the property. That suffices for standing.

Nor does it matter that Mona "has not sought an actual adjudication of her marital property rights" or "reached a settlement agreement." Br. 55. The district court concluded otherwise by relying on a reversed trial-level decision in *Hayward* (JA-1993-94; JA-1101-02), but the appellate court there held that a pre-existing compromise or order dividing relationship property was not required because the spouse had the "right" to claim her interest under the Property Rights Act (JA-1117-19). Mona's foreign law expert confirmed this interest. JA-1923-26. The district court thus erred in ruling that Mona lacked standing.

CONCLUSION

The government seeks an unprecedented power to take property around the world without having to prove its case. Because such power is inconsistent with Article III, 28 U.S.C. §2466, and due process, the judgments below should be vacated and the case dismissed for lack of jurisdiction or remanded for further proceedings.

Respectfully submitted,

s/ Steffen N. Johnson

STEFFEN N. JOHNSON
CHRISTOPHER E. MILLS
Winston & Strawn LLP
1700 K Street NW
Washington, DC 20006
(202) 282-5000

MICHAEL S. ELKIN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

ROBB C. ADKINS
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111
(415) 591-1000

Counsel for Claimant-Appellant Megaupload Limited

CRAIG C. REILLY
111 Oronoco Street
Alexandria, VA 22314
(703) 549-5354

Counsel for Claimants-Appellants

DAVID B. SMITH
Smith & Zimmerman, PLLC
108 North Alfred Street
Alexandria, VA 22314
(703) 548-8911

Counsel for Claimants-Appellants Julius Bencko and Sven Echternach

IRA P. ROTHKEN
JARED R. SMITH
Rothken Law Firm
3 Hamilton Landing, Suite 280
Novato, CA 94949
(415) 924-4250

WILLIAM A. BURCK
DEREK L. SHAFFER
STEPHEN M. HAUSS
Quinn Emanuel Urquhart & Sullivan
777 6th Street NW, Suite 1100
Washington, DC 20001
(202) 538-8000

Counsel for Claimants-Appellants Kim Dotcom and Megaupload Limited

SEPTEMBER 14, 2015

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Steffen N. Johnson, an attorney, certify that I have complied with the above-referenced rule, and that according to the word processor used to prepare this brief, Microsoft Word, this brief contains 6,999 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: September 14, 2015

/s Steffen N. Johnson
Steffen N. Johnson

CERTIFICATE OF SERVICE

I, Steffen N. Johnson, an attorney, certify that on this day the foregoing Reply Brief for Claimants-Appellants was served electronically on all parties via CM/ECF.

Dated: September 14, 2015

s/ Steffen N. Johnson
Steffen N. Johnson