No. 16-1206

IN THE

Supreme Court of the United States

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

Petitioners,

AND

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

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Fourth Circuit

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June 21, 2017

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INTRODUCTION

While opposing review, the Government barely engages the circuit splits and constitutional concerns Petitioners identify. If ever the views of the United States should be discounted, it is in the context of civil forfeiture and fugitive disentitlement. Here, the United States has a vested financial stake in forestalling review and preserving the prevailing regime. *See* Brief of *Amici Curiae* Institute for Justice, *et al.* ("IJ Br."), at 4–5, 7–15. The Government today is relatively unconstrained in pursuing forfeiture of assets abroad, and circuits are in disarray as to the bounds of fugitive disentitlement. This Court should clarify the jurisdictional, procedural and substantive parameters governing civil forfeiture.

The First Question Presented implicates essential jurisdictional limits. The circuits disagree about those limits, with the Second Circuit standing apart in applying "traditional" rules demanding control of property to constrain all *in rem* proceedings, notwithstanding 28 U.S.C. § 1355. That foreign courts have yet to enforce the forfeiture order and have expressed doubts about ever enforcing it (Petition for a Writ of Certiorari ("Pet.") 18–19) heightens concern that it is an unconstitutional advisory opinion.

As to the Second Question Presented, the procedures governing fugitive disentitlement have occasioned sharp splits. Although the Government now doubts preservation (Brief for the United States in Opposition ("Opp.") 26), it had no such doubt below, pointedly engaging the issue and citing its side of the on-point circuit split. *See* Supplemental

Appendix ("Supp.") 5a–8a. When the Fourth Circuit opted to review factual findings derived at the pleading stage only for "clear error" (36a), it joined those circuits holding that disentitlement and related factual disputes may be decided on pleadings alone. The D.C. Circuit and Sixth Circuit diverge, however, insisting that resolution of disputed facts await summary judgment, at which point non-movants still deserve all reasonable inferences.

Finally, the Third Question Presented has further fractured the circuits. While favoring the Second and Fourth Circuit's "specific intent" standard for fugitive status, the Government blinks reality when denying that the D.C., Fifth, Sixth, and Ninth Circuits substantively differ. Lest there be any doubt, the Second Circuit (which the Fourth followed) has "respectfully disagree[d]" with the D.C. Circuit (as later followed by the Sixth). *United States v. Technodyne LLC*, 753 F.3d 368, 371, 384–85 (2d Cir. 2014).

Any principled view of fugitive disentitlement has been abandoned in this case. *Cf. Degen v. United States*, 517 U.S. 820, 828 (1996) (noting due-process question); *Niemi v. Lasshofer*, 728 F.3d 1252, 1255–57 (10th Cir. 2013) (Gorsuch, J.) (expressing qualms); IJ Br. 20–26. Far from being directed towards persons who have fled or avoided our country while claiming assets in it, fugitive disentitlement is being used *offensively* to strip foreigners of their assets *abroad*. Contrary to the Fourth Circuit's view, the mere fact that a defendant simultaneously contests extradition and forfeiture of his foreign assets should not suffice to disentitle him as a "fugitive."

These Questions Presented build upon those the Court recently answered to invalidate criminal imposition of fines against innocent persons and forfeiture of untainted property. *See Nelson v. Colorado*, 137 S. Ct. 1249 (2017); *Honeycutt v. United States*, 137 S. Ct. ---- (2017). Absent review, forfeiture of tens of millions of dollars will be a *fait accompli* without the merits being reached. This is especially disconcerting because the Government's criminal case is so dubious. When the Government characterizes Petitioners as "designing and profiting from a system that facilitated wide-scale copyright infringement," (Opp. 5), it continues to paint a portrait of *secondary* copyright infringement, which is *not* a crime. *See* Pet. 5 & n.3. If this stands, the Government can weaponize fugitive disentitlement in order to claim assets abroad.

It is time for the Court to speak to the Questions Presented. Over the past two decades it has never had a better vehicle to do so, nor is any such vehicle elsewhere in sight.

ARGUMENT

I. THE FIRST QUESTION PRESENTED (JURISDICTIONAL) IMPLICATES CONSTITUTIONAL PRECEPTS AS WELL AS A CIRCUIT SPLIT

The First Question Presented asks whether federal courts can exercise *in rem* jurisdiction over foreign property controlled by foreign courts. The Second Circuit answers by holding that "well-settled law regarding *in rem* jurisdiction" requires "actual or constructive control" over the property. *United States v. All Funds on Deposit in any Accounts Main-*

tained in Names of Meza or De Castro ("*Meza*"), 63 F.3d 148, 152–53 (2d Cir. 1995).[1] Meanwhile, the Third, Fourth, Ninth, and D.C. Circuits hold that 28 U.S.C. § 1355(b) "dispense[s] with this traditional requirement," "abrogate[s] the traditional rule," and "confer[s] subject-matter jurisdiction . . . regardless of whether the court has actual or constructive control over the property." Opp. 11, 16 (citing cases). This presents a circuit split.

To oppose review, however, the Government distinguishes constitutional limits on *in rem* jurisdiction from statutory limits, contending only the latter occasions a split. Opp. 11–13, 15–18. Petitioners respectfully disagree. *Meza* concluded that § 1355 confers venue, not jurisdiction, out of solicitude for the traditional rule that "the court must have actual or constructive control of the *res* when an *in rem* forfeiture suit is initiated." 63 F.3d at 152 (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 87 (1992)).

Unlike *in personam* cases—which the Government inaptly cites, *see* Opp. 14 (citing *Chafin v. Chafin*, 133 S. Ct. 1017, 1025 (2013))—actions *in rem* are predicated upon the court's power over the *res*, rather than "*parties* who are before the federal court." Opp. 14 (emphasis added). The "judicial power" conferred by "Article III" specifically limits "*in rem*" disputes to those involving "property in the court's control." *Struck v. Cook Cty. Pub. Guardian*,

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[1] The Government denies neither that *Meza's* language is a holding nor that a subsequent panel could not overturn it. *Compare* Opp. 17 *with* Pet. 15 n.6. The court below was therefore right to acknowledge the ostensible split. *See* 7a–8a.

508 F.3d 858, 859–60 (7th Cir. 2007) (Posner, J.); *see Covell v. Heyman*, 111 U.S. 176, 182–84 (1884); *Mohr v. Manierre*, 101 U.S. 417, 421–22 (1879); Pet. 13–14. Even the Fourth Circuit has "emphasize[d] the distinction between *in personam* jurisdiction and *in rem* jurisdiction," indicating control of the *res* is an "Article III" requirement of the latter. *R.M.S. Titanic, Inc.*, 171 F.3d 943, 957, 961 (4th Cir. 1999). In rejecting *Meza's* holding, therefore, the Government and four circuits constitutionally err. *See* Opp. 16–17.

Nor, as the Government contends and the Fourth Circuit now maintains (Opp. 14–15, Pet. 13a–14a), is this longstanding requirement of custody or control peculiar to admiralty. The admiralty cases are grounded in jurisdictional precepts encompassing *all* actions *in rem*. *See, e.g.*, *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501–02 (1998); *R.M.S. Titanic, Inc.*, 171 F.3d at 957–58, 960–61. Indeed, civil-forfeiture statutes and procedures are often modeled upon admiralty, *see, e.g.*, 28 U.S.C. § 2461(b), as this Court made clear in *Republic National Bank* when invoking admiralty law to address civil forfeiture. 506 U.S. at 85–89.

In any event, the Government's distinction between statutory and constitutional limits should make no difference at this stage. *Cf.* 12a (treating constitutional challenge to jurisdiction as "essentially the same 'lack-of-control' attack claimants launched against § 1355"). Although Petitioners (like the dissent below) maintain the operative jurisdictional constraint is best grounded in Article III, the ultimate question for this Court will simply be whether jurisdiction exists. "Because it involves a

court's power to hear a case," subject-matter jurisdiction must be addressed and "can never be forfeited or waived." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (citation omitted). Granting review would thus ensure resolution of the extant split: By concluding that *in rem* jurisdiction *is* properly exercised in these circumstances, the Court would necessarily find requisite jurisdictional conferrals in *both* § 1355 *and* Article III. Alternatively, by concluding that jurisdiction is *not* properly exercised, the Court would establish limits hitherto eluding lower courts and thereby moot other questions bedeviling them. It simply does not matter to this Court's initial grant of review *where* exactly the operative limits reside—be it § 1355 or Article III.

Nor does the Government persuade by now characterizing New Zealand and Hong Kong courts as "cooperat[ing]" such that they will likely "honor a forfeiture" order. Opp. 13, 15 (citing 15a). Contrary to its newfound suggestion, the Government below effectively *disclaimed* constructive control. Supp. 9a–12a. Moreover, not only have the foreign courts *not* ordered forfeiture, but they have continually released funds over the Government's objections. *See* 29a. Indeed, the Government sought civil forfeiture upon perceiving foreign *non*compliance with the freeze. Opp. 4 & n.1; 5a, 29a. And Commonwealth courts have signaled strong misgivings specifically about fugitive disentitlement and compliance with same. *See* Pet. 9 n.5, 18–19. Although the Government purports to harmonize *Meza*'s result (sustaining jurisdiction), no such warnings of foreign noncompliance were apparent there.

In claiming support from initial freeze orders abroad (Opp. 15), the Government overlooks key distinction between the initial *criminal* freeze attending indictment of defendant *persons*, versus subsequent *civil* forfeiture of defendant *property*. Freezing assets to accommodate U.S. criminal prosecution is one thing. But crediting U.S. civil *in rem* adjudication of foreign property is something quite different—especially when it takes the form of a default judgment that owners were barred from contesting. Commonwealth courts signal understandable skepticism about the latter. *See* Pet. 9 n.5, 18–19.

All the district court did in these circumstances was advise foreign courts about its views on disposition of property they control. Article III does not permit that. Especially with tens of millions of dollars and international comity hanging in the balance, this Court would accomplish much by speaking to threshold jurisdiction. IJ Br. 18–20.

II. THE SECOND QUESTION PRESENTED (PROCEDURAL) HAS BEEN PRESERVED, JUST AS CIRCUITS HAVE SPLIT OVER IT

Contrary to the Government's assertion, Petitioners preserved their argument that fugitive disentitlement could not be resolved "at the pleading stage—rather than at summary judgment or after evidentiary hearing." Opp. 26. Petitioners clearly pressed this point to the Fourth Circuit, specifically advocating the D.C. and Sixth Circuits' procedural position and claiming entitlement to "all reasonable inferences." Supp. 2a, 14a–15a. The Government rejoined at length by arguing that "the fugitive disentitlement statute . . . is not governed by summary judgment," (Supp. 7a), pointing to the Second Circuit

for support (Supp. 7a–8a), and urging "clear error" review of the district court's findings (Supp. 6a). Furthermore, as the Government acknowledges (Opp. 26 n.5), Petitioners noted the due-process problem posed by the denial of hearing that should precede an adverse determination. *See, e.g.*, Supp. 3a–4a, 15a–17a. The Fourth Circuit adopted the Government's view by applying "clear error" review (36a), after rejecting Petitioners' due-process concerns (24a–30a).

Nor can the Government deny the procedural split between the D.C. and Sixth Circuits, on the one hand, and the Second and now Fourth Circuits, on the other. *See* Pet. 19–24. Confirming the split, the D.C. Circuit just reiterated its position that even "self-serving" affidavits establish disputes foreclosing summary judgment of civil forfeiture. *United States v. $17,900 in U.S. Currency*, No. 16-5284, slip. op. at 11–13 (D.C. Cir. June 20, 2017). District courts, too, are divided: Those following the D.C. Circuit refuse to apply disentitlement while facts remain disputed. *See, e.g.*, *United States v. Any & All Funds*, 87 F. Supp. 3d 163, 168 (D.D.C. 2015); *United States v. All Funds on Deposit at Old Mut. of Bermuda Ltd.*, 2014 WL 1758208, at *7 (S.D. Tex. May 1, 2014). But the courts below followed the Second Circuit, finding disputed facts by choosing between competing papers. *See* 24a–30a; 144a–148a.

The Government elides this divergence by noting the statute calls for a "finding," and Petitioners submitted declarations. Opp. 28. But such *summary* procedure could at most yield *summary* judgment, subject to the familiar standard. *See $17,900.00*, slip. op. at 9. Certainly dueling declarations cannot

alter the rule prohibiting judges from picking sides based on papers alone. *See Durukan Am., LLC v. Rain Trading, Inc.*, 787 F.3d 1161, 1164 (7th Cir. 2015); *Blackledge v. Allison*, 431 U.S. 63, 82 n. 25 (1977). Here, the judge impermissibly disbelieved Petitioners' affidavits while crediting the Government's, without factual testing. *See* Opp. 28 (citing 37a–39a, 131a–142a); Pet. 8–9.

Because disentitlement is discretionary, ultimate decision should account for *all* relevant facts, yet the courts below inappropriately adopted the Government's disputed account at the outset. To the extent lower courts are increasingly resolving factual disputes for the Government without any discovery, that trend further disconcerts. *See, e.g.*, *Pitre v. Cain*, 131 S. Ct. 8, 9 (2010) (Sotomayor, J., dissenting).

Despite carrying profound due-process implications, the procedures surrounding the Fugitive Disentitlement Statute have increasingly divided lower courts while evading this Court's review for 17 years. Grant of review is anything but premature.

III. THE THIRD QUESTION PRESENTED (SUBSTANTIVE) HAS ENGENDERED A PRONOUNCED CIRCUIT SPLIT

When confronting the substantive standard for disentitlement, the Government clearly favors the view of the Second and Fourth Circuits, which authorize fugitive disentitlement under 28 U.S.C. § 2466 if claimants remain abroad with "specific intent" to avoid prosecution. Opp. 19–20 (citing 30a–35a; *United States v. Technodyne LLC*, 753 F.3d 368, 385 (2d Cir. 2014)). The Sixth and D.C. Circuits

have split from that, insisting that intent to avoid prosecution must be "*the*" reason—*i.e.* the sole or primary reason, not just "a" reason—why a claimant remains abroad. *United States v. $6,976,934.65, Plus Interest Deposited into Royal Bank of Scot. Int'l, Account No. XXXX-XXXXXXXX, Held in Name of Soulbury Ltd.*, 554 F.3d 123, 132 (D.C. Cir. 2009); *United States v. Salti*, 579 F.3d 656, 664 (6th Cir. 2009) (following *Soulbury*). The Fifth and Ninth Circuits compound the split by adding a third view, accounting for the "totality of the circumstances." Pet. 31–32. Nothing short of certiorari review can resolve such fracturing.

The Government somehow submits that the circuits "broadly agree" with the "specific intent" requirement. Opp. 21–22. Yet the circuits themselves say otherwise. In *Technodyne*, the Second Circuit "respectfully disagree[d]" with the D.C. Circuit "[t]o the extent that . . . the government is required to prove that avoidance of criminal prosecution is [a defendant's] sole purpose." 753 F.3d at 384–85.

The Government questions whether the D.C. Circuit meant what it said in *Soulbury*, suggesting the problem was that the claimant lacked notice of criminal charges. Opp. 23 (quoting *Soulbury*, 554 F.3d at 132). But *Soulbury* bears no such gloss. Indeed, the D.C. Circuit there reversed the district court *specifically* for having "erred in concluding that the statute does not require the government to show 'that avoiding prosecution is *the* reason [the claimant] has failed to enter the United States and has otherwise evaded its jurisdiction,'" *Soulbury*, 554 F.3d at 132 (emphasis in original; quoting 478 F. Supp. 2d at 41), and held that "[t]he plain language of § 2466 man-

dates this showing." *Id.* As for the facts, the D.C. Circuit noted there was a video of that claimant "acknowledg[ing] the pending criminal complaint and that he would likely be arrested if he returned to the United States," further stating he would be "fine" steering clear of arrest by not returning. 554 F.3d at 132. Even though avoidance of arrest was manifestly one reason the claimant did not return, the D.C. Circuit deemed that insufficient to establish "he declined to reenter the country *in order to* avoid criminal prosecution under the 1998 or 2005 charges," *id.* (emphasis added), precisely because the court insists that avoidance of prosecution be the sole or primary motivation. The D.C. District Court has followed that pointed instruction. *See Any & All Funds*, 87 F. Supp. 3d at 168.

To justify the ruling below, the Government must equate Petitioners' "active[] oppos[ition to] extradition" with them intending to avoid prosecution. Opp. 25. Only thus can the Government seriously claim that the district court's "detailed [factual] findings" (Opp. 25 n.4) sufficed. The most the district court actually did, beyond note that the claimants opted to remain physically absent while advancing their claims, was point to extradition proceedings pursuant to treaty rights. 127a–128a, 37a–38a.[2] That is

[2] The Second and Third Questions Presented combine to keep the Government in check: The more the Government argues as though mere pendency of extradition proceedings triggers fugitive disentitlement, the more it distends the *substantive standard*. Alternatively, the more the Government argues as though a larger factual mosaic informs the disentitlement decision, the more it highlights the inadequacy of the *procedure* used to compile the underlying record.

the very stance the D.C. and Sixth Circuits have rejected, yielding a stark split.

Even the Government's embrace of *Technodyne* (Opp. 20–21) cannot justify this result. Unlike those claimants, these Petitioners did not "absent themselves from" the United States, nor are they trying to "retrieve" their assets. *Compare* 753 F.3d at 385–86. Instead, Petitioners are simply remaining at home, trying to retain foreign property there. By affirming the "harsh sanction" of fugitive disentitlement in this circumstance, the Fourth Circuit has steered the statute away from any defensible mooring, *see Niemi*, 728 F.3d at 1256, and into a violent collision with due process, *see Degen*, 517 U.S. at 828; *United States v. $40,877.59 in U.S. Currency*, 32 F.3d 1151, 1157 (7th Cir. 1994). *See generally* IJ Br. 20–26.

* * *

The Government is actively wielding § 2466 to force foreign defendants to choose between abandoning one or another right: they must either submit to United States jurisdiction without regard for extradition and treaty rights, or else forfeit any assets claimed by the United States. Civil forfeiture and fugitive disentitlement have thus become coercive weapons for the Government to unleash globally. Such a state of affairs offends international comity just as it does due process and fundamental fairness, and affords ample warrant for certiorari review here and now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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June 21, 2017

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX A

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 FOR CLAIMANTS-APPELLANTS

II. The district court erred in finding that the fugitive disentitlement statute applies and disentitles Claimants from defending their rights to millions of dollars of property.

Nor can the district court's application of the fugitive disentitlement statute withstand scrutiny. Establishing fugitive disentitlement under §2466 requires the government to prove five elements, only the fifth of which is at issue here: "(1) a warrant or similar process has issued in a criminal case for the claimant's apprehension; (2) the claimant had notice or knowledge of the warrant or process; (3) the criminal case is related to the forfeiture action; (4) the claimant is not confined or otherwise held in custody in another jurisdiction; and (5) the claimant has deliberately avoided criminal prosecution by leaving the United States, declining to enter or reenter the country, or otherwise evading the criminal court's jurisdiction." *$6,976,934.65*, 554 F.3d at 128. Because a motion to strike is akin to a motion "to dismiss the claim" or for summary judgment (JA-1966-67), all reasonable inferences must be drawn against the government. *$6,976,934.65*, 554 F.3d at 132. And even if every statutory requirement is met, "whether to order disentitlement" is discretionary. *Collazos*, 368 F.3d at 198.

Striking the claims here based on fugitive disentitlement was improper for multiple reasons. First, the district court applied the wrong standard in concluding that Claimants intended "to avoid criminal prosecution" under §2466(a)(1). Second, under any standard, the government failed to show

intent. Finally, even if the government had shown intent to avoid prosecution, the court abused its discretion in disentitling Claimants on these facts.

* * *

III. Application of fugitive disentitlement violates the Constitution.

A. 28 U.S.C. §2466 infringes Claimants' due process rights.

Reversal is independently warranted because the decision below stripped Claimants of their property without due process. "The fundamental requisite of due process of law is the opportunity to be heard" (*Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quotations omitted)), and that includes the opportunity to "present every available defense" (*Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Thus, due process ordinarily guarantees a person's "right to a hearing to contest the forfeiture of his property." *Degen*, 517 U.S. at 822. Under limited circumstances, the Supreme Court has allowed the use of fugitive disentitlement to dismiss a fugitive's direct criminal appeal. But it has repeatedly refused to expand this harsh doctrine further—and has rejected its use in civil forfeiture cases. *Degen*, 517 U.S. at 828.

Nonetheless, citing §2466, the district court deprived Claimants—foreign citizens who are not "fugitives" in any sense of the word—of all ability to contest the government's seizure of their property. Disentitlement here was not limited to an appeal (which, unlike a trial, is not a constitutional necessity). Rather, based on Claimants' decisions to remain in their foreign homes and not appear in a

different case, the court eviscerated Claimants' right to defend themselves against *the government's* action. Without considering Claimants' motion to dismiss—let alone providing an adversarial hearing—the Court disentitled them from defending their undisputed property interests. Thus, by cobbling together conclusory allegations, the government got to take Claimants' property—forever.

Claimants can never challenge the merits of the government's case. Even if Claimants eventually appear for the criminal trial and prevail, it will be too late—the forfeiture judgments will be final and the government can keep the property, without proving forfeitability. This cannot be the law. Depriving Claimants of all opportunity to be heard in this government-initiated suit violates due process.

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-1360

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 at Alexandria,
No. 14-CV-00969
The Honorable Liam O'Grady, District Judge

RESPONSE BRIEF OF THE UNITED STATES OF AMERICA

ARGUMENT

A. STANDARDS OF REVIEW

The questions concerning the jurisdiction of a district court are reviewed de novo, *Koehler v. Dodwell*, 152 F.3d 304, 307 (4th Cir. 1998), and the underlying factual findings are reviewed for clear error. *In re Celotex Corp.*, 124 F.3d 619, 627 (4th Cir. 1997).

The district court found that the Fugitive-Claimants deliberately refused to enter the United States to avoid criminal prosecution. This factual finding is reviewed for clear error. Fed. R. Civ.P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous").[6] This standard also applies to the district court's application of law to facts where it requires an "essentially factual" review. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

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[6] *See also Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."); *Scrimgeour v. Internal Revenue*, 149 F.3d 318, 324 (4th Cir. 1988) ("[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (citation omitted). This Court must defer to the district court's fact-finding function even when it reviews solely documentary evidence. *U.S. v. Stevenson*, 396 F.3d 538, 543 (4th Cir. 2005) (citing *Anderson*, 470 U.S. at 575; *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706, 714 (4th Cir. 1966) (deferring through the clearly erroneous standard to the district court's resolution of conflicting affidavits)) (additional citations omitted).

Any other legal conclusions are reviewed by this Court *de novo*, including the overall legal applicability of Section 2466 to a forfeiture claim, *see, e.g.*, *U.S. v. Technodyne LLC*, 753 F.3d 368, 371 (2d Cir. 2014), and interpretation of an international treaty, *see Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996).

Claimants suggest that the Government's motion to strike was "akin" to a motion for summary judgment and suggests that "all reasonable inferences must be drawn against the government." (Cl.Br.30) That is not the law. As observed in Technodyne, the fugitive disentitlement statute is not meant to address a claim or defense on its merits and is not governed by summary judgment. Instead, "it provides an ancillary basis for disallowing a claim, and it contains provisions that are incompatible with fundamental principles governing summary judgment." 753 F.3d at 380. In dealing with summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "In contrast, the fugitive disentitlement statute provides that the 'judicial officer' may disallow a person or entity from using the resources of the federal courts 'upon a finding,' 28 U.S.C. § 2466(a), that the factual prerequisites to disentitlement set out in that section are met." *Technodyne*, 753 F.3d at 381. "Since the judge is explicitly required to make findings of fact, determinations as to disentitlement are not to be made under the standards governing summary judgment." *Id.* at 381-82. Under the standard

invited by Claimants,[7] the factual evaluation dictated under Section 2466 would be impossible to conduct and Congress' intent frustrated.

Second, summary judgment is only applied when the undisputed facts show that the moving party is entitled to judgment in its favor "as a matter of law." Upon such a showing, "[t]he court shall grant summary judgment . . . ." Fed. R. Civ. P. 56(a). The fugitive disentitlement statute, however, provides only that the court "may disallow" the fugitive's pursuit of the claim. Accordingly, a court has clear discretion not to order disentitlement, and the plaintiff is thus never required to prevail under Section 2466 strictly as a matter of law, which is why application of summary judgment standards is inappropriate.

The "ultimate decision whether to order disentitlement in a particular case rests in the sound discretion of the district court." *U.S. v. $6,190.00*, 581 F.3d 881, 886 (9th Cir. 2009) (*citing Collazos v. U.S.*, 368 F.3d 190, 198 (2d Cir. 2004)). A district court's order of disentitlement is reviewed for an abuse of discretion. *See Technodyne*, 753 F.3d at 378. A "court abuses its discretion when its ruling is

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[7] The Claimants request that this Court procedurally treat the Government's motion to strike as a summary judgment motion (Cl.Br.30) should be rejected. The D.C. Circuit, in the case upon which the Claimants rely, *U.S. v. $6,976,934.65*, 554 F.3d 123 (D.C. Cir. 2009), ruled that the district court had erred in granting summary judgment despite the existence of a genuine factual dispute about the claimants' intent. *See id*. at 133. In this case, the district court sided with *Technodyne* over *$6,976,934.65*. For the reasons discussed above, the Government submits that this Court should do the same here.

based 'on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

B. DISTRICT COURT HAD IN REM JURISDICTION OVER THE DEFENDANT ASSETS LOCATED ABROAD.

Claimants first contend that the district court lacked *in rem* jurisdiction over the property at issue because it did not have actual or constructive control over the assets located abroad. (Cl.Br.17-26). Their argument is meritless. The plain language of 28 U.S.C. § 1355, as well as its legislative history, support the district court's legal conclusion that there is no requirement of actual or constructive possession for the court to exercise *in rem* jurisdiction over assets located in foreign countries. (J.A.1962-63)[8]

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[8] Claimants' reliance (Cl.Br.13,17-20) on *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999) for the proposition that a court must have exclusive custody and control over property to acquire *in rem* jurisdiction is misplaced. That case was an admiralty action where jurisdiction was founded on 28 U.S.C. § 1333, not a forfeiture action where jurisdiction is premised on Section 1355. It strains logic to assert that a court could have *in rem* jurisdiction over a shipwreck 400 miles offshore in 12,500 feet of water, 171 F.3d at 951, but that same district court did not have *in rem* jurisdiction over property placed in custody in New Zealand at the Government's request. See J.A.468-84. Section 1355(b)(2) provides *in rem* jurisdiction for district courts, as here, when property subject to forfeiture "is located in a foreign country" and other specified conditions are met. Rule G(3)(b)(iii) of the Supplemental Rules provides that if the defendant property is not real property, "a warrant [of arrest *in rem*] is not necessary if the property is subject to a judicial restraining order" as was the defendant property here.

Section 1355(b)(2) provides: "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country. . . . an action or proceeding for forfeiture may be brought," among other places, in "the district in which any of the acts or omissions giving rise to forfeiture occurred." 28 U.S.C. § 1355(b)(2). Thus, *in rem* jurisdiction is proper if any of the acts or omissions giving rise to the forfeiture action occurred in the district regardless of whether the district court had actual or constructive control over the property. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.")

The district court's interpretation and application of Section 1355 is further supported by legislative history. Section 1355 was amended in 1992 to provide for the forfeiture of property located in other districts and foreign countries. The explanatory language described how the amendment was to change the traditional paradigm of actual or constructive possession to confer *in rem* jurisdiction:

> [I]t is probably no longer necessary to base in rem jurisdiction on the location of the property . . . . the issue has to be repeatedly litigated whenever a foreign government is willing to give effect to a forfeiture order issued by a United States court . . . Subsection (b)(2)

Additionally, at least with respect to real property, seizure is not required for the court to acquire *in rem* jurisdiction. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 57-58 (1993). Thus, *in rem* jurisdiction for civil forfeiture actions simply does not require exclusive custody and control.

> resolves this problem by providing for jurisdiction over such property in the . . . district court for the district in which any of the acts giving rise to the forfeiture occurred . . . .

137 Cong. Rec. S16640-01,S16643, 1991 WL 236009 (Cong. Reg.) (Nov. 13, 1991).

At least three appellate courts agree that neither actual nor constructive control over assets located in foreign countries is required for a district court to exercise in rem jurisdiction based on the plain language and legislative history of Section 1355. *See U.S. v. $1.67 Million*, 513 F.3d 991, 998 (9th Cir. 2008) ("The plain language and legislative history of [§ 1355] makes clear that Congress intended § 1355 to lodge jurisdiction in the district courts without reference to constructive or actual control of the res."); *Contents . . . in the Name of Jalal*, 344 F.3d 399, 403 (3rd Cir. 2003) (holding that Section 1355(b) "grants district courts jurisdiction over the property at issue in forfeiture actions based on the plain language of the statute"); *U.S. v. All Funds in Account in Banco Espanol de Credito*, 295 F.3d 23, 27 (D.C. Cir. 2002) (holding that "Congress intended the district court . . . to have the jurisdiction to order the forfeiture of property located in foreign countries" whether or not the government obtained constructive control by virtue of the assistance of foreign authorities).[9]

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[9] The only case Claimants relied on to say the district court needed constructive possession under Section 1355 is *U.S. v. All Funds . . .* in *Names of Meza or De Castro*, 63 F.3d 148,154 (2d Cir. 1995). (Cl.Br.20-21) Claimants fail to observe

Claimants also argue that the district court lacked *in rem* jurisdiction because the government cannot show whether foreign countries will honor the district court's forfeiture order. (Cl.Br.22-26) Contrary to their conclusion, the uncertainty over whether foreign nations will honor a particular forfeiture order simply does not disturb the district court's *in rem* jurisdiction. *See Banco Espanol*, 295 F. 3d at 27 (holding that whether a foreign government will ultimately enforce a forfeiture order "determines only the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders."); *Contents*, 344 F.3d at 403; *U.S. v. One Gulfstream G-V Jet Aircraft*, 941 F. Supp. 2d 1, 7 n.7 (D.D.C. 2013) (federal court's jurisdiction to enter a forfeiture order over property abroad is not dependent on the willingness of a foreign government to enforce the order); *see also Certain Funds (HSBC)*, 96 F.3d at 24 (section 1355(b)(2) applies retroactively to create *in rem* jurisdiction over property in Hong Kong).

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that *Meza's* analysis has been rejected by the D.C., Ninth, and Third Circuits and was further undermined by a more recent Second Circuit case, as the district court noted. (J.A.1963,n.8) (*citing U.S. v. Certain Funds (HSBC)*, 96 F.3d 20, 22 (2d Cir. 1996)).

SUPPLEMENTAL APPENDIX C

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

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.

* * *

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 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.